Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

ATTORNEY GENERAL OF CANADA
(representing the Minister of Aboriginal Affairs and Northern Development Canada)

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

MEMORANDUM OF FACT AND LAW OF THE COMPLAINANT FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

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PART I - OVERVIEW

1. For thousands of years prior to the arrival of European settlers and the emergence of the Canadian state, First Nations peoples cared for their children pursuant to their traditional laws, customs and practices[1]. Children are at the centre of First Nations communities and are valued as sacred beings who must be protected:

> Children hold a special place in Aboriginal and First Nation culture. They bring purity of vision to the world that can teach their Elders. They carry within them the gifts that manifest themselves as they becomes teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the Elders young again with their joyful presence.[2]

2. The sanctity of the First Nations child and family was disrupted and attacked with the arrival of the colonial powers. As the Right Honourable Prime Minister Stephen Harper solemnly acknowledged, First Nations children were at the center of Canada's colonial and assimilative policies, and as the residential school era had a "profoundly negative… lasting and damaging" impact on First Nations peoples, their culture, traditions and identity:

> [it] remove[d] and isolate[d] children from the influence of their homes, families, traditions and cultures, […] to assimilate them into the dominant culture. […] 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.[3]

3. Respected Elder and Chief Robert Joseph described the colonial impacts on children this way:

> CHIEF JOSEPH: Thank you. I'm a Kwakwaka'wakw person from the coast of British Columbia. Our group live on the North

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[1] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CHRC BOD [CBD], Vol 2, Tab 7, p 982).
[2] First Nation Child and Family Services, *Joint National Policy Review – Final Report* [NPR], June 2000 (CBD, Vol 1, Tab 3, p 19).
[3] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10).

> Vancouver Island area of Vancouver and onto the mainland and we have a really ancient culture that's thrived there for thousands of years.
>
> And we still exercise and carry and practise some of the traditions that are important to us, including those of how we perceive children in our world and we have practices and perspective around child raising that are really important.
>
> One of the stories that I want to tell about today is about how all of that became very damaged and in some cases extremely broken, to the extent there was a real interruption in our ability to care for our children in the ways that we had since time began.
>
> And I think it's going to be important in the context of our discussion to understand that there were reasons, of course, for this loss of ability to care for our children like we had always had before this current time that, as a result of experiences of newcomers coming to our Territory, of Residential Schools and colonization, in general, that there was a huge, huge harm upon our families and communities.
>
> And I just want to say that in spite of all of those things that were broken and the things that we were not able to do for our children anymore, that we still deeply, deeply love them, that we still deeply, deeply desire to re-empower ourselves to raise our children in a way that we want to.[4]

4. Notwithstanding the Prime Minister's apology and the well documented impacts of the colonial practices associated with the residential school era and the Sixties Scoop, First Nations children continue to be systematically removed from their homes and communities as a result of the Federal Government's inequitable and discriminatory provision of child welfare services. Recognizing the Statement of Reconciliation made by INAC Minister Jane Stewart to Aboriginal Peoples, the United Nations Committee on the Rights of the Child expressed concern that Aboriginal children continue to experience discrimination in several areas in deeper and more widespread ways than non-Aboriginal children.[5]

5. The Royal Commission on Aboriginal Peoples emphasized the importance of taking action to resolve the contradiction between Canada's international role as a human rights leader

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[4] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, pp 5-7, lines 21-25, 1-25, 1-9).
[5] *United Nations Committee on the Rights of the Child – Concluding Observations: Canada*, (CBD, Vol 3, Tab 23, p 13).

and its retention of "the remnants of colonial attitudes of cultural superiority that do violence to the Aboriginal Peoples to whom they are directed".[6] This case finds itself at the nexus between Canada's harmful colonial conduct toward First Nations children and the unfulfilled promise of government reform. As stated in the Complaint, "as Canada redresses the impacts of residential schools it must take steps to ensure that old funding policies which only supported children being removed from their homes are addressed."[7]

6. Because of their unique status under s. 91(24) of the *Constitution Act, 1867,* First Nations children and families living on reserve and in the Yukon receive child welfare services from the federal government through First Nations Child and Family Services Agencies ("FNCFSA") funded and controlled by Aboriginal Affairs and Northern Development Canada ("AANDC", "the Respondent") rather than from the provinces or territories who provide and/or fund such services for other Canadians. In some cases, AANDC funds provinces and non-Aboriginal service providers to deliver child and family services to First Nations children in the absence of an FNCFSA.

7. The goal of the federal government's First Nation Child and Family Services Program (the "FNCFS Program") is to provide services comparable to those provided to other Canadian children and to provide culturally-appropriate services to First Nations children and families served by the program. The Respondent's FNCFS Program binds and controls the FNCFSA to provide the services to act in accordance with provincial legislation and refuses to fund services provided pursuant to First Nations Treaties/laws that meet or beat provincial standards. AANDC's flawed and inadequate funding results in First Nations children and families living on reserve and in the Yukon receiving fewer and poorer child welfare services than other Canadians in ways that are not culturally-appropriate. Moreover, the FNCFS Program fails to account for the historical atrocities visited upon First Nations peoples during the residential school era.

8. The Respondent's provision of First Nations child and family services is substantively expressed in its agreements with provincial/territorial government recipients and in three policy

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[6] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 1*, October 1996 (CBD, Vol 2, Tab 7, p 27).
[7] Human Rights Commission Complaint Form filed by Dr. Blackstock and Regional Chief Joseph, February 23, 2007 (CBD, Vol 1, Tab 1 at p 3) [*Human Rights Commission Complaint Form*].

regimes applied to First Nations child and family service agencies: Directive 20-1, currently applied in British Columbia, New Brunswick, Newfoundland and Labrador and the Yukon Territory; the Enhanced Prevention Focused Approach ("EPFA") currently applied in Alberta, Saskatchewan, Manitoba, Quebec and Prince Edward Island; and the 1965 Indian Welfare Agreement, applied in Ontario.

9. Numerous AANDC and external reviews, including those by the Auditor General, have found all three approaches to be flawed and inequitable.[8] Whilst the EPFA is an improvement over Directive 20-1, it incorporates some of the fundamental flaws of the latter and is not comparable to provincial funding levels.[9] The delays in implementing reforms are so significant that the Respondent felt compelled to include the following question in a 2013 internal Q&A document:

> "[T]he Department is making progress in supporting the transition to the enhanced prevention model. But isn't it taking a long time to fix the problem?[10]"

10. In the submission of the Caring Society, the answer is tragically obvious: the government is taking much too long to resolve the problem and to provide non-discriminatory child and family service. This delay is particularly unacceptable in light of available solutions and the vulnerability of the children and their families.

11. The evidence presented to this Tribunal demonstrates that the allegations in the Complaint are complete and sufficient for a decision in favour of the Caring Society. The Respondent's flawed and inequitable provision of First Nations Child and Family Services is discriminatory within the meaning of Section 5 of the *Canadian Human Rights Act* ("CHRA", "the Act") and results in the denial of or adverse differentiation in child and family services that are otherwise available to the public. The evidence demonstrates that the Respondent has known

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[8] OAG Report 2008 (CBD, Vol 3, Tab 11, p 19); See also AANDC, *Social Programs Power Point Presentation*, (CBD, Vol 6, Tab 79, p 3).
[9] AANDC, *First Nations Child and Family Services Program: the Way Forward (Draft)*, August 9, 2012 (CBD, Vol 9, Tab 143, p 32).
[10] AANDC, *Master Q. and A's – First Nations Child and Family Services*, February 2013 (CBD, Vol 13, Tab 329, p 9).

about this discriminatory situation for many years[11] and has failed to remedy the harms despite acknowledging that its flawed and inequitable polices contribute to "woefully inadequate"[12] funding and causes "circumstances [that] are dire",[13] meaning First Nations children are at greater risk of being unnecessarily removed from their families and that the death of some children may even result from inadequate funding.[14]

12. First Nations children and families also access a myriad of other social services from the federal government as a result of their unique constitutional status that other Canadians typically access through provincial / territorial governments. This jurisdictional divide has resulted in First Nations children being denied or experiencing detrimental delay or adverse differentiation in the provision of basic public services available to other Canadians. Motion 296 in support of Jordan's Principle passed unanimously in the House of Commons on December 12, 2007 to redress this inequality and stipulates that where a government service is available to all other children and a jurisdictional dispute arises between the federal government and the province / territory or between departments in the same government regarding services to a First Nations child, the government body of first contact pays for the service and can seek reimbursement from the other level of government / department after the child has received the service.

13. The Caring Society believes that the Respondent's flawed and narrow implementation of Jordan's Principle is discriminatory and out of step with the intent of Parliament in Motion 296[15] to ensure First Nations children receive equitable access to government services within the federal government and with other levels of government. The Respondent's discriminatory implementation of Jordan's Principle has been found to be unlawful in a case before the Federal Court[16] and the evidence demonstrates that it has also resulted in a wide array of harms for First

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[11] Office of the Auditor General, *Report of the Auditor General to the House of Commons – Chapter 4 – First Nations Child and Family Services Program – Indian and Northern Affairs Canada*, May 2008 (CBD, Vol 3, Tab 11, p 21) [OAG Report 2008].
[12] AANDC, *Untitled document* (*AANDC Disclosure Document 027195)*, (CBD, Vol 11, Tab 234, p 2).
[13] AANDC, *Untitled document (AANDC Disclosure Document 25939: Government Q. and A.'s)*, (CBD, Vol 11, Tab 233, p 1); see also Dr. Cindy Blackstock Cross-Examination, February 28, 2013 (Vol 4, pp 130-131; Vol 5, pp 89-91).
[14] AANDC, *Annex L – Internal Re-allocation Request*, November 2012 (Vol 13, Tab 298, p 7 of document); See also House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, p 8).
[15] *Vote No 27*, 39th Parl, 2nd Sess, Sitting No 36, Wednesday, December 12, 2007 (CBD, Vol 3, Tab 20, p 15).
[16] *Pictou Landing Band Council v Canada (Attorney General)*, 2013 FC 342 (appeal discontinued by the Attorney General) [*Pictou Landing*].

Nations children including delays in the receipt of critical services and denials of services predisposing children to placement in child welfare care.[17]

14. Both the FNCFS Program and Jordan's Principle ought to protect and foster the substantive equality rights of all First Nations children. Sadly, the Respondent's approach to both results in the provision of inequitable and discriminatory services to First Nations children, in violation of section 5 of the *CHRA*.

15. The First Nations Child and Family Caring Society (the "Caring Society"), in partnership with the Assembly of First Nations ("AFN") bring this complaint and allege that contrary to the *CHRA*, the Respondent discriminates in providing child welfare services to First Nations children living on reserve by providing inequitable and insufficient funding structured in improper ways to FNCFSA (the "Complaint"). The Complaint also alleges that jurisdictional disputes between and within governments regarding First Nations children in need of government services adversely impact those children and are discriminatory, in violation of Jordan's Principle.

16. The discrimination perpetuated by AANDC manifests itself in four essential ways: (i) First Nations children are not receiving comparable child welfare services with all other Canadian children, to their detriment; (ii) in providing services to First Nations children AANDC has failed to take into account the historic disadvantages suffered by First Nations peoples; (iii) AANDC has failed to provide culturally-appropriate services; and (iv) AANDC has failed to fully implement Jordan's Principle.

17. Furthermore, the Caring Society maintains that the Complaint is unequivocally based on the prohibited grounds of race and national and ethnic origin, as the Respondent restricts its provision of First Nations child and family services to First Nations children who are registered or eligible to be registered pursuant to the *Indian Act* and are resident on reserve or in the Yukon Territory.[18]

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[17] Terms of Reference Officials Working Group – Canada / Manitoba Joint Committee on Jordan's Principle, *Jordan's Principle Dispute Resolution – Preliminary Report*, May 2009 (CBD, Vol 13, Tab 302, p 14). [TOROWG Preliminary Report].
[18] Indian and Northern Affairs Canada [INAC], *First Nations Child and Family Services National Program Manual*, May 2005 (CBD, Vol 3, Tab 29, p 49); see also Aboriginal Affairs and Northern Development Canada [AANDC], *National Social Program Manual*, January 31, 2012 (CBD, Vol 13, Tab 272, p 34). See also House of Commons Standing Committee

18. The Caring Society will demonstrate that AANDC controls the provision of First Nations child and family services through extensive reporting requirements, maintaining exclusive control over the definition of eligible child and family services expenditures (even declaring some mandatory child welfare statutory provisions to be ineligible expenses),[19] and by failing to publish an accurate depiction of its programs authorities, policies and practices in ways that make the administration of the program accountable.[20] As Ms. Barbara D'Amico, Senior Policy Analyst for the Respondent noted in response to Member Belanger, minutes are not often kept, even about the most critical of matters such as setting funding amounts for EPFA:

> MEMBER BELANGER: Who makes them [minutes of tripartite meetings] – drafts them?
>
> MS. D'AMICO: We are not very diligent in keeping records that way.
>
> MEMBER BELANGER: You don't?
>
> MS. D'AMICO: Not very often.[21]

19. Finally, the Caring Society believes the evidence demonstrates that the Respondent's failure to ensure culturally appropriate services as per the program objectives[22] is discriminatory. Of particular concern is the failure of the Respondent to enable the provision of culturally appropriate services by exclusively compelling First Nations to use provincial/territorial legislation with no consideration given to supporting First Nations laws[23] and failing to provide adequate and flexible funding under the delegated model to develop culturally based standards and design, operate and evaluate culturally based programs. Additionally, the Caring Society is very concerned that the Respondent's practices of fettering the further development of First

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on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, p 1).

[19] INAC, *First Nations Child and Family Services National Program Manual*, May 2005 (CBD, Vol 3, Tab 29, p 18) [*National Program Manual*]; see also AANDC, *National Social Program Manual*, January 31, 2012 (CBD, Vol 13, Tab 272, p 38).

[20] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 131, 140-142); See also Phil Digby Cross Examination, May 8, 2014 (Vol 60, pp 179-182).

[21] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 131, 140-142).

[22] *National Program Manual* (CBD, Vol 3, Tab 29, p 5); see also *National Social Program Manual* (CBD, Vol 13, Tab 272, p 32).

[23] NPR, June 2000 (CBD, Vol 1, Tab 3, p 119); see also Loxley, J et al, *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 16) [*Wen:de The Journey Continues*].

Nations child and family service agencies[24] and providing non-Aboriginal recipients with higher levels of funding, greater flexibility and fewer reporting requirements[25] incentivizes non-culturally appropriate services.

20. In each of these respects, the Caring Society maintains that the Respondent has discriminated and is continuing to perpetuate discrimination against First Nations children and their families, who are among the most vulnerable members of Canadian society. Canada's failure to treat this generation of First Nations children in an equitable, just and respectful manner thwarts the Prime Minister's aspirations of reconciliation, expressed in the affirmation that there can be "no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever again prevail."[26] It also fails to heed the advice of the report of the Royal Commission on Aboriginal Peoples that "[r]edressing social and economic inequalities will benefit Aboriginal people in improving living conditions and quality of community life; it will benefit all Canadians as Aboriginal people become full participants in Canadian society […]."[27]

21. Most tragically, the Respondent's approach has chronically contributed to the disproportionate removals of First Nations children from their families[28] and deepened family hardship as families are denied or delayed receipt of culturally appropriate prevention services.[29] As the Respondent's data demonstrates, there could not be a more important case to come before this Tribunal, as First Nations children on reserve and in the Yukon have cumulatively spent over 66 million days in out of home care between the adoption of Directive 20-1 in 1989 and 2012 – over 187,000 years of childhood.[30] Canada can and must do better.

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[24] AANDC, *1016 Okanagan Nation Alliance Application for FNCFS – Decision by Regional Director General*, October 18, 2012 (CBD, Vol 13, Tab 280, p 3).
[25] See for example Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 110, lines 1-17); see also Carol Schimanke Cross-Examination, May 15, 2014 (Vol 62, p 54, lines 1-5).
[26] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10).
[27] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 1*, October 1996 (CBD, Vol 2, Tab 7, p 28).
[28] INAC, *Fact Sheet: First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).
[29] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, pp 214-215); See also Dr. Cindy Blackstock Examination in Chief, February 27, 2013 (Vol 3, p 25-26).
[30] *Child and Family Services: Total Number of Children in Care and Related Expenditures*, (CBD, Vol 13, Tab 296); See also Dr. Cindy Blackstock Examination in Chief, February 12, 2014 (Vol 48, pp 352-354).

PART II - ISSUES

22. It is submitted that the following issues stand to be determined by this Tribunal:

a) Does AANDC provide a "service" within the meaning of the *CHRA*?

b) Is the adverse treatment at issue based on a prohibited ground of discrimination under the *CHRA*?

c) Have the Complainants established prima facie discrimination?

d) If discrimination has been established, what are the appropriate remedies?

PART III - FACTS

23. The Caring Society adopts the facts as set out by the Canadian Human Rights Commission (the "Commission") it its closing submissions.

PART IV - SUBMISSIONS

PRELIMINARY ISSUES

24. The Complaint relates to the provision of essential public services by the federal government to one segment of the population in Canada, namely, First Nation peoples. The proper understanding of the legal framework governing the provision of those services and its relationship with the *CHRA* requires an examination of the broader legal principles governing the relationship between First Nations and human rights legislation as well as the division of powers under Canadian constitutional law. The introduction of the Caring Society's factum is devoted to the clarification of those issues and responds to the Tribunal's request that the parties address the relevance of fiduciary duties and Jordan's principle to the case.

A. Applying the Canadian Human Rights Act to the First Nations context

1. Basic Principles and Interconnectedness of Human Rights

25. The *CHRA* forms part of a broad network of international, constitutional and statutory instruments aimed at ensuring the effective protection of human rights. The Act should be interpreted in a manner coherent with other elements of that network.

26. Canada is a party to the *International Covenant on Civil and Political Rights* (the "*Covenant*").[31] The *CHRA*, among other purposes, was enacted to give effect to Canada's international commitments under the Covenant.[32] The Covenant is relevant in the interpretation of the Act[33] and the United Nations Human Rights Committee has held that States must allow indigenous persons to live with their communities, must consult the indigenous peoples before enacting measures that are likely to affect their rights and, where appropriate, must take positive measures to ensure the preservation of indigenous cultures.[34]

27. In 2007, the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* (the "Declaration").[35] While Canada initially voted against the Declaration, it reversed its initial position and expressed its support for the Declaration in 2010.[36] The Declaration may be viewed as a statement of the General Assembly as to the scope of the rights flowing from the Covenant when applied to indigenous peoples. Under the Declaration, indigenous peoples have the right to "the full enjoyment [...] of all human rights and fundamental freedoms" (art. 1), "the right to be free from any kind of discrimination [...] in particular that based on their indigenous origin or identity" (art. 2), "the right to autonomy or self-government [...] as well as ways and means for financing their autonomous functions" (art. 4), as well as the "right to maintain and strengthen their distinct [...] social [...] institutions" (art. 5). Moreover, indigenous peoples must not "be subjected to forced assimilation or destruction of their culture" (art. 8). Article 19 sets forth a duty to consult the indigenous peoples with respect to any governmental measure affecting them. Article 24 expressly states that "Indigenous individuals also have the right to access, without discrimination, all social and health services."

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[31] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at paras 9, 32 [*Canadian Foundation for Children*].

[32] *Canada (Human Rights Commission) v Canada (Attorney General),* 2012 FC 445 (CanLII) at paras 351-354 [*Mactavish J's Reasons*], aff'd in *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) at paras 16-17 [*FNCFCSC - FCA*].

[33] See generally *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157 at paras 22-23.

[34] *Ibid*.

[35] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples,* 2 October 2007, A/RES/61/295, online: <http://www.refworld.org/docid/471355a82.html> [*Declaration on the Rights of Indigenous Peoples*].

[36] *Canada's statement of support on the United Nations Declaration on the Rights of Indigenous Peoples* (12 November 2010), online : <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

28. Canada has ratified the *Convention on the Rights of the Child* (the "Convention"). While the Convention has not been incorporated in Canadian legislation, it is relevant to the interpretation of legislation and courts will attempt to give an interpretation of Canadian law – including the *Canadian Human Rights Act* – that is compatible with the Convention, as fully articulated in the written submissions of Amnesty International.[37] As is discussed later in this factum, articles 2, 3, and 8(1) are of particular relevance to this case.

29. It should be emphasized, at this juncture, that this Tribunal may properly consider Aboriginal law rules, doctrines or precedents that are relevant to the determination of the issues before it. The Supreme Court has repeatedly held that administrative tribunals may determine Aboriginal law issues, including Aboriginal rights and the duty to consult, that arise in cases falling within their jurisdiction.[38] Specifically, as Justice Mactavish recognized in her judgment, the *CHRA* must be interpreted in a manner consistent with Canadian Aboriginal law:

> I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.[39]

2. The Honour of the Crown and Fiduciary Duties

30. In *Mikisew*, the Supreme Court of Canada made the following observations about the fundamental purposes of Canadian Aboriginal law:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the

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[37] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 70.
[38] See for example *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
[39] *Mactavish J's Reasons* supra note 32 at para 340.

larger and more explosive controversies.[40]

31. The honour of the Crown is the main legal principle through which the fundamental purpose of reconciliation is given effect. In turn, the honour of the Crown gives rise to a fiduciary relationship and, in certain circumstances, to fiduciary duties towards Aboriginal Peoples. As explained by the Court in *Haida Nation*:

> The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. [...]
>
> [...] This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).[41]

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[40] *Mikisew Cree Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 1.

[41] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 2 SCR 511 at paras 16-18, 32 [*Haida Nation*].

32. As the foregoing quote makes clear, the doctrines of the honour of the Crown and fiduciary relationship have a strong remedial dimension. They arise because of the Crown's unjust assertion of sovereignty and control over Aboriginal lands and societies.

33. Certain Supreme Court decisions provide other accounts of the normative reasons explaining the fiduciary nature of the relationship between the Crown and Aboriginal Peoples. In *Mitchell*, Justice Binnie referred to the "two-row wampum" in the Haudenosaunee tradition.[42] According to that sacred agreement, the British and the Haudenosaunee were to travel the same river but in separate canoes, symbolizing the ethic of non-interference and mutual respect that was to prevail between them. The gradual assertion of British sovereignty and negation of indigenous autonomy over the course of colonization breached the trust that governed the early relations. Likewise, in *Manitoba Métis Federation*, the Court mentioned that the fiduciary relationship arose as a result of the military strength of the indigenous peoples and the necessity of persuading them to rely on the Crown.[43] In both cases, the common thread is that the Crown breached historic solemn promises made to the indigenous peoples and the courts took that history into account in developing the rules and doctrines of Aboriginal law.

34. While it is infused into all dealings between Aboriginal Peoples and the Crown, the honour of the Crown specifically translates into at least four doctrines: (i) fiduciary duty; (ii) the duty to consult; (iii) treaty-making and implementation; and (iv) purposive and liberal interpretations of legislation affecting the Aboriginal Peoples.[44] These categories are not closed.

35. Fiduciary duties aim at controlling the exercise of discretionary power over persons vulnerable to the exercise of that discretion. The Supreme Court recently explained the circumstances in which a fiduciary duty arises:

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute:

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[42] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at paras 127-128.
[43] *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 66 [*MMF*].
[44] *Ibid* at para 73.

> *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)[45]

36. It should be noted that "the judicially enforceable fiduciary duties of the Crown are not limited to transactions involving reserve land."[46]

37. The fiduciary relationship and fiduciary duties are relevant to the application of the *CHRA* to Aboriginal Peoples, and in particular to the First Nations children affected by the FNCFS Program, in a number of ways.

38. First, the fiduciary relationship (or the related principle of the honour of the Crown) is one of the justifications for the principle of liberal interpretation of laws affecting Aboriginal Peoples.[47] When the Act is applied to discrimination against Aboriginal Peoples, the same interpretive attitude should be adopted. In practice, this means that interpretations of the Act that further the purposes of Canadian Aboriginal law should be preferred to interpretations that would contradict those purposes. In particular, this Tribunal should prefer interpretations of the Act that foster reconciliation, that promote self-government, that recognize indigenous cultures and languages, and that value the participation of Aboriginal Peoples in decision-making. Moreover, the application of the Act should take into account the historical context of the

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[45] *MMF* supra note 43 at paras 49-50.

[46] *Canada v Kitselas First Nation*, 2014 FCA 150 at para 42.

[47] *R v Taylor and Williams* (1981), 34 OR (2d) 360 (CA) at 367; *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507 at 537 [*Van der Peet*].

relationship between the Crown and Aboriginal Peoples and the historical injustices visited upon them.

39. Second, where a fiduciary duty arises, a breach of that duty constitutes unlawful discrimination contrary to the Act. Fiduciary duties are owed to Aboriginal Peoples, by reason of their indigeneity. Indeed, when the government has a specific fiduciary duty towards a group identified by a ground of prohibited distinction, and breaches that duty, it is necessarily adversely affecting that group by reason of its identity. By way of analogy, when the government has an obligation to remedy discrimination against a specific group, and then unilaterally withdraws remedial measures, this withdrawal is, in and of itself, a discriminatory act.[48]

40. Third, if the government argues a defence or a justification for *prima facie* discrimination, the fiduciary relationship informs the assessment of that defence or justification by the Tribunal. In *Sparrow*, the Supreme Court set forth guidelines to determine whether a breach of Aboriginal rights protected by section 35 of the *Constitution Act, 1982* is justified.[49] One of the main requirements of that framework is that the measure that infringes upon Aboriginal rights must be compatible with the honour of the Crown and the fiduciary relationship. The same requirement should be applied to the justifications raised by the Respondent under the Act: the rationale proffered by the Respondent to justify *prima facie* discrimination must comply with the honour of the Crown.

41. Certain remarks made by the Supreme Court in *Sparrow* are relevant in this regard. First, the Court noted that the justification of the infringement of an Aboriginal right must be based on a "compelling and substantial" objective.[50] The Court specifically rejected the invocation of a mere "public interest" as being too vague. Hence, if the Respondent wants to counter a finding of *prima facie* discrimination, it must be able to articulate a clear, precise and pressing objective that goes beyond mere claims of administrative efficiency or freedom to make policy decisions, which amount to no more than a statement that the government must be presumed to act in the public interest. Second, in the context of fisheries management, the Court stated that the

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[48] *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 at paras 38-51.
[49] *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 at 1112-1119 [*Sparrow*].
[50] *Ibid* at 1113.

constitutional protection of Aboriginal rights translated into a priority in the allocation of the resource.[51] In other words, when resources are scarce, their allocation must give priority to the needs of Aboriginal Peoples, especially needs related to food and survival. Again, if this is to be transposed to the assessment of defences under the *CHRA* in cases involving the fiduciary relationship with Aboriginal Peoples, this means that the government cannot invoke the lack of financial resources unless it can show that it has given priority to the needs of Aboriginal Peoples over other needs.

3. Fiduciary Duties in this Case

42. Beyond the general fiduciary relationship, First Nations child and family services engage specific fiduciary duties of the federal government. This is so because "specific Aboriginal interests" are at stake, namely indigenous cultures and languages and their transmission from one generation to the other, and because the federal government has assumed discretionary control over programs and services that have direct impact on those interests.

43. "Specific Aboriginal interests" that trigger a fiduciary duty include Aboriginal rights protected by section 35 of the *Constitution Act, 1982*, including culture and language.[52] According to Professor Brian Slattery, whose thinking has strongly influenced the Supreme Court's Aboriginal jurisprudence, Aboriginal rights protected by section 35 include "generic" rights that belong to every Aboriginal group, without the need to adduce specific evidence. As Slattery notes, "[t]he basic contours of a generic right are determined by general principles of law rather than aboriginal practices, customs and traditions."[53] One example of a generic right is the right to speak an Aboriginal language:

> [...] an aboriginal right to speak an indigenous language would likely also be generic, because the basic structure of the right would presumably be identical in all groups where it arises, even though the specific languages protected would vary from group to group.[54]

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[51] *Sparrow* supra note 49 at 1115-1116.
[52] *Van der Peet* supra note 47 at para 30.
[53] Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can Bar Rev 196 at 212.
[54] *Ibid* at 212.

44. In this case, at the very least, the transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *Côté*:

> In the aboriginal tradition, societal practices and customs are passed from one generation to the next by means of oral description and actual demonstration. As such, to ensure the continuity of aboriginal practices, customs and traditions, a substantive aboriginal right will normally include the incidental right to teach such a practice, custom and tradition to a younger generation.[55]

45. It is not necessary, for the purposes of this case, to define further the contours of this Aboriginal right. It is enough to say that, by virtue of being protected by section 35, indigenous cultures and languages must be considered as "specific indigenous interests" which may trigger a fiduciary duty. Accordingly, where the government employs its discretion in a way that disregards indigenous cultures and languages and that hampers their transmission, it breaches its fiduciary duty.

46. The Ontario Superior Court of Justice recently certified a class action based on the operation of the child welfare system with respect to Ontario First Nations, especially in the context of the "sixties' scoop."[56] In the course of its reasons, the judge said:

> [...] it is at least arguable that 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.[57]

47. In this case, there is ample evidence before the Tribunal to the effect that the FNCFS Program adopted by the federal government, in the exercise of its discretion, has been designed

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[55] *R v Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139 at para 56.
[56] *Brown v Canada (AG)*, 2013 ONSC 5637 (CanLII).
[57] *Ibid* at para 44.

in a way that encourages the removal of First Nations children from their families and communities and their placement in non-indigenous foster homes, with the result that the transmission of indigenous cultures and languages to the next generation is severely hampered. Moreover, the evidence before this Tribunal makes it clear that the Respondent has been aware of that reality for a long time and chose not to take the steps necessary to remedy it.

48. For instance, Mr. Dubois of Touchwood Child & Family Services testified that Directive 20-1 was "basically designed" to keep children in care. He explained:

> Well, from my experience when I -- and previous to coming back to Saskatchewan, working in Alberta, my experience was that it was a directive that basically was meant to keep children in care. There was no family services component to it.
>
> It was very frustrating – still is – where there was no services for families.
>
> Like I said, it was primarily designed to keep children in care.[58]

49. AANDC recognized as much in the 2008 internal assessment of the FNCFS program:

> The program's funding formula has likely been a factor in increases in the number of children in care and program expenditures because it has had the effect of steering agencies towards in-care options – foster care, group homes and institutional care – because only these agency costs are fully reimbursed.[59]

50. Mr. Keewatin, former Executive Director of the Kasohkowew Child Wellness Society also testified that the placement of children outside their communities was not just a risk, but a common reality. When asked about Canada's funding formula which pre-supposes that 6% are in care, he broke down his numbers as follows:

> Eighteen percent of the children were in care, and by 18 percent I mean – I break that down to the fact that when you – we had 322 children where we had a Permanent Guardianship Order on those 322 children, there were 75 families and intake cases that were in assessment and investigations, so that the potential of another 75

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[58] Derald Richard Dubois Examination in Chief, April 8, 2013 (Vol 9, p 54, lines 6-15) [emphasis added].

[59] AANDC, *Comprehensive Program Assessment Template, First Nations Child and Family Services Program*, Canada's Disclosure, CAN113113 (CBD, Vol 15, Tab 478, p 13).

> children coming into care, and then there was also 152 children were apprehended off the Reserve that were in the care of other CFSAs.[60]

51. Ms Levi, from the province of New Brunswick, described how Canada's FNCFS Program causes First Nations children to be taken out of their home communities. She testified that Directive 20-1 actually forces more children into care by increasing funding depending on the number of children in care.[61] Chief Joseph described the consequence of children being taken into care outside of their homes communities. He testified:

> But once they're apprehended they're lost to the authorities or lost to a different set of considerations, a different set of frameworks on how to raise kids and just often removed physically from those homes into faraway places.[62]

52. A second kind of fiduciary duty that is relevant to this case arises from the relationship between children subject to child welfare measures and the State. With respect to children under foster care, the Supreme Court said in *KLB v British Columbia*:

> The parties to this case do not dispute that the relationship between the government and foster children is fiduciary in nature. This Court has held that parents owe a fiduciary duty to children in their care: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. Similarly, the British Columbia Court of Appeal has held that guardians owe a fiduciary duty to their wards: *B. (P.A.) v. Curry* (1997), 30 B.C.L.R. (3d) 1. 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.[63]

53. In such a case, the fiduciary duty is breached where there is "evidence that the government put its own interests ahead of those of the children or committed acts that harmed

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[60] Darin Michael Keewatin Examination in Chief, September 26, 2013 (Vol 32, p 61, lines 10-20).
[61] Ms. Judith Mildred Levi Examination in Chief, September 24, 2013 (Vol 30, pp 34-36, l.ines 24-25, 1-25, 1-13).
[62] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, p 65, lines 10-15).
[63] *KLB v British Columbia*, 2003 SCC 51, [2003] 2 SCR 403 at para 38 [*KLB*].

the children in a way that amounted to betrayal of trust or disloyalty."[64] Where the government fails to provide sufficient resources for the provision of proper child and family services to First Nations and provides no better justification than budgetary constraints or its freedom to make policy decisions, it can be said to put its own interests ahead of those of the children, and thus breaches its fiduciary duty.

B. Federalism and the Canadian Human Rights Act

54. This case requires the Tribunal to address the relationship between the *CHRA* and the principles of federalism. Of course, the Act is federal legislation and applies "within the purview of matters coming within the legislative authority of Parliament." It must, however, be interpreted and applied in a manner that is cognizant of the practical workings of Canadian federalism. Only in that way will the right to equality be truly realized and Canada's international commitments be kept.

55. With respect to the principles of federalism, two specific questions must be addressed, in response to defences raised by the Respondent. They are:

a) Whether the actions or omissions complained of fall "within the legislative authority of Parliament" and, thus, are amenable to review under the Act;

b) Whether, in applying the Act, the Tribunal may only draw comparisons with services or programs offered by the federal government.

56. In order to answer those questions, it is first necessary to understand how Canadian federalism has evolved to respond to the challenges raised by the provision of public services aimed at ensuring equality of opportunity.

1. Federalism, Public Services and Equality of Opportunity

57. The ground rules of Canadian federalism were laid down nearly 150 years ago, in an era where the functions, scope and aims of government were starkly different from what they are today.[65] The focus then was on the division of *legislative powers* between the two orders of

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[64] *KLB* supra note 63 at para 50.
[65] For an overview, see Patrick J. Monahan and Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law, 2012) at 256-258.

government. The assumption was that the government's role was to ensure public order and to facilitate the functioning of a free-market economy. Over the last 75 years or so, the development of the welfare state added significantly to the missions of government. The State is now explicitly based on the principle of equal worth of every person. To ensure that individuals have equal opportunities of developing their potential, the State has created programs for the provision of certain public services that are considered essential for individuals to overcome the hurdles that affect them in an unequal fashion. Thus, the State now provides free public education, health insurance and other similar programs. Through its ratification of the Covenant and the Convention, Canada is committed to maintaining such programs, including "social programmes to provide necessary support for the child and for those who have the care of the child," as provided for in Article 19 of the Convention.

58. Canadian federalism had to adapt to this fundamental change. In essence, the federal spending power was used to induce provinces to implement social programs that would meet national standards across Canada. The intervention of the federal government, and the use of the federal taxing power, allowed for the equalization of the burdens of providing public services among the provinces and ensured that citizens would have access to similar services, irrespective of whether they resided in a rich or a poor province. The spirit of the system is captured in section 36 of the *Constitution Act, 1982*:

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to	36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à
(a) promoting equal opportunities for the well-being of Canadians;	a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;
(b) furthering economic development to reduce disparity in opportunities; and	b) favoriser le développement économique pour réduire l'inégalité des chances;
(c) providing essential public services of reasonable quality to all Canadians.	c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.
(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient	(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des

revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.	revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

59. Child and family services have come to be regarded as an essential component of government and must be considered as one of the "essential public services" contemplated by section 36. In AANDC's own words:

> The program is indispensable to the public good; the benefits communities gain in strengthened family and community life far outweighing its costs. The need for child and family services is particularly acute in communities where traditional social, economic, and cultural relationships have undergone breakdown and change with significant resultant family dysfunction. The program's legitimacy is demonstrated by the existence of governmentally-funded and/or administered child welfare programs in every industrialized state in the world. The same social conditions that necessitate child welfare services elsewhere also exist in Canada, including First Nations communities.[66]

60. As a consequence, the provision of many public services is the result of collaboration between both levels of government.

2. Parliament's Legislative Authority over the Subject-Matter of the Complaint

61. We can now address the issue of whether the actions or omissions complained of are "within the purview of matters coming within the legislative authority of Parliament" (s. 2 of the Act). The issue is somewhat complicated by the fact that there is no federal legislation governing First Nations child welfare; we are essentially dealing with a spending program.

62. There is no dispute that child and family services is a matter that falls, with respect to non-First Nations Canadians, under provincial legislative jurisdiction.[67] It has also been held that provincial legislation concerning child and family services may apply to First Nations, unless

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[66] AANDC, *Comprehensive Program Assessment Template, First Nations Child and Family Services Program*, Canada's Disclosure, CAN113113 (CBD, Vol 15, Tab 478, p 6).

[67] *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696 at para 45 [*NIL/TU,O Child and Family Services Society*].

there is conflicting federal legislation.[68] In any event, section 88 of the *Indian Act* makes "provincial laws of general application" applicable to "Indians." This includes provincial legislation with respect to child and family services.

63. Likewise, there is little doubt that Parliament has jurisdiction to legislate with respect to child and family services for First Nations under section 91(24) of the *Constitution Act, 1867*. Section 91(24) empowers Parliament to enact laws that apply only to "Indians," even though the subject-matter of those laws is one that would fall under provincial jurisdiction if they were to apply to non-indigenous persons. As Professor Hogg explains:

> If s. 91(24) merely authorized Parliament to make laws for Indians which it could make for non-Indians, then the provision would be unnecessary. It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence.[69]

64. For example, the Supreme Court held in *Canard* that section 91(24) allowed Parliament to enact legislation concerning the wills of Indians.[70] If this is true of legislation with respect to estates and wills, it is difficult to argue that child and family services should be treated differently.

65. The Respondent's actions confirm the view that Parliament has jurisdiction over child and family services for "Indians." In Canadian constitutional law, the usual, if unstated assumption is that the level of government having legislative jurisdiction over a certain matter also has the primary (political) responsibility to bear the costs associated with public services in relation to that matter. This assumption is revealed in section 40 of the *Constitution Act, 1982*, which is expressly based on the idea that the allocation of certain jurisdictions entails a financial burden. In the past, the federal government argued that the Inuit were not "Indians" within the meaning of section 91(24), largely to avoid the cost of providing social services to the Inuit.[71] Its voluntary

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[68] *NIL/TU,O Child and Family Services Society* supra note 67 at para 41.
[69] Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (Toronto: Carswell, 2013), 28-5.
[70] *Attorney General of Canada et al v Canard*, 1975 CanLII 137 (SCC), [1976] 1 SCR 170 at 176, 193, 202 (Laskin CJ, Pigeon J and Beetz J's reasons, respectively) [*Canard*].
[71] *Reference re Term "Indians"*, 1939 CanLII 22 (SCC), [1939] SCR 104; for background to this case, see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 18-55.

assumption of the responsibility to fund child and family services for "Indians,"[72] coupled with the absence of a national child and family services program for the non-First Nations population, is a strong indication that it is of the view that section 91(24) encompasses jurisdiction over child and family services.

66. The fact that Parliament has not legislated with respect to child and family services for First Nations does not negate its jurisdiction under section 91(24). It is well established that the fact that a legislative body does not legislate on a specific matter does not amount to an abandonment of jurisdiction.

67. Likewise, the fact that the federal government has chosen to discharge its responsibilities with respect to First Nations child and welfare services through agreements with provinces and First Nations agencies does not detract from the fact that the subject remains under federal jurisdiction. In *NIL/TU,O*, the Supreme Court described some of the arrangements that are the subject-matter of the Complaint in the present case as follows:

> Today's constitutional landscape is painted with the brush of co-operative federalism [...]. A co-operative approach accepts the inevitability of overlap between the exercise of federal and provincial competencies.
>
> NIL/TU,O's operational features are painted with the same co-operative brush. The agency exists because of a sophisticated and collaborative effort by the Collective First Nations, the government of British Columbia and the federal government to respond to the particular needs of the Collective First Nations' children and families. This effort has resulted in a detailed and integrated operational matrix comprised of NIL/TU,O's Constitution and by-laws, a tripartite delegation agreement, an intergovernmental memorandum of understanding, a set of Aboriginal practice standards, a federal funding directive and provincial legislation, all of which govern the provision of child welfare services by NIL/TU,O in a manner that respects and protects the Collective First Nations' traditional values.[73]

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[72] In the *National Program Manual* (CBD, Vol 3, Tab 29, p 49), Canada defines eligible child as follows:
> a child who is registered in accordance with the Indian Act or who is eligible to be registered according to the Indian Act and whose custodial parent is Ordinarily Resident on reserve. In circumstances where the reference province or territory does not pay for Indians on reserve, only the Ordinarily Resident clause will apply."

[73] *NIL/TU,O Child and Family Services Society* supra note 67 at paras 42-43.

68. In compliance with Canada's international human rights obligations, Parliament and the provincial legislatures have each enacted human rights legislation dealing with matters falling under their own jurisdiction. Parliament's obvious intention is to cover the whole field of government services and private sector businesses under federal jurisdiction, in order to ensure that its legislation dovetails with provincial human rights legislation so as to create a seamless web of protection. An interpretation that would create gaps in the coverage should be avoided. Therefore, as a practical matter, where discrimination results from the joint action of both levels of government, each government should be subject to its human rights legislation for its own actions. Thus, if a provincial government discriminates in the provision of child welfare services to Aboriginal Peoples, for example by refusing to hire an Aboriginal social worker on racial grounds, this would properly be adjudicated under provincial human rights legislation. Conversely, the actions of the federal government, for example in establishing policies that result in discrimination, may be reviewed by this Tribunal. Of course, a provincial human rights tribunal would have no jurisdiction to review the actions of the federal government.

69. The Supreme Court's decision in *NIL/TU,O* does not mean that child welfare services for First Nations peoples fall under provincial jurisdiction for all intents and purposes. The question before the Court was which level of government had jurisdiction over the labour relations of a body created under provincial law and mainly subject to provincial controls. Of course, the answer would have been different if the case had involved employees of the federal government working on child and family services. Even though NIL/TU,O's labour relations fell to be regulated by the province, the Court fully recognized that child and family services for First Nations peoples were a joint effort involving both federal and provincial jurisdictions.

70. In the alternative, the programs that are the subject-matter of the Complaint are an exercise of the federal spending power and are, for that reason, within the "legislative authority of Parliament."

71. It is generally accepted that the federal government may spend money to subsidize activities or programs that fall under provincial jurisdiction.[74] The federal government may also

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[74] *Reference Re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC), [1991] 2 SCR 525 at 567; Peter W Hogg *supra* note 69 at 6-16 to 6-22.

attach conditions to such subsidies, with the result that it will effectively regulate or impose national standards in relation to a particular program.

72. In a secret program assessment template, AANDC described how the federal government became involved in the funding of First Nations child welfare services in a way that assumes at least that it is a result of the exercise of the spending power:

> The department is not legally obliged to provide FNCFS. However, because Canada exempted provinces from the responsibility to extend social services on reserves (under Part II of the Canada Assistance Plan) and authorized the Minister of Health and Welfare and the Minister of the Indian Act to negotiate with provinces for the extension of those services on reserve, most provinces opted not to deliver CFS in First Nation communities. Therefore, where CFS was not being delivered on reserve, the federal government exercised its executive authority to fund child welfare services.[75]

73. Parliament may legislate as to how it will exercise its spending power.[76] This kind of legislation is supported by s. 91(1A) of the *Constitution Act, 1867*, "The Public Debt and Property." Hence, any exercise of the spending power is a matter "within the legislative authority of Parliament." As we saw above, the fact that Parliament abstains from legislating on a particular subject within its jurisdiction does not amount to an abandonment of jurisdiction. In other words, an activity or program is within federal jurisdiction, whether or not Parliament actually legislates in its regard. Thus, the fact that Parliament has chosen not to enact framework legislation or national standards concerning child and family services for First Nations peoples does not put the matter beyond the jurisdiction of this Tribunal. In any event, the amount spent by the Respondent in relation to child and family services forms part of the credits appropriated yearly by Parliament.[77] To that extent, there is federal legislation authorizing the program that is the subject of the Complaint.

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[75] AANDC, *Comprehensive Program Assessment Template, First Nations Child and Family Services Program*, Canada's Disclosure, CAN113113 (CBD, Vol 15, Tab 478, p 5). Note that the *Canada Assistance Plan* was replaced by the Canada Social Transfer, under ss 24.3ff of the *Federal-Provincial Fiscal Arrangements Act*, RSC 1985 c F-8.

[76] *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 at para 25 [*Eldridge*]; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657 appendix B (both dealing with the *Canada Health Act*).

[77] See for example *Appropriation Act No. 2, 2013-14*, Bill C-63, schedule 1, under "Indian Affairs and Northern Development," pp 34-36.

74. Any other conclusion would lead to the unusual result than certain actions of the federal government would not come "under the legislative authority of Parliament." This is illogical. To the contrary, the manifest intention of Parliament in enacting the *CHRA* was to provide for the review of all actions of the federal government, including those complained of in this case.

3. Federalism and Comparison

75. A common theme in the Respondent's defence to the Complaint is the idea that the actions of the federal government with respect to child and family services must be assessed in isolation and should not be compared to child and family services offered by the provinces to the non-indigenous population. This argument is based on the assumption that drawing comparisons with other Canadian jurisdictions would somehow breach the principles of federalism.

76. The division of powers under the *Constitution Act, 1867*, should not operate so as to obstruct claims made under the *CHRA*. The Act implements international and constitutional guarantees of human rights that apply irrespective of the division of powers. These guarantees would be jeopardized if federalism were to serve as an excuse that could withdraw certain forms of discrimination from the purview of the Act or to operate so as to restrict the field of comparisons that may be drawn in order to establish discrimination. To the contrary, Parliament's intent in adopting the Act was to fully implement the right to equality within the sphere of federal jurisdiction, which may well require the analysis of comparators found in other Canadian jurisdictions. To understand why this is so, it is necessary to analyse the extent to which federalism authorizes the differential treatment of individuals.

77. Again, the discussion must start with the realization that the cardinal principle of modern government, reflected in section 2 of the Act, is to ensure that every citizen has equal opportunities. From a federal policy perspective, this translates into a presumption that federal legislation applies equally to all citizens across the country. The differential application from province to province, or region to region, is the exception and may be justified by different circumstances or needs or by adjustment to specific provincial policies. From a legal perspective, the prohibition on discrimination in the Act and in section 15 of the Charter is based on a number of enumerated or analogous grounds, and residence in a particular province is not one of these

grounds.[78] However, it must be emphasized that this is so only because the population of any province usually does not show any "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice."[79]

78. At the provincial level, federalism allows for a certain degree of variation from province to province. However, this must be qualified by the principle enshrined in section 36 of the *Constitution Act, 1982*, to the effect that provinces are committed to "providing equal opportunities" and "providing essential public services of reasonable quality to all Canadians." In practice, there is a substantial degree of similarity between the core public services offered by each province, such as education and health care. In some cases, such as health care, this similarity results from national norms adopted through the exercise of the federal spending power. As a matter of fact, child and family services are substantially similar from one province to the other, as a result of informal mechanisms such as voluntary collaboration among the provinces, emulation and sharing of best practices.[80]

79. The fact that the division of the country into several provinces may lead to somewhat different social services from province to province, beyond that common core, does not constitute discrimination. As the Supreme Court recently noted, federalism recognizes "the diversity and autonomy of provincial governments in developing their societies within their respective spheres of jurisdiction."[81] If the citizens of Quebec, acting as a self-governing community, decide to raise taxes in order to subsidize child care, and the citizens of Ontario decide to leave the provision of child care to the market, this does not as such result in discrimination against Ontarians. Such variations, while not insignificant, do not affect the common core of public services needed to ensure equality of opportunity and are the result of democratic choice by the category of persons to whom those variations apply.

80. However, First Nations children have not made a deliberate choice to have substandard child welfare services, nor have their parents. With respect to child welfare services funding

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[78] *R v Turpin*, 1989 CanLII 98 (SCC), [1989] 1 SCR 1296.
[79] *Ibid* at 1333.
[80] Nicholas Bala et al, *Canadian Child Welfare Law*, 2d ed (Toronto: Thompson Educational Publishing, Inc, 2004) at 16-17.
[81] *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at para 73.

agreements, First Nations are not treated as self-governing communities the way Quebec or Ontario are. Rather, the federal government has made conscious decisions not to adequately fund child welfare services for First Nations. Moreover, the contemporary social conditions in First Nations communities are, at least in large part, the result of past policies of the federal government, in particular the residential schools policy.

81. Likewise, federalism may allow a province to craft policies that reflect its distinctive culture.[82] Again, when a province does so, this is the result of democratic deliberation as well as the design of public policies by government officials who, for the most part, share in that distinctive culture. As will be demonstrated below, these features are absent from the policies that are the subject of the Complaint.

82. Exceptionally, certain categories of persons fall under federal jurisdiction for certain purposes. This includes, for instance, federal government employees, members of the armed forces or the RCMP, "aliens" (s. 91(25) of the *Constitution Act, 1867*) and, of course, "Indians" (s. 91(24) of the *Constitution Act, 1867*). From a policy perspective, the federal government usually tries to provide these categories of persons with services or treatment similar to what other persons would receive. This may be accomplished through explicitly referring to provincial legislation (such as in the *Government Employees Compensation Act*[83]) or by enacting federal legislation similar to provincial legislation (such as the *Canada Labour Code*[84]), although the aspiration is not always realized fully. From a legal standpoint, the right to equality prevents the federal government from discriminating against a category of persons falling under its jurisdiction, where that discrimination is based on an enumerated or analogous ground.

83. In this particular case, federal jurisdiction and disadvantage coincide. Where a category of persons falling under federal jurisdiction is also a group delineated by a prohibited ground of distinction, the Act prohibits discrimination. It would defeat the purpose of the Act to confine the analysis to services offered by the federal government, because by definition federal jurisdiction over a category of persons is exceptional. "Indians" only fall under federal

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[82] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 59.
[83] RSC 1985, c G-5, discussed in *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25 (CanLII).
[84] RSC 1985, c L-2.

jurisdiction but they are protected on the grounds of "race" and "national or ethnic origin", and are a recognized disadvantaged group within Canadian society.[85] Providing a lesser service to a disadvantaged group under federal jurisdiction cannot be considered a mere policy decision. Rather, it is discriminatory to deprive a disadvantaged group from what it would have been entitled to had it not had the characteristic in question.

84. In addition, the *CHRA* must be interpreted in light of the fiduciary relationship between the Crown and Aboriginal Peoples and in a manner that fosters reconciliation. It would be contrary to the spirit of a fiduciary relationship to allow the federal government to refuse to compare the treatment it affords to a group towards whom it has fiduciary duties to the treatment of other citizens in the same country, particularly given that the federal government created the FNCFS Program to be comparable with the services offered by the provinces. Reconciliation between the Crown and the Aboriginal Peoples requires, at the very least, the elimination of discrimination against the latter.

85. Some inspiration may be garnered from the reasons of Justice Laskin in the *Lavell* case. While he wrote in dissent, there is little doubt that his reasons would be more compatible with today's jurisprudence than the majority was. That case was not unlike the present one, insofar as the federal government invited the Court to focus on the absence of comparators and to conclude that s. 91(24) authorized Parliament to discriminate against the indigenous peoples:

> In my opinion, the appellants' contentions gain no additional force because the *Indian Act,* including the challenged s. 12(1)(*b*) thereof, is a fruit of the exercise of Parliament's exclusive legislative power in relation to "Indians, and Lands reserved for the Indians" under s. 91(24) of the *British North America Act.* Discriminatory treatment on the basis of race or colour or sex does not inhere in that grant of legislative power. The fact that its exercise may be attended by forms of discrimination prohibited by the *Canadian Bill of Rights* is no more a justification for a breach of the *Canadian Bill of Rights* than there would be in the case of the exercise of any other head of federal legislative power involving provisions offensive to the

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[85] *R v Williams*, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 at para 58; *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 59. *Mactavish J's Reasons* supra note 32 at para 334. See also Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons – Chapter 4, Programs for First Nations on Reserves*, 2011 (CBD, Vol 5, Tab 53, p 43) [OAG Report 2011]. In her testimony, Dr. Blackstock also described First Nations children as the most vulnerable children in the country (Vol 2, p 200, lines 18-24).

Canadian Bill of Rights.[86]

4. Federalism and Jordan's Principle

86. One particular consequence of federalism as it pertains to First Nations children is called Jordan's Principle. A recent decision of the Federal Court applied Jordan's Principle in the context of administrative law: in that case, the failure to apply the principle properly led the court to conclude that a decision was unreasonable.[87] While this principle has been elaborated in the specific context of the resolution of jurisdictional disputes concerning certain health and social services for Aboriginal children, it has deeper roots and its breach may lead to a finding of discrimination. To understand why, it is again necessary to consider the broader constitutional context.

87. As mentioned above, section 36 of the *Constitution Act, 1982* establishes the basic principle that both levels of government are committed to ensure equal opportunity as well as the provision of essential public services of reasonable quality to all Canadians. International, constitutional and statutory norms (such as the *CHRA*) require those services to be provided in a non-discriminatory manner. One critical aspect of the quality of those services is timeliness: as they often respond to urgent needs, it is necessary that these services be available whenever the need arises and that administrative difficulties do not unduly delay the provision of the service. For instance, one would never contemplate the idea of requiring persons to undergo a cumbersome process to determine their eligibility for emergency medical services. Children are particularly vulnerable to delays in the provision of services, as their development may be adversely affected by delay.

88. Where a particular service falls under the concurrent jurisdiction of both levels of government, the doctrine of double aspect of legislation translates into shared responsibility with respect to funding. However, the sad consequence of this situation is that both levels of government have, at least at the operational level, and sometimes at the policy level, a tendency to narrow the scope of their responsibility in order to reduce their own costs. Thus, the precise

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[86] *Attorney General of Canada v Lavell*, 1973 CanLII 175 (SCC), [1974] SCR 1349 at 1388-1389, Laskin J dissenting; see also *Canard* supra note 70 at 178-180.
[87] *Pictou Landing*, supra note 16.

divide between the respective areas of responsibility of the federal and provincial governments is determined through a combination of discussion, agreement and sometimes unilateral action. Needless to say, this may cause significant inconvenience to the citizen, especially where both levels of governments do not agree as to their responsibilities, where the line is blurred, where information about eligibility is not easy to access and where the procedures to determine responsibility are cumbersome. From a policy perspective, governments should make every reasonable effort to ensure that citizens do not suffer from jurisdictional conflicts. This is the source of Jordan's Principle.

89. From a legal perspective, Jordan's Principle may be relevant to the assessment of the reasonableness of a specific decision, as we saw in *Pictou Landing*. But there is more: where the category of persons who find themselves in a "double-aspect" area prone to jurisdictional conflict is delineated by a ground of prohibited discrimination, the failure to follow Jordan's Principle results in discrimination contrary to the Act. Under section 5(*b*), any adverse differentiation based on a prohibited ground is unlawful. The fact that a category of persons identified by race or ethnic or national origin is subjected to jurisdictional conflicts resulting in denials and delays in the provision of essential services, whereas persons of other races or origins are not, constitutes an adverse differentiation prohibited by section 5(*b*).

ISSUE 1: AANDC provides a "Service" under the *CHRA*

90. As outlined above, the Complaint alleges that contrary to s. 5 of the *CHRA*, the Respondent discriminates in providing child welfare services to First Nations children and that the Respondents failure to implement Jordan's Principle is discriminatory. Section 5 of the Act provides as follows:

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

on a prohibited ground of discrimination.

91. As part of its defence, the Respondent claims that its role in funding the FNCFS Program is not a service within the meaning of s. 5 of the Act and therefore the Tribunal has no jurisdiction to consider the Complaint. This argument is untenable. First, the concept of service under the *CHRA* is broad enough to include funding. Second, it is clear from the evidence presented to the Tribunal that the Respondent is more than a mere funder: it exerts control over the provision of child welfare services in a variety of ways and therefore is directly involved in the delivery of the service, bringing it squarely within the parameters of the *CHRA*.

A. Funding is a service

1. The Correct Approach to the Interpretation of the *Canadian Human Rights Act*

92. The Supreme Court of Canada has reiterated that human rights legislation, this "quasi-constitutional" legislation, should receive a broad, liberal and purposive interpretation to reflect the fact that it expresses fundamental values and pursues fundamental goals.[88] The Supreme Court has found that:

> [h]uman rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.[89]

93. The overarching goal of the *Canadian Human Rights Act* (the "Act") is to promote and safeguard substantive equality, achieved by preventing discriminatory practices based on the legislated enumerated grounds. Indeed, the approach to assessing *prima facie* discrimination under the Act is to be guided by the broad purpose outlined in s. 2:

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[88] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paras 33, 62 [*Mowat*]. See also *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 81 [*Vaid*].
[89] *CN v Canada (Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at 1134 [*Action Travail*].

PURPOSE OF ACT	OBJET
2. The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, martial status, family status, disability or conviction for an offence for which a pardon has been granted. [Emphasis added]	2. La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée. [Je souligne]

94. In order of fulfill this purpose, the impact and the result of the impugned activity must be examined. The Supreme Court has described substantive equality as follows:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.[90]

95. In the present case, taking account of the social, political, economic and historical factors involves consideration of the historical disadvantages and prejudice facing First Nations children, as well as the political and social reality facing First Nations communities. The lived experiences of First Nations peoples resident on-reserve and in the Yukon includes the political and social parameters created by the *Indian Act*, section 91(24) of the *Constitution Act, 1867* and section 35(1)

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[90] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 39 [emphasis added] [*Withler*].

of the *Constitution Act, 1982.* These realities, including the fact that many services provided on-reserve by the federal government are provided by provincial and territorial governments off-reserve, must be folded into the *prima facie* discrimination analysis with a focus on substantive equality.

96. Closely connected to the goal of substantive equality is the remedial nature of human rights legislation. Protections afforded pursuant to human rights legislation are often the "final refuge of the disadvantaged and the disenfranchised" and "the last protection of the most vulnerable members of society".[91] Indeed, when s. 67 of the *CHRA* was repealed in 2008, the Honourable Jim Prentice, then Minister of Indian Affairs and Northern Development, explained that its repeal was to "ensure that the laws of the country [...] apply equally to all Canadian citizens.[92] First Nations peoples face a legacy of stereotyping and prejudice, and are amongst the most disadvantaged and marginalized members of our society.[93] When s. 67 was repealed, Minister Prentice confirmed that the federal government would now be accountable for discrimination against First Nations peoples:

> Mr. Marc Lemay: [...] Let me give you an example. Under the Canadian Human Rights Act, a woman has the right to deliver her baby under the best conditions possible. An aboriginal woman living on a reserve 300 kilometres away from an urban centre could sue her band council based on the fact she is not given access to a hospital.
>
> Do you understand the issue? I am neither for nor against such an action, but it raises questions. What will happen after the passage of bill C-44? Do you understand, Mr. Minister? It is an important question.
>
> Hon. Jim Prentice: [...] Let me say, taking your illustration of access to health care services, that surely we want a country where a first nation citizen has the same ability to raise a human rights complaint about access to medical services as someone who is not a first nation citizen. Surely we want a country where there is

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[91] *Zurich Insurance Co v Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC), [1992] 2 SCR 321 at 339.
[92] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 39th Parliament, 1st Session, No 042, March 22, 2007, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2786776&Language=E&Mode=1> at p 1105 [Standing Committee on Aboriginal Affairs].
[93] *Mactavish J's Reasons* supra note 32 at para 334.

> equality and where a Canadian citizen, irrespective of status as an Indian or not, can voice or articulate a complaint and take it to the authorities.
>
> It's not simply the band council that is responsible, if section 67 is repealed; it is the government authorities generally, in particular the federal government. I appreciate there are complications, and I appreciate that this will change the circumstances for many people, but that surely is the reason to do it.[94]

97. Moreover, the federal government's fiduciary duty must inform the analysis of human rights complaints under the *CHRA* in relation to federal actions towards First Nations peoples.

98. It follows that a human rights tribunal ought not to read in a limitation to a term in human rights legislation that is not indicated by clear language or that thwarts the overall purpose of the act.[95] Ambiguous language will not suffice to limit the scope of the protection provided by the legislation, while "a strict grammatical analysis may be subordinated to the remedial purposes of the law".[96]

2. A broad and liberal approach supports an interpretation of "services" that includes funding

99. A broad and liberal approach to interpreting "service" is required, as any other interpretation would limit the remedial purpose of the Act, and, because of their unique constitutional status, would deny First Nations children the benefit of human rights protection.

100. The jurisprudence of the Supreme Court illustrates that only clear statutory language will give rise to limitations on the meaning and scope of the protections enshrined in human rights legislation. In *Gould v. Yukon Order of Pioneers*, the Court had to consider whether membership in an organization could be considered a "service" to the public, in providing which discrimination is prohibited under s. 8(a) of the Yukon *Human Rights Act.* The majority found that the existence of a separate prohibition on discrimination in connection with membership in certain groups, under s. 8(c) of the *YHRA*, showed clear legislative intent to treat membership

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[94] Standing Committee on Aboriginal Affairs *supra* note 92 at 1134 [emphasis added].
[95] *Dopelhamer v Workplace Safety and Insurance Board*, 2009 HRTO 2056 at para 9.
[96] *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc*, 2008 SCC 45, [2008] 2 SCR 604 at para 67 [*Potash Corporation*].

and services separately.[97] Further, given that s. 8(c) listed the types of organizations in which membership could not be discriminatory, there was legislative intent not to include every type of organization (although a broad and liberal approach could still apply to interpreting the scope of organizations intended).[98]*Gould* exemplifies a situation in which clear statutory language limits the scope of the term "services" in human rights legislation.

101. Unlike in *Gould*, there is nothing in the language of the *CHRA* to support the limited scope of "service" proposed by the Respondent. Indeed, the services argument amounts to the very "search for ways and means to minimize" the rights enshrined in the Act "and to enfeeble their proper impact" that the Court warned against in *Action Travail*.

102. Section 5 of the *Act* speaks of "the provision… of services". Funding is an essential and often determining component of the provision of services, particularly the funding of First Nations programs and services. Indeed, the wording chosen by Parliament shows an intent to include those who provide a service without necessarily delivering the service. While the FNCFSA delivers the child protection services at issue, AANDC is responsible for determining the existence and scope of those services through its funding formula. If AANDC's involvement ceased, the services would cease. Even a reduction in the Respondent's role would cripple the delivery of services. An AANDC briefing note to the Assistant Deputy Minister on the Plan to transition BC to the EPFA program, for instance, highlighted that

> [f]or the majority of these FNCFS agencies, a permanent reduction of unexpended maintenance balances and the absence of additional resources for operations on a go forward basis will render them financially unviable and will likely result in many agency closures.[99]

103. Indeed, the Respondent is aware of the direct causal link between inadequate funding and service deprivation, by way of the closure of FNCFSA:

> If First Nations Child and Family Services agencies were to withdraw from service delivery as a result of inadequate funding,

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[97] *Gould v Yukon Order of Pioneers*, 1996 CanLII 231 (SCC), [1996] 1 SCR 571 at para 14 [*Gould*].
[98] *Gould* supra note 97 at para 14.
[99] AANDC, *First Nations Child and Family Services British Columbia Transition Plan*, March 2011 (CBD, Vol 13, Tab 285, p 2).

> consequences could be severe.
>
> Pursuant to an 18-month long review involving the Province of Alberta, INAC, and on Alberta-based First Nations Child and Family Services agency, it was determined that expenses would likely double if the province were to assume responsibility for service delivery.
>
> In addition to escalating child welfare costs for INAC, culturally appropriate services would be compromised. This would be contrary to the United Nations Convention on the Rights of the Child [...][100]

104. Similarly, in an internal request for the Respondent to reallocate funding to a particular Agency, it is explained that

> [i]n the case of [Mi'kmaq Family & Childrens' Services] not being funded the continuance of inadequate service delivery in the Agency could lead to exposure of First Nations children to serious harm.[101]

105. In this case, the child welfare services would not exist without the funding. That the Respondent is responsible for the "provision" of child and family "services" to First Nations children is clear from the documents and the Respondent's own admission and acknowledgement that those services would be reduced or eliminated without its funding. The Respondent's role thus falls squarely within the scope of the language of s. 5 of the Act.

106. Even if there were ambiguity in the wording of s. 5 of the Act, this ambiguity would have to be resolved in favour of the remedial purpose of the Act, in keeping with the principles of interpretation of human rights legislation discussed above. Absent any statutory language to support a narrow reading of "services", there is no reason why under the required broad and liberal interpretation the term should not including funding.

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[100] AANDC, *First Nations Child and Family Services (FNCFS) Q's and A's* (CBD, Vol 6, Tab 64, p 6).
[101] AANDC, *Annex L – Internal Re-allocation Request*, November 2012 (Vol 13, Tab 298, p 2).

3. Funding meets the test for a "service" under s. 5

107. The Supreme Court has been clear that the term "service" under s. 5 of the *CHRA* encompasses a "broad range of activities."[102] In *Canada (Attorney General) v. Watkin*, the Federal Court of Appeal, concluded that "services" under s. 5 "contemplate something of benefit being 'held out' as services and 'offered' to the public."[103] In *Watkin*, the Court found that an enforcement action by Health Canada pursuant to the *Food and Drug Act* was not a service under the *CHRA*, based on the parameters of what the Court concluded was a service. Subsequently, in *Dreaver v Pankiw*[104] the CHRT canvassed human rights jurisprudence on the service issue, including *Watkin*, and articulated the test to be applied for determining the existence of a service, which the Federal Court upheld.[105] Under this test,

> to determine whether actions by a public official constitute a "service" under s. 5(b) of the *CHRA*, one must ask whether the activity provides a benefit or assistance to people. A related question is whether the characterization of the activity as a service is compatible with the essential nature of the activity.[106]

108. As in *Watkin*, the alleged service in *Dreaver* which failed to satisfy this test is illustrative. In *Dreaver*, a political pamphlet circulated by an MP was found not to constitute a service, because it was primarily of benefit to the MP rather than to the public who received it. Considered in terms of the "related question" of the essential nature of the activity, the pamphlet was "essentially communicative" in nature, disqualifying it as a service given that the *CHRA* addressed discriminatory communication as a separate matter, in ss. 12 and 13.[107]

109. Conversely, the FNCFS Program through which the Respondent funds child services clearly meets the test in *Dreaver*. The funding provided by the Respondent indisputably provides a direct benefit or assistance to First Nations children and families. The essential nature of the program is to ensure that statutory child welfare services are provided to First Nations children and that these services are reasonably comparable with those provided to all other Canadian

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[102] *Gould* supra note 97 at para 59.
[103] [2008] FCJ No 710, 2008 FCA 170 at para 31.
[104] 2009 CHRT 8 (CanLII) [*Dreaver*].
[105] [2010] FCJ No 657.
[106] *Dreaver* supra note 104 at para 23.
[107] *Ibid* at para 44.

children. It is entirely compatible with this essential nature of the program to characterize it as a service.

110. Courts and tribunals have found inequitable funding to constitute discrimination in providing a service in a range of circumstances, including funding of travel expenses to attend a softball tournament,[108] scholarships for post-graduate research,[109] live-in care programs,[110] schooling on reserves,[111] disability benefits and pensions,[112] and social assistance payments[113]. In each of these cases, the service provided was funding.

111. The law is clear that there is nothing in a government's allocation of resources, as compared to any other activity it undertakes, that insulates it from human rights law. This principle is not only reflected in the jurisprudence reviewed above, but in *Kelso v. the Queen*, the Supreme Court noted as follows:

> No one is challenging the general right of the Government to allocate resources and manpower as it sees fit. But this right is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act* [...][114]

112. That funding can be a service under s. 5 of the *CHRA* not only accords with jurisprudence, but with the common sense realization that funding can produce the very adverse effects which the *CHRA* is attempting to redress. In *Bitonti v. British Columbia*, the British Columbia Human Rights Council rejected a claim of discrimination against the Ministry of Health for want of clear arguments by the Complainants as to how the Ministry was involved.[115] However, it refused to endorse the argument by the Ministry that "the expenditure of funds by the provincial government is a legislative act that is immune from the Council's review." The Council pointed

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[108] *Hawkins obo Beacon Hill Little League Major Girls Softball Team - 2005 v. Little League Canada (No. 2)*, 2009 BCHRT 12 (CanLII).
[109] *Arnold v Canada (Human Rights Commission)*, [1997] 1 FC 582, 1996 CanLII 3822 (FC) [Arnold].
[110] *HMTQ v Hutchinson et al*, 2005 BCSC 1421 (CanLII), 261 DLR (4th) 171.
[111] *Courtois v Canada (Department of Indian and Northern Affairs)*, 1990 CanLII 702 (CHRT).
[112] *Ball v Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII); *Morrell v Canada (Employment and Immigration Commission)*, 1985 CanLII 91 (CHRT).
[113] *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235, 273 DLR (4th) 116.
[114] *Kelso v The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199, at 207.
[115] 1999 BCHRTD No 60, 1999 CarswellBC 3186 [*Bitonti*].

out that the possibility of providing funding in a discriminatory way clearly exists, and that there must therefore be scope for human rights review of funding:

> Carried to its extreme, [the Ministry's] position would mean, for example, that if the Ministry of Health provided funding for internships but stipulated that it would only pay male interns, that conduct would be immune from review. I am not prepared to go that far.[116]

113. It is important to remember that the remedial purpose of the *CHRA* requires that the focus of the investigation must be on the existence of discrimination, rather than the formal characterization of the action in question. The term "services" must be interpreted in a way that maintains this focus, and not in such a way as to shield instances of discrimination from review. As Abella J recently wrote for the majority in *Quebec (Attorney General) v. A*, in the context of s. 15 of the *Charter*:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. <u>If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory</u>.[117]

114. Inequitable funding decisions are as capable, and likely more capable, of widening the gap between disadvantaged groups and the rest of society as any other state conduct, effecting the very discrimination that the Act exists to combat. A principled, purposive interpretation of "services" must therefore include the funding of the FNCFS Program by the Respondent.

4. <u>The involvement of other entities in providing the service does not insulate AANDC from human rights review</u>

115. The fact that AANDC provides child welfare services through FNCFSA does not insulate it from its human rights obligations. In *Eldridge v. British Columbia (Attorney General),* the Supreme Court of Canada explained that a government cannot evade an allegation of discrimination in the provision of services by providing that service indirectly, through a third party:

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[116] *Bitonti* supra note 115 at para 315.
[117] *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 332 [emphasis added].

> Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.[118]
>
> […]
>
> [I]n providing medically necessary services, hospitals carry out a specific governmental objective. The [*Hospital Insurance*] Act is not, as the respondents contend, simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program.[119]

116. Given that providing a service through a corporate entity does not preclude the applicability of human rights law to government action, the question then becomes whether the government or the delegated entity is accountable for a failure to meet human rights standards. In answering this question, it must be born in mind that the government cannot delegate its responsibility to comply with human rights legislation to the FNCFSA. Moreover, the government cannot delegate its fiduciary duties to an outside entity.[120] In *Arnold v. Canada (Human Rights Commission)*[121], the Social Sciences and Humanities Research Council (SSHRC) argued that it did not have to accommodate scholars with disabilities when considering whether to provide them with grants because it could assume that they had been accommodated within the university. The Federal Court rejected this argument and explained as follows:

> When, as here, the SSHRC's decision is impugned in this Court, can the SSHRC simply shrug off the duty of accommodation onto a surrogate in the form of a provincial university whose performance is beyond this Court's supervision? Not by a long shot! The SSHRC must perform its own legal duties itself. The disabled applicant indeed is entitled, not merely to surrogate provincial-law accommodation, but rather to direct federal-law accommodation.[122]

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[118] *Eldridge* supra note 76 at para 42.
[119] *Ibid* at para 50.
[120] *Haida Nation* supra note 41 at para 53.
[121] *Arnold* supra note 109.
[122] *Ibid* at para 36.

117. Every service provider involved in the delivery of a service has independent human rights obligations. These obligations exist even when other service provides could equally be capable of preventing discrimination. In fact, the Supreme Court has held that, in keeping with its remedial purpose, the *CHRA* functions to ensure that responsibility is placed on the organization that is in a position to remedy the human rights violation.[123]

118. In this case, the Respondent is directly responsible for the level and adequacy of the child welfare services received by First Nations children and families. Indeed, the services are determined by the Respondent and can only be remedied by the Respondent. The Respondent is therefore the only relevant service provider in this case, and the involvement of the FNCFSA in the provision of child welfare services in no way shields the Respondent from the Tribunal's jurisdiction. Indeed, the fact that the Respondent developed, and has partially implemented, the EPFA funding mechanism to replace Directive 20-1 demonstrates that it recognizes that it has the power, through decisions about how to structure its funding of the FNCFS program, to ameliorate outcomes on the ground and remedy shortfalls. AANDC Deputy Minister Michael Wernick underlined this before the House of Commons Standing Committee on Public Accounts. He "acknowledged the flaws in the older funding formula and pointed to the new approach."[124]

> What we had [under Directive 20-1] was a system that basically provided funds for kids in care. So what you got was a lot of kids being taken into care. And the service agencies didn't have the full suite of tools, in terms of kinship care, foster care, placement, diversion, prevention services, and so on. The new approach [...] provides the agencies with a mix of funding for operating and maintenance [...] and for prevention services, and they have greater flexibility to move between those.[125]

119. It is clear that AANDC itself recognizes its own power to improve child and family services for First Nations. It is therefore the party with the power to ameliorate the discrimination faced by First Nations children with respect to these services.

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[123] *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84, 1987 CanLII 73 (SCC) at p 94.
[124] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, p 8).
[125] *Ibid.*

5. The interpretation of the *CHRA* must take into account the unique constitutional status of First Nations Peoples in Canada and the Charter

120. In its decision on the motion to strike this complaint, the Federal Court held that when interpreting the *CHRA*, human rights tribunals and courts must consider the unique constitutional status of First Nations Peoples and the Charter.[126] In that decision, Justice MacTavish rejected the Respondent's argument that a mirror comparator group was required in order to establish prima facie discrimination under the *CHRA*, because this interpretation would result in First Nations Peoples being unable to make discrimination claims in respect of government services that other Canadians are able to make. In light of this absurd result, this proposed interpretation of the *CHRA* was rejected by the Court.[127] As noted above, and as alluded to by Justice MacTavish in her decision,[128] this interpretation would also be directly at odds with the legislator's purpose in repealing s. 67 of the *CHRA*, which was to afford First Nations Peoples the same rights under the Act as other Canadians.

121. The Caring Society submits that the same reasoning applies to the services issue. Interpreting "service" in a manner to exclude funding would lead to the same absurd result of denying First Nations Peoples the protection that all other Canadians enjoy under human rights legislation. As demonstrated by the evidence, the Respondent is responsible for funding a multitude of services for First Nations Peoples that, for other Canadians, are funded by the provinces. This includes services such as education and health care. The Respondent funds and control these services when they are provided to First Nations Peoples, as it does for child welfare services.

122. Excluding the Respondent's role in providing these essential programs and services from the definition of "service" under the *CHRA* would lead to the same result rejected by the Federal Court and the Federal Court of Appeal. It would shield the Respondent from human rights scrutiny and deprive First Nations Peoples of their right to equality under the Act when receiving

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[126] *Mactavish J's Reasons* supra note 32 at para 340.
[127] *Ibid* at para 337.
[128] *Ibid* at paras 270, 347.

government services that all other Canadians take for granted. The Caring Society respectfully requests that this Tribunal reject this absurd and inequitable interpretation of the *CHRA*.

B. The Respondent Is More Than a Funder

123. The Respondent asserts that it is a mere funder of child welfare services for First Nations children on reserve and in the Yukon, and thus does not provide a service within the meaning of s. 5. As explained above, even if it were a mere funder, the Respondent's funding would still qualify as a service. However, the Respondent's characterization of its role does not reflect the true scope of the service it provides. As Iacobucci J wrote in *Gould*:

> I would note that the fact that an organization labels what it offers as a "membership" rather than a "good or service" is not determinative. The appropriate characterization, and the question of whether s. 8(a) or (c) is engaged, is, as a legal question, one for the relevant decision-making body to determine.[129]

124. In *Moore v. British Columbia (Education)*,[130] the Supreme Court expanded on the importance of properly characterizing the service in question. Abella J's reasons show clearly that the Tribunal or Court must be alive to the consequences of defining the service at issue too narrowly. A definition of the service that relieves the service provider of its duty not to discriminate must be rejected.[131]

125. It is evident that the Respondent's role in child welfare services for First Nations children and families is far more than that of a mere funder. The Respondent exerts a considerable amount of control over those services under each of the funding mechanisms in place across the Country.

1. Assertions of control by the Respondent

126. The very provisions of the funding mechanisms by which the Respondent provides child welfare services on reserve attest to a level of control over those services. Indeed, the Respondent does not simply give FNCFSA the funding it needs to provide reasonably comparable services.

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[129] *Gould* supra note 97 at para 15.
[130] 2012 SCC 61, [2012] 3 SCR 360 [*Moore*].
[131] *Ibid* at para 29.

As outlined below, the Respondent dictates, controls and participates in how, when and where FNCFSA provide child welfare services.

127. For example, Directive 20-1 commits AANDC (then DIAND) to "the expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances."[132] This expansion is to be gradual, occurring "as funds become available and First Nations are prepared to negotiate the establishment of new services or the takeover of existing services."[133] The Department is to "support the creation of Indian designed, controlled and managed services" and "the development of Indian standards for those services."[134] The Department sets the conditions for funding the development of new FNCFSA,[135] and sets a rule that FNCFSA are to serve at least 1,000 children, unless the grounds for exception are met.[136] The Department will conduct period reviews of the Child Welfare Program.[137] Each of these provisions speaks to the control that the Respondent asserts over the provision of services by FNCFSA.

128. Internal documents created by the Respondent also confirm its control over the services being provided. A Logic Model of the Child and Family Services Program, put to Dr. Blackstock and Sheilagh Murphy, AANDC Director General Social programs, during their testimony, indicates that the Respondent itself sees the delivery of services by FNCFSA as falling under an AANDC (then DIAND) "Area of Control".[138] A disclosed government document entitled "Explanations on Expenditures of Social Development Programs", also put to Dr. Blackstock, described the Federal Role in this area as follows:

> Federal Role
>
> Federal Government (INAC in particular) <u>acts as a province in the provision of social development programs on reserve</u>.

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[132] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, s 6.1).
[133] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, s 6.4).
[134] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, ss 6.2-6.3).
[135] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, ss 7.1-7.2).
[136] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, s 9.1).
[137] Directive 20-1, April 1, 1995 (CBD, Vol 1, Tab 2, s 11.2).
[138] *Logic Model - Child and Family Services Program*, (CBD, Vol 13, Tab 304); Dr. Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, p 100); Sheilagh Murphy Examination in Chief, April 2, 2014 (Vol 54, pp 62-64).

> Federal Policy
>
> While the Federal policy for social programs follows provincial/territorial rates and criteria, it has not kept pace with provincial proactive measures, thus, the current programs help perpetuate the cycle of dependency. [139]

129. Given that provinces control, and have direct responsibility for, child welfare off reserve, this characterization of the Federal Role implies that AANDC sees itself as possessing a similar level of control and responsibility under the FNCFS Program.

130. Similarly, AANDC's National Program Manual[140] for the First Nations Child and Family Services program is unequivocal in referring to what the program provides as services. The "Program Objectives and Principles" provided for in the Manual include the following:

> 1.3.5 The child and family services offered by FNCFS on reserve are to be culturally relevant and comparable, but not necessarily identical, to those offered by the reference province or territory to residents living off reserve in similar circumstances.
>
> 1.3.6 Protecting children from neglect and abuse is the main objective of child and family services. FNCFS also provides services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.[141]

This language is not consistent with the argument that the Respondent is a mere funder.

131. The Manual's requirement that services be "culturally relevant" is also a clear indicator of an intent to exert control over the quality and character of the service provided.

2. AANDC does not fund according to provincial legislative standards

132. AANDC's argument that it is a mere funder rests on the assertion that the FNCFSA are bound to follow provincial standards of child welfare, and that AANDC therefore has no input

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[139] *Explanations on Expenditures of Social Development Programs*, (CBD, Vol 13, Tab 330, pp 1-2) [emphasis added]; Dr. Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, pp 142-143).
[140] *National Program Manual*, May 2005 (CBD, Vol 3, Tab 29); Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 11-13).
[141] *National Program Manual*, May 2005 (CBD, Vol 3, Tab 29, p 6) [emphasis added].

into what the FNCFSA provide as services. Sheilagh Murphy's testimony on Directive 20-1 is illustrative:

> MS MacPHEE: So did the federal government have any role in dictating the service that was being provided by those Agencies?
>
> MS MURPHY: We leave sort of the definition of what is required in terms of the service in terms of – protection, as an example.
>
> Those Agencies, in their delegation, need to use and follow the rules that are set by the province through the legislation and the regulation and then we would fund them for the costs of doing that. We do not – we are not experts in the area of child welfare, so we don't go in and counter what the province would be expecting of a delegated Agency and say, "oh, you don't have to do that, do this instead." We leave it to the province to manage that on an ongoing basis, to manage that delegation and to ensure that the services that are being provided meet their requirements.[142]

133. Carol Schimanke, AANDC Regional Program Officer, Alberta, provided a similar description of the respective roles of the federal and Albertan governments under the EPFA funding mechanism:

> MS McCORMICK: What involvement does your office have with the programs and services provided on-Reserve?
>
> MS SCHIMANKE: We don't develop those programs, like that is – my understanding is the Child and Family Service Agencies as per their service delivery agreements deliver services under the Act the provincial Act called the Child, Youth and Family Enhancement Act and they develop the programs based on that Act and the regulations from that. So we don't have any input into that.
>
> MS McCORMICK: Do you have any role in the administration of the programs?
>
> MS SCHIMANKE: We do not, no.
>
> MS McCORMICK: Or any role in the way the programs are run?
>
> MS SCHIMANKE: No, we do not.

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[142] Sheilagh Murphy Examination in Chief, April 2, 2014 (Vol 54, pp 36-37, lines 20-25, 1-13) [emphasis added].

> MS McCORMICK: Okay. Are there any restrictions on what First Nations Agencies can offer in Alberta?
>
> MS SCHIMANKE: I believe, again, that comes based on their service delivery agreement with the province and what's allowed under the *Child, Youth and Family Enhancement Act*
>
> […]
>
> MS McCORMICK: So essentially what I think you've just described is that Alberta sets the rules and Canada provides the funding; is that fair to say?
>
> MS SCHIMANKE: That's fair to say, yes.[143]

134. However, the evidence before the Tribunal shows that AANDC's funding departs in significant ways from the provincial standards, leaving FNCFSA, children and families without funding for items that the province mandates. This is a clear exercise of control.

135. For example, under the Alberta *Child, Youth and Family Enhancement Act*,[144] in dealing with a child who is a band member living on reserve, a director is required to involve a person designated by the band in planning for intervention services.[145] However, as Carol Schimanke testified, there is no provision for funding for such a band representative under the EPFA funding mechanism in place in Alberta:

> [W]e don't fund that position and we don't expect the Agencies to use their operations or prevention dollars to fund it.[146]

Ms. Schimanke made clear that AANDC monitors FNCFSA for compliance, not with the provincial child welfare legislation, but with AANDC's funding policy.[147] Ms. Schimanke testified that in AANDC's view, the FNCFSA are responsible for negotiating funding for this band representative from the province.[148] No such funding currently exists. By failing to fund this

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[143] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, pp 25, 28-29, lines 2-25, 25, 1-5).
[144] RSA 2000, c C-12.
[145] *Ibid* at s 107(1).
[146] Carol Schimanke Cross-Examination, May 15, 2014 (Vol 62, p 95, lines 8-11).
[147] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, p 30, lines 10-13).
[148] Carol Schimanke Cross-Examination, May 15, 2014 (Vol 62, p 95, lines 15-20).

element of the services mandated by the provincial legislation AANDC is exerting direct control over child welfare services on reserve.

136. A similar situation occurs in Ontario, where Band representation is not funded by AANDC under the 1965 Agreement, but is mandated under the current *Child and Family Services Act*.[149] The Ontario Minister of Children and Youth Services wrote to the Minister of Indian and Northern Affairs in 2007 to ask that the federal government reinstate funding for the band representative program mandated under the provincial *Act*, but this was not done.[150] The 1965 Agreement has not been updated to reflect other services that have been included in the *Child and Family Services Act* over time, including provisions on child mental health and youth justice which became part of the legislation in 1984.[151] Phil Digby, AANDC Regional Program Officer, Ontario, was asked about the impact on the ground of the decision not to expand federal cost-sharing to include these areas:

> MR. POULIN: What about differences in the ground? Are you privy to any such differences on the ground?
>
> MR. DIGBY: Well, I understand that, in many First Nations communities, there is concern that children's mental health services are not extended to the full degree that the First Nations feel would be necessary to meet the need of children, and that is certainly a concern
>
> […]
>
> MR. DIGBY: […] if I said something along the lines of it made no difference, please understand, the extension of children's mental health services throughout the Province of Ontario concerns everybody and it certainly makes a difference in everybody's life in terms of children in need having access to the services that they require for mental health.
>
> My only point is with respect to the Government of Canada's cost-sharing under the 1965 Agreement, nothing changed. We did not start reimbursing the cost of Children's mental health services in

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[149] *Memorandum of Agreement Respecting Welfare Programs for Indians*, December 1, 1965 (CBD, Vol 11, Tab 214) [1965 Agreement].
[150] Mary Anne Chambers, *Letter to the Honourable Jim Prentice*, February 23, 2007 (CBD, Vol 14, Tab 362).
[151] Phil Digby Cross-Examination, May 8, 2014 (Vol 60, pp 81-82, lines 12-25, 1-15).

1984 and that continues to be the government's policy to this day.[152]

137. Not only do the federal government's decisions on what to fund create important differences between the services available to First Nations children on reserve and elsewhere in the province, but they demonstrate the control that AANDC exerts over the provision of these services on reserve.

3. The funding mechanisms dictate how child welfare services are provided

138. The Complainants' witnesses consistently testified to the control that AANDC exerts over their operations through its funding mechanisms.

139. Raymond Shingoose, for example, testified that his Agency, the Yorkton Tribal Council and Child and Family Services, has to cover its legal costs relating to the care of First Nations children on reserve out of the operations amount provided under the EPFA.[153] For children under the Agency's care under the provincial system, legal costs are completely reimbursed as part of the child's maintenance. By limiting the funding available for legal costs, AANDC exerts direct control over the Agency's conduct of child welfare cases. A much higher percentage of children are placed in care under voluntary placement agreements than is the case provincially. Raymond Shingoose stated that this is

> because we just don't have the dollars to apply it to the courts. So we try and work with the families as best we can.
>
> […] [W]e're only allowed to have [voluntary placement agreements for] 18 months, and then we have to apply for either short-term, long-term or get court orders.
>
> So we have a lifeline of trying and do the best we can in 18 months to try and return this child back to home with what we have. And it's always playing catch-up. It's very frustrating and challenging.[154]

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[152] Phil Digby Cross-Examination, May 8, 2014 (Vol 60, pp 83-84, lines 7-16, 4-17).
[153] Raymond Shingoose, September 25, 2013 (Vol 31, pp 83-86). See also Barbara D'Amico Examination in Chief, March 19, 2014 (Vol 52, p 58-59, lines 7-25, 1-14), and Carol Schimanke Cross Examination, May 15, 2014 (Vol 62, p 58, lines 19-23).
[154] Raymond Shingoose, September 25, 2013 (Vol 31, pp 84-85, lines 20-22, 6-9).

140. The inadequate funding for prevention under Directive 20-1 provides another clear example of how the structure of the Respondent's funding mechanisms directly impact the services provided to vulnerable children. The problem was summarized in *Wen:de: We are coming to the light of day* as follows:

> Another complication is that agencies have been disallowed prevention based expenditures that they have billed as a part of the child maintenance. It is an expectation of all child welfare statutes in the country that once a child is admitted to care the child welfare authority has to provide services to the family and the child to optimize conditions for the child's safe return. In many cases, agencies find themselves in a catch 22 situation – they have inadequate funds in the operations pool to pay for these services and then regional INAC would disallow the expenditure if it was billed under maintenance. This means that agencies in this situation effectively have no money to comply with the statutory requirement to provide families with a meaningful opportunity to redress the risk that resulted in their child being removed. More importantly, the children they serve are denied an equitable chance to stay safely at home due to the structure and amount of funding under the Directive. In this way the Directive really does shape practice – instead of supporting good practice.[155]

141. Under Directive 20-1, AANDC officials at the regional level are the ultimate arbiter of whether a service is funded under the operations or maintenance amount. Given that the operations budget is fixed, these decisions, which are not consistent across regions,[156] have a significant influence on what services Agencies end up deciding to provide. Similarly, AANDC regional officers decide whether expenditures claimed by FNCFSA are eligible expenses, and there is no appeal mechanism from these decisions.[157]

142. Dr. Blackstock testified to the constant influence of the Directive 20-1 funding mechanism on the services she provided as a social worker working on reserve in British Columbia.

> MEMBER LUSTIG: And, in fact, as I recall, you mentioned that you had, on occasion, been able to get funds where, in the

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[155] First Nations Child and Family Caring Society of Canada, *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 21) [*Wen:de We Are Coming to the Light of Day*] [emphasis added]. See also Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 122-123).

[156] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 40-41, lines 17-25, 1-9).

[157] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, pp 130-131, lines 4-25, 1-5).

> provincial setting, where funds had not been available by, presumably, getting the provincial government to somehow fund something that was not available funding-wise?
>
> And that wasn't your experience on the reservation because it wasn't that flexible?
>
> DR. BLACKSTOCK: What I found is that, as a social worker officer, although, as you quite rightly observed, the situation was not ideal. You always wanted better for children and families. The level of consideration I had to give to funding was very small. But, when I was on reserve, I felt that almost the directive was my supervisor because it just seemed to – it seemed to, unfortunately, always be there when I was making practice decisions.[158]

Similarly, the funding mechanisms exert a large degree of control over strategic and operational decisions by Agencies.

> MS. McPHEE: But in theory the opportunity is always there for these various communities in New Brunswick to talk amongst themselves and determine for themselves whether [amalgamation] makes sense, given their particular issues?
>
> DR. BLACKSTOCK: Right, but choice assumes the ability to choose.
>
> I would say that, in the Directive, you have the ability to choose but while wearing a straitjacket, in that the funding formula really does dictate and shape the way that you are able to make choices about the way you operate.[159]

143. Sheilagh Murphy's testimony highlighted the disconnect between the Respondent's self-characterization as a mere funder and the reality of how it controls the provision of child welfare services.

> MS MacPHEE: […] And under this new approach, the EPFA, has the role of the federal government changed […]?
>
> MS MURPHY: I mean, we continue to be a funder, we don't espouse to be experts in the area of child welfare practice. I mean, our role I think has changed in some ways in that when you look at

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[158] Dr. Cindy Blackstock Examination by the Tribunal, March 1, 2013 (Vol 5, pp 118-119, lines 16-25, 1-10).
[159] Dr. Cindy Blackstock Cross-Examination, February 13, 2014 (Vol 49, p 225, lines 13-25). Note that Ms. McPhee's question is misattributed to Dr. Blackstock in the transcript.

> the progression of this program – we do audits and we do evaluations, the Auditor General looked at this program in 2008 and again in 2011. We do need to have – we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nations Agencies are delivering the program according to the legislation and regulation, that they have the capacity to do that, that we are getting outcomes.
>
> So we are not a passive player in terms of being interested in how First – I mean, it's program risk management, it is financial risk management, to make sure that they are delivering the program that is within the authorities, that they are paying for the right things that we have been given the money for.[160]

The Respondent's testimony evinces a clear intent to exert control over how services are actually provided.

144. Beyond exercising control through specific decisions about what services are funded, and how, under the different funding regimes, the Respondent exerts a significant degree of control over the provisions of child welfare services by its very decision of what funding regime to implement in a given province. In their letter of 17 November 2009 to the Honourable Chuck Strahl, then Minister of Indian Affairs and Northern Development, the British Columbia Ministers of Children and Family Development and Aboriginal Relations and Reconciliation highlighted this reality. The Ministers asked Minister Strahl to implement the EPFA model in British Columbia, explaining that "[t]he longer the delay in providing much needed funding, the longer British Columbia's First Nations children residing on reserve do not receive comparable level of services provided to the rest of British Columbia's children".[161] They indicated their full agreement with B.C. First Nations in asking the Federal Government to abolish Directive 20-1 and fully implement Jordan's Principle:

> We would therefore urge you to work with your Federal Cabinet colleagues to ensure equity in the funding of services for First Nations children and families *throughout* Canada. This is a fundamental issue of equity, and there is no justification for differential treatment of children on reserve to those living off

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[160] Sheilagh Murphy Examination in Chief, April 2, 2014 (Vol 54, pp 51-52, lines 15-25, 1-16).

[161] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69, p 1).

reserve.[162]

145. In response, Minister Strahl indicated that EPFA would not be implemented in B.C. at that time.[163] This response belies the Respondent's assertion of provincial control over child welfare services on reserve. If the provinces truly held the reins, then B.C.'s demand to implement EPFA should have been determinative, with the federal government immediately stepping in to provide the necessary funding. The reality is the exact opposite: the federal government is the one dictating what funding formula is in place in each province, and thus what services are ultimately provided. The federal government's financial priorities, rather than the province's legislation and standard for child welfare services, determine what services are funded.

146. In her testimony, Sheilagh Murphy spoke to the process of internal discussion at AANDC on the question of whether EPFA should be expanded to more provinces.[164] What emerges from this evidence is that the decision of what funding structure exists in a given province – a decision that exerts an enormous amount of control over what services can be provided by FNCFSA on the ground – is ultimately a decision of the federal government. No one else exerts this level of control. This means that, for instance, in a province where Directive 20-1 is currently in place, the fundamental flaws in service provision created by that funding regime simply cannot be redressed by either the province/territory or child welfare agencies on the ground. Both they and the federal government are service providers, but the federal government is the service provider with the most fundamental level of control over what services are provided. This should in no way be taken to mean that the federal government could live up to its human rights obligations simply by implementing EPFA across the country; as is explained below, that funding regime, while an improvement on Directive 20-1 in a few respects, is also irredeemably flawed and inequitable.

147. Sheilagh Murphy's testimony attests to the Respondent's awareness of the degree to which its decisions pertaining to the provision of child welfare control the situation on the

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[162] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69, p 1).
[163] Hon. Chuck Strahl, *Letter of Reply to the Hon. Mary Polak and the Hon. George Abbott Regarding Jordan's Principle*, January 21, 2010 (CBD, Vol 6, Tab 70).
[164] Sheilagh Murphy Cross-Examination, April 3 2014 (Vol 55, pp 204-205).

ground. In a November 2012 Power Point presentation, Ms. Murphy made recommendations to the AANDC Minister to increase funding for the FNCFS, and complete the reform of the program nationally.[165] The presentation noted the impacts should AANDC fail to carry out the recommendations, including that it would "not advance improved outcomes for First Nations children and their families".[166] Ms. Murphy confirmed in her testimony that the Respondent's decision to not adopt these recommendations was understood to have a direct and negative impact on the provision of services:

> MR. CHAMP: […] So what you are saying there, Ms. Murphy, are you not, is that it is going to not improve outcomes for – there is going to be negative outcomes potentially for First Nations children and families?
>
> MS MURPY: It could mean negative, or it could mean that we don't lower the rate of children in care. I mean, prevention – this is about prevention dollars and there are demonstrable results in where prevention has been working and so certainly you weren't going to get to better outcomes by not allowing for increased prevention.[167]

148. The evidence demonstrates three essential facts: (i) AANDC directly controls whether FNCFSA can meet the provincial/territorial legislated standard of service; (ii) AANDC directly controls the type of service that FNCFSA can provide to First Nations children and families; and (iii) AANDC is aware that its funding decisions directly impact the quality and adequacy of child welfare service available. The funding levels and methods employed by AANDC are intimately determinative of the child welfare services provided by FNCFSA; the two cannot be separated. As such, AANDC is not a mere funder, but an integral partner in the service provision of child welfare services, bringing its actions directly in the purview of s. 5 of the *CHRA*.

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[165] AANDC, *Review of the Child and Family Services Program*, November 2, 2012 (CBD, Vol 13, Tab 289, p 2); Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 208, lines 6-12).
[166] AANDC, *Review of the Child and Family Services Program*, November 2, 2012 (CBD, Vol 13, Tab 289, p 8).
[167] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, pp 214-15, lines 17-25, 1-4) [emphasis added].

4. The Respondent mandates reporting from FNCFSA

149. The Tribunal heard evidence as to the reporting requirements imposed on FNCFSA by the Respondent. These requirements are indicative of a high level of control by the Respondent in two ways.

150. First, the reporting requirements make significant demands on the time and resources of the FNCFSA, effectively controlling both. The 2010 report on the Implementation of the EPFA, commissioned by the Respondent, found the following:

> Literature reviewed for this evaluation points to the administrative burden on First Nations and Tribal Councils and most of the other Aboriginal organizations as ranging from "onerous" to "manageable." However, the funding provided for management and administration was considered to be inadequate by all, with the amount of reporting not commensurate with the amount of funding received. First Nations recipients are concerned with the value of the reports since they sometimes do not receive feedback from INAC.[168]

151. Brenda Ann Cope testified to the administrative burden that reporting obligations to the Respondent imposes on her Agency, Mi'kmaw Children and Family Services of Nova Scotia.[169]

152. The second way in which reporting requirements indicate control by the Respondent is in dictating the organization and administration of Agencies. A new reporting obligation under the EPFA requires FNCFSA to submit five-year business plans to the Respondent. These plans must "identify key goals, performance measures and strategies for approval and regular monitoring by INAC."[170] Sheilagh Murphy was asked whether the new requirement of business plans indicated that the Respondent is taking on a role beyond that of a funder.

> MS MURPHY: Well, I think there had been an evolution within government, within the federal government, as to what departments are accountable for in terms of the flow of funding, so there has been an increased focus on accountability and risk

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[168] T.K. Gussman Associates Inc. and DPRA, *Implementation Evaluation of Enhanced Prevention Focus in Alberta*, March 5, 2010 (CBD, Vol 13, Tab 271, p 20).
[169] Brenda Ann Cope Examination in Chief, September 23, 2014 (Vol 29, p 87-89).
[170] *Key Questions and Answers (For Internal Use Only) First Nations Child and Family Services – Continuing the Reform in Manitoba and British Columbia* (CBD, Vol 14, Tab 369, p 5).

> management and ensuring that money is going for its intended purpose, that we are getting to -- there is a focus on performance and better outcomes.
>
> […] So, as part of the Enhanced Prevention Focused Approach, we felt it was a good management practice that Agencies, like most organizations, actually articulate the strategies of what they are going to use the money for, what their goals and objectives are in what we call a five-year business plan. That plan really is focused on, you know, in the area of operations this is what we are going to do, we are going to – we want to – certainly they had to scale up because they would be hiring new staff for prevention, here are our goals in doing that; in terms of prevention programing, here is the programming that we are going to offer; in terms of maintenance – so it really is a strategic plan around how they are going to manage the money from a performance perspective.
>
> It doesn't get into sort of here is how we are going to manage our case files and here is how we are – it's not that, it's really this broader management piece. And we do that with First Nations in all our programs, we look at how they are managing the program, what tools do they have, what capacity do they have, do they have a Board of Directors that is functioning, that is giving the guidance it is supposed to give, if that is part and parcel of the organizational structure.[171]

153. The argument that imposing administrative and organizational requirements on FNCFSA does not elevate the Respondent beyond the role of a funder is artificial. The kind of monitoring of FNCFSA that the five-year business plan represents shows an unambiguous intent on the part of the Respondent to control how FNCFSA operate in the performance of their functions.

154. In addition to its reporting requirements, the Respondent also conducts compliance reviews of FNCFSA. Carol Schimanke described what a compliance review looks like in Alberta.

> MS McCORMICK: […] And why are there – the compliance reviews required? Why is the Agency required to do those?
>
> MS SCHIMANKE: A compliance review? Like an on-site compliance review?
>
> MS McCORMICK: M'hmm.

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[171] Sheilagh Murphy Examination in Chief, April 2, 2014 (Vol 54, pp 56-58, lines 4-12, 7-25, 1-9).

> MS SCHIMANKE: We do that as part of the accountability process. In Alberta region, we continue – we are doing compliance reviews every three years. These are on-site reviews and there are two parts. One, because we get a maintenance report, we don't get any kind of backup documentation with that maintenance report, so we will take the report and, you know, verify that there is actual supporting documentation, whether there is a receipt or a contract or whatever to support that expenditure on the child's file.
>
> We also do a bit of program management review to make sure that they have policies in place to support their entity, such as an HR policy or a financial policy and that they are implementing those policies, right, and applying them as they are written.[172]

155. This is a clear indication that the Respondent exerts control on how FNCFSA function. It is not a mere funder: it actively shapes the front-line service delivery organizations, ensuring that child welfare services are delivered according to a model of its design.

5. <u>The Respondent's control over child welfare in the Yukon</u>

156. The Tribunal heard evidence on the Respondent's unique role in the provision of child welfare for First Nations children in the Yukon, and the measure of control it exerts over child welfare services there. The Respondent funds child welfare services for all First Nations children in the Yukon, not only those on Reserve.[173]Under the *Yukon Act*, the federal Governor in Council appoints a Commissioner of Yukon.[174] The Commissioner enacts legislation in the Yukon, including the *Child and Family Services Act*.[175] The Commissioner in Executive Council also designates the director of family and children's services, who has "general superintendence over all matters pertaining to the care or custody of children" in care.[176] This indicates a significant measure of control by the Respondent over child welfare services generally in the Yukon.

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[172] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, pp 140-141, lines 10-25, 1-8).
[173] Dr. Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, p 68, lines 8-18); see also *Funding Agreement Government of Yukon Department of Health and Social Services for 2011-2012* (CBD, Vol 13, Tab 305).
[174] *Yukon Act*, SC 2002 c 7, s 4(1).
[175] *Child and Family Services Act*, Statutes of Yukon 2008, Preamble, online: <http://www.gov.yk.ca/legislation/acts/chfase.pdf> [*CFSA Yukon*].
[176] *Ibid* at ss 173(1)(a), 174(2). See also Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, p 69, lines 8-21).

157. In the specific context of child welfare for First Nations children, the Funding Agreement between the Respondent and the Yukon Department of Health and Social Services specifies that in the area of Child and Family services,

> [t]he Territory will administer the First Nation Child and Family Services Program in accordance with DIAND's First Nation Child and Family Services Program – National Manual or any other program documentation issued by DIAND as amended from time to time […][177]

Further,

> [t]he budget is set at the beginning of the year and may be adjusted based on actual expenditures as identified on invoice amounts.[178]

158. Thus the Territory administers the FNCFS as authorized by the Respondent, rather than the Respondent funding child welfare for First Nations according to the Territory's *Child and Family Services Act*.

159. By way of example, the 2008 *Child and Family Services Act* allows for the Commissioner in Executive Council to designate a First Nation service authority (i.e. a First Nations child welfare Agency).[179] However, when the Carcross Tagish First Nation sought to create an child welfare agency, the Respondent effectively refused. In a draft of a letter to the Chief of the Carcross Tagish First Nation, Deputy Minister of Indian Affairs and Northern Development Michael Wernick wrote:

> […] Canada also believes that, in the case of protecting children, small stand-alone agencies serving small populations do not work, as such an approach does not create the scale and capacity required to succeed. I would not want my comments misinterpreted as a criticism of the abilities or capacities of your First Nation, or its individual members, or as a comment that your First Nation is unable to assess what would be best for your children. This is about the institutional capacity to provide the level of services that Canada believes would be required.

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[177] *Funding Agreement Government of Yukon Department of Health and Social Services for 2011-2012* (CBD, Vol 13, Tab 305, SCHEDULE "DIAND-3" at p 18).
[178] *Ibid.*
[179] *CFSA Yukon* supra note 175 at s 169.

> As such, I would not be prepared to recommend a mandate with the objective of creating a separate agency for your First Nation. From our perspective, an approach involving the Government of Yukon would be the ideal solution. You have indicated that you do not believe that there is enough common ground between the approaches of Carcross/Tagish First Nation government and the Government of Yukon at this time. This is unfortunate, and I would encourage you to continue to attempt to work with Government of Yukon officials on this issue.[180]

To date, there are no First Nations Agencies operating in the Yukon.[181] It is apparent that the Respondent has ultimate say over when and whether any such Agency will come into being, again demonstrating the control it exerts over child welfare for First Nations in the Yukon.[182]

160. In summary, the Respondent's service argument attempts to paint a picture of child welfare services in which the federal government is a detached funder. In this picture, the province sets standards for child welfare, the FNCFSA provide the services, and the federal government pays the bills. If the services are inadequate or discriminatory the responsibility lies with the FNCFSA or the province/territory. The evidence before this Tribunal shows the true picture, demonstrating the many ways in which the federal government exerts control over the services provided, creating deficiencies that simply cannot be remedied by the FNCFSA or the provinces/territories on which the Respondent seeks to foist responsibility.

C. Consequences of finding that AANDC does not provide a service

161. Because of their unique status under s. 91(24) of the *Constitution Act*, 1867, First Nations children and families living on reserve and in the Yukon receive child welfare services from the federal government through agencies funded and controlled by AANDC, rather than from the provinces or territories who provide and/or fund such services for other Canadians.

162. If AANDC is found not to provide a service within the meaning of s. 5 of the *CHRA*, then First Nations children served by the FNCFS Program are excluded from the Act's protections. This reasoning will surely serve to exclude First Nations peoples from *CHRA* protection in other

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[180] Michael Wernick, *Draft letter to Khà Shâde Héni Mark Wedge* (CBD, Vol 13, Tab 323, p 1).
[181] Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, p 93, lines 17-23).
[182] Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, p 92-93, lines 14-25, 1-6).

instances when their unique status results in federal action and activities that other Canadians do not experience.

163. Failing to afford federal human rights protections to First Nations peoples would further marginalize this community that has already been affected by the multi-generational trauma experienced during the residential school era and the legacy of stereotyping and prejudice facing First Nations peoples, who already face serious social disadvantages.

164. Moreover, a finding that AANDC does not provide a service thwarts the overarching purpose of the *CHRA* and denies the very intention of repealing s. 67, which is to ensure that First Nations peoples, like all Canadian citizens, have recourse when they have experienced discrimination.

165. Such a finding would also arguably contravene Canada's obligations under the Convention, to which it is a party. Article 2 of the Convention requires that States Parties, like Canada, ensure the rights it sets for all children, without discrimination of any kind.[183] Article 3 of the *Convention* holds:

> In all actions concerning children, whether undertaken by public of private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.[184]

The principle of the "best interests of the child" is also a principle of domestic Canadian law, under a number of statutes, including child welfare legislation.[185]

166. This complaint is, above all, an action concerning children. It concerns a population of children that has been historically, and remains today, amongst the most vulnerable in Canadian society. Moreover, the evidence shows that this disadvantage is largely sourced in the Respondent's historical and contemporary actions toward First Nations peoples. In deciding the services issue, in addition to all the considerations of fact and law that argue against the

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[183] UN Convention on the Rights of the Child, 44/25 of November 20, 1989, online: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, art 2 [*Convention on the Rights of the Child*].
[184] *Ibid* art 3.
[185] *Canadian Foundation for Children* supra note 31 at para 9.

Respondent's position, the principle of the best interests of the child requires that this complaint be decided on its merits.

ISSUE 2: The adverse treatment is based on a prohibited ground of discrimination

167. In order to establish that a service is discriminatory, a complainant must first demonstrate that the adverse treatment in question is based on a prohibited ground of discrimination. In this case, the relevant grounds are "race" and "national or ethnic origin."

168. Prohibited grounds may refer to popular views or conceptions that have no scientific validity. Yet, a decision made on the basis of such erroneous views is discriminatory, because what counts is the effect on the complainant. Thus, the Supreme Court held that discrimination based on "handicap" includes adverse decisions based on the erroneous perception that the complainant's medical condition results in functional limitations.[186] What is important is not the objective reality, but the subjective perception of the perpetrator.

169. Likewise, "race" is now universally viewed as a scientifically invalid concept. According to the Ontario Human Rights Commission's Policy Paper on Racial Discrimination :

> There is no legitimate scientific basis for racial classification. Genetic science now tells us that physical characteristics and genetic profiles correlate more strongly *between* "races" than among them. It is now recognized that notions of race are primarily centred on social processes that seek to construct differences among groups with the effect of marginalizing some in society. While biological notions of race have been discredited, the social construction of race remains a potent force in society.[187]

170. Hence, even though "races" do not objectively exist, racism remains pervasive and racial discrimination occurs where a decision is made based on subjective perceptions that racial differences are real and do matter.

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[186] *Quebec (Commission des droits de la personne et de la jeunesse) v Montreal (City)*, 2000 SCC 27, [2000] 1 SCR 665.
[187] Ontario Human Rights Commission, "Policy and guidelines on racism and racial discrimination" (June 9. 2005), online: <http://www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination> at 11; See generally Sébastien Grammond, "Disentangling "Race" and Indigenous Status: the Role of Ethnicity" (2008) 33 Queen's LJ 487 [S. Grammond].

171. In this context, Canadian courts have repeatedly held that discrimination against First Nations peoples constitute discrimination based on race.[188] For example, the Supreme Court once said that the rights of First Nations members under the *Indian Act* are "related to the race of the individuals affected."[189] The Supreme Court has also noted that there is widespread racism against the indigenous peoples in Canadian society.[190]

172. Most evidently, the link between the adverse treatment and the ground of discrimination is established by the Respondent's name for the service in question: "First Nations Child and Family Services Program." This link is emphasized by the eligibility criteria established by the Respondent to receive services under the FNCFS Program. According to the Respondent's 2005 First Nations Child and Family Services National Program Manual:

> "The primary objective of the FNCFS program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily resident on reserve, in the best interests of the child, in accordance with the legislation and standards of the reference province."[191]

173. The manual further defines a child eligible for services as:

> "[A] child who is registered in accordance with the Indian Act or who is eligible to be registered in accordance with the Indian Act and whose custodial parent is Ordinarily Resident on Reserve. In circumstances where the referent province or territory does not pay for Indians on reserve, only the Ordinarily Resident clause will apply."[192]

174. The rules of the *Indian Act* concerning registration rely solely on ancestry to determine who is eligible for Indian status. For a person to be entitled to registration, two of the person's grandparents must have Indian status.[193] While the terminology is not employed in the *Indian*

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[188] *Drybones v The Queen*, [1970] SCR 282, 1969 CanLII 1 (SCC); *Bear v Canada (AG)*, 2003 FCA 40 (CanLII), [2003] 3 FC 456 (CA) at 477; *Bignell-Malcolm v Ebb and Flow Indian Band*, 2008 CHRT 3 (CanLII), [2008] 2 CNLR 15 (CHRT); *Commission des droits de la personne et des droits de la jeunesse v Blais*, 2007 QCTDP 11 (CanLII).
[189] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 1999 CanLII 687 (SCC) at para 19.
[190] *R v Williams* supra note 85.
[191] *National Program Manual,* May 2005 (CBD, Tab 29, p 5) [emphasis added].
[192] *Ibid* (CBD, Tab 29, p 49). Similar definitions appear in the Respondent's updated *National Social Programs Manual*, January 31, 2012 (CBD, Tab 272).
[193] *Indian Act*, RSC 1985, c I-5, s 6.

Act, this rule amounts to a 50% blood quantum requirement. Such a rigid use of ancestry constitutes a racial conception of indigenous identity and can be said to constitute racial discrimination.[194]

175. Despite the important changes in how race and racial differences are understood today, the Respondent's FNCFS Program continues to focus on biology and genetic profiles, rather than self-identification, when determining who is considered eligible to receive its services.[195] In a document authored by a government official, it was acknowledged that "blood quantum" was a "critical determinant for registration", and as a consequence, the eligibility to receive services under the FNCSF Program.[196] The author recognised that this emphasis has "created circumstances in which close family members are treated differently in respect to securing registration and band membership." The author went on to provide a specific example of the complications caused by this practice:

> For example [...] eligibility for First Nations child and family services maintenance funding, that is, funding for services provided to children outside the parental home, is predicated on registration in that INAC funds services for registered children on reserve (and their families) while the cost of services provided to non-registered children on reserves is charged back to the Province. Additionally, First Nations Child and Family Services Agencies Operations funding is allocated based on the 0-18 year old registered Indian population." [197]

176. It is clear that the services provided by the Respondent to First Nations children through the FNCFS Program are based on their race. In fact, it is the Respondent that defines who it considers to be "Indian" enough to receive these services based on outdated concepts of race based on blood quantum.

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[194] S. Grammond *supra* note 187 at paras 53-56.

[195] Socio-Economic Policy and Regional Operations Sector, *Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector*, July 2005 (CBD, Tab 321, p 4).

[196] *Ibid*.

[197] Socio-Economic Policy and Regional Operations Sector, *Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector*, July 2005 (CBD, Tab 321, p 6); See also the email dated October 22, 2012 authored by AANDC Director General Sheilagh Murphy which emphasized that "Only the CFS program makes the distinction that the child and his/her family members have to be registered Status Indians in order for the agency to be reimbursed by AANDC" (Vol 15, Tab 407, p 1).

177. In the alternative, First Nations constitute a "national or ethnic" group. Ethnicity refers to the social process of group differentiation based on culture.[198] In a modern perspective, First Nations' cultures are widely recognized as being distinctive. Moreover, First Nations are political entities characterized, among other things, by a distinctive culture. That is the hallmark of a nation. Thus, discrimination against First Nations is discrimination based on "national or ethnic origin."

A. An adverse treatment can be based on a prohibited ground even if not all members are affected

178. The FNCFS Program can be considered discriminatory on the basis of race and national or ethnic origin even if not all First Nations Peoples living in Canada are eligible to receive services under the program. The Supreme Court has repeatedly held that a conduct can be based on a prohibited ground even if does not affect all members of group.[199] In *Janzen*, the Court explained that "it is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically".[200] Based on this reasoning, courts and human rights tribunals have held that the adverse treatment of a pregnant woman amounts to discrimination on the basis of sex even if not all women were pregnant.[201] Similarly, sexual harassment in a workplace is clearly sex discrimination even if not all women experience this adverse treatment.[202] It follows that a program specifically aimed to provide child welfare services to First Nations children and families living on a reserve or in the Yukon is clearly linked to race and national or ethnic origin.

179. Requiring complainants to demonstrate that all members of their group experienced discrimination would significantly undermine the objectives of human rights legislation. As explained by the Supreme Court:

> While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It

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[198] S. Grammond *supra* note 187 at para 17.
[199] *Brooks v Canada safeway ltd*, [1989] 1 SCR 1219, 1989 CanLII 96 (SCC).
[200] *Janzen v. Platy Enterprises Ltd.,* [1989] 1 SCR 1252, 1989 CanLII 97 (SCC) at 1289 [*Janzen*].
[201] *Ibid.*
[202] *Ibid*.

> is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value.[203]

180. As indicated by its name, Canada's FNCFS Program provides child welfare services to First Nations children and families. While it is generally accepted today that there is no legitimate basis for racial classification, the Respondent's eligibility criteria under the FNCFS Program are linked to an individual's blood quantum. There is clearly a link between the service in question and the Respondent's understanding of race and national or ethnic origin.

ISSUE 3: The Complainants Have Established Prima Facie Discrimination

> *In 1833 -- and it's hardly that long ago, and you think about all these statistics that we cite about this experience, most of us, most Canadians in the first instance want to say, "This is not my business, it's old and historical, so don't waste my time with it." And they fail to understand that all of us have a responsibility now to consider this and to be a part of trying to figure out a way of moving forward.*[204]

181. 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.[205] If the respondent provides no justification, the Complaint is substantiated.

182. Discrimination can manifest itself in a number of subtle ways. The *CHRA* must be interpreted in a way that is flexible enough to respond to the changing ways that an evolving society can express discrimination. It is for this reason that "the legal definition of a *prima facie* case does not require the complainant to adduce any particular type of evidence to prove the facts necessary to establish that he or she was the victim of a discriminatory practice."[206] Indeed, as Mr. Justice Evans, of the Federal Court of Appeal held in *Morris v Canada (Canadian Armed Forces)*:

> 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*, namely, the elimination in the federal legislative

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[203] *Janzen v. Platy Enterprises Ltd* supra note 200 at 1288-1289.
[204] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, pp 82-83, line 22-25, 1-6).
[205] *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at para 28 (cited to CanLII).
[206] *Mactavish J's Reasons* supra note 32 at para 299.

> sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms.[207]

183. Madam Justice Abella provided a succinct summary of the test for establishing a *prima facie* case of discrimination in *Moore v British Columbia (Education)*, where she held that complaints must establish "that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact."[208]

184. In assessing adverse impacts, it must be recalled that, as noted by Mr. Justice McIntyre in *Andrew v Law Society of British Columbia*:

> identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis v United States*, 339 U.S. 162 (1950), at p 184:
>
> > It was a wise man who said that there is no greater inequality than the equal treatment of unequals.[209]

185. In this case, the Complainants have clearly demonstrated that First Nations children served by the FNCFS Program experience discrimination as a result of their status as First Nations peoples. This discrimination is evidenced by four essential factors: (i) if First Nations children served by the FNCFS Program were served by the provinces / territories they would be treated differently, receiving equitable and more adequate child welfare services than they receive under the FNCFS Program; (ii) in providing child welfare services under the FNCFS Program, the Respondent has failed to take into account the unique and greater needs of the First Nations children it serves, to their detriment; (iii) the Respondent has failed to ensure that First Nations children served by the FNCFS Program receive culturally appropriate services; and (iv) First Nations children are denied essential social services due to jurisdictional disputes.

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[207] *Morris v Canada (Canadian Armed Forces)*, 2005 FCA 154 (CanLII), 55 CHRR 1 at para 28.
[208] *Moore* supra note 130 at para 33.
[209] *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at p 164.

186. Each of these factors are fully examined below and clearly demonstrate that the Complainants have established *prima facie* discrimination. Moreover, each share a central feature: as a result of the Respondent's discriminatory and inequitable activities, there are more First Nations children being substantiated for maltreatment and entering the child welfare system than other Canadian children.[210]

A. A Mirror Comparator Group is Not a Requirement to Establish Discrimination

1. The Goal of the Comparison: Evidence of Discrimination

187. On December 21, 2009, the Respondent filed its motion to dismiss the Complaint on the basis that its role in funding the FNCFS Program is not a "service" within the meaning of s. 5 of the Act, and that the Complaint raised a "cross-jurisdictional comparison" between federal and provincial/territorial funding structures that "cannot amount to differential treatment based on any ground under the Act". On March 14, 2011, the Tribunal dismissed the Complaint on the basis that discrimination under s. 5(b) of the *CHRA* could only be established through evidence of a mirror comparator group, which, because of the unique constitutional status of First Nations peoples, does not exist (the "Tribunal Decision").

188. On the issue of whether the comparator group must be a same-service/same-provider comparator, the Tribunal invoked an *in terrorem* argument that allowing a comparison to services provided to off-reserve children funded by the provinces/territories, as proposed by the Caring Society, would "open the flood gates to a barrage of new types of complaints", and represented a "sea-change in the analytical framework".[211]

189. The Commission and the Complainants each brought an application for judicial review of the Tribunal Decision to the federal court. The applications were heard on February 13, 14 and 15, 2012. In reasons issued April 18, 2012, Mactavish J. granted the applications, holding that the Tribunal's conclusion that s. 5(b) required a formal comparator group and its decision to dismiss the entirety of the Complaint without consideration of s. 5(a) were unreasonable. Mactavish J. set

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[210] Dr. Nicolas Maurice Trocmé Examination in Chief, April 3, 2013 (Vol 7, pp 72-73, lines 18-25, 1-9).

[211] *First Nations Child and Family Caring Society of Canada and Assembly of First Nations v Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4 (CanLII) at paras. 129, 131.

aside the Tribunal Decision and remitted the matter to a differently constituted panel of the Tribunal.

190. On the issue of the requirement of a formal comparator group, Mactavish J. held that, while the Supreme Court has long held that discrimination is an inherently comparative concept and that determining whether discrimination exists in a given case will often involve some form of comparison, this does not mean that there needs to be a formal comparator group in every case in order to establish discrimination and does not necessarily contemplate a rigid comparator group analysis.[212] Mactavish J. reasoned that such a requirement would bar blatant human rights violations and was simply not necessary or required in order to establish discrimination:

> A comparator group is not part of the *definition* of discrimination. Rather, it is an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases.[213]

191. Her Honour noted that the *Withler* decision recognized that "there may even be cases where there is no appropriate comparator group – such as the circumstances that presented themselves in the present case – where no one is like the complainants for the purpose of comparison".[214] Moreover, she stated that "in cases where no precise comparator exists due to the complainants' unique situation, a decision-maker may legitimately look at circumstantial evidence of historic disadvantage in an effort to establish differential treatment".[215]

192. Mactavish J. concluded that the overall purpose of the *CHRA* and the intention of Parliament would be nullified if such clear victims of discrimination could not seek recourse under the Act. As a result, she determined that the appropriate meaning of "differentiate adversely in relation to any individual" is to ask whether someone has been treated differently than they might otherwise have because of their membership in a protected group.[216]

193. Finally, Mactavish J. held that, in the alternative, even if the Commission and the Complainants had to point to a comparator group, the Tribunal unreasonably found that one did

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[212] *Mactavish J's Reasons* supra note 32 at paras 281, 283.
[213] *Ibid* at para 290 [emphasis in original].
[214] *Ibid* at para 327.
[215] *Ibid* at para 331.
[216] *Ibid* at para 254.

not exist. Indeed, given that the federal government's FNCFS Program adopts provincial standards, a clear comparison exists and may be appropriate, given that a perfect "mirror comparator" is not required for the purposes of discrimination under the *CHRA*.[217]

194. The Respondent appealed the Federal Court decision. The Federal Court of Appeal dismissed the appeal and reasoned as follows:

> [It] bears recalling that discrimination is a broad, fact-based inquiry. Among other things, it requires "going behind the façade of similarities and differences", and taking "full account of social, political, economic and historical factors concerning the group": *Withler, supra* at paragraph 39. Consequently, the relevance and significance of particular facts, such as the existence or non-existence of a comparator, will vary in the circumstances. As the Supreme Court wrote in *Withler*, "the probative value of comparative evidence … will depend on the circumstances" (at paragraph 65)[218]

195. Both the Federal Court decision and the Federal Court of Appeal decision are reflective of Canada's equality jurisprudence. In *Lavoie v Canada (Treasury Board of Canada),* this Tribunal squarely addressed the need for a comparator group under the *CHRA* and determined that it is not a pre-requisite to a finding of *prima facie* discrimination. Ms. Lavoie alleged that the Treasury Board's maternity policy discriminated on the basis of sex, as it refused to count periods of unpaid maternity leave when calculating the cumulative three-year working period required for conversion from term employee status to permanent employee status within the federal Public Service. The Tribunal agreed. On the issue of the comparator group, the Tribunal held as follows:

> I must point out that it is not always necessary to determine a comparator group. In this case, it is my opinion that for maternity leave, determining a comparator group appears pointless since only women take maternity leave. On this point, I agree with the comments made by the Court of Appeal of Québec in *Gobeil c. CECQ*, where the Court held that a school board's refusal to hire, on a part-time basis, a teacher who was not available based on her pregnancy was discriminatory: [Emphasis added; citation omitted]

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[217] *Mactavish J's Reasons* supra note 32 at paras 374-390.
[218] *FNCFSCS - FCA* supra note 32 at para 22.

[TRANSLATION]

> Pregnant women, but for their pregnancy, would be available. *For this reason, I cannot adhere to a comparative analysis likening them to unavailable persons in order to determine whether or not there is a distinction. A rule that has the effect of depriving pregnant women the right to be hired when they otherwise would have had access thereto necessarily breaches the right to full equality.* The distinction created by the availability clause arises from the fact that childbirth and maternity leave hinder women from getting the contract to which they would be entitled.[219] [Emphasis added by the Tribunal]

196. More recently, in *Chaudhary v. Smoother Movers,* this Tribunal endorsed the approached outlined by Mactavish J., noting that a complainant is not required to show evidence of how a comparator group is or would be treated in order to demonstrate that discrimination exists under the *CHRA*.[220]

197. In *Morris v. Canada (Canadian Armed Forces)*, the Federal Court of Appeal addressed a claim in respect of employment under s. 7(b) of the *CHRA* (which the Tribunal recognized ought to be interpreted coherently with s. 5(b)). The Attorney General argued that discrimination under s. 7(b) could normally only be established by adducing comparative evidence in the form of information about successful candidates (although the Attorney General there conceded that an exception would be made where no comparator was available). The Court of Appeal disagreed, noting that the *Shakes* analysis was simply an application of the general requirement to show a *prima facie* case of discrimination:

> [T]he legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act.[221]

198. The Supreme Court of Canada has also made it clear in recent decisions that a finding of discrimination is not contingent upon the identification and consideration of a perfect mirror

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[219] *Lavoie v Canada (Treasury of Canada)*, 2008 CHRT 27 (CanLII) at para 143.
[220] *Chaudhary v Smoother Movers*, 2013 CHRT 15 (CanLII) at para. 39; See also *Peart v. Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 (CanLII) at paras 326-329.
[221] *Morris v. Canada (Canadian Armed Forces),* 2005 FCA 154 (CanLII) at para. 27

comparator group. For example, in *Withler v. Canada (Attorney General)* the Supreme Court held that applying a strict comparator approach is detrimental to the goal of substantive equality and to the discrimination analysis:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[222]

199. In *Moore v. British Columbia*, the Supreme Court reiterated that a comparator group is but one form of evidence used to establish discrimination and its presence does not determine or define whether discrimination has been experienced by a complainant. The Supreme Court held the insistence on an mirror comparator group "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy".[223] Similarly, in *Quebec (Attorney General) v. A.* the Supreme Court affirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply".[224]

B. AANDC Underfunds On-Reserve Agencies Compared with the Provinces

200. The central question to be determined by this Tribunal is: are First Nations children who receive child protection services pursuant to the FNCFS Program being treated differently than they might otherwise be treated because of their membership as First Nations children primarily resident on reserve and living in the Yukon Territory? Based on the evidence presented to the Tribunal, the answer is an unequivocal "yes": on-reserve First Nations children and those living in the Yukon receive less child protection services because of their status as First Nations children living on reserve and in the Yukon. These children are experiencing discrimination. In addition,

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[222] *Withler* supra note 90 at para 63 [emphasis added].
[223] *Moore* supra note 130 at paras 30-31.
[224] *Quebec (Attorney General) v A* supra note 117 at para 346.

as a result, they are entering the child welfare system at significantly higher rates than other children in Canada.

201. In Canada, child welfare services for First Nations children and families living on reserve and resident in the Yukon are provided by the federal government through AANDC's FNCFS Program. This program funds child welfare agencies offering the services to First Nations children and families primarily resident on reserve and in the Yukon Territory and controls such agencies through various funding criteria, formulae and policies. Child welfare services for children and families living off reserve (both First Nations and non-First Nations), on the other hand, are provided by provincial / territorial governments.

202. The express purpose of the FNCFS Program is to provide for child welfare services to registered Indian children primarily resident on-reserve and in the Yukon territory that are reasonably comparable to those provided off-reserve in provincial and territorial jurisdictions.[225] Indeed, AANDC decided pursuant to its own policy, that First Nations children served by the FNCFS Program are entitled to equitable child welfare services and that all children in Canada, whether they are First Nations or not, deserve substantively equal services. However, AANDC has failed to meet the "reasonably comparable" standard and in the process has exposed First Nations children to discrimination.

203. Various government reports, studies and the testimony of numerous witnesses before the Tribunal demonstrate that the current level of child welfare services provided to First Nations children served by FNCFS Program is not comparable and in fact is less than such services provided to other children. First Nations children served by the FNCFS Program receive fewer and poorer child welfare services than other Canadians. The funding provided by AANDC to FNCFSA simply does not allow the agencies to provide comparable services, which AANDC is aware of and has failed to adequately address. This differential treatment is to the detriment of these First Nations children, who ultimately have poorer outcomes as a result.

204. The differential treatment is also discriminatory, contrary to section 5 of the *CHRA*. The Caring Society, as well as the other Complainants, have demonstrated that AANDC is denying

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[225] *National Program Manual*, May 2005 (CBD, Vol 3, Tab 29, p 6).

First Nations children equitable child welfare services because of their First Nations status. The evidence of this discrimination is outlined below.

1. The Research Demonstrates that First Nations Children are being Treated Differently

205. AANDC has known for years that First Nations children served by FNCFS Program are not receiving comparable child welfare services, contrary to the stated objective of the FNCFS Program. In 2000, a collaborative report published by AANDC and the Assembly of First Nations revealed a number of inequities in the funding and delivery of child welfare services on reserve pursuant to Directive 20-1. The *First Nations Child and Family Services Joint National Policy Review*, *Final Report 2000* (the "NPR") made numerous findings regarding the inequitable treatment of on-reserve First Nations children, all of which were accepted by AANDC[226], including the following:

> - Effects of some provincial legislation changes are often seen as positive by First Nation representatives, however, it creates additional administrative and service-delivery responsibilities for which agencies are not adequately funded.[227]
>
> - If insufficient [AANDC] funding prevents the agencies from meeting their obligations, there would appear to be a conflict with the fundamental principle of comparability of services expressed in Directive 20-1.[228]
>
> - FNCFCS Agencies are expected through their delegation of authority from the provinces, the expectations of their communities and by [AANDC], to provide a comparable range of services on reserve with the funding they receive through Directive 20-1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is.[229]
>
> - The average per capita per child care expenditure of the [AANDC] funded system is 22% lower than the average of

[226] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, pp 66-67, lines 22-25, 1-7).
[227] NPR, June 2000 (CBD, Vol 1, Tab 3, p 65).
[228] *Ibid* (CBD, Vol 1, Tab 3, p 65).
[229] *Ibid* (CBD, Vol 1, Tab 3, p 83).

the selected provinces.[230]

206. The NPR made seventeen key recommendations, including the need for AANDC to seek funding to support the provision of adequate legislated/targeted prevention, alternative programs, and least disruptive measures for children at risk.[231] The NPR made the following conclusion: "A new policy to replace current Directive 20-1 (chapter 5) must be developed in a joint process that includes all stakeholders and ensures funding support for that process".[232] Unfortunately, the recommendations were never implemented.

207. Throughout 2003 to 2005 these and other issues came to light when AANDC commissioned the Caring Society to produce a series of reports in partnership with the National Advisory Committee (which is co-chaired by AFN and AANDC) regarding the applicability of the NPR recommendations and the experiences of FNCFSA (the "Wen:de Report"). The Wen:de Report also sought to identify, research and analyze three options for alternative on-reserve child welfare funding in order to address the inequities facing First Nations children living on reserve.[233] The Wen:de Report was fully funded by AANDC and approved by the National Advisory Committee.[234]

208. The Wen:de Report uncovered that there was a general acceptance by all parties, including AANDC, that agencies are unable to provide reasonably comparable services to on-reserve First Nations children as a result of inadequate funding by the Department.[235] For example, the report found that small agencies, which represent more than 50% of all agencies, "face significant challenges in terms of administrative and core staffing requirements" and delivering "services comparable to the provincial government child welfare agencies".[236] Indeed,

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[230] NPR, June 2000 (CBD, Vol 1, Tab 3, p 94); See also Dr. Cindy Blackstock Examination in Chief, February 26, 2014 (Vol. 2, p 32, lines 18-25).
[231] NPR, June 2000 (CBD, Vol 1, Tab 3, p 120).
[232] *Ibid* (CBD, Vol 1, Tab 3, p 121).
[233] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 92-96).
[234] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 94, lines 23-24); Dr. John Loxley Cross Examination, September 12, 2013 (Vol 28, p 79, lines 14-18).
[235] Dr. John Loxley Examination in Chief, September 11, 2013 (Vol 27, p 83, lines 4-10); Dr. John Loxley Cross Examination September 12, 2013 (Vol 28, p 46, lines 9-12). Dr. Loxley also described other research that has revealed a lack of comparability between the services provided by the provinces and the services provided by First Nations Child and Family Services Agencies, including in Alberta and Quebec: Dr. John Loxley Examination in Chief, September 11, 2013 (Vol 27, pp 121-122).
[236] *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 48).

the research uncovered significant problems with the Directive 20-1 funding formula, all of which have clear implications for the issue of comparability, including the following:

- there was a lack of money for prevention services and for keeping families together and children in communities;[237]
- Directive 20-1 failed to adjust for inflation so the real value of the dollars going to First Nations Child and Family Service Agencies was declining annually by a significant amount;[238]
- because Directive 20-1 funded agencies pursuant to a population threshold, the smaller agencies did not have enough money to provide necessary services to the First Nations children in their catchment area;[239]
- the actual amount transferred to First Nations Child and Family Service Agencies, even at the maximum level, was inadequate, and failed to provide for essential components, including but not limited to legal costs, human resources, and comparable salaries for child protection workers;[240]
- remote communities were not adequately provided for: (i) the remoteness allowance was based on the nearest service centre, which often provided no services in child welfare and was therefore meaningless; and (ii) there was no rationale attached to the remoteness allowance and as a result there were significant gaps between the most remote and the least remote communities;[241]
- there was a lack of provision for information systems and other capital needs, including building and office maintenance;[242] and
- provincial governments have the option of applying to provincial treasury boards or similar structures to offset unexpected costs but First Nations Child and Family Service Agencies do not have such a safeguard.[243]

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[237] Dr. John Loxley Examination in Chief, September 11, 2013 (Vol 27, p 15, lines 5-12).
[238] Dr. John Loxley Examination in Chief, September 11, 2013 (Vol 27, p 15, lines 19-25).
[239] Dr. Loxley Examination in Chief, September 11, 2013 (Vol 27, p 16, lines 1-5).
[240] Dr. Loxley Examination in Chief, September 11, 2013 (Vol 27, p 16, lines 6-20).
[241] Dr. Loxley Examination in Chief, September 11, 2013 (Vol 27, pp 16-17, lines 21-25, 1-12).
[242] Dr. Loxley Examination in Chief, September 11, 2013 (Vol 27, p 17, lines 13-23).
[243] Dr. Loxley Examination in Chief, September 11, 2013 (Vol 27, p 56, lines 12-22).

209. Notwithstanding the findings and recommendations of the Wen:de Report, AANDC failed to implement any significant changes to Directive 20-1, which remains in place in British Columbia, New Brunswick and Newfoundland.

210. In 2008 and 2011 the Auditor General reviewed the FNCFS Program, examining Directive 20-1, the EPFA, and the 1965 Agreement.[244] In both reports, the Auditor General underscored the overrepresentation of First Nations children in the child welfare system, the lack of equitable access to social and child welfare services for on-reserve First Nations children, and the lack of equitable funding for child welfare services on reserve.

211. With respect to the EPFA, in 2008 the Auditor General found a number of problems, including the following:

- the EPFA still assumes a fixed percentage of First Nations children and families in all the First Nations served by an agency need child welfare services;[245]
- the EPFA does not address differing needs among First Nations;[246]
- pressures on AANDC to fund exceptions will likely continue;[247]
- the EPFA does not treat First Nations or provinces in a consistent or equitable manner;[248] and
- under the EPFA, many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserve.[249]

[244] OAG Report 2008 (CBD, Vol 3, Tab 11); OAG Report 2011 (CBD, Vol 5, Tab 53).
[245] OAG Report 2008 (CBD, Vol 3, Tab 11, p 23, sec 4.64)
[246] *Ibid* (CBD, Vol 3, Tab 11, p 23, sec 4.64).
[247] *Ibid* (CBD, Vol 3, Tab 11, p 23, sec 4.64).
[248] *Ibid* (CBD, Vol 3, Tab 11, p 23, sec 4.66) [emphasis added].
[249] *Ibid* (CBD, Vol 3, Tab 11, p 23, sec 4.64) [emphasis added].

212. Ultimately, the Auditor General found that many of the inequities perpetuated by Directive 20-1 persist under the EPFA.[250] Indeed, research completed in 2010 regarding the EPFA found similar problems:

> Although the intent of the EPFA is to increase prevention activities and delivery culturally-appropriate services, the design of the program's funding formula limits DFNAs from making greater progress in these areas. The fixed funding formula is not based on numbers of children in care and lacks the explicit linkages to workforce development, improved housing, and poverty reduction needed for greater success in northern and First Nations communities.[251]

213. By 2011, the EPFA had been negotiated and implemented in Manitoba, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan. While the Auditor General observed that AANDC expected the implementation of the EPFA to reduce the number of children in care, at the time of the 2011 report, it was too early to observe any results.[252]

214. With respect to comparability, the Auditor General noted that AANDC has failed to analyze and compare the child welfare services available on reserves with those in neighbouring communities off reserve.[253] Indeed, in 2008 the Auditor General recommended that AANDC define what is meant by reasonably comparable services and find ways to know whether the services that the program supports are in fact reasonably comparable.[254] This recommendation was echoed by the Standing Committee on Public Accounts in its 2009 Report.[255] However, AANDC failed to follow this recommendation and in 2011 the Auditor General again recommended that AANDC take steps to define what is meant by reasonably comparable and implement this definition and expectation into the FNCFS Program. [256]

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[250] OAG Report 2008 (CBD, Vol 3, Tab 11, p 23, sec 4.64); OAG Report 2011 (CBD, Vol 5, p 24, sec 4.50).
[251] T.K. Gussman Associates Inc. and DPRA, *Implementation Evaluation of Enhanced Prevention Focus in Alberta*, March 5, 2010 (CBD, Vol 13, Tab 271, p 7).
[252] OAG Report 2011 (CBD, Vol 5, Tab 53, p 24, sec 4.50).
[253] OAG Report 2008 (CBD, Vol 3, Tab 11, p 12, sec 4.19); 2011 AG Report (CBD, Vol 5, Tab 53, p 23, sec 4.49).
[254] OAG Report 2008 (CBD, Vol 3, Tab 11, p 13, secs 4.25-4.26).
[255] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 4-6).
[256] OAG Report 2011 (CBD, Vol 5, Tab 53, pp 23, 26, 35, sec 4.49, Exhibit 4.6, sec 4.86).

215. AANDC funds some provinces for delivering child welfare services where First Nations do not, such as British Columbia and Alberta. The Auditor General found that in these provinces, AANDC reimburses all or an agreed-on share of their operating and administrative costs of delivering child welfare services directly to First Nations and of the costs of children placed in care.[257]

216. Indeed, in Alberta under the Arrangement for Funding and Administration of Social Services Agreement, AANDC allows for built-in adjustments to the funding formula, which is not available to FNCFSA.[258] In British Columbia, under the Memorandum of Understanding for the Funding of Child Protection Services for Indian Children, AANDC provides direct funding to "deliver comprehensive (prevention and protection) child and family services, and covers all activities that support the service delivery of child and family services not covered by maintenance and development funding."[259] FNCFSA in British Columbia do not have access to this type of funding.

217. Indeed, these funding approaches differ greatly from both Directive 20-1 and the EPFA and suggest that FNCFSA are not providing reasonably comparable services given that AANDC will not fund the agencies at the rate provided to the provinces. One stark illustration of this funding discrepancy is the situation of the Nuu-chah-nulth Tribal Council (NTC) in British Columbia. In 2013, the President of the NTC wrote to Sheilagh Murphy, explaining that "[i]n 27 years we have not received an increase in our operations budget since that time."[260] The attached briefing notes indicated that:

> NTC received an annual budget of $1.1 million for operations in 1989, when full investigation and protection responsibilities began... NTC still receives an annual budget of $1.1 million for operations in 2013, but inflation over the last 27 years has reduced the value by half.[261]

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[257] OAG Report 2008 (CBD, Vol 3, Tab 11, p 19, sec 4.49).
[258] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 286, lines 8-24).
[259] *Agreement between British Columbia and Canada Regarding the Funding of Child Protection Services of First Nation Children Ordinarily Resident on Reserve*, April 1, 2012 (CBD, Vol 13, Tab 275, p 4, sec 5.3).
[260] *Email and Letter from Nuu-chah-nulth Tribal Council*, December 20, 2013 (CBD, Vol 15, Tab 412, p 1).
[261] *Ibid* at page 2.

218. Sheilagh Murphy confirmed in her testimony that "we have not been able to necessarily increase the operations budget of Agencies."[262] The situation for the Province of British Columbia is far different. In the fiscal year 2006-2007, for instance, it saw its rate for administration costs (or operational costs) for its provision of child protection services to First Nations on reserve increase by 60%, from $43.48 to $69.44.[263]

219. It is clear based on the evidence presented before the Tribunal that if AANDC did in fact undertake a review of the services provided by the provinces and those provided by the FNCFSA it would uncover that FNCFSA are unable, as a result of the funding formulae administered by AANDC to provide comparable services. In fact, in 2008 the Auditor General reported that AANDC officials and staff from First Nations agencies agreed that child welfare services in First Nations communities are not comparable with off-reserve services.[264]

220. While there is limited research regarding the comparability of services in Ontario, where neither Directive 20-1 or the EPFA apply, it is clear that First Nations children living on reserve are not receiving adequate child protection services and are likely receiving less service than those living off reserve. For example, in Ontario, provincial agencies have access to and the benefit of social services, whereas on reserve agencies have no such access. The 1965 Agreement fails to account for this reality, leaving FNCFSA without the capacity to provide comparable services.[265] In addition:

> Delivering child protection services in remote, isolated communities, accessible only by air or ice roads for a few months in the winter, presents serious logistical challenges. Societies are doing excellent work in utilizing existing resources to meet the requirements of the Act, to the best of their abilities. Given the reality that there are few resources to support families, the family service worker must carry more of the reasponsibility to ensure the

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[262] See also Sheilagh Murphy Cross Examination, April 3, 2014 (Vol 55, p 226-7).
[263] Ministry of Children and Family Development (British Columbia), *Invoice: Ministry of Children and Family Development & Indian Affairs and Northern Affairs Canada – Retroactive Adjustment for Fiscal Year 2006/07* (CBD, Vol 13, Tab 322, p 1). See also Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 37-8).
[264] OAG Report 2008 (CBD, Vol 3, Tab 11, p 12, sec 4.19).
[265] Judith Rae, *The 1965 Agreement: Comparison & Review*, May 2009 (CBD, Vol 11, Tab 213, p 63); See also Bill Johnson, *Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services*, March 2009 (CBD, Vol 11, Tab 230, pp 4-5).

safety of children on his/her caseload.[266]

221. Finally, the United Nations Committee on the Rights of the Child (the "Committee") has raised significant concerns regarding the outcomes for Aboriginal children and the services available to on-reserve First Nations children. Indeed, the Committee noted with the concern the inequitable distribution of child welfare series to Aboriginal children as compared with other children in Canada.[267] With respect to the principles of non-discrimination, the Committee recommended that Canada "take immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination" and noted as follows:

> While welcoming [Canada's] efforts to address discrimination and promote intercultural understanding, such as the Stop Racisms national video contest, the Committee is nevertheless concerned about the prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin and other grounds. In particular, the Committee is concerned at: […]
>
> (b) The serious and widespread discrimination in terms of access to basic services faced by children in vulnerable situations, including minority children, immigrants and children with disabilities; […]
>
> (d) The lack of action following the Auditor General's finding that less financial resources are provided for child welfare services to Aboriginal children than to non-Aboriginal children;[268]

2. AANDC Evidence Demonstrates that First Nations Children are being Treated Differently

222. AANDC, in its own internal documents, has acknowledged that FNCFSA are not equipped through the FNCFS Program funding structures to provide comparable services on reserve, resulting in the differential treatment of First Nations children served by FNCFS Program. In an undated AANDC power point presentation regarding social programs, the Department clearly acknowledged that First Nations children living on reserve are not receiving

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[266] Barnes Management Group Inc, *Northern Remoteness – Study and Analysis of Child Welfare Funding Model Implications on Two First Nations Agencies: Tikinagan Child and Family Services and Payukotayno: James Bay and Hudson Bay Family Services*, December 2006, (CBD, Vol 11, Tab 219, p 11) [emphasis added].
[267] UN Committee on the Rights of the Chid, *Consideration of reports submitted by State parties under article 44 of the Convention – Concluding Observations: Canada*, October 5, 2012 (CBD, Vol 5, Tab 57, pp 15-16).
[268] *Ibid* (CBD, Vol 5, Tab 57, p 7).

equitable services: "Many First Nations and Inuit children and families are not receiving services reasonably comparable to those provided to other Canadians".[269]

223. Indeed, as early as 2002, the Department knew that on-reserve First Nations children were receiving comparably less services than children living off reserve:

> Over the past several years, most provinces have increased emphasis on services to children and families in their own homes, and some provincial courts will only order children into care as a last resort. Provision is made for in-home or "prevention" services under FNCFS Operations budget.
>
> As a result of the shift in most provinces towards prevention, however, agency costs have been steadily rising. The 1991 funding methodology is no longer adequate to cover the operational costs of agencies plus prevention services. FNCFS agencies are under increasing pressure to keep pace with evolving provincial legislation and standards.[270]

224. Another 2002 AANDC internal document drew a similar conclusion regarding the services available to on-reserve First Nations children: "[w]ith changing provincial priorities moving toward more emphasis on prevention, it is clear that the [AANDC] funding methodology is outdated and unable to adapt to changing conditions".[271]

225. A 2007 internal audit of the FNCFS Program prepared by the Departmental Audit and Evaluation Branch came to similar conclusions five years later:

> there has been a trend towards a much stronger emphasis on early intervention and prevention programming, and away from child apprehensions and placements outside the parental home, with the result that the FNCFS Program's funding structure is no longer in step with provincial and territorial approaches.
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> [...] Now the only resources that agencies are able to access for early intervention and prevention work is from their limited operations budget. Although not the only factor, this has likely

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[269] AANDC, *Social Programs Power Point Presentation*, (CBD, Vol 6, Tab 79, p 3). See also *Explanations on Expenditures of Social Development Programs*, (CBD, Vol 13, Tab 330, pp 2).
[270] Jerry Lyons, *Briefing Note: First Nation Child and Family Services (FNCFS) – Media Coverage*, October 31, 2002 (CBD, Vol 15, Tab 467, p 4) [emphasis added].
[271] Jerry Lyons, *Briefing Note: Meeting of the Forum of Ministers Responsible for Social Services – Moncton*, November 13, 2002 (CBD, Vol 15, Tab 466, p 5).

> contributed to the significant growth in the number of Aboriginal children in care, and also to the rapid growth of program costs.[272]

226. In 2007, the Department stated the following on its website: "the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians".[273]

227. In 2010, the Department prepared a review of child and family services expenditures in British Columbia, Alberta and Manitoba, demonstrating that in each province AANDC was providing significantly less per child than each of the provincial governments for children living outside of parental care.[274]

228. In 2012, AANDC prepared a series of power point presentations regarding the FNCFS Program, all of which demonstrate that AANDC knows that FNCFSA are unable to provide comparable services as a result of inadequate funding from the Department. For example, the August 9, 2012 Draft Presentation to Françoise Ducros prepared by Odette Johnston states that if the federal government transferred the FNFCS Program to the provinces and territories, the issue of comparability would be resolved but would potentially cost the Department significantly more, suggesting that comparability remains an unresolved issue.[275] In the August 22, 2012 draft, AANDC directly acknowledges that on-reserve First Nations children are not receiving comparable services: "[a]udits and evaluations between 2008 and 2012 demonstrate a need for EPFA, but also a need to annually review the EPFA formula as constant provincial changes make it difficult to stay current and enable Agencies to provide a full range of child welfare services".[276]

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[272] INAC Departmental Audit and Financial Branch, *Evaluation of the First Nations Child and Family Services Program*, March 2007 (CBD, Vol 4, Tab 32, p 18).
[273] INAC, *Fact Sheet: First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).
[274] AANDC, *Preliminary Comparisons of Manitoba, British Columbia, Alberta INAC Child and Family Services Expenditures per Child in Care out of the Parental Home*, 2010 (CBD, Vol 13, Tab 306).
[275] Odette Johnston, *First Nations Child and Family Services Program: the Way Forward (Draft)*, August 9, 2012 (CBD, Vol 9, Tab 143, p 32).
[276] Odette Johnston, *First Nations Child and Family Services Program: the Way Forward (Draft)*, August 22, 2012 (CBD, Vol 9, Tab 144, p 10).

229. Moreover, in the August 29, 2012 draft of the same power point, AANDC acknowledged that it either needs to fund the full range of services provided by the provinces or transfer child welfare on reserve to the provincial / territorial governments.[277] Indeed, analysis of the funding levels suggest that the EPFA is falling out of line with the funding and services provided by the provinces.[278] In addition, AANDC analysis suggests that there are significant funding gaps in British Columbia, Yukon, Ontario, New Brunswick and Newfoundland where FNCFSA likely cannot provide reasonably comparable services when their funding levels are dramatically below their respective provincial / territorial averages.[279]

230. The October 31, 2012 AANDC power point presentation prepared by Sheilagh Murphy, acknowledges that EPFA funding must increase in order to allow FNCFSA to provide reasonably comparable services: "[i]n addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve".[280] Similar statements appear in the November 2, 2012 draft of the power point presentation, including the need to align program funding and create flexibility to match provincial / territorial child welfare regimes.[281]

231. In 2012, the Department reviewed the implementation of the EPFA in Quebec and Prince Edward Island. The report noted that in Quebec on-reserve First Nations children are not receiving reasonably comparable child welfare services: "[t]he province of Quebec has been providing prevention services for over 25 years for off-reserve communities; however,

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[277] Odette Johnston, *First Nations Child and Family Services Program: the Way Forward (Draft)*, August 29, 2012 (CBD, Vol 12, Tab 248, p 13).
[278] Dr. John Loxley Examination in Chief, September 11, 2013 (Vol 27, p 129, lines 5-7).
[279] Odette Johnston, *First Nations Child and Family Services Program: the Way Forward (Draft)*, August 29, 2012 (CBD, Vol 12, Tab 248, p 15).
[280] Sheilagh Murphy, *Presentation to DGPRC – Renewal of the First Nations Child and Family Services Program*, October 31, 2012 (CBD, Vol 13, Tab 288, p 5).
[281] Sheilagh Murphy, *Presentation to DGPRC – Renewal of the First Nations Child and Family Services Program*, November 2, 2012 (CBD, Vol 13, Tab 289, pp 4, 5, 7).

comparable prevention services have not been accessible to on-reserve clients due to funding levels and the current funding mechanism".[282]

232. The Department found similar results in its 2012 audit of the Mi'kmaw Children and Family Services Agency (the "MCFS") in Nova Scotia, which has been receiving EPFA funding since 2009 and was operating in crisis mode for some time. In fact, the audit made the following conclusions regarding the crisis situation facing the agency:

> The Agency has stated they are running large deficits and therefore in danger of closing their doors if additional funding is not provided.
>
> […] The management and staff of the Agency are having significant challenges in providing services and managing operations effectively. Opportunities exist to improve the effectiveness of operations, however, current resource levels provide a significant challenge to adequate planning, monitoring and management of operations.[283]

233. Indeed, during her testimony regarding the MCFS audit, Barbara D'Amico, Senior Policy Manager for the AANDC FNCFS Program, admitted that underfunding of the MCFS went on for at least four years prior to 2011.[284] She further noted that the results and recommendations of the MCFS audit are applicable to other areas in Canada, including the issue of adequately funding intake and investigation, which are currently not accounted for under the EPFA.[285]

234. In British Columbia, AANDC documents suggest that on-reserve agencies are receiving significantly less funding compared to provincial levels of funding.[286] Clearly, FNCFSA cannot provide reasonably comparable services when they are receiving millions of dollars less than provincial agencies. Indeed, on November 17, 2009, Mary Polak, Minister of Children and Family Development and George Abbott, Minister of Aboriginal Relations and Reconciliation wrote to

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[282] Evaluation, Performance Management and Review Branch, *Methodology Report – Implementation Evaluation of the Enhanced Prevention Focused Approach in Quebec and Prince Edward Island for the First Nations Child and Family Services Program*, August 2012 (CBD, Vol 9, Tab 166, p 3).
[283] Audit and Assurance Services Branch, *Internal Audit Report - Mi'kmaw Children and Family Services Agency*, March 28, 2012 (CBD, Vol 5, Tab 51, pp 3 and 10).
[284] Barbara D'Amico Cross Examination, March 19, 2014 (Vol 52, p 55, lines 6-12).
[285] Barbara D'Amico Examination in Chief, March 18, 2014 (Vol 51, pp 116-117, lines 16-25, 1-20).
[286] AANDC, *British Columbia – Provincial Funding Formula for FNCFS Options for Discussion*, October 2010 (CBD, Vol 13, Tab 283).

Chuck Strahl, the then Minister of INAC, outlining the inequitable treatment of on-reserve First Nations children and calling on the government to redress this unfairness:

> While budgetary constraints are understood in present times, we are concerned that children [First Nations] will remain disadvantaged through this inequitable funding approach. The longer the delay in providing much needed funding, the longer British Columbia's First Nations children residing on reserve do not receive comparable level of services provided to the rest of British Columbia's children; especially, at a time when services are needed most.[287]

235. In Ontario, AANDC documents demonstrate that the FNCFSA are not capable of providing reasonably comparable services. For example, the 1965 Agreement does not provide funding pursuant to the most recent enactment of the *Child and Family Services Act,* which requires that child welfare agencies implement least disruptive measures when working with families.[288] Moreover, as explained by Phil Digby, AANDC Regional Program Officer for Ontario, there are some First Nations in Ontario that receive no funding for prevention services.[289]

236. Indeed, AANDC is aware of the significant funding shortfalls facing FNCFSA in Ontario, Newfoundland, the Yukon Territory and British Columbia. In an October 8, 2012, email to Odette Johnson, Steven Singer outlined the significant gaps in funding facing many FNCFSA and acknowledged that current levels of funding are inadequate.[290]

237. AANDC documents also suggest that if the provinces were to take over the delivery of child protection services on reserve, the cost to the federal government would likely double, demonstrating that the funding received by FNCFSA is inadequate and that on-reserve First Nations children are not receiving comparable services. For example, in an AANDC Question and Answer document, the following exchange is provided:

> Q12: What are the implications of First Nations Child and Family Services agencies withdrawing from service delivery?

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[287] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69, p 1) [emphasis added].
[288] 1965 Agreement (CBD, Vol 11, Tab 214).
[289] Phil Digby Cross-Examination, May 8, 2014 (Vol 60, pp 117-118, 134-135, lines 23-25, 1-4, 17-25, 1-4).
[290] *Email from Steven Singer to Odette Johnston*, October 8, 2012 (CBD, Vol 13, Tab 287).

> A12: If First Nations Child and Family Services agencies were to withdraw from service delivery as a result of inadequate funding, consequences would be severe. Pursuant to an 18-month long review involving the Province of Alberta, INAC and one Alberta-based First Nation Child and Family Service agency, it was determined that expenses would likely double if the province were to assume responsibility for service delivery.[291]

238. Moreover, AANDC has already anticipated a Charter challenged based on what it knows to be inadequate and inequitable funding:

> Q13: What are the legal implications of INAC providing inadequate resources for Child and Family Services on reserve?
>
> A13: While the Department of Justice has indicated that the Government of Canada's position is legally defensible because of the Program's basis in policy (versus legislation), it is possible that a Charter challenge may be initiated claiming that residents of a province in similar circumstances are receiving a higher level of service that residents on reserve. Further, as a consequence of providing inadequate prevention resources, it is foreseeable that civil proceedings could be initiated against the Government of Canada as a result of neglect or abuse suffered by children in care.[292]

239. AANDC personnel testified before the Tribunal that they are also aware that FNCFSA are unable to provide reasonably comparable services as a result of the FNCFS Program funding structures.

240. In fact, Sheilagh Murphy admitted that they are aware that while it is the intention of the FNCFS Program to provide reasonably comparable services, the Department has not been successful in ensuring that agencies are capable of meeting such a standard:

> MS MURPHY: It has always been our intention to provide reasonably comparable services.
>
> We were noticing trends in increasing kids in care and we were having stresses in our budget to be able to maintain those levels and, of course, the Department's doing re-allocations, but we

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[291] AANDC, *First Nations Child and Family Services (FNCFS) Q's and A's* (CBD, Vol 6, Tab 64, pp 5-6). See also *Explanations on Expenditures of Social Development Programs*, (CBD, Vol 13, Tab 330, p 2).
[292] AANDC, *First Nations Child and Family Services (FNCFS) Q's and A's* (CBD, Vol 6, Tab 64, p 6).

> weren't -- we noticed changes for sure and we needed to keep up with those changes and we weren't necessarily being successful in all cases of being able to do that.[293]

241. Similarly, AANDC is aware that the EPFA has been unable to keep pace with the services provided by provincial agencies pursuant to child welfare legislation and as a result, FNCFSA have been unable to provide reasonably comparable services. Carol Schimanke, Regional Program Officer, Alberta, explained as follows:

> MEMBER LUSTIG: On the subject of -- I think the term that counsel used was modernizing, so we will use that term. So is that an exercise that essentially has to do with comparability of services with the province because the province, according to your evidence, has modernized its legislation and that leaves some difference between the two levels as far as funding is concerned? Is that a fair way to put it?
>
> MS SCHIMANKE: The initial, when we first did the model back in 2006 and implemented in 2007/2008, that was trying our first attempt to be more comparable to the Act that came out in 2004. Now, over time, the province has -- you know, there has been changes to their salaries, their has been some changes to their -- their prevention model continues to evolve and so we are trying again to upgrade our operations model to keep up with those changes, so yeah.[294]

3. The Experiences of Child Protection Workers Demonstrate that First Nations Children are being Treated Differently

242. Child protection workers and agency directors have also demonstrated that that the agencies funded by AANDC have been and are unable to provide comparable services to the First Nations children they serve, demonstrating that First Nations children are being treated differently. Dr. Cindy Blackstock was a child protection worker for both the province of British Columbia in North Vancouver and subsequently with the Squamish First Nation headquartered on the Seymour Reserve situated in North Vancouver.[295] In her experiences as a child protection worker, Dr. Blackstock found that the children in the Squamish Nation reserve communities were

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[293] Sheilagh Murphy Examination in Chief, April 2, 2013, (Vol 54, pp. 163-164, lines 15-25, 1) [emphasis added]; See also (Vol 54, pp 225-226).
[294] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, pp. 159-160, lines 24-25, 1-19).
[295] Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, p. 166, lines 3-15).

not receiving reasonably comparable services to those provided to the children living off reserve. For example, on reserve there were less prevention services[296] as well as funding available for legal services, which are an essential component to providing child protection services.[297]

243. Similarly, Brenda Ann Cope, CFO for Mi'kmaw Children and Family Services ("MCFS") testified before the Tribunal that she has experienced the disparity between the services that Nova Scotia off-reserve agencies can provide and those provided by her agency.[298] For example, Ms. Cope explained that while off-reserve agencies provide prevention services and services related to least disruptive measures, the funding received by MCFS makes the provision of such services impossible:

> MS COPE: Least disruptive measures would include supervision, which is court ordered, and intervention, which is not court ordered. The provinces calls it in home support and they provide it. They are probably able to provide more of it than we are because they have – they have a child welfare budget and they have a prevention budget and we have a child welfare budget.[299]

244. Carolyn Bodonovich, CFO of the West Region Child and Family Services ("WRCFS") in Manitoba described during her testimony before the Tribunal that her agency cannot provide reasonably comparable services to the children in her catchment area. For example, she explained that off-reserve agencies receive funding for prevention services and capital works while the EPFA withdrew that funding, making it impossible for WRCFS to provide comparable services.[300] Ms. Bodonovich also described the disparity in legal services available to WRCFS as compared to what is available to provincial agencies. In particular, Ms. Bodonovich provided an example of an inquest it was required to participate in pursuant to the services it provides in the community:

> MS BODONOVICH: So our legal fees were approximately $250,000 in that inquest. And we had tried to go forward to the Region to get those costs covered. And we had checked with the Province of Manitoba and said, "If this was a provincial child, would you have paid for these legal costs?" And our understanding is yes, they

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[296] Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, pp 178-180, 184, lines 21-25, 1-25, 1-20, 4-11).
[297] Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, pp 186-188).
[298] Brenda Ann Cope Examination in Chief, September 23, 2013 (Vol 29, pp 127-129, 168-171).
[299] Brenda Ann Cope Examination in Chief, September 23, 2013 (Vol 29, pp 36-37, lines 24-25, 1-7).
[300] Carolyn Bohdanovich Examination in Chief, August 29, 2013 (Vol 21, pp 196-199).

> would have.
>
> So we went to the Region and request that. We did that several times. […] at least five times we brought it forward on the table again, and we never did get compensated for those legal fees for that inquest cost.[301]

245. In Quebec Sylvain Plouffe explained that his agency began serving First Nations communities after a First Nations child and family services agency closed. Mr. Plouffe's agency initially operated under a funding regime similar to that of the closed First Nations agency and he found that under that arrangement his agency was unable to provide reasonable comparable services:

> MR. PLOUFFE: We took over the services in 2003, as I said. In the year that followed, we quickly realized that the extend of the need was greater than the investment that had been made. We quickly reached out to the department to say that this wouldn't work, that the amount of money being allocated would make it hard for us to achieve the same level of service that is provided to white people.[302]

In response, the Respondent increased the amount of funding provided to Mr. Plouffe's agency.

4. Reallocating funding from other essential AADNC programs to subsidize shortfalls in child welfare funding is evidence of prima facie discrimination

246. The Caring Society further submits that the Respondent's practice of subsidizing its shortfalls in child welfare funding by reallocating funding from other AANDC programs providing essential services for First Nations Peoples is another form of comparative evidence establishing prima facie discrimination in this case. This practice was described as follows in one of the Respondent's internal documents:

> The annual increase in maintenance costs have exceeded the 2% the department receives for this program. As rates are set by provinces / Yukon Territory, the department must pay these rates. With limited capacity to expand the network of lower cost options, many First Nation Child and Family Service Agencies depend on higher cost options to place children out of the parental home. In order to meet its obligations, the department has had to reallocate resources

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[301] Carolyn Bohdanovich Examination in Chief, August 29, 2013 (Vol 21, pp 64-65, lines 21-25, 1-9).
[302] Sylvain Plouffe Examination in Chief, December 5, 2013 (Vol 37, p 97, lines 18-25) [emphasis added].

> from other program areas (most notably infrastructure) in order to meet these increased costs.[303]

247. Evidence suggests that the Respondent's practice of cutting funding from other programs areas such as housing to cover AANDC child welfare funding shortfalls actually increases child welfare risks for children. Dr. Blackstock testified:

> So, instead of increasing the overall envelope, which is what I think we would all like to see, what they're doing is they're taking funds from other programs, in this case infrastructure, and then rejigging that over to child welfare.
>
> What is the implication of that for kids? Well, remember that when I testified the first round the three major factors driving children into child welfare care under the neglect portfolio for First Nations are poverty, poor housing and substance misuse. So, if you're pulling money out of housing, you're actually exacerbating the risk factor at least of kids coming into care in the first place; what you should be doing is re-addressing this formula and increasing the funds sufficiently so that you're able to do it. There's no evidence that I've seen -- and, in fact, we'll go to other documents in my further testimony -- that say that there is an abundance of funds in the capital or infrastructure; in fact, they say there's dramatic under funding creating a crisis situation in those levels. So, it's really the equivalent of shuffling deck chairs on the Titanic and it's hard to see how this is in the best interests of children.[304]

248. These concerns were echoed by the Auditor General of Canada in her 2008 review of the Respondent's provision of First Nations child and family services.[305] Specifically, the Auditor General recommended in section 4.74:

> Indian and Northern Affairs Canada should determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program. It should periodically review the program's budget to ensure that it continues to meet program requirements and to minimize the program's financial impact on other departmental programs. [306]

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[303] *Key Questions and Answers (For Internal Use Only) First Nations Child and Family Services – Continuing the Reform in Manitoba and British Columbia* (CBD, Vol 14, Tab 369, p 4).

[304] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, pp 218-219, lines 5-25, 1-8).

[305] OAG Report 2008 (CBD, Vol 3, Tab 11, p 25).

[306] OAG Report 2008 (CBD, Vol 3, Tab 11, p 25). Despite the Department's agreement with the Auditor' General's recommendation, the practice of reallocating funds from other programs to cover shortfalls in child welfare has continued. See for example AANDC, *Sustainability of Funding: Options for the Future*, August 2012 (CBD, Vol 13, Tab 291, pp 7-8).

249. In addition to having the perverse effect of increasing the risk of children being put into care, this practice simply displaces the discrimination experienced by First Nations Peoples, who "fall behind" other Canadians in the program area from which the money is taken. As AANDC Director General Sheilagh Murphy acknowledged this phenomenon in her testimony when she stated:

> So what we are trying to say in this deck is that we haven't kept pace in terms of being able to provide all of the services we think First Nations need. We are meeting our bills related to some of those essential services, like Income Assistance, maintenance and child welfare, but we're starting to feel strain of that, we're re-allocating from programs that are not considered essential and so, First Nations are falling behind, they're falling behind in areas like infrastructure.[307]

250. Other Canadian children are not forced to choose between having equal welfare services or adequate housing. The Caring Society submits that putting First Nations children in a situation in which having access to better child welfare services comes at the expense of other access essential services which exacerbate child welfare risk levels, such as housing, is discriminatory.

5. AANDC Has Failed to Justify Its Discrimination

251. The test for justification was recently summarized by the Supreme Court in *Moore v. British Columbia (Minister of Education)*.

> At this stage in the analysis, it must be shown that alternative approaches were investigated (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 ("*Meiorin*"), at para. 65). The prima facie discriminatory conduct must also be "reasonably necessary" in order to accomplish a broader goal [...]. In other words, an employer or service provider must show "that it could not have done anything else reasonable or practical to avoid the negative impact on the individual" (*Meiorin*, at para. 38 [...]).[308]

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[307] Sheilagh Murphy Examination in Chef, April 2, 2014 (Vol. 54, p. 190, lines 3-13). Likewise, an internal government documented dated August 2012 stated that subsidizing shortfalls in child welfare by reallocating funds from other key programs caused an "inability to "keep up" with provincial investments, creating a growing gap in investments on versus off-reserve, and consequent quasi-judicial challenges: AANDC, *Sustainability of Funding: Options for the Future*, August 2012 (CBD, Vol 13, Tab 291, pp 7-8).

[308] *Moore* supra note 130 at para 49.

252. The evidence outlined above demonstrates that First Nations children served by the FNCFS Program are being treated differently than they would be treated if served by provincial/territorial child welfare agencies, to their detriment. AANDC has failed to justify this differential and discriminatory treatment.

253. First, AANDC's suggestion that comparing provincial/territorial child welfare services with those provided by FNCFSA is like comparing "apples to oranges" is not a reasonable justification for the discrimination facing First Nations children. It is possible to make the comparison, as suggested by the Attorney General, the Standing Committee on Public Accounts, and the FNCFS Program itself. Indeed, AANDC cannot create the standard to be applied and then thwart the complainants' claim on the basis that their own standard is unfair or unattainable.

254. Second, the suggestion that change is slow or that the funding structures are evolving is not a reasonable justification at this juncture. AANDC has known since at least 2000 that Directive 20-1 was not supporting comparable services and since at least 2008 that the EPFA continues to perpetuate many of the inequalities found in Directive 20-1. The FNCFS Program is designed to service vulnerable First Nations children who need and deserve equitable child protection services. The slow evolution of policy development is not a reasonable justification in this context.

255. Finally, the creation of the EPFA and the promise of its improvement do not answer or justify the discrimination experienced by First Nations children served by FNCFS Program. While some progress has been made and some agencies are receiving more funding, the EPFA continues to perpetuate the differential and discriminatory treatment facing First Nations children served by FNCFS Program. As outlined below, there are a number of remedies available to AANDC to redress this inequality and steps ought to be taken in order to ensure that all children in Canada have the opportunity to thrive, to realize their potential, and to experience full citizenship, irrespective of their First Nations status.

C. Evidence of discrimination: the failure to take into account historic disadvantage

256. Canada's failure to take into account the unique and greater needs of First Nations children when providing child and family services is discriminatory. This treatment is "contributing to the over representation of Status First Nations children in child welfare care"[309] and constitutes a *prima facie* case of discrimination within the meaning of s. 5 of the *CHRA*. While the evidence reviewed above regarding the Respondent's failure to provide and ensure comparable services, in itself, suffices to establish prima facie discrimination, the Caring Society further, submits that Canada's failure to take into account the greater and unique needs of First Nations children caused by their historical disadvantage also amounts to a breach of the *CHRA*.

257. Canada has not led evidence to support a *bona fide* justification for its failure to provide First Nations child and family services that take into account the historical disadvantage faced by First Nations children. Likewise, by its own admission, Canada has made no *bona fide* justification of undue hardship considering health, safety and cost. Given the absence of any evidence to this effect, the Complaint ought to be substantiated.

258. In a prior proceeding in this case, Madam Justice Mactavish recognized that "no one can seriously dispute that [First Nations Peoples in Canada] are amongst the most disadvantaged and marginalized members of our society."[310] In the same decision, Mactavish J. also emphasized the relevance of historical disadvantage within the discrimination analysis under the *CHRA*. She wrote:

> The [*prima facie* case] test is flexible enough to allow the Tribunal to have regard to all of the factors that may be relevant in a given case. These may include historic disadvantage, stereotyping, prejudice, vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.[311]

259. As fully outlined below, the historical traumas suffered by First Nations children must be considered, acknowledged and reflected in the FNCFS Program.

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[309] *Human Rights Commission Complaint Form*, February 23, 2007 (Vol 1, Tab 1, p 1).
[310] *Mactavish J's Reasons* supra note 32 at paras 334-335.
[311] *Ibid* at para 337.

260. As Chief Joseph noted in his evidence, children are an essential part of First Nations communities, and the bond between the community and the child must be maintained:

> All of these Elders that I spoke to, and there were about 50, 55 of them across these three language groups, each talking about how special children are and talking about how sacred an obligation and responsibility we have to try to raise those kids.
>
> But once they're apprehended they're lost to the authorities or lost to a different set of considerations, a different set of frameworks on how to raise kids and just often removed physically from those homes into faraway places.[312]

261. The legacy of the residential school system, and events like the Sixties Scoop, also have an impact on the greater needs of the FNCFS Program decades later. As Ms. Flette noted in her evidence:

> We also had the Sixties Scoop experience, and not just on-reserve, but certainly a part of the reserve communities or the First Nations communities.
>
> So there was a lot of historically painful, bad, traumatic experiences with child welfare. Many kids that had been removed from communities or their families, and no one knew where those children were.
>
> We had started in the early eighties what we call the Repatriation Program. And we did a lot of work with kids who were phoning and saying, you know, "I've been adopted. I am living down in the States. I don't know where I come from."
>
> So we would do a lot of work with the children, or young adults often, and their families to try and reconcile them back to their community.
>
> But there was a lot of I'd say just a lot of hurt and very painful experiences related to child welfare.
>
> So one of the big challenges for the First Nations agencies is, here you are, you're mandated under the Act. You have to provide safety and protection services for children. No one will argue that. But you have to also be able to try and work in a way that doesn't

[312] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, p 65, lines 4-15).

> alienate people further, that will make them cooperate and make them become part of seeing this as a community problem not just a child welfare problem.[313]

262. Treatment that perpetuates a historical disadvantage to a group is discriminatory. As Madam Justice Abella put it in *Quebec (Attorney General) v A*, speaking for a majority of the Supreme Court, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[314]

263. This emphasis on narrowing the gap between the advantaged and disadvantaged groups in society is the reason why under section 15 of the *Charter*, "the claimant's burden […] is to show that the government has made a distinction on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage."[315] Given that both section 15 and the *CHRA*'s purpose are to "eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available,"[316] the Caring Society submits that a *prima facie* case of discrimination can also be established when a service perpetuates a disadvantage that has historically affected a given group.

264. Human rights tribunals and courts alike have recognized that jurisprudence regarding section 15 of the *Charter* is relevant to human rights law. Mr. Justice Stratas, of the Federal Court of Appeal, recognized this simple reality in a prior step of this proceeding, where he held that

> […] the Federal Court *had* to have regard to the Charter cases – and the same can be said for the Tribunal. The equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and *vice versa*: see *e.g.*, *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at pages 172-176; *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675, [1999] 1 SCR 497 at paragraph 27; *Moore*, *supra* at paragraph 30, *A.*, *supra* at paragraphs 319 and 328.[317]

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[313] Elsie Flette Examination in Chief, August 28, 2013 (Vol 20, pp 187-188, lines 18-25, 1-24).
[314] *Quebec (Attorney General) v A* supra note 117 at para 332.
[315] *Ibid* at para 323.
[316] *Ibid* at para 319.
[317] *FNCFCSC - FCA* supra note 32 at para 19.

265. Given the confluence of the objectives of the *Charter* and the *Canadian Human Rights Act*, evidence that Canada's manner of providing the FNCFS program fails to consider and perpetuates the historic disadvantage faced by First Nations children suffices to establish a case of *prima facie* discrimination.

6. First Nations children have been subjected to historic disadvantage

266. The Tribunal has before it voluminous material and testimony from the Complainants and the Commission, detailing the historic disadvantage faced by First Nations children. This evidence is reviewed below.

267. The historic disadvantages faced by First Nations children predate confederation and have persisted since the creation of Canada itself. While the early relationship between the First Nations peoples of Canada and British settlers in the latter half of the eighteenth century focused on military alliances,[318] in the early nineteenth century the policy of "the British government began to change to develop concerns about social and cultural economic issues with respect to First Nations people."[319] Dr. Milloy, who was qualified as an expert in the history of residential schools by the Tribunal on October 28, 2013,[320] terms this shift in policy the beginning of the "era of civilization."[321]

268. This shift in policy gave rise to the imposition of the historic Treaties on First Nations peoples, the creation of reserves, and to the opening of the first residential school in the late 1840s,[322] laying the groundwork for the federal policies that would be imposed by the new Dominion of Canada after its creation in 1867.

269. This early British North American and Canadian view of civilization was anchored in the view "that civilization becomes, in a sense, the disappearance of communities rather than what it had been before, the civilization of communities, because now civilized people would march

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[318] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 63, lines 10 to 18).
[319] Dr. John Sheridan Milloy Examination on Qualifications, October 28, 2013 (Vol 33, p 7, lines 4-7).
[320] Ruling of the Chair on Dr. John Sheridan Milloy's Qualifications, October 28, 2013 (Vol 33, p 31, lines 19-20).
[321] Dr. John Sheridan Milloy Examination on Qualifications, October 28, 2013 (Vol 33, p 7, lines 8-9).
[322] *Ibid* (Vol 33, p 8, lines 3-10).

forward into Canadian citizenship and the old people will die off."[323] From the beginning, the British North American civilizing project was an integrationist one. As Dr. Milloy described it:

> It was pretty simple: What you do is form completely-serviced settlement sites; right? You go in there, you build houses, roads, schools churches, plough the fields, invite the community in, they take up agriculture, and when they get to the point of self-sufficiency, the Department of Indian Affairs disappears.[324]

270. First Nations children were the linchpin in this early British North American and Canadian scheme: if successive generations could be 'civilized', in time the nascent British North American culture would dominate, and replace, the various First Nations cultures that predated it by centuries. Children were at the heart of the 'civilizing' vision of Reverend T.B.R. Westgate, who, in Dr. Milloy's words, aimed to "change the aboriginal future in Canada by appropriating children, placing them in Anglican residential schools -- and the same can be said for everybody else -- and then producing someone who had been remade in the image of Victorian yeomanry, right, Victorian Canadians."[325] This vision was shared by the Department of Indian Affairs, which viewed First Nations children as "the leaven of civilization on the Reserve. These kids would come back socialized as white, with all the skills that they needed, and civilization would pop up on the Reserve like a loaf of bread".[326]

271. The push towards residential schools began in the mid-nineteenth century, in support of the British North American 'civilizing' project that had been aimed at First Nations children. The object of residential schools was to sever the link between the child and his or her community, as in the eyes of the British North American administration, "[w]hen they went home, they became First Nations individuals all over again. So the whole emphasis -- the whole experiment was blunted by the reuniting of children and parents and children and community."[327]

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[323] Dr. John Sheridan Milloy Examination on Qualifications, October 28, 2013 (Vol 33, p 9, lines 18-23).
[324] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 66, lines 7-13).
[325] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 56, lines 12-17).
[326] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 70-71, lines 24-25, 1-3).
[327] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 72, lines 3-7).

272. By severing the link between Aboriginal children and their past, residential schools were meant to assimilate Aboriginal peoples into the new Canadian landscape. Dr. Milloy described this process as a kind of 'social alchemy':

> It was a policy of assimilation, a policy designed to move Aboriginal communities from their 'savage' state to that of 'civilization' and thus to make in Canada but one community – a non-Aboriginal one.
>
> […]
>
> […] the Department envisioned increasing numbers of graduates abandoning their communities through enfranchisement and being placed on their own land, assimilated into the colony. The impact was profound. 'Civilization' was redefined. The goal of community self-sufficiency was abandoned in favour of assimilation of the individual. Tribal dissolution, to be pursued mainly through the corridors of residential schools, was the Department's new goal. Progress toward that goal was to be measured in the reduction of the size of First Nations through enfranchisements.[328]

273. The state took a forceful role in the civilizing project, deploying its official powers to sever the link between First Nations children and their parents. In 1895, warrants were created by the Department of Justice for the committal of First Nations children to residential school on the ground that they were "not being properly cared for".[329] These warrants gave legal force to Canada's 1894 *Regulations relating to the education of Indian children*, which provided that:

> An Indian Agent or Justice of the Peace, on being satisfied that any Indian child between six and sixteen years of age is not being properly cared for or educated, and that the parent, guardian or other person having the charge or control of such child, is unfit or unwilling to provide for the child's education, may issue a warrant authorizing the person named therein to search for and take such child and place it in an industrial or boarding school, in which there may be a vacancy for such child, and a child so placed in an industrial or boarding school may be retained until the age of eighteen years is reached ; but no child shall be committed to any industrial or boarding school before the parent, guardian or other person having the charge or control of such child, is notified orally, or in writing, by a Justice of the Peace, Indian Agent or truant

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[328] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 3, 19.
[329] *Warrant for Committal of Indian Children*, 1895 (CBD, Vol 13, Tab 278, p 4).

> officer, of the intention to commit the child, and four days shall be allowed to elapse between the giving of such notice and the committal of the child, except in the Province of Manitoba and the North-west Territories, where an Indian child may be committed by an Indian Agent or Justice of the Peace, as aforesaid, without notice.[330]

274. The parents of First Nations children had no role in the 'social alchemy' that sought to transform First Nations cultures in the mid-nineteenth century. As Dr. Milloy described it:

> And that's what's expected, right, the old people will be left behind and will die quietly, and the young people will march out into partnership with Canadian society. The old society will die, aboriginal society will pass away, and that's all good because indeed we have rescued the children and we have rescued their future.[331]

275. The civilizing scheme perpetuated by residential schools had a devastating effect on the First Nations children who attended them. In his testimony before the Tribunal Chief Joseph evoked the trauma of the residential schools experience in his evidence:

> Can anyone the 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.[332]

276. However crushing the residential school experience was to those who survived it, the negative impacts of the residential school system have not been limited to those who were forced to attend them. The Royal Commission on Aboriginal Peoples summarized the lamentable legacy of the residential school system in its 1996 report:

> Tragically, the future that was created is now a lamentable heritage for those children and the generations that came after, for Aboriginal communities and, indeed, for all Canadians. The school

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[330] *Regulations Relating to the Education of Indian Children*, 1894 (CBD, Vol 13, Tab 278, pp 11-12).
[331] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 89, lines 12-19).
[332] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, pp 34-35, lines 20-25, 1-4).

> system's concerted campaign "to obliterate" those "habits and associations", Aboriginal languages, traditions and beliefs, and its vision of radical re-socialization were compounded by mismanagement and underfunding, the provision of inferior educational services and the woeful mistreatment, neglect and abuse of many children – facts that were known to the department and the churches throughout the history of the school system.[333]

277. The British North American civilizing scheme was a collective trauma. Before the Tribunal Dr. Amy Bombay was qualified as an expert in "the effects and transmission of stress and trauma on well-being, including the intergenerational transmission of trauma among the offspring of Indian residential school survivors and the application of the concepts of collective and historical trauma",[334] defined as "a traumatic event directed at a group based on race, political, religious or cultural beliefs and can be as random as a single natural disaster or purposely conducted for an extended period."[335] As Dr. Bombay went on to point out, "Indian residential schools is really just one example of one collective trauma which is part of a larger traumatic history that aboriginal peoples have already been exposed to."[336]

278. Indeed, residential schools were at the forefront of this 'civilizing' scheme. The system was vast, and did not just involve the Department of Indian Affairs, but also engaged "the many other departments and agencies who had to do with the system, RCMP officers who were truant officers, et cetera, Department of Transportation people who organized transportation to schools sometimes, Department of Health who provided forms of health services to students in the schools".[337] Beginning in the late nineteenth century, the residential school system began to spread throughout the country as, in Dr. Milloy's words:

> In 1883, the Federal Government begins to fund residential schools and they pop up all over the place, so there is one after the other, after the other, to say the least.
>
> There are, as you know, a little over 135 who are qualified as residential schools under the PRC Settlement Agreement and there

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[333] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 1*, October 1996 (CBD, Vol 2, Tab 7, pp 425-426).
[334] Dr. Amy Bombay Examination on Qualifications, January 9, 2014 (Vol 40, p 4, lines 5-10); Ruling of the Chair on Dr. Bombay's qualifications, January 9, 2014 (Vol 40, p 52, lines 19-20).
[335] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, p 94, lines 6-11).
[336] *Ibid* (Vol 40, p 94, lines 20-23).
[337] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 34-35, lines 24-25, 1-5).

> were certainly more schools than 135. […] I'm saying schools came and went. High schools burned down, new ones were opened, so there were certainly more than 135 and a few.[338]

279. However, the residential school system must also be considered in the context of the other facets of the historic disadvantage faced by First Nations children, such as forced relocation of communities and mass apprehensions of First Nations children, placing them in care. As Dr. Bombay noted in her evidence:

> [R]esidential schools were only one example of one of the significant collective trauma endured by residential schools. Another example is forced relocation that many communities were subjected to.
>
> This is significant because, for many aboriginal groups, their traditional land is important for their well-being and they really have a connection to this land that is important to them. So this was a very stressful experience and traumatic experience for these groups.
>
> […]
>
> [I]n addition to residential schools, forced relocation, many experts in aboriginal health consider the large-scale removal of aboriginal children from their homes to foster care to be another example of a collective trauma because it has affected such a large proportion of the aboriginal population.[339]

7. <u>The residential school system inflicted historic disadvantage on First Nations children</u>

280. The 'civilizing project' was inherently harmful to First Nations children and cultures. As Dr. Milloy observed:

> The system was Savage, the system itself, this sort of flip-flop, right, because I thought when I first looked at it, when you read the discourse, that the Indians were the savages right, to be civilized in this process. But if you think about it, there was a savagery of violence in the very idea of residential schools.
>
> It wasn't only about separating children from their parents and communities and putting them in the schools, it was about cutting

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[338] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 102-103, lines 23-25, 1-14).
[339] Dr. Amy Bombay Examination in Chief, January 10, 2014 (Vol 41, pp 13-15, lines 17-25, 1-2, 7-13).

> the artery of culture that flowed between parents, children and community. That was to be destroyed willy-nilly.
>
> If you look at the rhetoric, right, that is there, you know, the rhetoric which was about, at the end of the day, there will be no Indian left in the child, we will kill the Indian in the child. The rhetoric is at times redolent with this ironic kernel of savagery in the system -- in the operation of the residential school system and how it will impact on the students.[340]

281. The harm that was inflicted on First Nations children was more than rhetorical. The record is clear, and speaks for itself. First Nations children who were subjected to residential schools suffered physical abuse. This is clear, and is acknowledged in the historical record, contemporaneously with the events identified. Dr. Milloy testified to such contemporaneous recognition being a common finding in the course of his research:

> People asked me right at the very beginning: How are you going to make a comment about particular types of behaviour that you find in the record that exists that take place in 1880 or 1920, you know, times when things were different, right? How are you going to make that judgment? Won't you just be imposing upon the past late-twentieth-century values?
>
> And I worried about that. You know, gee, that's really going to be a problem. And I discovered it wasn't a problem at all, because what I discovered was that whatever critique you wanted to make of the system -- or needed to be made of the system, let's put it that way, right -- was there in the record. I didn't have to say, right, when those [four] hunters found that aboriginal child in the woods and he was nearly naked and he had been beaten so that he was black and blue all over, I didn't say after that -- I didn't have to say that was child abuse. The hunters went to the local police station and said this child has been abused, this sort of behaviour is unacceptable.
>
> And I'm not just talking about, you know, members of the public who suddenly tripped across this system, I'm talking about members of the Department themselves who wrote critiques of the operation of the system.
>
> […]

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[340] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 42-43, lines 10-25, 1-6).

> So I don't have to make judgments, they were there, right, from school inspectors, from female school teachers, from children themselves who managed to write in, from newspaper columnists, from all kinds of people who said this is not acceptable in terms of the function of an educational institution, the function of a home, because that's what these institutions were supposed to be. So that is in there.[341]

282. Indeed, the long-lasting harm done to First Nations children who were subjected to residential schools was known to those working inside the Department of Indian Affairs. In his evidence, Dr. Milloy tellingly noted that:

> I think the first quote I saw about the harm done by the system was about 1913, and it was done by -- it was said by an Indian agent in Saskatchewan and Alberta who said, "I'm not sending any more of my children to residential school," he said, the children from his reserve, "because when they come home they're useless. It's better that they should stay on the Reserve than come home and become prostitutes and drunkards like these ex-residential school students."[342]

283. These harms were also evident to those working inside the schools. In his 1999 book, *A National Crime: the Canadian Government and the Residential School System 1879-1986,* Dr. Milloy observes that "[m]any school staff may well have shared the sentiments of Miss Eden Corbett, who resigned her teaching position at the Aklavik Anglican School in 1944, that the educational process in which they were participating was not just ineffective but morally questionable."[343] In his book, Dr. Milloy also addressed the reaction of school administrators to conditions in residential schools:

> The [National Association of Principals and Administrators of Indian Residences] went on in their 1968 brief to detail the effect of what they charged had been yet another decade of underfunding in a school-by-school survey – a lengthy system-wide catalogue of deferred maintenance, hazardous fire conditions, inadequate wiring, heating, and plumbing and much-needed capital construction to replace structures that were "totally unsuitable and a disgrace to Indian affairs." Some principals had reached the limits

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[341] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 41, 42, 44, lines 22-25, 1-24, 1-9).
[342] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 205-206, lines 18-25, 1-3).
[343] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 185, citing N.A.C. RG 10, Vol. 6476, File 919-1, MR C 8152, from Miss E. Corbett to Hon. I. Mackenzie, 18 March 1944.

of their patience.[344]

284. First Nations children who were subject to residential schools also experienced negative health outcomes. These negative health outcomes were known to Canada, as they were detailed by Dr. Peter Bryce in reports made in the early twentieth century.[345] In his text, *Story of a National Crime: Being a Record of the Health Conditions of the Indians of Canada from 1904 to 1921*, Dr. Bryce describes a report he made to the Minister of the Interior and Superintendent General of Indian Affairs in 1907 regarding thirty-five residential schools in the prairie provinces:

> This report was published separately ; but the recommendations contained in the report were never published and the public knows nothing of them. It contained a brief history of the origin of the Indian Schools, of the sanitary condition of the schools and statistics of the health of the pupils, during the 15 years of their existence. Regarding the health of the pupils, the report states that 24 per cent of all the pupils which had been in the schools were known to be dead, while one school on the File Hills reserve, which gave a complete return to date, 75 per cent were dead at the end of the 16 years since the school opened.[346]

285. In light of the serious problems he witnessed in the prairie residential schools, Dr. Bryce recommended 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."[347]

286. However, due to the financial motivations bred by a system in which funding was accorded to a residential school based on the number of pupils within its four walls, residential

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[344] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 272, citing INAC File 6-21-1, Vol. 4, The National Association of Principals and Administrators of Indian Residences, Brief Presented to the Department of Indian Affairs . . . , 1968, 3-18.

[345] Dr. Bryce was an Ottawa-based physician who was described by the American Journal of Public Health as "honored and beloved by all who knew him, genial in character, honest, and outspoken." See American Journal of Public Health, *Eulogy of Dr. Peter H. Bryce* (CBD, Vol 4, Tab 43).

[346] Peter H. Bryce, *The Story of a National Crime: Being a Record of the Health Conditions of the Indians of Canada from 1904 to 1921*, 1922 (CBD, Vol 4, Tab 44, p 4).

[347] *Ibid* (CBD, Vol 4, Tab 44, p 4).

schools could become crowded, which led to negative health outcomes.[348] As Dr. Milloy recounted, tuberculosis was a particular problem in residential schools.[349]

287. As Dr. Milloy observed, the particular devastation wrought on the Aboriginal Peoples of Canada, and in particular on the First Nations children who attended residential school, is emblematic of the consistent and systemic disadvantage faced by the Aboriginal Peoples of Canada:

> We know that the tuberculosis rates amongst the Aboriginal population in Canada and therefore the Aboriginal children in residential schools far outstrips any other rates. It's really easy to be an Aboriginal historian because you just have to multiply everything by five. You have to multiply all the bad stuff by five, right?
>
> Tuberculosis five times, right? Death by suicide at least five times. You go on and on and on that they are at the head of every line you don't want to be at the head of and in the back of every line you don't want to be at the back of and usually five times more grievous than anything else.[350]

288. The disadvantages suffered by First Nations children subjected to residential schools was compacted by the laissez-faire attitude of the central administration in Ottawa. As Dr. Milloy recounted:

> It's so badly managed and so neglectfully managed that everything goes off the rails. The care of the physical fabric of schools, the nature of a deliverable curriculum in a pedagogically quality manner, given that you don't have fully trained teachers, in almost every category, you find that it's not coming up to its standards, to the extent to where there are standards.[351]

289. The lack of regulations, control, and funding had serious impacts on even the basic needs of First Nations children subjected to residential schools, including a lack of proper nutrition, at times leading to starvation and a lack of adequate clothing.[352] Much like the inordinately high

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[348] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 128-129, lines 18-25, 1-4).
[349] *Ibid* (Vol 33, pp 130-132, lines 25, 1-25, 1-19).
[350] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 142, lines 9-23).
[351] *Ibid* (Vol 33, pp 146-147, lines 25, 1-9).
[352] *Ibid* (Vol 33, pp 149-150, lines 18-25, 1-17).

death-rate from tuberculosis caused by overcrowding, the food and clothing shortfalls were linked to inadequate funding of the residential school system, which Dr. Milloy described as a system "starved for resources".[353]

290. However, the hardships visited on First Nations children who attended residential schools were not limited to those that flowed from a lack of funding and neglect. They included horrors visited on First Nations children by the individuals in positions of authority in residential schools, including sexual abuse of many students, which has been well documented by the Truth and Reconciliation Commission, and in the media. Indeed, this sexual abuse affected not only the First Nations victims, but had a "spillover" effect, which flowed back into the communities.[354]

291. The consequences of this sexual abuse for First Nations communities were devastating.

292. However, as Dr. Milloy observed in his evidence, these devastating consequences were also predictable, and flowed directly from the position of vulnerability imposed on First Nations children by Canada's assimilationist policy:

> Where our children congregate and where they especially congregate and are not under the direct charge of care of their parents, they are, to some degree, likely to become the object of deviant sexual behaviour by members of our society.
>
> Everything seems to go back to the initial decision made by Sir John A. [Macdonald] and the others at the founding moment of residential schools. That, as Davin had advised, it was necessary to take those children away from their parents and to place them in another place.
>
> And when you travel around the line of inquiry with respect to sexual behaviour, that's, for me, the takeaway, as it were. The children were placed in a dangerous place, children were placed in a dangerous place that, while it had standards, those standards were not regularly applied.
>
> The Department did not regularly assume -- execute the rights it had to control behaviour of all sorts in the schools towards the

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[353] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 173-175, lines 20-25, 1-25, 1-2).
[354] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, p 9, lines 8-16).

> students.
>
> So, sexual behaviour, sexual abuse is shocking and extremely sad, to say the least, and the impact on children, and therefore, on adults, is -- on those communities is perhaps the worst of all the school crises or impacts.
>
> But it's pretty predictable, given the decision to take those children away.[355]

293. There were also numerous instances of physical abuse, at the hands of those in positions of authority over First Nations children in residential school. Dr. Milloy's evidence is replete with numerous examples of the terrible treatment suffered by First Nations children who attended residential schools, including constant and common violence, at times on an everyday level.[356] More particularly, Dr. Milloy recounted:

> In these schools, in many times, children were -- way too many times -- children were punished for who their parents were. We must beat it out of you. We must kill the Indian in the child. You must not be like your parents.
>
> And the discipline, therefore, the physical discipline always carried that message to the children that they came from disrespectful places. Whereas I was being asked to live up to values that my parents respected.[357]

294. Indeed, as Dr. Milloy noted, the consequences of this abuse were often severe:

> There are many examples of the running away, of the punishments, of death in the snow, many -- too many of children who freeze to death because they have been exposed.[358]

295. Tragically, Dr. Milloy recounted the way in which some First Nations children were pushed to the brink:

> The document collection, excuse me, has instances of suicides and attempted suicides by children. Sometimes, at least in two occasions that I can remember, which are in the text, they were group suicides. I think there were a number of girls that tried to kill themselves together and there were a number of boys at a

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[355] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, pp 11-12, lines 8-25, 1-12).
[356] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 85-124).
[357] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, p 46, lines 3-12).
[358] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 94-95, lines 23-25, 1).

> British Columbia school, it may have been Williams Lake School -- I'm pretty sure it was the Williams Lake School, in fact, who ate a poisonous plant, I can't quite remember the plant, arsenic or -- no, it couldn't have been arsenic.
>
> Anyway, I didn't even know we had that plant in Canada but they went out and got it and ingested it and all of them survived except one boy, who died, obviously of that.
>
> And there are other instances, I believe, in the text which talk about individual attempts at that sort of thing.
>
> I don't know, I'm not a psychologist but it seemed to be, as with speaking your language and the way in which I was talking about that yesterday and running away from school, suicide was a way of, obviously, escaping from what -- for these children who took that path -- had become an unbearable situation.[359]

296. In the face of these numerous crises, First Nations children who attended residential school were left helpless by an administration at Indian Affairs, including high ranking officials such as Duncan Campbell Scott, who emphasized appearance over the living conditions of children.[360] This knowing neglect was not limited to the upper echelons of the Indian Affairs administration, but extended throughout the system. As noted by Dr. Milloy:

> People who say they are caring for children are not doing so and they know they're not doing so and they refuse to stop doing what they're doing, which is inadequate.
>
> There's an RCMP inspector that returns a child to a residential school. It's in the text. And he says to his superior, having seen the inside of the school, "If this was a white school, I'd have the principal in court tomorrow."
>
> It wasn't a white school, it was an Indian residential school and so he let it pass. So, there was a wider neglect than what the Department was practising, right?[361]

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[359] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, pp 2-3, lines 10-25, 1-10).
[360] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 169-170, lines 19-25, 1-8).
[361] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, p 175, lines 6-19).

297. Indeed, "the system was careless. It just was a shrug of the shoulders, right, it became routine. It just sort of marched on."[362]

298. Dr. Milloy's assessment of the conditions in the residential school system, and the circumstances that caused them, were echoed in the 1996 report of the Royal Commission on Aboriginal Peoples:

> 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.[363]

299. Residential schools also perpetuated a legacy of disadvantage, as they imposed a multitude of adverse circumstances on First Nations children, without imparting an education. Dr. Milloy described the tendency of the 'practical component' of a residential school education, often code for labour around the school, to fail to provide training that would be useful to First Nations children in their lives after residential school.[364] In his 1999 book, Dr. Milloy described how the underfunding of residential schools often meant that First Nations students had to do the "bulk of the chores".[365]

300. In his evidence before the Tribunal, Dr. Milloy also described the impact of these cost-cutting measures on students' 'academic' pursuits:

> The negative effect of labour, of overwork, was not restricted to the practical part of the curriculum. The half day devoted to chores often swelled to encompass a significant part of the children's school-room time. Across the system, scant progress, or

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[362] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, p 51, lines 20-23).
[363] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 1*, October 1996 (CBD, Vol 2, Tab 7, p 446).
[364] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, p 145, lines 18-23).
[365] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 269, citing INAC File 772/25-1-002, Vol. 1, 22 October 1956 and INAC File 501/25-1-105, Excerpts From Letter . . . dated Dec. 3rd, 1956.

> "retardation" as it was termed, in the arts of reading, writing, arithmetic, and other components of the "literary" curriculum was, agents and school inspectors told the department, all that could be "expected when only a portion of the day is devoted to classroom activities," when students consistently got "too little time at their studies."[366]

301. Indeed, as Dr. Milloy noted in his 1999 book:

> [o]nly three in every hundred went past grade 6. By comparison, well over half the children in provincial public schools in 1930 were … past grade 3; almost a third were beyond grade 6. The formal education being offered young Indians was not only separate but unequal to that provided their non-Indian contemporaries.[367]

302. Beyond their educational shortcomings, residential schools also hindered the development of First Nations children as individuals. As the 1967 Caldwell Report found, with regard to residential schools in Saskatchewan:

> The residential school system is geared to the academic training of the child and fails to meet the total needs of the child because it fails to individualize; rather it treats him en masse in every significant activity of daily life. His sleeping, eating, recreation, academic training, spiritual training and discipline are all handled in such a regimented way as to force conformity to the institutional pattern. The absence of emphasis on the development of the individual child as a unique person is the most disturbing result of this whole system. The schools are providing a custodial care service rather than a child development service.[368]

303. With a litany of disadvantage in their formative years, and having been deprived of the opportunity to acquire meaningful life skills, First Nations children who attended residential schools, and the communities to which they would return, were set up to fail.

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[366] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 148-149, lines 22-25, 1-10).

[367] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 171, citing J Barman, Y Hébert, and D McCaskill, eds, *Indian Education in Canada*, vol 1: *The Legacy* (Vancouver: University of British Columbia Press, 1986) at 9.

[368] George Caldwell (The Canadian Welfare Council), *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, January 31, 1967 (CBD, Vol 12, Tab 268, p 151).

304. The consequences of this system, which was designed to assimilate First Nations children by severing the link between these children and their parents and communities had a devastating impact on future generations:

> […] if you look at a question of assimilation in 1920 or 1930, most Aboriginal people were working in the Canadian workforce. They were part of the Canadian economy, right?
>
> It's only after the, you know, the ravages of the residential school set in and Aboriginal people can't keep up because they don't have the capital and they don't have the training with other Canadians that we ended up with 70 percent of the Aboriginal community on welfare.
>
> And then we add, on top of that, the social and psychological deficiencies that pour out of res schools and res school survivors. So, it's a pretty dreadful mix, right?[369]

8. The historic disadvantage caused by residential school system has an undeniable link to the disadvantage faced by First Nations children in the child welfare system

305. The present-day First Nations child and family services system is linked to residential schools not only in the intergenerational problems it must now respond to, but also in its institutional evolution. Indeed, Dr. Milloy explained that residential schools evolved from educational institutions to child welfare institutions with many children taken to a residential school becoming wards of the state, never to return home, rather than students going to school.[370]

306. After the end of the Second World War, with the rise of the welfare state in Canada, a push began to integrate the services received by Aboriginal Peoples with those delivered to all Canadians. This, in turn, led to an initiative to close residential schools and re-integrate Aboriginal children into their communities.[371] However the reintegration process that took over 40 years to complete, replete with its own harms.

307. During these four decades, the purpose of the residential school system began to change, as "[t]he system then, while it's being dismantled, takes on its final identity […] It continues to

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[369] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 163-164, lines 17-25, 1-6).
[370] *Ibid* (Vol 33, pp 200-201, lines 22-25, 1-13).
[371] *Ibid* (Vol 33, pp 182-185).

have this CAS, this Children's Aid Society characteristic."[372] As Dr. Milloy described this transition:

> The problem is that when you come to making a decision as to which children will be brought home and can be educated in the community, you find that there are children and families who rightly or wrongly are judged by the social workers as being incapable of properly taking care of their children, and that it's not wise to put those children back into their families, right? So it's best for those children to remain in residential school or indeed to be sent to residential school.[373]

308. In the course of this transition, it must be recalled that the definition of neglect applied to First Nations children was "measured against Non-Aboriginal concepts. Officially, it was to be "understood as defined in the provincial statute of the province in which the family resides."[374] However, as Dr. Milloy noted in his 1999 book:

> [N]eglect covered a wide spectrum of conditions. Beyond social factors (alcoholism, illegitimacy, excessive procreation), neglectful "home circumstances" were often economic, the product not of some flaw in the character of Aboriginal parents but of the marginalization of Aboriginal communities.[375]

309. Taking Saskatchewan as an example, the 1967 Caldwell Report found that:

> The reasons given for the admission of 80% of the children in eight of the residential schools [in Saskatchewan], and 60% of the total population of the nine schools in Saskatchewan, is related to the welfare need of the family. There is no evidence of preventive or rehabilitative services operating to serve the family.[376]

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[372] Dr. John Sheridan Milloy Examination in Chief, October 28, 2013 (Vol 33, pp 204, lines 6-9).
[373] *Ibid* (Vol 33, p 198, lines 3-13).
[374] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 212, citing INAC File 577/25-2, Vol. 1968, Circular No. 37, To Chiefs . . ., 9 June 1969, and see attached: Admissions Policy for Indian Student Residences.
[375] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 213.
[376] George Caldwell (The Canadian Welfare Council), *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, January 31, 1967 (CBD, Vol 12, Tab 268, p 148). See also Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 214, citing INAC File 901/29-4, *Analysis of Residential Schools – British Columbia*, 8 December 1961.

310. The rise of the residential school as child welfare institution had nefarious consequences for the most vulnerable Aboriginal children, as Canada continued its policy of removing children from their communities.

311. Of course, the disadvantages imposed by residential schools and increasing child welfare needs played a role in creating a significant enough demand for the continued operation of residential schools as child welfare institutions in the post-Second World War period. Dr. Milloy gave evidence that:

> [...] part of [the increase of Aboriginal children needing care] is related to the dysfunction created by children who had been to residential school who then become parents and find that their parenting skills are lacking, or who suffer from disabilities, as with the first two parents who are excessive drinkers, now separated, that those sorts of issues were on the rise and the department was -- as I said again yesterday, the department's mandate was wider than it was earlier on in the post-war period, so it began to take an interest in questions of child welfare whether it wanted to or not; right?[377]

312. However, the evolution of residential schools from the educational arm of the assimilationist policy of Indian Affairs to a child protection mechanism of the welfare state did not resolve the serious problems that increasingly arose through the first half of the twentieth century.[378]

313. This transformation, and its resulting placement of numerous Aboriginal children into care outside of their communities reproduced the challenges of residential schools within the various provincial child welfare systems. As Dr. Milloy noted, "one morphs into the other in a sense, foster homes and boarding homes become, as I said, residential schools, writ small, that you just reduce the school down to further isolation of the child from his family by putting him in a foster home somewhere."[379]

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[377] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, pp 88-89, lines 18-25, 1-5).
[378] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 36-37, lines 9-25, 1-2).
[379] Dr. John Sheridan Milloy Examination on Qualifications, October 28, 2013 (Vol 33, p 17, lines 20-25).

314. This increasing isolation would have consequences, both for First Nations children and for the confidence of the First Nations community in the child welfare system. As Elsie Flette of the MSW Southern First Nations Network of Care noted in her evidence:

> There had been a lot of concern expressed about the Sixties Scoop, which was in the '60s –'70s, I guess a lot of efforts made to adopt First Nations kids, many of them adopted out of country, [or] out of province, and the loss of these kids to their community; people didn't know where they were.[380]

315. Theresa Stevens, Director of Abinooji Family Services also gave evidence with regard to the Sixties Scoop, and its impact on First Nations communities in the vicinity of Kenora, in Ontario:

> I started to tell you the story about one of our communities where the buses came in to take the children and, you know, there are other stories from the same community that those children were in fact flown up north to Sandy Lake and literally offered to the community, come down to the landing dock and pick up children, that you can have these children to raise as your own.
>
> And so, you know, there is a history and the relationship between the community of Wabaseemoong and the First Nation of Sandy Lake because there was a group of their children that were raised in that community that were just given to that community. They lost huge numbers of children.
>
> When the first round of reforms, when the timelines came into effect, when from 0 to 6 years of age you had one year to deal with the issues in that family, otherwise you had to make that child a Crown ward and children 6 and up had two years. Because of those new timelines that came into effect, again that very same community had 98 children that were made Crown wards in one fell swoop at that time.
>
> So we have communities that have been devastated by child welfare, have been -- when you have a community, you know, of 2000 and have 10 percent of their children in care, being made Crown wards, adopted out not only in Ontario, but all over the country, internationally even, it's a great loss to a community. The

[380] Elsie Flette Examination in Chief, August 28, 2013 (Vol 20, p 17, lines 19-25).

community has suffered greatly.[381]

9. The historical disadvantage imposed by residential schools continues to this day

316. The experiences of First Nations children early in their lives provide the foundation for the future of First Nations communities. The treatment received early in life often sets the stage for an individual's outcomes, and the world the next generation will enter. As Charles Morris, Executive Director of Tikinagan Child and Family Services (Sioux Lookout, ON) noted in his evidence to the Royal Commission on Aboriginal Peoples in December 1992:

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families… for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities.[382]

317. Kenn Richard, Executive Director of the Native Child and Family Services of Toronto provided concrete evidence of the link between the conditions of the childhood of one generation, and the fate of the next in his evidence before the Royal Commission on Aboriginal Peoples in November 1992:

> Most of our clients – probably 90 per cent of them – are, in fact, victims themselves of the child welfare system. Most of our clients are young, sole support mothers who very often were removed as children themselves. So we are dealing with perhaps the end product of the child welfare system that was apparent in the sixties scoop. Actually the sixties scoop lasted well into the '70s and we are seeing the reality of that on our case loads… We take the approach in our agency that it is time to break that cycle. The other interesting note is that while the mother may have been in foster care the grandmother – I think we all know where she was. She was in residential school. So we are into a third generation.[383]

318. Twenty years later, large proportions of the present-day on-reserve population has direct links to the residential school system. Dr. Amy Bombay gave evidence that the most recent statistics indicate that 19.5% of First Nations adults living on reserve are residential school survivors, while 52.7% had at least one parent who was a residential school survivor, and 46.2%

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[381] Theresa Stevens Examination in Chief, September 5, 2013 (Vol 25, pp 80-81, lines 15-21).
[382] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 968).
[383] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 996).

had at least one grandparent who was a residential school survivor.[384] However, as Dr. Bombay noted, "the 52.7 percent who had at least one parent who attended could have also included survivors, because in a lot of families these families were impacted at more than one generation."[385] As a result of further research, Dr. Bombay has concluded that there are only "35.8 percent of First Nations on-reserve who were not themselves or who were not intergenerationally affected by residential schools."[386]

319. The historic disadvantage of residential schools was not limited to First Nations children who attended the schools, but affected the community as a whole. In response to a question from Member Bélanger, Dr. Milloy explained the way in which an entire community could be affected by the scourge of the experiences of some of its children in a residential school:

> What they said was, you took these children away, you (1) destroyed their potential, and that is a loss to our community; right? You took young people away who should have been educated properly, who should have been healthy, morally and psychologically, and who should have come back and contributed to our community. So that was the first thing we were upset about.
>
> The second thing that we were upset about was that you sent them back; right? You sent them back to the community and we have had to deal with them and they have been a burden upon our community. They have been disruptive, they have been non-productive, they have been violent, they have been sexually deviant, they have raised children in the most inappropriate way so, you know, the pebble and the pond, it just keeps -- spreading out.
>
> When I gave evidence at the Alkali Lake Inquiry, which was mentioned in the CV, the first people that gave evidence that day were the young people's club in the community, teenagers, boys and girls, and their spokesman looked at their parents around and pointed her finger at the members of the Tribunal and said you have to do something about these people, we can't live with them; they are drunks, they are violent.
>
> The children who never went to residential school were being raised in the community in that atmosphere. That's why I say, the

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[384] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 120-121, lines 4-25, 1-6).
[385] *Ibid* (Vol 40, p 121, lines 7-12).
[386] *Ibid* (Vol 40, p 125, lines 2-10).

> effects simply flow back to the community, flow back to the lives of ordinary people who are innocent and have no experience of the system.[387]

320. Indeed, the historic disadvantage imposed on First Nations communities by the loss of so many of their children to residential schools continues today and has a "transgenerational impact" that cannot be ignored in the delivery of present day child welfare services.[388]

321. Dr. Bombay's evidence demonstrates that the intergenerational impact of residential schools transcends into issues of mental health and issues related to cultural identity, affecting the parenting capacity of the second generation. [389] Indeed, it goes beyond physical transference, and extends to childrearing:

> [N]umerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing -- being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools -- how they treated the children, actually instilled negative -- a lot of negative parenting practices, as this was the only models of parenting that they were exposed to.[390]

322. Chief Joseph also gave evidence of these intergenerational impacts, both in his own life and in the lives of First Nations communities throughout Canada:

> So there is no question about this idea on intergenerational trauma that thousands upon thousands upon thousands of kids currently today are still experiencing and suffering the impact of those experiences that we went through. I know that we have a lot of brilliance, so, I mean, I'm really optimistic. I see young people going to universities now and other places of learning and I -- I envy those kids.
>
> But for some of us, like some of my children, we just didn't quite

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[387] Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, pp 112-113, lines 2-25, 1-9).
[388] Dr. Milloy used the terms intergenerational impact and transgenerational impact interchangeably throughout his evidence. The Caring Society views these words as having the same meaning, such that a reference to transgenerational impact should be taken as a reference to intergenerational impact, and *vice versa*. See also: Dr. John Sheridan Milloy Examination in Chief, October 30, 2013 (Vol 35, pp 112-113, lines 20-25, 1-11).
[389] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, p 113, lines 18-24).
[390] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, p 110, lines 9-20).

> get there.[391]

323. Chief Joseph's observations are in line with Dr. Bombay's evidence regarding research into the intergenerational effects of the residential school system, which shows that "many children of residential school survivors struggled with issues, mental health issues, as well as issues related to cultural identity, so how they feel about being aboriginal, and again, parenting in this second generation has been affected."

324. In her evidence, Dr. Blackstock spoke to her experience as a front-line worker in the child welfare system with First Nations children on reserve. She described the impacts of the historical disadvantage to which First Nations children have been subjected:

> The needs of the clients on reserve were higher because of the multigenerational impacts of residential schools and other historical disadvantages than the non-aboriginal population. So it was more challenging, but from a working perspective here guiding byline was doing what's best for this kid […][392]

325. Dr. Bombay noted that negative outcomes extend not only from parent to child, but even from grandparent to grandchild, as "the grandchildren of [residential school] survivors are also at an increased risk for suicide, as 28.4 percent of the grandchildren attempted suicide versus only 13.1 percent of those whose […] grandparents did not attend residential school."[393]

326. Canada has also acknowledged the link between residential schools and the historic disadvantage faced by First Nations children today. For example, in his Apology to First Nations Peoples, Prime Minister Harper stated:

> 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

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[391] Chief Robert Joseph Examination in Chief, January 14, 2014 (Vol 43, pp 35-36, lines 23-25, 1-9).
[392] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 172, lines 2-9).
[393] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, p 115, lines 8-13). See also (Vol 40, p 116, lines 11-17).

> from suffering the same experience, and for this we are sorry.[394]

327. Indeed, as Chief Joseph also observed during his evidence, the Prime Minister of Canada's Apology is a recognition of the link between the historic disadvantage inflicted on First Nations children by residential schools, and the current crisis facing First Nations children in care on-reserve:

> And so, we have the state now saying, "Yeah, we made a mistake." We can't make the same mistake twice. These are the same children and their parents and grandparents and we can't afford to continue losing children into despair and oblivion, detachment or loneliness, brokenness or whatever it is.[395]

10. <u>The descendants of residential school survivors are at greater risk of being placed in the care of the child welfare system</u>

328. The link between the residential school system and the greater risk of First Nations children being placed in care was acknowledged not just in the fact of Canada's Apology, but also in internal AANDC documents. For example, in the AANDC "Master Q&A List", in response to the question "Why are First Nations children (6 times) more likely than non-aboriginal children to be placed in care?", AANDC provides the following answer:

> 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.[396]

329. Dr. Blackstock also commented on this particular questions during her testimony: "what I take from this is, there's a direct link the Department is making from the Residential Schools

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[394] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10).
[395] Chief Robert Joseph Examination in Chief, January 13 2014 (Vol 42, p 97, lines 10-16).
[396] AANDC, *Master Q. and A's – First Nations Child and Family Services*, February 2013 (CBD, Vol 13, Tab 329, p 4).

and the effects of those Residential Schools up to child welfare provision today that results in higher need of children being removed."[397]

330. This link is supported by common sense, and by Dr. Blackstock's own experience, which she recounted in detail to the Tribunal on the first day of her examination-in-chief:

> And so we've had these successive generations of parents, if you will, who had been deprived of a proper childhood, who had been deprived of an opportunity to grow up with their family and they, themselves, struggle as parents in that next generation.
>
> So what I saw at the time when I was doing child protection, the children themselves were not in residential school. The last residential school in British Columbia closed in 1984, roughly. But what I could see clearly are these multi-generational impacts.
>
> And I didn't even have to see it. The families would be talking about it all the time.[398]

331. This link is also supported by Dr. Bombay's research:

> [W]e actually did in our research look at the relationship between being affected by residential schools and the likelihood of spending time in foster care, and so we found that those who had -- whose families were more impacted by residential schools, by having more generations in their family who went to residential school, these created consequences like having a lesser ability to provide adequate and stable care for their children, which in turn was associated with increased likelihood of spending time in foster care.[399]

11. Proactive steps must be taken to resolve the historical disadvantage faced by First Nations children

332. The unique historical ramifications of the residential school era must be redressed, in part, through preventative and community-wide initiatives. Dr. Bombay explained as follows:

> 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

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[397] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 256, lines 1-6).
[398] Dr. Cindy Blackstock Examination in Chief, February 13, 2013 (Vol 1, pp 175-176, lines 17-25, 1-6).
[399] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 86-87, lines 15-25, 1).

> 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.
>
> 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.[400]

333. The call for greater preventive services in the First Nations child welfare sector is not a new one. As early as the 1967 Caldwell Report, preventative and community services were recognized as an essential tool in ensuring First Nations child welfare.[401]

334. In order to stem the tide of the historic disadvantage to which First Nations children have long been subjected, a robust, First Nations-centric child welfare system must be established. This need arises from the legacy of state programs that imposed hardship on First Nations children, as noted by Ms. Kennedy in her evidence:

> Well, we believe that it is the responsibility of our own people to provide service to our own people, and many of our children were still in the care of mainstream CAS' and there were, you know, real issues with respect to loss of cultural identity related to that ongoing situation, and the fact that, you know, many times children returned home as adults and, you know, presented with real issues with respect to who they were, where they came from; they didn't know that, they didn't know their language, they didn't know where they belonged.[402]

335. Dr. Blackstock also spoke to the rationale underlying First Nations-managed child welfare services, drawing a link to the historic disadvantage faced by First Nations children:

> I think it is important to remember why First Nations agencies became developed anyway. Of course, we have a long history of

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[400] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 84-85, lines 9-25, 1-16).
[401] George Caldwell (The Canadian Welfare Council), *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, January 31, 1967 (CBD, Vol 12, Tab 268, p 149).
[402] Elizabeth Ann Kennedy Examination in Chief, September 4, 2013 (Vol 24, pp 12-13, lines 20-25, 1-6).

> the Department's removal of children because they weren't properly cared for and their placement in residential schools, a history for which the Prime Minister has apologized in 2008. And on the heels of that was the amendment of the Indian Act in the 1950s to allow for the general laws of application of provincial child welfare to be delivered.
>
> So there is a span of about 20 years or more where the provinces were the sole child welfare delivery agents.
>
> And if we turn only to Justice Kimmelman's report in 1983 reviewing the whole process, at least in that province, he felt that the Sixties Scoop, which is the mass removal of children and their placement predominantly in non-aboriginal resources, both within Canada and the United States and abroad in Europe, amounted to something that -- he used the catch phrase -- he counted as "cultural genocide". So we had another wave of mass removals akin to the experience of residential schools.
>
> So the idea of starting these agencies was to better support families and communities in caring for their children, to stop the long history of governments of Canada, be they provincial or federal, placing themselves [...] between First Nations families and their children.[403]

336. However, a First Nations-managed child welfare system alone is not sufficient to address the historic disadvantage faced by First Nations children, and its accompanying greater needs. Proactive remedies, at the individual, family and the community levels are essential to achieving substantive equality. As Joan Glode, Executive Director of the Mi'kmaq Family and Children's Services noted in a research paper prepared for the Royal Commission on Aboriginal Peoples:

> The development of an agency is not a happy ending because it is neither happy nor an ending. In our fourth year of operation a flood of disclosures of family violence and child sexual abuse have begun to surface. Many of these happened years ago and were masked by misuse of alcohol and drugs, social and health problems and mental illness. New skills and knowledge are needed, but as a community we have learned that the process involves looking back to our values and traditions and outward to current therapy and

[403] Dr. Cindy Blackstock Examination in Chief, February 12, 2014 (Vol 48, pp 91-92, lines 4-25, 1-11).

practice.[404]

337. In her evidence, Dr. Bombay was clear that a failure to address the historic disadvantage imposed by residential schools will only perpetuate the same cycle of disadvantage that First Nations children have been trapped in since the beginning of the British North American 'civilising' project:

> 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.[405]

338. These intergenerational impacts continue to place First Nations children at risk, and render them more likely to be placed in care, contrary to section 5 of the *CHRA*. These impacts, and the proactive steps required to address them, must be considered in their context. As Dr. Blackstock observed:

> I think we have to be very cautious about this idea that everybody is kind of the same and -- Justice Frankfurter from the United States Supreme Court, I believe it was in 1955, in his ruling said there is no greater inequality than the equal treatment of unequals.
>
> What we have here is Aboriginal Affairs, from your own documents, underfunding these children on reserve significantly, creating [what] I believe one of the documents said, "a dire situation", in your own -- in the Department's own request for additional funding, saying even death could result if we don't provide this funding. That needs to be addressed. You bring those kids up to that standard and then you look at the outcomes.[406]

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[404] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 995), citing Joan Glode, quoted in Patricia E. Doyle-Bedwell, "Reclaiming Our Children: Mi'kmaq Family and Children Services", research study prepared for RCAP (1994).

[405] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 85-86, lines 17-25, 1-6).

[406] Dr. Cindy Blackstock Cross-examination, February 13, 2014 (Vol 49, p 76, lines 8-24).

339. In order for substantive equality to be achieved, the FNCFS Program must address and respond to the unique and great needs of First Nations children caused by residential schools. If it does not do so, the intergenerational cycle of discrimination that began with Canada's residential school program in the nineteenth century will continue. In the words of the Royal Commission on Aboriginal Peoples in its 1996 report:

> Healing the wounds of Aboriginal families is absolutely essential to achieving the rest of the Aboriginal agenda of self-reliance and self-determination. The family is the mediating structure, the bridge between the private world of the vulnerable child and the unfamiliar, too often hostile world of non-Aboriginal society.[407]

D. Evidence of discrimination: Failing to provide culturally appropriate services

> *I sometimes think when I look out into the universe about how tragic that is, that no one on earth will know this language anymore, that it has such powerful meaning and connotation that used to lift us up as people, lift us up as children even, to know how valued we were, to know that we as children then, as they are now, were the center of our universe.*[408]

340. The evidence before the Tribunal clearly details AANDC's failure to provide culturally-appropriate child and family services for First Nations children. By failing to ensure that FNCSFAs are able to provide culturally-appropriate services to First Nations' children, AANDC has failed to provide child welfare services that are substantively equal to those provided to non-First Nations children. The Caring Society submits that this constitutes a breach of section 5 of the *CHRA*.

12. Defining the Scope of Culturally-Appropriate Services

341. Given the profound multi-generational harms inflicted by the Respondent's Residential School program and other colonial undertakings on First Nations children and their families, it is critical that the Respondent take positive measures to restore and strengthen First Nations cultures, languages and child caring systems. As Chief Robert Joseph noted, "In order for our communities, our families and our youth to heal, they must benefit from a proper institutional support system. Such a support system must be crafted to address the unique challenges which

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[407] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 982).
[408] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, pp 7-8, lines 22-25, 1-4).

First Nations face in Canada. It must also reflect individual communities' visions of what proper childcare entails."[409]

342. FNCFSA's are in the best position to fulfill this mandate, both because of their understanding of local realities and because they have pre-established relationships with community leaders and with the First Nations children who benefit from child and family services. The development of culturally-appropriate services must therefore include the provision of adequate funding and support for FNCFSA's in any community wishing to participate in the FNCFS Program. Most importantly, childcare practices must be holistic and tailored to reflect traditional values. This can be accomplished by supporting initiatives such as the Touchstones of Hope program[410] to collectively identify visions of safe and healthy children within the distinct cultural and linguistic community to guide the design, operation and evaluation of service delivery. Other means of ensuring the FNCFS Program delivers more culturally-appropriate services include Elder's advisory committees, integrating cultural teachings into the administrative structures, encouraging customary care arrangements, customary adoptions, cultural camps, and family conferencing, as well as the involvement of extended family members in childcare decisions.

343. FNCFSA are a key instrument to implementing culturally appropriate services for First Nations children and families. As Dr. Blackstock observed in her evidence before the Tribunal:

> DR. BLACKSTOCK: […] From a community perspective, for First Nations agencies are -- we also have an accountability back to the communities, back to them to try and provide the most culturally based services that keeps families together in the way that would have made their ancestors of that distinct First Nations community proud and honoured.
>
> MR. DUFRESNE: And the First Nations child welfare agencies play a role in that, in the issue of culture?
>
> DR. BLACKSTOCK: They do, I mean, it's vitally important.

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[409] In keeping with its ongoing efforts to ensure the delivery of culturally-appropriate services, the Caring Society has a program called the Touchstones of hope, which works with First Nations communities, governments and other stakeholders to develop community based visions for the safety and well-being of children: Dr. Cindy Blackstock Examination in Chief, Feburary 25, 2013 (Vol 1, pp 101-102, lines 9-25, 1-3).

[410] Dr Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, p 107, lines 20-24, and p 107, lines 3-8).

> Otherwise what we can do is replicate the system with the provincial governments, where they have not been successful.[411]

344. As Ms. Steven's evidence makes clear, FNCFSA are living up to their end of the bargain:

> So you know, it's [culturally appropriate service delivery] not just rhetoric, it's not just words that this is what we do, we do it and we show [it] by how we live [and] this is the way we practice. We don't – we don't just make administrative bureaucratic decisions without going to ceremony first, we go to shake tent ceremonies or we go to the Elders or a drum ceremony and we ask, is this the direction we are moving in-, is it okay? [D]o we have the blessing of the elders and the spirits to move in the direction that ewe are going. So we take, you know culturally- appropriate services as being something very real, very tangible, and it has to be core to our organization. That's the difference of what culturally-appropriate services are to us.[412]

345. The right of Indigenous children to their culture and language is set out in Article 30 of the *Convention on the Rights of the Child*, and the United Nations Committee on the Rights of the Child commented on the benefit provided by FNCFSA in its 2003 report with regard to Canada, where it observed that it was "encouraged by the establishment of the First Nations Child and Family Service providing culturally sensitive services to Aboriginal children and families within their communities."[413]

346. Despite the Respondent's deference to First Nations expertise to define culturally appropriate,[414] the Respondent provides non-Aboriginal recipients higher levels of funding with fewer reporting requirements and more flexibility to provide child welfare services to First Nations children not served by a First Nations agency.[415] This creates a disincentive for culturally appropriate practice. This discriminatory conduct devalues First Nations expertise in defining culturally appropriate services and is akin to providing Anglophone school boards more money

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411 Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, p 119, lines 8-22).
412 Teresa Stevens Examination in Chief, September 5, 2013 (Vol 25, p 49-50, lines 16-25 and lines 1-6).
413 UN Committee on the Rights of the Chid, *Consideration of reports submitted by State parties under article 44 of the Convention – Concluding Observations: Canada*, October 27, 2003 (CBD, Vol 3, Tab 23, para 26).
414 Ms. Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, pp 114-116).
415 See for example Ms. Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, p 110, lines 1-17); Ms. Carol Schimanke Cross Examination, May 15, 2014 (Vol 62, p 54, lines 1-5); William McArthur Cross Examination, May 29, 2014 (Vol 64, pp 31-32 and 78-79).

for educating Francophone students than the presumptive experts in French education, Francophone school boards, would receive.

347. As Dr. Blackstock noted funding non-Aboriginal services recipients at a higher level places children in an untenable situation:

> MEMBER LUSTIG: So is there a set off there – perhaps an unhappy one, but a set off that, in the hands of the provincial agency, while not providing culturally based services you feel would more appropriate, they are providing more money, or are getting more money?
>
> DR. BLACKSTOCK: Well, the question is, why does that perplexing problem exist at all?...If my goals as a Department are , under EPFA or under the Directive, culturally appropriate services provided in a comparable manner, wouldn't I actually provide more money to the group that's able to provide culturally appropriate services in order to realize not only the statutory obligations under the Child and Family Services Act, which specifically identifies the right of indigenous children to their culture and grow up in their communities, but also in alignment with my own policy? I don't think children should be faced with the choice of having equality or having culturally representative services. If that is the trade-off in either view I feel that's adverse differentiation and it is certainly not in keeping with the spirit of the Prime Minister's Apology.[416]

348. Culturally appropriate First Nations child and family services require a holistic approach, which brings a need for sufficient funding. As the First Nations Child and Family Caring Society noted in its 2005 report *Wen: De The Journey Continues*

> Without funding for preventative and related services many children are not given the service they require or are unnecessarily removed from their homes and families. As indicated in the *Wen:de* report, in some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at

[416] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, pp 85-7).

> length the importance of healing and cultural revitalization. Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.[417]

13. AANDC's Failure to Provide and Support Culturally-Appropriate Services

349. In conjunction with providing reasonably comparable services to First Nations children and families, the primary objective of the FNCFS Program is to provide and support "culturally appropriate child and family services of Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child".[418] AANDC clearly recognizes that the provision of culturally-appropriate services are essential to fostering substantive equality for First Nations children served by the FNCFS Program.

350. Indeed, Canadian equality case law has embraced the principle that some groups must be treated differently to achieve formal equality. As Chief Justice McLachlin and Madam Justice Abella held for the Supreme Court of Canada in *Withler v Canada (Attorney General)*:

> [s]ubstantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the façade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.[419]

351. In this case, the social, political, economic and historical factors must be broad enough to capture the unique cultural needs of First Nations children and their families. In considering these unique needs, the Tribunal ought to interpret the *CHRA* in light of the Convention, article

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[417] *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 20).
[418] *National Program Manual*, May 2005 (CBD, Vol 3, Tab 29, p 5, sec 1.3.2).
[419] *Withler* supra note 90 at para 39 [emphasis added].

8(1) of which requires Canada to "undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[420] The importance of creating an environment that promotes a First Nations child's ability to develop his or her identity was also enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*, which recognizes "in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education, and well-being of their children, consistent with the rights of the child".[421]

352. Since at least 2000, AANDC has been aware of its failure to provide and support culturally appropriate services under the FNCFS Program. As discussed above, the NPR examined the FNCFS Program, and made a number of recommendations, including the following with respect to culturally-appropriate services;

> - [AANDC], Health Canada, the provinces/territories and First Nations agencies must give priority to clarifying jurisdiction and resourcing issues related to responsibility for programming and funding for children with complex needs, such as handicapped children and children with emotional and/or medical needs. Services provided to these children must incorporate the importance of cultural heritage and identity; and
> - [AANDC] and First Nations need to identify capital requirements for FNCFS agencies with a goal to develop a creative approach to finance First Nation child and family facilities that will enhance holistic service delivery at the community level.[422]

353. The NPR also recommended "that First Nations CFS Programs should be based on First Nations values, customs, traditions, culture and governance".[423] As discussed above, the NPR recommendations were never implemented.

354. The Wen:de Report also found that Canada's FNCFS Program did not support culturally appropriate services. For example, 83.4% of the FNCFSA involved in the Wen:de Report research indicated that the funds provided under Directive 20-1 were not adequate to ensure culturally-

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[420] *Convention on the Rights of the Child* supra note 183, art 8(1).
[421] *Declaration on the Rights of Indigenous Peoples* supra note 35, preamble.
[422] NPR, June 2000 (Vol 1, Tab 3, pp 120-121).
[423] NPR, June 2000 (Vol 1, Tab 3, p 122).

appropriate services.[424] Indeed, these FNCFSA indicated a "clear and critical need for upgrading of funding to support culturally based standards and practice in First Nations child and family service agencies".[425] As the Caring Society noted in *Wen:de* We are Coming to the Light of Day:

> [t]he formula does reimburse for services once a child is removed from the family home. This means that, in practice, there are more resources available to children who are removed from their homes than for children to stay safely in their homes. Focus group participants echoed this finding and urged strategic and sustained investments in prevention services which would provide families the best opportunity to have their children remain safely in their homes. These services, however, must be reflective of local culture and context and also consider the broader structural risks that impact on child safety such as community poverty, lack of infrastructure and inadequate or overcrowded housing [emphasis in original].[426]

355. In 2008, the Auditor General identified a number of serious concerns with the FNCFS Program, including the shortcomings of its failure to provide culturally-appropriate services. Moreover, as the Auditor General noted in her 2008 report:

> [t]he formula is not adapted to small agencies. Consistent with the federal policy, the funding formula was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. This was considered the minimum client base an agency could have and still provide services economically and effectively, although exceptions could be made.[427]

356. In her 2011 follow-up report, the Auditor General recalled that:

> In 2008, we audited INAC's program for child and family services on reserves. We found that INAC had not defined key policy requirements related to culturally appropriate child and family services and comparability of services with those provided by provinces. Moreover, the Department had no assurance that its First Nations Child and Family Services Program funded child welfare services that were culturally appropriate or reasonably

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[424] *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 38).
[425] *Ibid* (CBD, Vol 1, Tab 5, p 38); see also AANDC, *Canada's New Government, Treaty 6, Treaty 7 and Treaty 8 First Nations and Alberta Embark on New Approach to Child Welfare on Reserve*, April 27, 2007 (CBD, Vol 9, Tab 170, p 1).
[426] *Wen:de Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 19).
[427] OAG Report 2008 (CBD, Vol 3, Tab 11, p 21, sec 4.55).

> comparable with those normally provided off reserves in similar situations.[428]

357. As Dr. Blackstock summarized in her evidence, the lack of culturally appropriate First Nations child and family services is a perennial issue, which has faced Canada for many years:

> [The EPFA] was -- as you mentioned in your comments, Mr. Tarlton, was implemented in Alberta in 2007.
>
> The Auditor General reviews it in 2008 and finds it to be -- in paragraph 4.64, to be an improvement on the Directive but to incorporate some of the fundamental flaws of the Directive and finds it to be flawed and inequitable.
>
> The Auditor General -- then the Standing Committee on Public Accounts takes a further look and finds that those problems still remain.
>
> The Auditor General takes a look in 2011 and says that this is -- there is unsatisfactory progress on the issue of comparability in cultural programs.
>
> The Standing Committee on Public Accounts takes another look at that and agrees with those findings.
>
> And then the United Nations Committee on the Rights of the Child finds that there has been unsatisfactory progress towards the implementation of an Auditor General's report.
>
> If we were looking at something like -- that's static, that's not as critical as child development – we've been at this, as you quite rightly said, you know, just my own personal involvement, we've been trying to get the children to a place of culturally based equity, at least on the Directive, since my early involvement in 1997.[429]

358. Individuals who work on the ground with present-day First Nations children and families have echoed the view that Canada's First Nations child and family services are not culturally appropriate. Ms. Kennedy's evidence before the Tribunal is representative of the perceptions of many front-line workers:

> MS. KENNEDY: Well, I mean, the bottom line is we keep losing our

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[428] OAG Report 2011 (CBD, Vol 5, Tab 53, p 23).
[429] Dr. Cindy Blackstock Cross-examination, March 1, 2013 (Vol 5, pp 84-85, lines 15-25, 1-21).

> kids to a system that can't meet their needs [...] -- and so we feel that it is imperative that we retain the right to care for our own children, whether it is in care or out of care.
>
> MR. POULIN: Why do you think that -- why is it felt that the system cannot meet their needs? [...]
>
> MS. KENNEDY: Well, you know, one of the main reasons is the fact that they don't provide services in a culturally appropriate way.
>
> You know, our children lose their relationship to their communities in many cases, to their language, you know, to the whole culture and, you know, resulting in that whole loss of cultural identity.[430]

359. In her examination-in-chief, Ms. Stevens echoed the concerns raised by Ms. Kennedy and provided an summary of the challenges facing First Nations children and families who are engaged in the child and family services sector:

> I would also say that <u>because of mainstream service providers not necessarily being able to operate of offer services in a culturally appropriate way, that their services aren't necessarily accessible to the need that's out there</u>, and I would say that the First Nations service providers on Reserve are underfunded and under resourced and the volume of need that's out there that they don't have you know, the bodies and the manpower and the resources to be able to provide services to the level of need.[431]

360. AANDC's failure to provide child and family services to First Nations communities on a basis of substantive equality appears more egregious in light of the reality, acknowledged by Mr. McArthur under cross-examination that provincial agencies, which are not tailored to provide culturally-appropriate services to First Nations communities, receive more funding than FNCFSA.[432]

361. In spite of the crucial importance of delegated FNCFSA's, Canada's limiting the provision of culturally appropriate services to circumstances where delegation is possible leaves a number of communities unserved. As Dr. Blackstock noted in her evidence before the Tribunal:

> [...] the Department does not provide funding for communities that

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[430] Elizabeth Ann Kennedy Examination in Chief, September 4, 2013 (Vol 24, p 21, lines 1-22).
[431] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 26, pp 42-43, lines 19-25, 1-4) [emphasis added].
[432] William McArthur Cross-examination, May 29, 2014 (Vol 64, pp 101-103, lines 22-25, 1-25, 1-14).

> have less than 250 First Nations children in care, except in a couple of circumstances, and there are occasions, for a variety of reasons, a First Nations may not want to establish an agency.
>
> But it's still clear that First Nations children on reserve in those circumstances require culturally based services, and although it's acknowledged that an agency may not be the mechanism to do that, there should be some funds available for those communities to do things like foster home recruitment, make cultural support services, to help those communities participate in a more active way in the lives and plans of care of children who are removed from their communities or families, who are going through difficult circumstances and are having contact with a local child protection authority.[433]

362. Dr. Blackstock's evidence on this point is not conjectural. She also stated that:

> What is not clear is that there is actual -- that INAC said this to the Standing Committee on Public Accounts, too. They said that, really, they were going to leave it up to the First Nations to determine what is culturally appropriate.
>
> What's not clear is if there's any funding for First Nations to actually implement their views of what's culturally appropriate.
>
> I've not seen any documents that suggest that there's actual funding beyond that's targeted. So, that if I, as a First Nations, say that this specific element is culturally appropriate for us, that there's actual funding tied to that. I have not seen that.[434]

363. Moreover, AANDC's failure to provide First Nations children with culturally appropriate child and family services is discriminatory, not only due to the fact that it perpetuates the historic disadvantage imposed by residential schools, but also as it is based on the arbitrary assumption that First Nations children can be assisted by the same types of services that meet the needs of non-Aboriginal children, which simply is not the case.

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[433] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 194-195, lines 12-25, 1-5).
[434] Dr. Cindy Blackstock Examination in Chief, February 27, 2013 (Vol 3, pp 103-104, lines 18-25, 1-7).

14. The Impact of AANDC's Failure to Provide Culturally-Appropriate Services

364. AANDC's failure to provide and support culturally-appropriate services for First Nations children served by the FNCFS Program has and continues to have an adverse and detrimental impact.

365. The consequences of failing to provide culturally appropriate services to First Nations children in care ought to be obvious, as they reflect those which occurred in residential schools. In his evidence, Dr. Milloy reflected on the failure of residential schools to provide culturally appropriate education:

> If you keep on that track, if you do not produce a curriculum that meets the needs and experiences and beliefs of the children and their communities, the educators are saying, you're going to get the same results as you always got, right?
>
> What did Einstein say? Stupidity is doing the same thing over and over again and expecting a different result and that's what they're doing. They're doing the same thing over and over again, not changing and they will get the same result in terms of under-achievements, yes.[435]

366. The reality is that without culturally-appropriate services, more First Nations children are removed from their homes, families and communities. This dislocation disrupts and often severs a child's connection with their culture, identity, language, and ultimately, their sense of self. As the Royal Commission on Aboriginal Peoples noted in its 1996 report:

> The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart. Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy.[436]

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[435] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 190-191, lines 17-25, 1-3).
[436] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 986), citing Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development in association with James Lorimer & Company, 1983) at 60-61.

367. This dislocation was discussed by Dr. Bombay, who in her evidence before the Tribunal provided the following recounting of the experience of one of her research participants:

> My mother was taught to be ashamed of her Aboriginal identity. This caused her to struggle for some sense of belonging… She even talked down about Aboriginal people, because of their misfortunes. As a kid, I remember being ashamed when my mother came to school, because I was often called names such as wagon-burner and savage… Today, I am so ashamed of the shame I experienced a child, and I'm so angry that my parents never taught me to be proud of who I was.[437]

368. The thought that the only way for certain First Nations children to obtain services is to be taken into care outside of the community is particularly disturbing, as it pits quality of service against the cultural appropriateness of that service. These two items are linked. Dr. Blackstock explained the conundrum when she was re-called by the Commission:

> So kids are really in a Catch-22: You either get culturally-based services from a First Nations agency to a lesser level and standard […] or you get services from the province that might be at a higher level of service, but they are not going to be culturally-appropriate and represent who you are.
>
> And of course, a directive requires both of the federal government. They are supposed to be culturally-based and comparable according to its own authorities.[438]

369. Ms. Stevens in her evidence described the impact of not providing culturally appropriate services:

> It also has to do with the issue of cultural safety. So even though they might have accessibility and maybe even ability to get into town to receive those services, whether it's those services are received or interpreted to them as being culturally safe.
>
> So they have to come off of their Reserve, into an urban centre that may or may not be foreign to them, may or may not be their first language, go to a strange building with a cultural group that may not be of their own cultural group, be intake in the manner that's foreign to them, so they might have to do a telephone intake, be

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[437] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 164-165, lines 18-25, 1-9).
[438] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 170 lines 9-19).

> assessed by tools which may or may not be culturally appropriate, and then again see a counsellor who may or may not be from their cultural group or be able to relate to them in a culturally safe manner.
>
> So, you know, it's debatable whether people who want to receive or access those services when they aren't culturally safe.[439]

370. Giving non-culturally-appropriate service providers greater funding than culturally-appropriate service providers is a self-defeating exercise, particularly as it disregards the expertise and capacity that can be developed on the part of a culturally-appropriate service-provider like a FNCFSA. Indeed, much as section 23 of the *Charter* has ensured that "French as a first language" education has been entrusted to minority French-language school boards, the promise of substantive equality enshrined in section 5 of the quasi-constitutional *CHRA* ought to privilege the provision of First Nations child and family services by FNCFSA.

15. The FNCFS Program Must Provide Culturally-Appropriate Services

371. Entrenching a system that is not substantively equal due to its failure to recognize the unique needs of the individuals it serves infringes the *CHRA* by as such a system cannot reflect the actual needs, capacities, and circumstances of First Nations children and families. The FNCFS Program must provide and support culturally-appropriate services.

372. In order to provide culturally appropriate child and family services to First Nations communities, AANDC must not only ensure that all First Nations children are reached (as opposed to only those in a jurisdiction with a FNCFSA), but must also ensure that First Nations child and family services are addressed to all stages at which a First Nations child requires assistance. In the First Nations context, there is an essential link between home and culture, and anything that puts the child's ability to remain in the home in question jeopardizes the cultural appropriateness of services.

373. As the Royal Commission on Aboriginal Peoples noted in its 1996 report, First Nations families are a key component of improving outcomes for First Nations children:

> We begin our discussion of social policy with a focus on the family

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[439] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 25, pp 64-65, lines 8-25, 1-3).

> because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life.[440]

374. Mr. Digby provided a clear vision of what is required in order to truly provide culturally relevant services that follow a child throughout his or her interaction with the child and family services sector:

> […] it's important whenever an aboriginal child comes into care that a determination would be made, do they have a link to a First Nations community, and that that First Nations community would be notified and then that First Nations community would be a party to any proceedings with respect for the placement of the child in care, and very much encouraging that close relationship between societies and First Nation communities.[441]

375. This pro-active tendency when First Nations are truly involved was echoed by Mr. Dubois:

> […] social work in Indian country is different, we are more – we want to be more proactive. Like I said, historically our families have been ripped apart by the church, by state and we want to change that, we want to heal. You know, like prison systems are not working for us so we want to design our own systems.[442]

376. As Ms. Stevens noted in her evidence, a holistic approach is required in order to address this issue:

> I think we all share that responsibility. I believe the government, because of their own promises, or obligations that they have made themselves through agreements, so under '65, that they have made a commitment to ensure that there are culturally appropriate

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[440] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 966).
[441] Phil Digby Cross-Examination, May 8, 2014 (Vol 60, p 85, lines 13-22).
[442] Derald Richard Dubois Examination in Chief, April 8, 2013 (Vol 9, p 64, lines 6-13).

> services available to First Nations people.
>
> I know our Elders and our leaders have a responsibility to ensure that and they take that responsibility very seriously. And then, as service providers or a social workers, you know, ethically, morally, I feel obligated that I am not just an Executive Director of a Children's Aid Society, I have spiritual responsibilities.[443]

377. With respect to the issue of small agencies and small communities, the solution ought not to involve "mixing and matching" between communities of comparable size. As Dr. Blackstock noted in her evidence, "it would be very difficult for one community, say the Coast Salish, to deliver culturally relevant services to the community in the interior because they will often speak very different languages, they will have very different social structures." [444]

378. Indeed, the solution will likely involve engaging the provinces' child welfare system. As Elder Joseph noted during his evidence:

> I know that ministries that aren't Aboriginal are going to be taking our kids and, at a minimum, we should be demanding some kind of cultural competency level for those outside people who don't understand culture and history, they should be provided a level of orientation, education that allows them to respond in the very best ways that they can. I don't think we can rebuild Aboriginal families without that.[445]

379. Finally, provincial legislation that FNCFSA are required to follow pursuant to the FNCFS Program must be considered. Indeed, Provincial child and family services legislation, policies and directives have typically been enacted without consulting First Nations and without considering the differential impacts of certain rules on First Nations. This is even true of recent amendments.[446] Thus, provincial legislation, policies and directives cannot be said to be fully responsive to the specific needs of First Nations children.

380. In certain provinces, child and family services legislation requires that notice be given to a First Nation where one of its children is apprehended; it also provides for placement preferences

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[443] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 25, pp 48-49, lines 19-25, 1-7).
[444] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 47, lines 1-6).
[445] Chief Robert Joseph Examination in Chief, January 13 2014 (Vol 42, p 94, lines 13-22).
[446] C Guay and S Grammond, "À l'écoute des peuples autochtones? Le processus d'adoption de la Loi 125" (2010) 23:1 Nouvelles pratiques sociales 99 at 108.

aimed at keeping a child within his or her community.[447] However, the legislation of other provinces is silent on the issue.[448] Even where the legislation contains specific directives aimed at improving its cultural appropriateness, these provisions are often disregarded by the courts.[449]

381. In contrast, certain recent self-government regimes empower First Nations to enact their own legislation with respect to child welfare.[450] The only limitation is that the legislation's guiding principle must be the best interests of the child.[451] This gives First Nations a wider latitude to adapt child and family services legislation to First Nations cultural needs.

382. While the First Nations' subjection to provincial child and family services legislation may be inevitable pending the full realization of self-government in this field, a blanket rule that forbids adaptations that would enhance the compatibility of the legislation with First Nations' needs, circumstances and culture is discriminatory. Indeed, a rule that forbids accommodations that are required in order to achieve substantive equality is, in and of itself, discriminatory.

383. As discussed above, and as made clear by the Supreme Court in *Withler*, substantive equality requires the consideration and a "full account of social, political, economic and historical factors concerning the group".[452] First Nations children face a multitude of unique social, political, economic and historical factors that must be redressed, in part, through culturally-appropriate services. AANDC recognizes this essential issue, as reflected in its own policy under the FNCFS Program. Failure to implement and provide culturally-appropriate services, as AANDC has acknowledged it ought to, is discriminatory under s. 5 of the *CHRA* as this failure serves to continue the history of marginalizing and prejudicing First Nations children.

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[447] See for example the Ontario *Child and Family Services Act*, RSO 1990, c C.11, ss 37(4), 57(5).
[448] See for example the Quebec *Youth Protection Act*, CQLR c P-34.1, s 2.4(5º), which merely provides that the Act must be applied having regard to the characteristics of aboriginal communities.
[449] Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children* (Farnham (UK): Ashgate, 2012) at 103-107; see for example *H (D) v M (H)*, 1998 CanLII 4431 (BC CA), 156 DLR (4th) 548 (BCCA), rev'd [1999] 1 S.C.R. 328; *Directeur de la protection de la jeunesse c JK*, 2004 CanLII 60131 (QC CA), [2004] 2 CNLR 68.
[450] *Nisga'a Final Agreement Act*, RSBC 1999, c 2, ch 11, ss. 89-93; *Yukon First Nations Self-Government Act*, SC 1994, c 35, Sch. III, Part II, ss. 6-7.
[451] *Nisga'a Final Agreement*, RSBC 1999, c 2, ch 11, s 96.
[452] *Withler* supra note 90 at para 39.

16. AANDC has failed to Justify its failure to provide culturally-appropriate First Nations child and family services

384. AANDC has attempted to explain its failure to provide culturally-appropriate First Nations child and family services as an attempt to receive adequate input from First Nations communities with regard to what would be required for services to be culturally appropriate. Indeed, Ms. D'Amico's evidence was that AANDC was looking

> to ensure that the leadership in the community is in agreement with the objectives of the Agency. So this becomes to the cultural appropriateness piece. We want to make sure that whatever services are being delivered on reserve are services that are respectful of the community.[453]

385. Ms. D'Amico's explanation for AANDC's failure to act has been echoed at the highest levels of AANDC. As the House of Commons Standing Committee on Public Accounts recounted in its 2009 report:

> [w]hen asked whether the Department had defined "culturally appropriate services," the Deputy Minister somewhat flippantly replied, "Culturally appropriate services are not really something that I, as a white bureaucrat in Ottawa, can define for a First Nations agency operating in a particular community."[454]

386. The Public Accounts Committee's response to such an excuse is to-the-point, and bears repeating:

> The Committee was not expecting the Deputy Minister to provide the definition, but instead he should have had a clear grasp of what progress the Department has made in working with its partners to develop a definition, especially as the Department's response to the OAG's recommendation states, "Definitions of culturally appropriate services will be developed through discussions with the various First Nations based upon community circumstances, and are targeted for completion in 2012."[455]

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[453] Barbara D'Amico Examination in Chief, March 17, 2014 (Vol 50, p 149, lines 12-22).
[454] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, p 6).
[455] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 6-7).

387. However, there has been a failure to provide adequate implementation support. As Dr. Blackstock noted in her evidence before the Tribunal:

> […] in some regions, there was a one-time provision, like, a grant, like, a project almost given by the Department for collective standards to be developed but many communities wanted to develop their own standards instead of having to use the provincial ones and they had no staff to do this.
>
> So, this was about let's make funds available so culturally-based standards that take into account the needs of kids in that community can be provided for.[456]

388. This failure to implement standards was identified in the *Wen:De* report in 2005:

> Culturally based practice pivots on culturally based operational and practice standards. Therefore, having child welfare standards that meet the needs of the clients is of utmost importance to the First Nations child and family agencies. However, there is minimal funding to develop and maintain culturally appropriate child welfare standards. The child welfare standards utilized by First Nation agencies across Canada are very diverse, as are the communities they serve. This diversity requires the development and maintenance of standards that are appropriate and applicable to the people each agency serves. This request applies not only to First Nations agencies serving First Nations but also to First Nations communities being served by non-First Nations agencies.
>
> The development of standards for First Nation's agencies is critical to the delivery of culturally based services. As one is required to follow the other, financial support is mandatory to adequately meet the needs of the First Nation's clients. The development of culturally based standards by First Nation's agencies particular to their clientele can contribute to the overall impact and success of the agency, children and families.[457]

389. Even where there has been some measure of implementation of culturally-sensitive services for First Nations children and families, there remain a number of hoops for FNCFSA to jump through. As Ms. D'Amico observed under cross-examination:

> MR. CHAMP: You indicated in your first testimony that the First

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[456] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 54, lines 10-20).
[457] *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 30).

Nations Agencies themselves determine what is culturally-appropriate services and that's why you don't come up with the definition.

MS. D'AMICO: That's right. […]

MR. CHAMP: If an Agency determines that a culturally-appropriate -- they would say here is a culturally-appropriate service from our perspective --

MS. D'AMICO: M'hmm.

MR. CHAMP: -- if that falls under a category for the government that is an ineligible expense, is it fair to say that the Agency can't get funding for it?

MS. D'AMICO: They would get funding from a different source.

MR. CHAMP: So in short, AANDC -- or the program will not necessarily fund what an Agency describes or defines -- or identifies, pardon me, as a culturally-appropriate service?

MS. D'AMICO: The First Nation Child and Family Services Program has Terms and Conditions. AANDC has other programs so, for example, you didn't give me an example of culturally-appropriate.

MR. CHAMP: Yes, that's what I was going to go to next.

MS. D'AMICO: But a culturally-appropriate service could be education-type something because it's specific to that child. So maybe it's their cultural learning for that child or that family to support them.

If it would fall under education, we would tell the Agency, go to education, to that pot, and use that money.

MR. CHAMP: Yes.

MS. D'AMICO: If it doesn't fall under education, then we would pay for it. So where another program doesn't cover it, then we would pay for it.[458]

[458] Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, pp 114-116).

390. Indeed, this demonstrates that where First Nations communities jump through the hoops laid out by AANDC, culturally-appropriate services can be available, under the right conditions. This availability speaks to the fact that AANDC's financial circumstances do not render the provision of culturally-appropriate services impossible.

391. In any event, the provision of culturally-appropriate services through FNCFSA appears to be a fiscally feasible course for Canada. As AANDC has noted in an internal Q & A document, obtained by Dr. Blackstock through an Access to Information request, and which Dr. Blackstock spoke to during her evidence:

> If First Nations child and family service agencies were to withdraw service delivery as a result of inadequate funding, consequences could be severe. Pursuant to an 18-month long review involving the Province of Alberta, INAC and one First Nations agency, it was determined that expenses would likely double if the province were to assume responsibility for service delivery. In addition, escalating child welfare costs for INAC culturally appropriate services would be compromised.[459]

E. Evidence of discrimination: Failing to implement Jordan's Principle

392. Canada's failure to fully implement Jordan's Principle amounts to *prima facie* discrimination under s. 5 of the *CHRA*. Indeed, First Nations children are denied basic public services or experience detrimental delay in receiving such services for no reason other than their status as First Nations peoples.

393. Jordan's Principle is a child first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province / territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government / department after the child has received the service.

394. Jordan's Principle was conceived of as a means to prevent First Nations children from being denied essential public services, or experiencing delays in receiving them, as a result of

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[459] AANDC, *First Nations Child and Family Services (FNCFS) Q's and A's* (CBD, Vol 6, Tab 64, p 6); Dr. Cindy Blackstock Examination in Chief (Vol 3, p 34, lines 3-21).

jurisdictional disputes, and is a procedural mechanism by which First Nations children living on reserve can exercise and vindicate their rights to substantive equality. Jordan's Principle is built upon the fundamental premise that all children, including First Nations children living on reserve, are entitled to be equal before and under the law and are fully entitled to the protections and benefits of the rights and freedoms afforded in our democratic society.

395. Although Jordan's Principle was unanimously adopted by the House of Commons[460], and is meant to include basic public services available to all Canadian children, the federal government has narrowly restricted the principle to apply only to situations that involve a "dispute" between government and to First Nations children with complex medical needs and/or multiple disabilities. Indeed, its formulation is so narrow that by AANDC's own reckoning, not a single true Jordan's Principle case has ever been brought forward.

396. To ensure that First Nations children in the child welfare system are not discriminated against by Canada's delay in providing services readily available to other children, or indeed the outright denial of such services, the Caring Society submits that this Tribunal must supplement a remedy relating to the funding formula with a remedy giving full effect to Jordan's principle for First Nation child and family services.

17. Background

397. Jordan's Principle is a child-first principle. It is named for Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had medical conditions that necessitated his stay in a Winnipeg hospital for the first two years of his life. Shortly after his second birthday in 2001, Jordan's doctor told his family that he could leave the hospital and live with a specialized foster family close to the medical facilities in Winnipeg. Jordan never saw this family home. For the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's home care. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in a hospital.

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[460] *Vote No 27*, 39th Parl, 2nd Sess, Sitting No 36, Wednesday, December 12, 2007 (CBD, Vol 3, Tab 20, p 15).

398. Jordan's story is indicative of a wide-scale problem that was identified by UNICEF in the spring of 2005[461] and during the research and publication of the Wen:de Report. The report explained the problem as follows:

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children (McDonald, 2005; Lavalee, 2005). Survey results in Phases 2 and Phase 3 indicate that the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.[462]

399. In memory of Jordan and in an attempt to ensure that all First Nations children have equitable access to public services, in March 2007, Ms. Jean Crowder, Member of Parliament for Nanaimo-Cowichan, introduced a motion regarding Jordan's Principle before the House of Commons. Motion no. 296, which was approved on December 12, 2007 with 262 votes in favour, and none opposed, stated:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.[463]

400. In introducing the motion, Ms. Crowder specifically cited the finding of the *Wen:de* report that of the jurisdictional disputes over the costs of caring for First Nations children, "[t]he vast majority of those disputes were between two federal government departments or between the federal government and the provincial-territorial government."[464] The debates on the motion demonstrate that there was no suggestion that Jordan's Principle should only apply when the disputing government entities are from different levels of government, federal and provincial, nor was any rational basis for such a narrow reading of the Principle advanced. Equally, the

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[461] Dr. Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, pp 219-220, lines 4-7).
[462] *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 16).
[463] *Vote No 27*, 39th Parl, 2nd Sess, Sitting No 36, Wednesday, December 12, 2007 (CBD, Vol 3, Tab 20, p 15).
[464] Hansard, 39th Parl, 2nd Sess, No 12, October 31, 2007 (CBD, Vol 3, Tab 20, p 3).

motion was framed broadly in terms of services needed by children, without a narrow emphasis on children with multiple disabilities. The breadth of the vision for Jordan's Principle emerges from these extracts of the debates:

> Jordan's Principle proposes a direct approach to ensuring that First Nations children get the care they need. By putting the needs of children first, it advances a straightforward solution which should ensure that services are delivered in a timely fashion.[465]
>
> Jordan's Principle calls on all government agencies to provide the services first and resolve the paperwork later. This government supports Jordan's Principle and is committed to making improvements in the lives of First Nations and Inuit children, women and families.[466]
>
> As we saw during the previous debate, the government must immediately adopt a child first principle for resolving jurisdictional disputes involving the care of First Nations children. This approach, known as Jordan's Principle, forces those involved to set aside any jurisdictional disagreements between two governments, two departments or organizations with respect to payment for services provided to First Nations children.
>
> In other words, when a problem arises in a community regarding a child, we must ensure that the necessary services are provided and only afterwards should we worry about who will foot the bill. Thus, the first government or department to receive a bill for services is responsible for paying, without disruption or delay.[467]

401. As Corinne Baggley, the Senior Policy Manager in the Children and Family Directorate of the Social Policy and Programs Branch at AADNC from 2007 to 2014, responsible for Jordan's Principle, testified before this Tribunal, the House of Commons motion placed the "prime responsibility"[468] for the implementation of Jordan's Principle on AANDC, as was reflected in the statement on the motion released by the Minister of AANDC and the Minister of Health.[469]

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[465] Hansard, 39th Parl, 1st Sess, No 157, May 18, 2007, Conservative Member of Parliament, Harold Albrecht.
[466] Hansard, 39th Parl, 2nd Sess, No 12, October 31, 2007, Conservative Member of Parliament, Steven Fletcher.
[467] Hansard, 39th Parl, 2nd Sess, No 31, December 5, 2007, Conservative Member of Parliament, Steven Blaney [emphasis added].
[468] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, pp 35-36, lines 21-25, 1-6).
[469] Hon. Chuck Strahl and Hon. Tony Clement, *Statement from the Federal Minister of Health and Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians regarding Motion 296, Jordan`s Principle*, December 12, 2007 (CBD, Vol 3, Tab 22, p 1).

Moreover, as noted by Justice Mandamin of the Federal Court in the case of *Pictou Landing Band Council v. Canada (Attorney General)*, the federal government "has undertaken to implement this important principle," and "took on the obligation espoused in Jordan's Principle." [470]

18. First Nations Children Are Denied Basic Services

402. The Tribunal heard extensive evidence that demonstrates that First Nations children continue to be denied basic public services after a significant and detrimental delay.

403. Indeed, this Tribunal heard how even relatively mundane yet necessary services have been denied to children in care.

> DR. BLACKSTOCK: I remember one child who required Ensure. He had a severe medical condition. And the government, federal government wouldn't pay for it because they said it didn't have -- it wasn't within the definitions that they have.
>
> And the province was saying, well, it's a federal responsibility. They should be paying for it. This is a child in care.
>
> And the child needed this to be able to eat. How long do you wait? How many phone calls do you make before you do what I did and that is personally go to the local store and buy the Ensure so the child can eat.[471]

404. Raymond Shingoose provided another example where his Agency was faced with the situation of a child who was ineligible for a needed wheelchair:

> MR. SHINGOOSE: [...] An example is we had to fundraise for a wheelchair for one of our paraplegic -- we have a child with cerebral palsy, but she wasn't eligible for a wheelchair under the INAC or the Health, so we had to do some fundraising, and they are very costly, but we -- the staff went out in the community and we raised the money.
>
> MS PENTNEY: And that child, was it a child in care?
>
> MR. SHINGOOSE: A child in care.
>
> MS PENTNEY: But providing them with a wheelchair was not --

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[470] *Pictou Landing* supra note 16 at paras 106, 111.
[471] Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, p 199-200, lines 18-25, 1-6).

> you weren't able to do so?
>
> MR. SHINGOOSE: No.
>
> MS PENTNEY: Why not? Were you ever given an explanation as to why that's not an eligible expense?
>
> MR. SHINGOOSE: We were told we had to approach Health Canada and we had to have -- I believe at that time I think it was a letter or a number of letters, I can't recall though, but of refusal. I think it was about three letters of refusal, but by that time the child would be grown up.
>
> It kind of takes -- the way the system is it takes about maybe six months to a year to receive a response from these entities.
>
> MS PENTNEY: So the Agency decided to fundraise
>
> MR. SHINGOOSE: Yes.
>
> [...]
>
> MS PENTNEY: And if they hadn't done so, what would've happened to that child?
>
> MR. SHINGOOSE: Well, the child would have went without.
>
> [...]
>
> MS PENTNEY: [...] And at the time of reconciliation, when the Agency is informed that an expense they have claimed is ineligible for reimbursement, what is the Agency's response?
>
> MR. SHINGOOSE: We swallow it. We just -- we just do what we can.[472]

405. In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition.[473]

> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that

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[472] Raymond Shingoose Examination in Chief, September 25, 2013 (Vol 31, pp 143-145, lines 2-25, 1-13, 2-7).
[473] AANDC, *Jordan's Principle Chart Documenting Cases*, October 6, 2013 (CBD, Vol 15, Tab 422, p 2).

correct?

MS BAGGLEY: Well, it said the summer of 2008.

MR. WUTTKE: Okay.

MS BAGGLEY: "Tomatoe / tomato".

MR. WUTTKE: Between half a year and three quarters of a year?

MS BAGGLEY: Yes, yes.

MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?

MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons.[474]

406. The evidence also demonstrated that finding information about how to access services under AANDC's formulation of Jordan's Principle can be challenging. For example, Ms. Baggley's testimony indicated that it would be very difficult to know how to access the process or find a focal point within the Department.[475] Moreover, Ms. Cope testified about her own difficulties in confirming funding for a disputed service.[476]

19. Jordan's Principle and child welfare

407. Jordan's Principle is relevant to First Nations child welfare in at least two ways. First, First Nations children are being denied child welfare services and related services due to jurisdictional disputes. Unless the current funding formulas can be replaced by one that itemizes the funding available for every conceivable need of a child that may arise (which may not be possible) there will inevitably arise situations where Canada and provincial governments and their relevant departments and ministries cannot immediately agree on who has the responsibility to fund a particular service for a child. This is a result of the unique apportionment of federal and provincial government responsibility for First Nations in our constitutional system.

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[474] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).
[475] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 30-32).
[476] Brenda Ann Cope Examination in Chief, September 23, 2013 (Vol 29, pp 161-162, lines 14-25, 1-15).

A proper implementation of Jordan's principle is needed in order to make sure that in such situations, the child's access to the service is never denied or delayed. The most equitable funding formula will not help a child if the funding it allows for is held back until government officials can decide amongst themselves whether it applies to the particular service.

408. The second connection between Jordan's Principle and First Nations child welfare stems from the unfortunate reality that some First Nations children continue to be placed in care, not because they are in need of protection, but because this is the only way for them to access needed services. This phenomenon was noted in the Auditor General's report.

> Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need.[477]

409. This phenomenon has also been noted by the Terms of Reference Officials Working Group of the Canada / Manitoba Joint Committee on Jordan's Principle, in its Preliminary Report[478], and by AANDC in a briefing note prepared by Betty-Ann Scott for Parliamentary Secretary Rod Bruinooge.[479] The former document explained that this was a problem that the Federal definition of Jordan's Principle could not adequately address, while the latter explained that:

> Limited progress has been made in support of Jordan's Principle and issues related to First Nations with disabilities, including children. These issues often fall outside of existing authorities and policies of both governments. Current practice results in the children being placed into care to receive services, even though the placements often do not involve child protection issues.[480]

410. The rationale for putting a child who is not in need of protection into care is that not only is more funding likely available off reserve, but there is no ambiguity over who has jurisdiction

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[477] OAG Report 2008 (CBD, Vol 3, Tab 11, p 17).
[478] TOROWG Preliminary Report, supra at note 17, (CBD, Vol 13, Tab 302, p 14).
[479] Betty-Ann Scott, *Briefing Note on Jordan's Principle and Children with Life Long Complex Medical Needs*, December 6, 2007 (CBD, Vol 14, Tab 380, p 2).
[480] Betty-Ann Scott, *Briefing Note on Jordan's Principle and Children with Life Long Complex Medical Needs*, December 6, 2007 (CBD, Vol 14, Tab 380, pp 2-3). See also Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 170, lines 1-9) and February 11, 2014 (Vol 47, pp 193-194, lines 18-25).

to provide needed services. This puts children and their families on the horns of an unacceptable dilemma, forced to choose between keeping the child in contact with community and culture, or leaving in order to access more equitable services. A full implementation of Jordan's Principle, under which jurisdictional confusion would never lead to a denial or delay in providing a service to a child on-reserve, is thus necessary to prevent children unnecessarily entering the child welfare system and being taken away from their families and communities simply in order to access needed services.

20. Canada's narrow interpretation of Jordan's Principle is discriminatory

411. Canada will only apply "Jordan's Principle" when two narrow and limiting categories exist: (i) when there is a jurisdictional dispute; and (ii) when the child in need has complicated medical needs. This restrictive and inequitable definition was developed without meaningful involvement of First Nations:

> MR. POULIN: -- so I couldn't find any references to discussions, to agencies, or even to First Nations at large.
>
> Am I right?
>
> MS BAGGLEY: At the time that we were developing the federal response, as I explained, it was a process that was internal to government and it involved the policy process that was secret and subject to Cabinet confidence.
>
> We had to seek the mandate to engage, and once we received that mandate we did engage with provinces, initially from Minister to Minister, but part of that engagement process did include First Nations where there was a willingness to do so, and an interest to do so.
>
> And you can see through some of the agreements that we have developed and some of the work that we have done, that we do have First Nations participating in some of those processes.
>
> MR. POULIN: But there is no First Nation -- my understanding is there is no First Nation agreement on the definition that is used by the federal government.
>
> MS BAGGLEY: Well, it's a federal definition, as I have explained, and we didn't go out seeking agreement with our definition, and we certainly do acknowledge in any documents that we develop

> through the agreements for example, if there are other definitions that the parties are working with, we do acknowledge and reference those.[481]

412. Thus, while First Nations who were "willing" and "interested" may have been engaged by AANDC, they were not asked to contribute to the development of the scope of Jordan's Principle nor was specific funding allocated to support their meaningful engagement. The extent of the "engagement" of First Nations by AANDC is unclear, since it seems that it was left to the provinces to communicate with First Nations:

> MR. WUTTKE: [...] And where there is no involvement or little involvement with First Nation communities in various jurisdictions, has the Department initiated a sort of call out asking them to engage in the Jordan's Principle process?
>
> MS BAGGLEY: There has been no national call out. Any efforts to engage First Nations are very much driven by the province that we're working in. So there has been no national call out on engagement, although we have engaged bilaterally with the Assembly of First Nations on Jordan's Principle where we have had -- I think I've been at two or three meetings where we have presented the Respondent's approach and outlined our implementation efforts at that point that we were at.[482]

413. When discussions with stakeholders did occur, Ms. Baggley would report on these discussions to senior management within AANDC.[483] She did not recall ever recommending in these reports that the Respondent's definition of Jordan's Principle should be modified,[484] nor did she have any reason to believe that Canada is contemplating changing the definition. Indeed, she suggested that Canada is not motivated to modify its approach to Jordan's principle:

> MEMBER LUSTIG: So the people that you report up to would, therefore, know that there was disagreement among various groups in the provinces and First Nations with the position that the federal government has taken, but you're not aware that anyone has reacted to that to change anything?
>
> MS BAGGLEY: Well, it's quite possible that that has

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[481] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 10-11, lines 18-25, 1-24) [emphasis added].
[482] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 109-110, lines 16-25, 1-6).
[483] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 121, lines 20-25).
[484] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 126, lines 4-14).

> happened and we're just not privy to those discussions that may happen between, say, our Deputy and the Minister. So those discussions could have occurred, but we wouldn't be part of those.
>
> But I think it has to be balanced against that, from, you know, if I were to stand in my Deputy Minister's shoes and look down, yes, there are challenges and issues, but we are still kind of carving a path forward. So they're seeking that we are making some progress at the same time that we're encountering challenges.
>
> […] So I think all along it's been more of a wait and see approach […][485]

414. The origins and justification for the narrow definition of Jordan's Principle that the Respondent eventually adopted are not clear. In a September 2008 presentation entitled "Social Policy and Programs," AANDC rooted its implementation of Jordan's Principle in the Parliamentary Motion of December 2007, and presented a proposed two-fold approach:

> 1. In the short-term, the concept of case conferencing has been presented as a mechanism to provide a focal point for multiple providers to coordinate and determine cost-sharing service plans for children with complex medical needs.
> 2. In the long term, INAC and Health Canada could use the results from the interim approach along with other research to undertake a comprehensive assessment of service gaps, roles and responsibilities, as well as costs of services. INAC and Health Canada could then develop a joint submission to Cabinet to address the gaps identified within federal responsibilities.[486]

The presentation also notes that a joint Health Canada and AANDC Ministerial letter had been sent to all provinces requesting input on the federal implementation of Jordan's Principle.

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[485] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 122-3, lines 14-25, 1-13).
[486] AANDC, *Social Policy and Programs – Working Together for a Better Future*, September 2008 (CBD, Vol 14, Tab 355, p 15).

415. Already at this stage, AANDC seems to have been narrowly focused on children with "complex medical needs", without any explanation for this deviation from the broad language of Motion no. 296. It is interesting to note, however, that the only service gaps specifically mentioned by AANDC are those *within* federal responsibilities, between AANDC and Health Canada.

416. The Ministerial letter received responses from a number of provinces and territories. A common thread in these responses was the provinces' "sincere hope that government and First Nations can reach a common understanding that will serve the interests of First Nations children today and for generations to come."[487] The response from British Columbia's Ministers of Health Services and of Children and Family Development stressed that:

> implementation of Jordan's Principle must include a full range of health and social services so that First Nations children will be provided the same care that all British Columbia children are entitled to, regardless of jurisdiction as contemplated by the House of Commons motion…[488]

417. Unfortunately, rather than seeking a "common understanding" with First Nations and the provinces on a broad, principled scoped for Jordan's Principle, Canada decided to advance a restricted definition. Canada's definition was framed in the following terms in a June 2011 presentation, used to brief senior management, Jordan's Principle regional focal points, and the provinces[489]:

> Our response focuses on:
>
> i. *Continuity of care* – care of the child will continue even if there is a dispute about responsibility
> ii. *Cases involving a jurisdictional dispute* – between a provincial government and the federal government

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[487] Hon. June Draude, Hon. Don McMorris and Hon. Donna Harpauer, *Letter to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle*, July 11, 2008 (CBD, Vol 14, Tab 364, p 2); see also BC, PEI and NWT Letters to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle (CBD, Vol 14, Tab 364, pp 5-12).
[488] Hon. Tom Christensen and Hon. George Abbott, *Letter to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle*, July 30, 2008 (CBD, Vol 14, Tab 364, pp 5-7) [emphasis added].
[489] Corrine Baggley, Examination in Chief, April 30, 2014 (Vol 57, p 18, lines 1-13).

iii. *First Nations children ordinarily resident on reserve with multiple disabilities* – assessed by health and social service professionals and require services from multiple providers

iv. *Comparable services* – a child ordinarily resident on reserve receives the same level of care as a child with similar needs living off reserve in a similar geographic location (normative standards of care)[490]

418. The notes accompanying this presentation acknowledge that "there are differing views regarding Jordan's Principle",[491] but, as discussed below, the Respondent was not open to re-evaluating its definition in spite of strenuous objections from the provinces and First Nations.

419. AANDC has been unresponsive to calls from the provinces and from First Nations to revise the narrow federal definition of Jordan's Principle. While federal-provincial agreements on the implementation of Jordan's Principle do acknowledge differences in the definitions and approaches to the Principle, the narrow federal definition will always ultimately determine whether Jordan's Principle applies, because the relevant federal and provincial Assistant Deputy Ministers both have to agree that the Principle is engaged in order for a payment to be made.[492]

420. As outlined in these submissions, in November 2009, the British Columbia Ministers of Children and Family Development, and Aboriginal Relations and Reconciliation, wrote to Minister of Indian Affairs and Northern Development Chuck Strahl. In addition to asking for the immediate implementation of the EPFA funding formula in BC, the Ministers asked that the Canada "implement Jordan's Principle based on the broad definition originally accepted by your government."[493] They explained that they were in full agreement with First Nations in seeking the "full implementation" of Jordan's Principle.[494] Minister Strahl responded two months later,

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[490] Health Canada, *Update on Jordan's Principle: The Federal Government Response*, June 2011 (RBA, R14, Tab 39, p 6).
[491] Health Canada, *Update on Jordan's Principle: The Federal Government Response*, June 2011 (RBA, R14, Tab 39, p 6).
[492] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 17, lines 11-19).
[493] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69, p 1).
[494] *Ibid* (CBD, Vol 6, Tab 69, p 1).

refusing the BC Ministers' request to meet, and reiterating the narrow federal response to Jordan's Principle.

421. British Columbia's concerns about the federal definition were reiterated by the Honourable Mary Polak, BC Minister of Child and Family Development, in her appearance before the Standing Committee on Aboriginal Affairs and Northern Development in February, 2011.

> Hon. Mary Polak: We were in fact the first province in Canada to adopt Jordan's Principle. We do have agreements with the federal government. There is right now, though, a very narrow definition, and I know these things are up for dialogue and discussion as we all grow and learn about them. But it's our feeling that the definition currently utilized is too narrow to really respond to the overall intent of Jordan's Principle. I think we also believe and have the confidence that it is the desire of the federal government, and it's certainly ours, to work together to effectively broaden that definition.
>
> Mr. Todd Russell: So right now it's just basically on the complex, multiple needs. Is that the definition you're using?
>
> Hon. Mary Polak: Not from our perspective, but of course we have to work in agreement with the federal government [...][495]

422. Minister Polak also explained that while there was a working agreement in place with the federal government, the narrow definition of Jordan's Principle remained a barrier to a formal agreement: "[t]he reason we have not reached the position where we have actually signed off on a formal agreement is the issue of the definition."[496]

423. Similar objections to the Respondent's definition, and invitations to discuss an implementation of Jordan's Principle more in line with the original House of Commons motion, have been voiced by First Nations groups.[497]

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[495] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 40th Parl, 3rd Sess, Sitting No 46, February 8, 2011 (CBD, Vol 13, Tab 276, p 10).

[496] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 40th Parliament, 3rd Session, Sitting No. 46, February 8, 2011 (CBD, Vol 13, Tab 276, p 14).

[497] See for example British Columbia First Nations Leadership Council, *Letter Regarding the Implementation Strategy for Jordan's Principle*, November 14, 2008 (CBD, Vol 14, Tab 378), which proposed a broader definition of Jordan's Principle for discussion.

21. Canada's failure to implement Jordan's Principle perpetuates discrimination

424. For First Nations children, Jordan's Principle is a means to attain the substantive equality that the *CHRA* functions to protect. As discussed above, Canada's constitutional architecture has given rise to a unique arrangement of overlapping responsibilities over First Nations individuals on reserves, shared between departments and ministries in two levels of government. The overarching purpose of Jordan's Principle is to prevent First Nations children from being denied prompt and equal access to benefits and services available to other Canadian children as a result of their Aboriginal status.

425. Where jurisdictional disputes lead to the delay or denial of services for First Nations children, this amounts to discrimination on the prohibited ground of race and national or ethnic origin, in violation of s. 5 of the *Act*. This discrimination, which is independent of the discrimination caused by underfunding of child and family services, can only be prevented by full implementation of Jordan's Principle such that the Principle applies to any jurisdictional dispute over any service.

426. The Respondent's implementation of Jordan's Principle, in failing to meet this standard, is *prima facie* discriminatory. The Respondent's definition of the Principle is too narrow, in that it fails to address jurisdictional disputes between departments or agencies of the federal government, and only applies to children with multiple disabilities. The *CHRA* does not limit the right to freedom from discrimination to only individuals with complex medical needs and multiple disabilities. All individuals have to the right to freedom from discrimination. Likewise, all First Nations children, not just those with complex medical needs and multiple disabilities, should be covered by Jordan's Principle.

427. Canada has provided no evidence or argument to demonstrate either that there is a rational justification for its narrow definition of Jordan's Principle, or that further accommodating First Nations children by applying the Principle to all jurisdictional disputes would cause Canada undue hardship.[498] Canada's case conferencing approach for cases falling outside its definition of Jordan's Principle is an insufficient response that does not address the discriminatory effects

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[498] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at para 54 [*Meiorin*].

of its implementation of the Principle. Further, the flow of information about the initiative to the families and FCNFSA affected by it has not allowed it to take full effect even within the limited scope provided for by Canada.

22. The Respondent's Implementation of Jordan's Principle Significantly Delays Service Delivery

428. The first fundamental flaw with Canada's definition of Jordan's Principle, even before considering all those whom it excludes, is that it has a perverse effect on process. The entire purpose of Jordan's Principle is to ensure that when a child is in need of a service, funding is provided first, and inter-governmental discussions on recovering the cost from the appropriate department or ministry happens second.

429. In Canada's incarnation of Jordan's Principle, however, AANDC first undertakes an evaluation process to determine whether the child's needs meet Canada's arbitrary eligibility requirements. Delay is therefore inherently part of the process – the very delay which Jordan's Principle is meant to redress. As Ms. Baggley explained, in the context of the Joint Statement on the Implementation of Jordan's Principle in New Brunswick[499], the service a child needs will not be funded until it is determined, through case conferencing, that the federal definition of Jordan's Principle is met:

> MS ARSENAULT: And are only formal Jordan's Principle cases brought forward to these case conferencing?
>
> MS BAGGLEY: No, no. We encounter a whole range of cases. In order for us to respond to them or address them they don't have to meet the federal definition. And so, all cases are looked at, it's just that it reaches a certain point if it becomes clear that there is a disputed service between the federal and provincial government, then as per our definition we are committed to making sure that we fund the service in question and then work with the provincial government to figure out the process and the ultimate responsibility at the end of the day.[500]

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[499] First Nations' Chiefs in New-Brunswick, Government of New-Brunswick and Government of Canada, *Joint Statement on the Implementation of Jordan's Principle in New-Brunswick*, December 2011 (Respondent's BOD [RBD], R14, Tab 46).

[500] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, p 43, lines 8-23) [emphasis added].

430. In some cases, the service a child needs will fall into a service gap between two federal departments, and so funding is not released. In other cases, such as the situation at issue in the *Pictou Landing* decision, the Canadian and provincial governments may decide there is no disputed service between them based on an erroneous understanding of the normative standard of care. Both of these situations are addressed below; but it is crucial to emphasize at the outset that *even in cases that end up being accepted as true Jordan's Principle cases* under Canada's definition, the spirit of the Principle is not observed, because a child must wait for officials to "check the boxes" of Canada's definition before the service he or she needs is funded. This delay does not exist for other children in Canada. As such, the Caring Society submits that manner in which Canada is currently implementing Jordan's Principle causes First Nations children to experience discrimination on the basis of their race and national or ethnic origin.

23. Canada's definition of "dispute" violates Jordan's Principle

431. Canada's view is that only disputes between governments (as opposed to interdepartmental disputes) will qualify under Jordan's Principle. This arbitrary criteria not only violates Jordan's Principle but it serves to deny many First Nations children equitable access to services available to other Canadian children.

432. The evidence gathered in the *Wen:de* reports demonstrates that jurisdictional disputes between departments impair access to services for First Nations children in the child welfare system:

> As this report notes, the lack of non-judicial forums for the resolution of jurisdictional disputes is a problem. This is also evident in the First Nations agency survey which indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident. The most frequent types of disputes were between federal government departments (36%), between two provincial departments (27%) and between federal and provincial governments (14%).[501]

433. Corinne Baggley estimated that approximately half of the cases tracked by AANDC using the tracking tool developed under the department Jordan's Principle initiative involved

[501] *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 17) [emphasis added].

jurisdictional disputes between federal departments.[502] She was asked on cross-examination how the federal definition of Jordan's Principle squares with this research:

> MR. POULIN: So the research – so my understanding of the research that was done on Jordan's Principle is that it describes in details -- sorry, let me rephrase that. It describes that the most frequent disputes that take place are between federal departments.
>
> If the federal government's approach was informed by research, I am at a loss to understand why it concentrates on the smaller -- on the smallest number of disputes in order to create the Jordan's Principle approach.
>
> MS BAGGLEY: So it was based on research, but other things, too, I said; right? It wasn't just solely based on what the research is saying because one research is going to say something and another piece of research will say something else.
>
> And we also -- as I explained, we looked at Jordan's case because the federal response to Jordan's Principle, the aim was to take a very practical and measured response to addressing cases, and the way to do that was to take Jordan's case and build the response around him.
>
> Certainly, research informs all of that, but it doesn't define or drive that. It is one piece of information that we use in developing the policy response.[503]

434. Canada is fully aware of the types of jurisdictional disputes that are excluded by its narrow definition of Jordan's Principle. In the Preliminary Report of the Terms of Reference Officials Working Group of the Canada / Manitoba Joint Committee on Jordan's Principle, senior officials from Health Canada and AANDC listed a number of "service disparities" that "are not the result of a dispute between the Federal and Provincial jurisdictions" over responsibility for funding, and therefore "do not relate to Jordan's Principle" as defined by the Respondent.[504] One example of such a disparity in service involves mobility equipment:

> Service Example: A child with multiple disabilities and / or complex medical needs requires a wheelchair and stroller and requires that

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[502] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p. 24-25).
[503] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 40-41, lines 2-25, 1-4).
[504] TOROWG Preliminary Report *supra* note 17 at 15.

> a lift and tracking device be installed in his/her family home. The Non-Insured Health Benefits Program (NIHB) will provide children with only one item, once every five years. If the item is a wheelchair, NIHB supports the provision of manual wheelchairs only, which must be fitted with seating inserts in order to accommodate small children. If the item is a ceiling mounted lift and tracking device, funding is not provided by NIHB to install the device in the family home. If these same children were to reside off reserve, they would be eligible to receive more than one mobility device (if needed) and any installation costs would be borne by the provincial program providing the mobility device.[505]

435. Because no one in this example alleges that the province is responsible for funding the mobility device, there is no federal-provincial dispute. The federal definition of Jordan's Principle thus would not apply to a child in need of a second wheelchair, a non-manual wheelchair, or the installation of a ceiling mounted lift and tracking device. Instead, such a child is faced with the challenge of obtaining funding from either AANDC or Health Canada. The case conferencing approach that Canada applies to cases falling outside its definition would not assist this child:

> MR. POULIN: And so that would form -- but the problem, of course, I can see right now, is none of them could be found to be a Jordan's Principle case if it is a dispute between the two departments; none of them could -- and therefore any payments would need to be within your authorities.
>
> MS BAGGLEY: That's correct.[506]

436. There is no formal dispute resolution process in place between AANDC and Health Canada.[507] AANDC will not fund services outside of its authorities, and maintains that it does not have the authority to fund services that are covered by Health Canada.[508] In order to be satisfied that a disputed service is not covered by Health Canada's Non-Insured Health Benefits Program (NIHB), AANDC requires that a claimant exhaust the three-part NIHB appeal process.[509]

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[505] TOROWG Preliminary Report *supra* note 17 at 13 [emphasis added]. See also Debra Gillis Examination in Chief, May 2014 (CBD, Vol 64, p 214-219), and Health Canada, *Provider Guide for Medical Supplies and Equipment (MS&E) Benefits: Non-Insured Health Benefits*, April 2009 (CBD, Vol 15, Tab 459, p 9).

[506] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 23-24, lines 22-25, 1-4).

[507] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 23, lines 5-9); see also Debra Gillis Examination in Chief, May 29, 2014 (Vol 64, pp 194-195, lines 21-25, 16-22).

[508] OAG Report 2008 (CBD, Vol 3, Tab 11, pp 16-17).

[509] See Health Canada, *First Nations & Inuit Health: Procedures for Appeals*, July 10, 2012 (CBD, Vol 15, Tab 462), and Debra Gillis Examination in Chief, May 29, 2014 (Vol 64, pp 186-187, lines 13-25, 1-2).

As explained by Debra Gillis, each of the three appeals can take up to a month, or more if the committee requires further information.[510] Payment to the service provider can take a further month.[511] Barbara D'Amico confirmed that "it takes a considerable amount of time and effort and paperwork" for a FNCFSA to go through this appeals process in order to get reimbursed for a child's medical expense not covered by Health Canada, such as a new wheelchair.[512]

437. Orthodontic benefits provide another illustrative example of the service gap between AANDC and Health Canada. Of 532 appeals for orthodontic benefits under NIHB documented in the 2012/2013 fiscal year, 83% were first appeals, of which only 20% were approved. Of the only 80 second appeals during this period, a mere 1% were approved. None of the 12 third level appeals were approved.[513] Not only was the appeals process unlikely to result in Health Canada reimbursing the expense, but the ever smaller number of claimants at each level of appeal demonstrate the discouraging effect of having to jump through so many hoops simply in order to receive reimbursement. One of Canada's documents, highlighting gaps between the services provided by AANDC and Health Canada to First Nations children and families in British Columbia, notes how this very issue impacts children in care:

> Orthodontia: there is some limited accessibility for CIC [children in care] but the process is cumbersome and often requires agency to appeal 2 times, and full coverage is rarely provided over the full plan of care.[514]

438. Very often the significant delay is a direct result of matters going "back and forth between HC and INAC".[515] Moreover, as emerged in the testimony before this Tribunal, the result of this service gap between Health Canada and AANDC is a completely arbitrary deficiency in the services available to First Nations children as compared to their counterparts off-reserve:

> THE CHAIRPERSON: If we go back to page 13 with the example, the child with multiple disabilities and complex medical needs, I

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[510] Debra Gillis Cross Examination, May 29, 2014 (Vol 64, pp 225-226, lines 18-25 and 1-4).
[511] *Ibid* (Vol 64, pp 229-230, lines 22-25, 1-7).
[512] Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, p 197, lines 13-15).
[513] Health Canada, *Summary note – LOP-NIHB Appeals*, Caring Society Disclosure (CBD, Vol 15, Tab 479); Health Canada, *LOP Request June 2014*, Caring Society Disclosure (CBD, Vol 15, Tab 480).
[514] *INAC and Health Canada First Nations Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, June 2009 (CBD, Vol 6, Tab 78, p 3).
[515] AAND, *Jordan's Principle Chart Documenting Cases*, October 6, 2013 (CBD, Vol 15, Tab 422, p 2).

> was wondering, if the child needs three devices [...] what is the rationale for paying only one –
>
> DR. BLACKSTOCK: I don't know.
>
> THE CHAIRPERSON: -- and if they pay for one, there must be another provision for the rest of the devices, or what is, in your view, the rationale behind that?
>
> DR. BLACKSTOCK: I know of no rationale that would really concord with the children's best interest [...] this is a very clear example where just across the reserve line the children would be entitled to this – to multiple devices. I don't know the reasoning behind that.[516]

439. As mentioned above, the Preliminary Report explains that this kind of service gap for First Nations children on reserve creates an incentive to place children who are not in need of protection into care off-reserve, in order to receive a needed service.[517]

440. The *Pictou Landing* case is another example of the problematic application of Canada's "dispute" criteria. The *Pictou Landing* case is illustrative of this problem. That case centered on the story of Jeremy, a young man with multiple disabilities, and his mother, who assisted him with all facets of his personal care, and who herself had limited mobility after suffering a stroke. Both were members of the Pictou Landing First Nation, whose Band Council received funding from AANDC and Health Canada for personal and home care services. Finding that 80% of the First Nation's total allotment were going towards the $8,200 cost per month of assisting Jeremy, the Band Council contacted Health Canada to request case conferencing, because it was of the view that this was a Jordan's Principal case.

441. AANDC and Health Canada participated in the conferencing, but disagreed that Jordan's Principle was engaged. Based on discussions with provincial officials, the federal view was that a family living off reserve could receive no more than $2,200 per month in respite services. The departments therefore took the view that "there was no jurisdictional dispute in this matter as

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[516] Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, pp 265-266, lines 18-25 and 1-13).
[517] TOROWG Preliminary Report *supra* note 17 at 14.

both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve."[518]

442. In the *Pictou Landing* case, Canada did not contest who should pay for Jeremy's Assisted Living services. Rather, Canada contested the normative standard of care available off reserve with the Pictou Landing Band Council, despite a recent Supreme Court of Nova Scotia court ruling clarifying the standard.[519] Because a dispute over *how much* funding it had to provide did not fit the narrow category of disputes that the Respondent's definition of Jordan's Principle implicates, Canada denied that this was a Jordan's Principle case. The Court disagreed.

> I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The SAA and Regulations require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.[520]

443. Justice Mandamin correctly recognized that a live dispute between levels of government over who should pay cannot be the proper litmus test for whether Jordan's Principle applies:

> I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.[521]

444. Both the province and the federal departments had erred in assessing the amount of funding that would be available off reserve, by failing to take into account an allowance for more

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[518] *Pictou Landing* supra note 16 at para 23.
[519] See *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126 (CanLII), 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].
[520] *Pictou Landing* supra note 16 at para 111.
[521] *Pictou Landing* supra note 16 at para 86.

funding in exceptional cases under provincial law, as had been recognized in *Boudreau*. In reaching this decision, Justice Mandamin articulated the essence of Jordan's Principle:

> Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.[522]

24. Canada's Medical Requirements Violate Jordan's Principle

445. Canada's definition of Jordan's Principle also narrowly applies only to children with multiple disabilities or complex medical issues. There is nothing in the language or application of Jordan's Principle that limits its scope to these particular children. The Principle is meant to apply to all First Nations children.

446. Canada's medical requirements present a number of significant problems. First, the standard of what constitutes a complex medical issue is not defined, leading to unnecessary ambiguity. Second, the definition fails to provide an expedient mechanism for children in urgent need of a service or medical device or intervention. Third, the rationale for this focus is unclear. The only justification presented for the focus on complex medical issues, aside from the fact that this reflects Jordan's own situation, is that

> Jurisdictional disputes are more likely to happen when children with multiple disabilities require a comprehensive suite of services from a variety of providers who may be in different jurisdictions to meet their physical, social and educational needs.[523]

447. While it may be true that the more medical issues faced by a child, the more likely it is that multiple service providers will be implicated and a jurisdictional issue will arise, it does not follow that Jordan's Principle ought only to apply to children with complex medical needs and / or multiple disabilities. Indeed, Canada's definition ignores the reality that a child can be in need of a service even if it is not related to a medical condition. That the federal definition of Jordan's Principle is overly narrow is confirmed by the fact that, amongst this group in which jurisdictional

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[522] *Pictou Landing* supra note 16 at para 18 [emphasis added].
[523] AANDC, *Questions & Answers (Qs & As) Jordan's Principle*, March 10, 2010 (CBD, Vol 14, Tab 377, p 2).

disputes "are more likely to happen", not a single Jordan's Principle case has been recognized by Canada to date.

448. In the conclusion to the Preliminary Report, the Terms of Reference Officials Working Group stated the following:

> The best interests of First Nations children with multiple disabilities and/or complex medical needs must remain the priority of all: the federal government, the provincial government, and First Nations communities. We accept that the history of Canada and the development of our social services and health services have created a complex environment within which all endeavour to meet the needs of these children. Children should not continue to pay the price for this history.[524]

449. The Caring Society is in wholehearted agreement that children should not pay the price for the historical artifact of the arbitrary division of services for First Nations amongst various governmental departments and ministries. However, confining services under the rubric of Jordan's Principle only to those children with complex medical needs and/or multiple disabilities serves to compound the historical ramifications of excluding First Nations children from equality of services. There simply is no reason why a First Nations child in need of a service available to other Canadian children should be denied that service.

25. Canada's Implementation of Jordan's Principle Violates the Substantive Equality Rights of First Nations Children

450. At the heart of Jordan's Principle is the commitment to ensuring that the government pays for a child's service *first*, and determines the proper funding source later. *Pictou Landing* supports the proposition that Canada should pay for the service upon receiving the funding request, backed by the First Nation or Agency's view as to why the service would be available to a child off-reserve. Then, once the service has been paid for by Canada, the process of determining the proper payer, and how much ought to be paid, can proceed.

451. The necessity of this adjustment to Jordan's Principle is evident from the facts of *Pictou Landing*. While awaiting an answer from AANDC, and then until the litigation was resolved, the

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[524] TOROWG Preliminary Report *supra* note 17 at 28.

Pictou Landing Band Council continued to cover the cost for Jeremy's care. As explained in email from Wade Were, the Jordan's Principal focal point for Health Canada in the Atlantic Region, the options for the Pictou Landing Band Council to the refusal of funding were unpromising:

> We don't know how the community will react to the news of no funding. They have options (1) keep paying for 24/7 care using their own source revenue, (2) continue service and arrange for facility placement on a temporary/respite or long term basis depending on how the needs evolve, (3) discontinue service thus requiring Child and Family Services (protection) intervention and emergency placement.[525]

452. In other words, until it could establish the error of both governments as to the normative level of care off-reserve, the community would have to either stretch its resources to continue to pay for Jeremy's care, or Jeremy would have to leave his family and his community. If the latter had occurred, then even once the Band Council's understanding of the law was vindicated by the courts, there would have been an irreversible impact on Jeremy. This approach is antithetical to putting the child first.

453. Canada's approach to Jordan's Principle violates the substantive equality right of First Nations children. Pursuant to Canada's approach, on-reserve First Nations children are not entitled to equality before and under the law and are being denied the right to receive the same services provided to all other Canadian children. The criteria established and enforced by AANDC lead to the conclusion that because of their First Nations status, they will not be guaranteed the same rights, benefits and protections afforded to other Canadian children. This is a direct violation of s. 5 of the *CHRA*.

454. Moreover, the effect of the Respondent's position suggests that while the government has no obligation to provide on-reserve First Nations children with the services that are available to other children, the government will nonetheless provide some services to some children in some limited circumstances.

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[525] Health Canada, *Email Correspondence Regarding the Pictou Landing Case*, May 2011 (CBD, Tab 423, p 2-3).

455. It could not have been Parliament's intention to exclude First Nations children living primarily on reserve from human rights and equality protections when it unanimously passed Jordan's Principle in the House of Commons. It is the Caring Society's position that Jordan's Principle ought to be interpreted as it was intended: to ensure that First Nations children who primarily live on reserve have access to public services on the same terms as all other Canadian children.

456. Failing to protect substantive equality and afford human rights protections to all on-reserve First Nations children would further marginalize a community that has already been affected by a legacy of stereotyping and prejudice, and who already face serious social disadvantages. Conversely, protecting a procedural mechanism designed to safeguard the rights of on-reserve First Nations children is consistent with and promotes *Charter* values.

26. Canada has advanced no reasonable justification for the discrimination

457. Given that Canada's implementation of Jordan's Principle is *prima facie* discriminatory, it has the onus of justifying its approach. The only explanation advanced before this Tribunal for the narrowness of the federal definition of Jordan's Principle was given by Corinne Baggley.

> [T]he policy response that we were mandated to implement was based on Jordan, and my role is to provide that analysis and advice, and we had to start with Jordan's case and look at those particulars and implement, to ensure that if there are other children like Jordan out there that the federal response as our very first step that we could actually address those cases.[526]

458. It has been seven years since Motion No. 296 was unanimously passed in the House of Commons, without the restrictive definition of Jordan's Principle that Canada has adopted. To date, there has been no sign that Canada is contemplating moving past the "very first step" that it decided on. The *CHRA* does not simply require service providers to take procedural "first steps" to ensure non-discrimination. Rather, the right to non-discrimination is a substantive one.[527] As such, the Respondent has an obligation to take all necessary steps, short of undue

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[526] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, p 13, lines 14-22).
[527] (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131 (CanLII) at para 9.

hardship, to ensure that First Nations children are not denied services that other children take for granted.

459. Canada has provided no evidence as to why it has failed to take all of the steps necessary to ensure that First Nations children do not experience discrimination. In the absence of such evidence, Canada's narrow and improper application and implementation of Jordan's Principle amounts to a breach of the *CHRA*.

27. The federal emphasis on case conferences does not make up for its narrow definition of Jordan's Principle

460. The existence of a case conferencing procedure for cases that do not meet Canada's criteria for recognition as a formal Jordan's Principle case does not balance out the negative impacts of the narrow definition, described above.

461. Case conferencing, no matter how prompt and inclusive, simply does not address the problem that Jordan's Principle was conceived of to solve. Indeed, it is difficult to see how the case conferencing approach differs from the discussion that was carried on at the government level for two years, while Jordan River Anderson waited for the chance go home. As Dr. Blackstock testified:

> Again, I just want to remind everybody that the case conferencing approach was what was used in Jordan's case. There were numerous meetings there to try and resolve the jurisdictional issues and we all know the sad outcome of that case. And it's difficult to understand how this approach would be differentiated from that approach.[528]

462. Corinne Baggley was asked about the gaps in services between Health Canada and AANDC, which the federal definition of Jordan's Principle does not cover. Her response illuminates the troubling uncertainty of relying on case conferencing as a way for children to obtain needed services:

> MS ARSENAULT: Can Jordan's Principle be used to fix these gaps identified?

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[528] Dr. Cindy Blackstock Examination in Chief, February 12, 2014 (Vol 48, p 104, lines 4-11).

> MS BAGGLEY: [...] We have seen cases that come up to us as -- labelled as Jordan's principle, that don't meet the criteria, but we have found solutions to providing that needed service.
>
> MS ARSENAULT: What kind of solutions?
>
> MS BAGGLEY: Well sometimes, you know, we see under the Non Insured Health Benefits Program that exceptions are made to policy. Sometimes Aboriginal Affairs will provide the service based on compassionate or ethical grounds. There is a whole -- I think that what has helped with Jordan's Principle is that we have found creative solutions. And it's not always necessarily finding the money to pay for the service, a lot of cases that we see under Jordan's Principle are really about a navigation and awareness issue as well, where sometimes we need to help point the service provider or the family to a range of other possible services that they could access, and it really, really helps when we have the province at the table because they have a whole range of services that, perhaps, for that case, they could ensure that the child can access.
>
> [...] under Jordan's Principle, we have a mandate to identify the issues that come up through the cases. So we have a mandate to track and analyze the issues that come forward. We are not mandated to fix the gaps in the sense that we are going to go off and create a new program to fill those gaps. [529]

463. What emerges from this description is that case conferencing perpetuates a culture of *ad hoc* solutions. While case conferencing may help create dialogue between government departments and ministries, it does not provide children, their parents, or the FNCFSA responsible for them with a predictable framework on which they can confidently act to provide needed services. Even under the most robust case conferencing regime, a service provider comes to the table, unsure of whether they will be pointed to "a whole range of services" that the province may have available, or whether, instead, they will have to argue for an exception to an NIHB policy, or even rely on the compassion of AANDC to provide a service to which they are not otherwise considered entitled. For an FNCFSA dealing with a large caseload of evolving circumstances, trying to plan for how to provide a contested service to a child is like building on quicksand. In any event, even if individual cases are tracked by AANDC, case conferences cannot

[529] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, pp 96-98, lines 13-25, 1-22, 1-7) [emphasis added].

address the gaps that emerge as cases are considered, such that greater certainty would be provided for those who may face the same issue later.

464. The inadequacy of the case conferencing approach can be seen in some of the cases tracked by AADNC. In one, case conferencing proceeded around a request for services, until the child aged out and was no longer eligible to receive services.[530] Another case involved a child who had suffered cardiac arrest and an anoxic brain injury during a routine dental examination, becoming totally dependent for all activities of daily living. The child was assessed as requiring "significant medical and equipment [sic] before she can be discharged from the Health Sciences Centre."[531] Amongst the equipment the child needed was a specialized bed and mattress. Case conferencing over who would provide the equipment began on November 29, 2012. The notes on the case conferencing indicate "NIHB response of "absolutely not" to request for specialized bed and mattress."[532] This refusal came on December 4, 2012. On December 19, 2012, the child was discharged from the Health Sciences Center, and returned home to the Sandy Bay First Nation. According to the notes, it was not until January 22, 2013, that the specialized bed and mattress were provided for the child. The notes indicate:

> Please Note: The bed was provided by the Medical Director, HSC but wants to remain anonymous. This was confirmed in discussion with the Social Worker, HSC.

465. Having gone without the much-needed bed and mattress for over a month at home, this seriously disabled child had to rely on the kindness of a third party to finally get the equipment she needed. When asked about this case, Corinne Baggley explained that "this was a good outcome that the child got the service they required."[533] It is certainly a good thing that the Medical Director bought the bed and mattress for the child, since it was not at all clear that the child would otherwise have received it through funding from any government. However, it is impermissible and unconscionable that a child in this situation should have to rely on a third party for such a vital service. The federal enactment of Jordan's Principle has not taken the Parties

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[530] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 68, lines 4-16).
[531] *Jordan's Principle – Case Conferencing to Case Resolution – Federal/Provincial Intake Form*, November 21, 2012 (CBD, Vol 15, Tab 420, p 1) [emphasis added].
[532] *Ibid* (CBD, Vol 15, Tab 420, p 7).
[533] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 70, lines 11-12).

out of the paradigm in which, as discussed above, a social worker has to personally buy Ensure for a child in care because no government is willing to pick up the tab.

466. For Jordan's Principle to properly fulfill its role, the federal definition must be extended to give immediate funding to those cases that currently only qualify for case conferencing.

ISSUE 4: The Appropriate Remedy

[T]here are a huge amount of goodwill in the Aboriginal community to do what it can if it has – if it can find a way to bring that about by resourcing various things, training, teaching, money or whatever it is, there's a huge desire.

Chief Joseph [534]

A. General Principles

467. Section 53(2) of the *CHRA* grants this Tribunal a considerable degree of discretion in crafting human rights remedies where a complaint is substantiated. In *Doucet-Boudreau*, Justices Iacobucci and Arbour, writing for the majority, provided guidance to courts and tribunals regarding their remedial decision-making powers when fundamental rights are at stake. According to them, remedial powers, such as those conferred by section 53(2) of the *CHRA*, ought to be exercised in a purposive manner so as to provide "a full, effective and meaningful remedy" to those whose fundamental rights have been violated. The majority said this purposive approach to remedial discretion gives "modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy." The Justices went on to specify the requirements to ensure that remedial powers are exercised in a manner meaningful to those whose rights have been violated. They wrote:

> First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies (original emphasis).[535]

468. In keeping with the majority's direction in *Doucet-Boudreau*, the Caring Society seeks remedies that are both responsive and effective. Seeing as the CHRA protects substantive and not

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[534] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, p 70, lines 2-7).
[535] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 3 SCR 3 at para 25 [*Doucet-Boudreau*].

merely formal equality, a responsive remedy will ensure equal funding will be allocated to First Nations child and family services and that these services will be delivered in a culturally appropriate manner. This will require negotiations between the parties, with the help of declarations and under the continuing supervision of the Tribunal. Remedies must also be effective, which, in this case, means putting an immediate end to certain discriminatory aspects of the FNCFS program. Immediately effective orders to cease discriminatory conduct will be required to achieve this purpose. Moreover, the need for an effective remedy calls for an innovative approach to monetary redress.

469. Sections B to E below contain the Caring Society's submissions on the legal basis and need for the types of remedies sought. The specific remedies sought by the Caring Society are listed in section F below.

B. Immediate Relief for First Nations Children

1. Declaratory relief

470. The Caring Society respectfully requests that several declarations be made by the Tribunal in order to clarify which aspects of the Respondent's FNCFS Program are discriminatory. As explained by Professor Kent Roach, declaratory relief serves the useful purpose of clarifying and settling the legal relations in issue.[536] In this case, the Caring Society is seeking declaratory relief, in addition to other remedies that will provide immediate relief to First Nations children and create a consultative process that will ensure that substantive equality is achieved.

471. Human rights tribunals may provide successful complainants declaratory relief as well as other remedies listed in section 53(2) of the *CHRA.* Nothing in the wording of section 53(2) precludes the Tribunal from ordering more than one of the remedies available to successful complainants. As such, this Tribunal routinely provides declaratory relief, in the form of findings of discrimination, coupled with individuals and systemic remedies.[537] The Caring Society respectfully requests that declaratory relief be granted, in addition to the remedies sought below.

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[536] Kent Roach, *Constitutional Remedies,* 2nd Ed (Toronto : Canada Law Book, 2013) at 12-70 [Kent Roach].
[537] *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10 (CanLII) at paras 18, 43, 48, 54, 58, 76-78, 223, 253. Varied on other grounds in *Tahmourpour v. Canada (Attorney General),* 2010 FCA 192 (CanLII).

472. It must be emphasized, however, that the Caring Society is of the view that declaratory relief alone would not be appropriate in this case. As emphasized by Professor Roach,

> Declaratory relief is not appropriate when it is no longer reasonable to expect voluntary compliance from the government. A governmental defendant may be unwilling to comply with the *Charter* rights of unpopular or marginal groups or in some cases, the defendant may simply lack the capacity or competence to comply.[538]

473. As argued above, it is no longer reasonable to expect Canada to voluntary comply with the *CHRA*. Canada has known about the adverse impact of its FNCFS Program for nearly 15 years and has failed to take meaningful action to remedy this situation. In light of this longstanding knowledge, the Caring Society also asks that Canada be ordered to provide immediate relief to First Nations agencies and establish a process to ensure that First Nations children receive culturally appropriate welfare services that are reasonably comparable to those provided to other children and that take into account the unique needs of First Nations children.

474. The declarations sought by the Caring Society aim at identifying the main aspects of the current FNCFS program that result in discrimination. These declarations will guide the parties in their subsequent negotiations and will identify the precise issues that need to be addressed if discrimination is to be eradicated.

2. Orders to Cease Discriminatory Conduct

475. Section 53(2) of the *CHRA* confers on this Tribunal the remedial powers to order respondents to cease their discriminatory conduct. In certain jurisdictions such orders are mandatory in cases where discrimination has been found.[539] These orders are consistent with the *CHRA*'s objectives to eradicate discrimination. However, this Tribunal has emphasized that in order for such orders to be effective and meaningful, they must be enforceable without delay. In *Doucet-Boudreau*, the majority explained:

> An ineffective remedy, or one which was "smothered in procedural delays and difficulties" is not a meaningful vindication of the rights

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[538] Kent Roach, *Constitutional Remedies in Canada*, 2nd Ed (Toronto : Canada Law Book, 2013) at 12-49.
[539] *Human Rights Code,* RSBC 1996, c 210, s 37(2)(a).

and therefore not appropriate and just[540]

476. Because a remedy smothered in procedural delays does not provide a meaningful vindication of rights, the Caring Society respectfully submits that the remedy awarded in this complaint must provide some form of immediate relief to First Nations children. In particular, the Caring Society respectfully requests that Canada be ordered to immediately provide levels of service under the FNCFS Program that are comparable to those provided to other Canadian children, based on the best evidence available before the Tribunal.

477. In the Caring Society's view, this can be accomplished by ordering the Respondent to remove the most discriminatory factors from the formulas it uses to fund First Nations agencies.

478. The orders sought by the Caring Society are based on the evidence before the Tribunal and relate to the flawed assumptions, perverse incentives and shortcomings that most obviously contribute to the presence of systemic discrimination. Those factors have been specifically identified in part III.C.ii.b of the Commission's written submissions, which the Caring society adopts. The Caring Society submits that Respondent should be ordered to eliminate the flawed assumptions and perverse incentives in its FNCFS system, and to rectify the shortcomings in this system. This measure of relief would significantly contribute to the elimination of discrimination.

479. An analogy may be drawn with the remedies ordered by this Tribunal, and confirmed by the Supreme Court of Canada, in *Action Travail des Femmes*.[541] In that case, the Tribunal issued a multi-faceted order which included a number of directions to cease specific practices that contributed significantly to the presence of systemic discrimination against women. Recognizing that this afforded only a partial solution, the Tribunal also ordered a systemic remedy, namely an affirmative action program. Likewise, as will be explained below, the Caring Society is asking, beyond orders to cease certain specific practices, a more systemic remedy.

480. It is expected that the elimination of the flawed assumptions, perverse incentives and shortcomings in Canada's FNCFS system will require an immediate increase of approximately

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[540] *Doucet-Boudreau* supra note 535 at para 55.
[541] *Action Travail* supra note 89.

$108.13 million in annual funds provided to FNCFSA's,[542] plus a 3% escalator as adjusted from 2012 values to the date of the order.

481. It is also important that the amount of money that Canada will have to provide to FNCSFA's or otherwise spend to comply with the Tribunal's order should not be arbitrarily capped or subject to AANDC's other budgetary constraints. Canada has not submitted any evidence that the provision of equal child and family services to First Nations would result in undue financial hardship and should not be excused on that basis from fully achieving equality.

482. Likewise, in much the same way that pay equity should not be achieved through the reduction of the salary of other employees,[543] the Respondent should not be permitted to reduce the funds allocated to other First Nations programs in order to recuperate the cost of complying with the Tribunal's order. For reasons similar to those that apply in this case, the reduction of the funding allocated to other essential public services that the Respondent is providing to First Nations, either directly or through intermediaries, would result in discrimination. The long-standing discrimination that has been inflicted on First Nations children should not be eliminated at the expense of creating or aggravating discrimination against other First Nations groups, or to First Nations at large.

483. The Caring Society also seeks an order declaring Canada's Federal Response to Jordan's Principle discriminatory and requiring the Respondent to fully and properly implement Jordan's Principle in keeping with Motion no. 296 and the judgment of the Federal Court in the *Pictou Landing* case.[544] Proper implementation of Jordan's Principle includes immediately applying the principle to all First Nations children (not just those with multiple disabilities and multiple service providers) and the inclusion of all educational, health and social services customarily available to children within the ambit of Jordan's Principle.

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[542] This figure comes from a presentation by Odette Johnston to Assistant Deputy Minister Françoise Ducros, August 29, 2012 (CBD, Vol 12, Tab 248, p 13). The presentation involved a calculation of the cost of applying an improved EPFA program across the country. It should be noted that at page 17 of (CBD, Vol 12, Tab 248), it is said that transferring FNCFS to provinces and territories, which would presumably provide at least formal equal services to First Nations children, would have a "potential for dramatic increases in costs."

[543] See for example Quebec's *Pay Equity Act*, CQLR, c E-12.001, s 73.

[544] *Pictou Landing* supra note 16.

484. The scope of Jordan's Principle must address disputes between federal government departments and ensure the receipt of needed services by the First Nations child takes precedence over government processes to classify or resolve disputes.

485. The proper implementation of Jordan's Principle will require AANDC to become the payor of first resort to ensure children receive immediate relief. This requirement recognizes that AANDC is in the best position to engage other federal government departments or provincial/territorial governments that it seeks reimbursement from in the dispute classification or dispute resolution process. Requiring AANDC to assume the role of payor of first resort will significantly advance the progress of First Nations children in benefitting from formal equality. However, in order to ensure the fullest measure of formal equality, Canada must be compelled to enter into negotiations with the Complainants and the Commission to fund a new Jordan's Principle definition, dispute resolution process, appeal mechanism and related public education campaign.

486. The Caring Society believes that the specific orders to cease discrimination that it is seeking all relate to issues that are easily delineated and ascertainable, and that they provide sufficient guidance to Canada as what is required for compliance. Should the Tribunal be of the view that the order is not sufficiently specific, the Caring Society asks, in the alternative, that the Tribunal issue a declaration that Canada's current practices regarding the FNCSF system and the implementation of Jordan's Principle are discriminatory.

C. Measures to achieve substantive equality

487. While section 53(2)(a) empowers the Tribunal to order respondents to cease their discriminatory practices, measures aiming to prevent similar practices from occurring in the future may also be ordered. The Tribunal's broad remedial powers to prevent future violations of the *CHRA* are in keeping with the legislation's overarching purpose of eradicating discrimination.[545] In fact, the Supreme Court of Canada has stated that, in certain cases, systemic remedies are the only means by which the *CHRA's* objectives can be met.[546]

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[545] *Hughes v Election Canada*, 2010 CHRT 4 (CanLII) at para 50.
[546] *Action Travail* supra note 89 at 1141-1142.

488. Due to the fact that the causes of discrimination are often multi-facetted, complex, and deep-rooted, the Supreme Court of Canada has directed human rights tribunals to ensure that their systemic remedies are creative and responsive to the fundamental rights at stake.[547] As explained by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*:

> Despite occasional disagreements over the appropriate means of redress, the case law of this Court […] stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights […]. [I]n the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*.[548]

489. In accordance with the Supreme Court of Canada's decision in *Communauté urbaine de Montréal*, human rights tribunals have ordered a wide range of novel and expansive remedies to stop ongoing discrimination and prevent recurrence. By way of example, human rights tribunals across Canada have ordered various remedies such as: (1) the creation of educational and training programs on discrimination; (2) the implementation of independent review procedures for requests for accommodation;[549] (3) the review of policies on human rights; (4) the hiring of an independent consultant to advise on human rights matters;[550] and (5) consultations with various equality seeking groups on how to prevent future discrimination.[551] Such measures are aimed to "strike at the heart of the problem, to prevent its recurrence and to require that steps be taken".[552]

1. Designing a Non-Discriminatory FNCFS Program

490. As argued above, the Caring Society submits that substantive equality will only be achieved when First Nations children receive culturally appropriate services that take full

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[547] *Ibid* at 1145-6.
[548] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 789 at para 26 [*Communauté urbaine de Montréal*]. This decision was applied in *Ball v. Ontario (Community and Social Services)* supra note 112 at para 164.
[549] Upheld in *Canada (Attorney General) v Green,* 2000 CanLII 17146 (FC), [2000] 4 FC 629 at paras 79-80.
[550] *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 (CanLII) at para 165. Appeal allowed in part on other grounds in *Adga Group Consultants Inc v Lane,* 2008 CanLII 39605 (ON SCDC).
[551] *Hughes v Election Canada* supra note 545 at paras 79-80.
[552] *Robichaud v Canada (Treasury Board)* supra note 123 at p 94.

account of the greater needs caused by their historic disadvantage. Given that the *CHRA* provides a guarantee of substantive, and not formal equality, the Caring Society respectfully requests further remedies that will ensure that First Nations children receive substantively equal child welfare services over the long term. Due to Canada's incapacity to address the serious inequities in its FNCFS system on its own, as evidenced by Canada's lack of action over the last 15 years, the Caring Society submits that it is necessary to create a mechanism that will guide Canada through the process of achieving substantive equality for First Nations children.

491. A collaborative mechanism that involves the Commission, the Complainants and is broad enough to include the Caring Society's member agencies is particularly apposite given Canada's admitted lack of knowledge and expertise regarding culturally appropriate child and family services for First Nations.

492. Moreover, such a mechanism would give effect to the right of First Nations to participate and to consent freely to legislative and administrative measures affecting them, such as the parameters of a child and family services program. Those rights are imposed on Canada by the Honour of the Crown, and are also set forth in articles 18 and 19 of the United Nations *Declaration on the Rights of the Indigenous Peoples*:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

493. To achieve substantive equality for First Nations children, the Caring Society seeks a three-step remedy.

494. First, AANDC must fund and reconvene the National Advisory Committee, with representation from the Commission and the Complainants to identify discriminatory elements in AANDC's provision of First Nations Child and Family Service Agencies.

495. Second, AANDC must fund tri-partite regional tables with representation from the Complainants and the possibility of participation by First Nations Child and Family Service Agencies to negotiate (not discuss) the implementation of equitable and culturally based funding mechanisms and policies for each region having the benefit of guidance from the National Advisory Committee.

496. Third, in partnership and consultation with the Complainants and the Commission, Canada must develop an independent expert structure with the authority and mandate to ensure that Canada maintains non-discriminatory and culturally appropriate First Nations Child and Family Services. This body must also be adequately and sustainably funded by Canada.

497. Section 53(2)(*a*) of the *CHRA* provides that the Tribunal may order the Respondent to take measures "in consultation with the Commission." As the Supreme Court held in *Action Travail des Femmes*,[553] this remedial power must be given a broad interpretation that provides the flexibility required to address complex situations of systemic discrimination. Moreover, as noted above, the *CHRA* must be interpreted in light of the particular legal status of First Nations. "Consultation," in this regard, must be understood in light of Articles 18 and 19 of the UN Declaration, quoted above, as well as in light of the decisions of the Supreme Court explaining how consultation must take place in order to maintain the honour of the Crown.[554] It is increasingly recognized that consultation, in this context, means that the government must engage in discussions with the aim of obtaining the consent of First Nations. In the Supreme Court's recent *Tsilhqot'in Nation* decision, reference is repeatedly made to the fact that the consultation process aims at obtaining the consent of the First Nation involved.[555]

498. In this context, the reference to "consultation with the Commission" in section 53(2)(*a*) should be considered as a threshold and not a ceiling. It is certainly open to the Tribunal to order

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[553] See generally *Action Travail* supra note 89 at p 1134.
[554] See especially *Haida Nation v British Columbia (Minister of Forests)* supra note 41.
[555] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, especially at paras 90, 92, 97.

the Respondent to consult with parties other than the Commission, especially the Complainants, in order to design a non-discriminatory FNCFS program. In any event, nothing would prevent the Commission from consulting the Complainants before discussing with the Respondent, and the language of the CHRA does not prevent the Tribunal from recognizing this reality. Most importantly, the principle of the honour of the Crown has been elevated to the status of underlying constitutional principle.[556] While such principles may not always give rise to enforceable duties, decision-makers must always exercise their discretion in light of them, and a discretionary decision made in disregard of a constitutional principle may be struck down.[557] The crafting of a proper remedy to eradicate discrimination lies at the heart of the Tribunal's discretion and expertise and that discretion must take the honour of the Crown into account. The Caring Society submits that, in light of the principle of the honour of the Crown and the ensuing duty to consult, the Tribunal should order Respondent to engage in a consultation process, involving the Complainants and other First Nations child and family services organizations, with the aim of achieving consensus on the measures that are required to eliminate discrimination and to realize substantive equality.

499. Practical considerations also call for such a process. If the Respondent is directed to consult with only the Commission, the latter will certainly want to consult with the Complainants before it engages in discussions with the Respondent, and this will likely slow down the process considerably. The Commission might even be required by the honour of the Crown to do so. Moreover, one crucial aspect of the remedies sought by the Caring Society is the adaptation of child and family services to the cultural needs and the historical disadvantage of First Nations. These needs and circumstances vary across the country. With all due respect, the Commission does not possess the cultural knowledge required to craft a program that ensures substantive equality. The Caring Society submits that the three-part remedy it is seeking is the most efficient manner of integrating these considerations into a non-discriminatory program, by having all the parties at the same table.

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[556] *MMF* supra note 43 at para 70 ("The Constitution [...] is at the root of the honour of the Crown").
[557] *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA), 208 DLR (4th) 577 (Ont CA) at paras 176-180.

500. There is no doubt that, in the end, the Tribunal is empowered to order Respondent to adopt specific measures aimed at providing substantively equal child and family services to First Nations. What is at stake is the design of such measures. If, following a process in which the Complainants and other First Nations representatives are not involved, the Respondent proposes measures that do not achieve substantive equality, it is inevitable that further requests to order specific measures will be brought before the Tribunal. The Caring Society submits that a process of consultation, in which the government genuinely seeks to achieve consensus, is a more efficient alternative.

501. The Caring Society seeks an order that Canada provide reasonable funding for the expenses of the Complainants in the course of the National Advisory Committee and regional table process, as well as those of the First Nations Child and Family Services Agencies who choose to participate in this process.[558] The Caring Society and its member agencies are non-profit organizations with very limited resources. While their involvement in the proposed process would certainly contribute to the elimination of discrimination, it would also impose a significant burden upon them, which should be supported by Canada, who is the perpetrator of the discrimination that needs to be remedied. By way of analogy, it is common practice for the government to fund the costs of First Nations who are consulted according to the *Haida Nation* framework, and the presence of such funding is a factor that courts take into account in assessing whether sufficient consultation has taken place.[559] Put simply, the Caring Society and its members should not bear the cost of eliminating discrimination.

2. Training

502. Human rights tribunals have a broad discretion to promote the overarching objectives of the CHRA by ordering respondents who have been found in breach of their human rights obligations to implement training programs to prevent further discrimination from occurring in the future.[560] Such orders are one of the ways that human rights tribunal can ensure that

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[558] *Hughes v Election Canada* supra note 545 at paras 71, 79-80.

[559] *Tsuu T'ina Nation v Alberta (Minister of the Environment)*, 2010 ABCA 137 (CanLII), [2010] 2 CNLR 316 (Alta CA) at para 130; *Ka'a'Gee Tu First Nation v Canada (AG)*, 2012 FC 297 (CanLII) at paras 45-46, 113; *Conseil des Innus de Ekuanitshit v. Canada (AG)*, 2013 FC 418 (CanLII) at paras 125-129.

[560] *Pchelkina v Tomsons,* 2007 HRTO 42 (CanLII) at para, 32. *Vallee v Fairweather Ltd*, 2012 HRTO 325 (CanLII) at paras 7, 36.

discrimination will not reoccur and the underlying policies or behaviour that resulted in the discrimination are removed.[561] Accordingly, human rights tribunals have ordered respondents to create and implement training and education programs for their employees on a wide range of issues, including accessibility, sexual harassment, human rights and cultural sensitivity.[562]

503. The Caring Society submits that an order for Canada, in partnership with the Complainants and Commission to create and implement a training program would be appropriate in this case. It is submitted that one of the causes of the discrimination experienced by First Nations children through the FNCFS Program is the lack of training and knowledge regarding First Nations culture and historic disadvantage, human rights, social work and the FNCFS Program of AANDC's administration and staff. The Caring Society seeks the implementation of a training program so that behaviors that have resulted in the discrimination are remediated and do not reoccur.

504. As demonstrated by the evidence in this case, most of AANDC's administration and program staff do not have an educational background or training regarding First Nations peoples or social work. AANDC witnesses testifying for Canada had educational credentials in fields ranging from business administration, to forestry,[563] criminology,[564] and tourism. While these credentials have merit in related professions, they are unrelated to qualifications in social work, econometrics and Aboriginal studies that are directly relevant to the FNCFS Program. Sheilagh Murphy testified that she was not sure if any of her staff had any formal training in social work but recognized it would be good to have staff with social work qualifications.[565] The Caring Society submits that the lack of proper educational requirements among AANDC administrators and program staff were exacerbated by a lack of work experience in fields related to children, youth and families.

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[561] *Heintz v Christian Horizons*, 2008 HRTO 22 (CanLII) at para 242 [*Heintz* HRTO], varied on other grounds, *Ontario (Human Rights Commission) v. Christian Horizons*, 2010 ONSC 2105, [2010] O.J. No. 2059 (QL) (Div. Ct.) at paras 242-243 [*Heintz* ON Div Ct].
[562] A Akgungar, ed, *Remedies in Labour, Employment and Human Rights Law*, (Toronto: Carswell, 2014) at 6, 41-43.
[563] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, pp 21-25).
[564] Barbara D'Amico "did a sociology course" but studied criminology and political sciences: Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 20, lines 14-20).
[565] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol. 55, pp 70-72).

505. Moreover, even after joining AANDC, new staff are not required to undergo training on the key reports and events shaping the AANDC FNCFS Program. For example, when asked whether she was familiar with the Joint National Policy Review commissioned by the Respondent in 2000, Barbara D'Amico testified that she was "supposed to say" that she had read it in great detail but that she had actually just skimmed through it.[566] The apparent lack of formal training for new staff working within the FNCFS Program is all the more troubling when considering what appears to be a common practice within AANDC to conduct its business mostly verbally. Ms D'Amico testified that the record keeping practice within the FNCFS Program were "not very diligent".[567] She explained :

> And no, a lot of it is verbal and I apologize, we don't have a lot of time to write things down, even though it looks like we write a lot of things down, but a lot of the stuff is done verbally. [568]

506. The potential value of having at least some AANDC staff trained in First Nations social work was also confirmed in the evidence presented to the Tribunal. It was established that the lack of training among AANDC staff caused Canada to underfund First Nations agencies based on false and unfounded assumptions about how these agencies operated. For example, Barbara D'Amico testified that when developing EPFA, she did not include a funding allocation for legal fees for children when taken into care because she had wrongly assumed that these were covered by the provinces.[569] Likewise, the same AANDC staff person was unaware that First Nations agencies were responsible for intake and investigations, one of their key functions, and consequently did not confer funding to First Nations agencies for this.[570]

507. The importance of having staff trained in social work was also demonstrated by the fact that AANDC staff occasionally second-guessed or sought to challenge the decisions of social workers providing on the ground services for FNCFSA's.[571] For example, Ms. D'Amico testified

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[566] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 169, lines 9-13).
[567] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 141, lines 1-2).
[568] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 141, line 1-5).
[569] Barbara D'Amico Cross-Examination (Vol 52, p 175, lines 12-23). Ms. Sheilagh Murphy also testified that agencies in Alberta were requesting more funding because "certain functions" were not included in the costing model. See Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, pp 74-75, lines 18-25, 1-3).
[570] Barbara D'Amico Cross-Examination (Vol 52, p 32). The witness testified that she was not made aware of this. However, the *Wen:de* reports clearly indicate that First Nations agencies are responsible for intake and investigations.
[571] Barbara D'Amico Cross-Examination (Vol 52, p 61, lines 20-25).

that she was of the opinion that among FNCFSA's "drug testing is taken too far on the pendulum to overcompensating."[572]

508. The Tribunal was also presented with evidence that First Nations Peoples reasonably believe that AANDC administrators and staff making decisions that affect First Nations children and families must understand First Nations histories and cultures. Chief Joseph summarized his community's view as follows:

> I know that ministries that aren't Aboriginal are going to be taking our kids and, at a minimum, we should be demanding some kind of cultural competency level for those outside people who don't understand culture and history, they should be provided a level of orientation, education that allows them to respond in the very best ways that they can. I don't think we can rebuild Aboriginal families without that.[573]

509. Individuals working within the FNCFS Program make decisions that impact the lives of over 163,000 First Nations children across our country.[574] Yet, the evidence in this case demonstrates that individuals working within the FNCFS Program generally have no formal education or training relating to First Nations culture or social work.[575] Moreover, at least one of Canada's witnesses testified that AANDC staff working in the FNCFS Program were not diligent in record keeping and conducted its business verbally. In the absence of accurate and consistent written documentation regarding AANDC's policies and practices, formal training for new staff is essential.

3. Public posting of AANDC policy, practices and other information relating to the FNCFCS Program

510. Human rights remedies can also have an important educational value, both for the parties to a complaint, and for the broader public.[576] As such, human rights tribunals have ordered

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[572] Barbara D'Amico Cross-Examination (Vol 56, p 62, lines 3-17). During her cross-examination, Ms. D'Amico acknowledged that some of these drug tests may have been ordered by a Family Court as a condition of the child returning to his or her home: Barbara D'Amico Cross-Examination, March 20, 2014 (Vol. 53 pp 193-194, lines 24-25, 1-2).
[573] Chief Robert Joseph Examination in Chef, January 13, 2013 (Vol. 42, p 94, lines 12-22).
[574] Dr. Cindy Blackstock, February 11, 2014 (Vol 47, pp 143-144, lines 12-22).
[575] The training program sought be the Caring Society is described in Appendix A.
[576] *Heintz* HRTO *supra* note 561 at para 242, varied on other grounds *Heintz* ON Div Ct *supra* note 561 at paras 242-243.

respondents to publicize information regarding a human rights case to help prevent future discrimination and to empower individuals who may experience discrimination. For example, in *Ontario (Ministry of Correctional Services),* the Ontario Human Rights Board ordered the respondent to publicize its decision by directing the preparation of a summary of both the 1998 and 2002 decisions for general circulation and a précis to be read at parade by senior officials.[577] Similarly, human rights tribunals have ordered to post Commission "Code Cards" in prominent locations that are accessible to all employees, to provide information about its willingness to provide accommodation in letters to job applicants and to post the human rights legislation or other information on human rights.

511. The Caring Society submits that the lack of information provided to FNCFSA's about Canada's policies, directives and practices, as well as data regarding children in care, is one of the causes of the discrimination experienced by First Nations children. For example, Ms. Murphy testified about the lack of consistency between regions and their use of the National Manual.[578] She went on to explain that AANDC could confer additional funding to agencies for maintenance in exceptional circumstances even though this information was not in the National Manual.[579] When asked about whether First Nations agencies were aware of this, she testified:

> Well, I don't know whether they are using old material or not, I can't speak to what regions are doing, that's not my -- I mean my staff could, but I can't.[580]

512. In order to promote First Nations children's best interests and right to be free from discrimination, the Caring Society seeks an order that Canada be ordered to post publicly all policies, directives and practices regarding its FNCFS Program and Jordan's Principle.[581] The Caring Society also asks that Canada be ordered to submit hard copies of this information annually to all First Nations agencies.

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[577] A stay of this order was lifted while the respondent sought to appeal this decision: *Ontario v McKinnon,* 2003 CanLII 32438 (ON SCDC), 2003 CarswellOnt 6167 (Ont Div Ct). The Ontario Divisional Court held that the cost of such orders was likely scant compared to the potential harm of allowing racism to persist within the Ministry.
[578] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 120, lines 9-14).
[579] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 120, lines 20-25).
[580] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 123, lines 15-18).
[581] The information which the Caring Society asks that the Respondent be ordered to post is found in Appendix to these submissions.

D. Monetary Award

1. Human Rights Damages for Recognition of the Discrimination Experienced by First Nations Children

513. In addition to the broader social objective of eradicating discrimination in the present and the future, human rights remedies must provide victims of discrimination with some measure of recognition of the harm done to them. This recognition can be achieved in a variety of ways. Given several aspects of the complexity and novelty of this case, this Tribunal should heed the Supreme Court of Canada's call to show "flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[582] First, the individual victims of discrimination, First Nations children, are not complainants in this case. Second, this complaint is a systemic one that addresses a discriminatory program that has affected tens of thousands of First Nations children, if not more. Third, this Tribunal has not received evidence about the precise nature and extent of the harm suffered by each individual child; as this would have been an impossible task for the Commission and the Complainants. Fourth, the harm suffered by First Nations children follows on the heels of, and is intertwined with, other harms suffered by First Nations over time as a result of Canada's colonial policies. These harms cannot be compensated simply by an award of money.

514. Given those constraints, the Caring Society asks this Tribunal to use its power under section 53(3) of the *CHRA* to grant "special compensation" for Canada's wilful and reckless discriminatory conduct with respect to each First Nations child taken in out of home care since 2006. Due to the voluntary and egregious character of Respondent's omission to rectify discrimination against First Nations children, the Caring Society submits that the maximum amount, $20,000 per person, should be awarded. The amount awarded should be placed into an independent trust that will fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services. Several aspects of this request are explained below.

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[582] *Communauté urbaine de Montréal* supra note 548 at para 26.

2. Standing

515. Although the Complainants in this case are not "individuals" whose rights under the *CHRA* have been violated, the Caring Society submits that First Nations children who received discriminatory child welfare services are entitled to compensation for the pain and suffering they have experienced.[583] Nothing in the language of section 53(3) prevents this Tribunal from awarding compensation to "victims" who personally experienced discrimination where a complaint is substantiated, even if they did not personally lodge the complaint. In the absence of specific language, the Supreme Court of Canada has held that human rights tribunals and courts cannot limit the meaning of terms meant to advance the purpose of human rights legislation. [584]

516. Moreover, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* the Supreme Court of Canada cautioned courts not to allow the fundamental rights of a vulnerable population to be violated without recourse due to the vulnerable population's lack of capacity, resources or expertise.[585] On the issue of standing, it wrote that

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected.[586]

517. As in *Downtown Eastside,* public interest litigants initiated this case on behalf of a disadvantaged population whose legal rights are at stake. The evidence presented by the Commission and the Complainants clearly established that First Nations children are amongst the most vulnerable segments of Canada's population.[587] The Caring Society submits that the fact that First Nations children do not have the resources or capacity to file individual complaints should not bar them from receiving human rights damages under the CHRA.

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[583] It is noted that the Respondent has not challenged the standing of the Complainants in this complaint.
[584] *Vaid* supra note 62 at para. 81
[585] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 51 [*Downtown Eastside Sex Workers*].
[586] *Downtown Eastside Sex Workers* supra note 585 at para 51.
[587] OAG Report 2011 (CBD, Tab 53, p 23). In her testimony, Dr. Blackstock also described First Nations children as the most vulnerable children in the country: Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 200, lines 19-24). See also *Mactavish J's Reasons* supra note 32 at para 334.

3. Wilful and Reckless Discrimination

518. Section 53(3) of the *CHRA* provides for awards of "Special Compensation" for wilful and reckless conduct, to a maximum of $20,000.00. This Tribunal has held that such damages are justified in cases where a respondent's conduct has been found to be "rash, heedless or wanton."[588] An award under section 53(3) may be likened to an award of exemplary damages and should be governed by similar rules. In particular, an award of exemplary damages does not depend on proof of prejudice. Exemplary damages may be awarded as a stand-alone remedy, even in the absence of compensatory damages.[589]

519. In a decision recently upheld by the Federal Court of Appeal, this Tribunal ordered a respondent to pay the maximum award under this heading due to its failure to take measures to change its discriminatory conduct despite its knowledge of its impact on the complainants. The Tribunal wrote:

> This Tribunal finds that CBSA, by ignoring so many efforts both externally and internally to bring about change with respect to its family status policies of accommodation has deliberately denied protection to those in need of it.[590]

520. The Tribunal also took issue with the fact that the Canada Border Services Agency, the respondent in *Johnstone,* had apologized for similar conduct in the past, yet had done little to remedy the situation. It wrote:

> CBSA, and its organizational predecessor's lack of effort and lack of concern takes many forms over many years including: disregard for the *Brown* decision after writing a letter of apology; developing a model policy and then burying it (some management knew of it, some did not); pursuing arbitrary policies that are unwritten and not universally followed; lack of human rights awareness training even at the senior management level; the proffering of a floodgates argument 5 years after the complaint with the Respondent giving insufficient time and data to its own expert to enable him to provide a helpful expert opinion; and no attempt to inquire of Ms. Johnstone as to her particular circumstances or inform her of

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[588] *Brown v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 24 (CanLII) at para 16.
[589] *De Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64.
[590] *Johnstone v Canada Border Service Agency,* 2010 CHRT 20 (CanLII) at para 380.

> options to meet her needs.[591]

521. As was the case in *Johnstone,* the Respondent in this complaint has a long history of discriminatory treatment, despite repeated internal and external efforts to bring about change. According to the evidence before the Tribunal, Canada was formally made aware of its discriminatory treatment as early as 2000, through a report it commissioned entitled the Joint National Policy Review.[592] Amongst other things the NPR found that Directive 20-1, which the Respondent continues to apply in three provinces and the Yukon Territory and which forms the basis of EPFA, was outdated.[593] The report also presented Canada with comparative evidence indicating that First Nations children were receiving lower levels of service when compared to non-First Nations children. Dr. Blackstock explained the findings of the NPR as follows:

> There were significant concerns about the comparability of the funding. The report says that there was 22 percent less funding for First Nations Children and Family Services.[594]

522. The report also raised concerns about the impact of jurisdictional disputes on First Nations children. Dr Blackstock summarized the NPR's finding in that regard in the following manner:

> Given that we had jointly decided, around this table, that the paramount consideration was the child, any differences between or within governments or any inconsistencies of government policy to what is in the best interests of the child needed to be sorted out because, at that point, there was a shared recognition that these inconsistencies of these disputes between governments about who should fund services were getting in the way and were creating denials of service or unequal service or unequal access to service.[595]

523. In a letter dated August 7, 2001, the then Minister of Indian and Northern Affairs, confirmed that he had reviewed the draft final report of the NPR. He went on to state that he hoped to implement the report's recommendations and stated that the argument for additional

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[591] *Johnstone v Canada Border Service Agency,* supra note 590 at para 381.
[592] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 28). The NPR was formed of representatives of the then Department of Indian and Northern Affairs, the Assembly of First Nations and First Nations agencies and was funded by the Respondent.
[593] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 32, lines 18-25).
[594] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, p 32, lines 21-25). See also *NPR*, June 2000 (CBD, Vol 1, Tab 3, p 14).
[595] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 39, lines 10-21). See also NPR (CBD, Vol 1, Tab 3, p 120).

funding would be "very strong".[596] Despite this, and the creation of an implementation review committee, very few of the NPR's recommendations were actually implemented.[597]

524. In 2004, Canada again undertook an extensive study that made it aware of the discriminatory manner in which it was treating First Nations children. What would become a series of three reports confirmed many of the NPR findings, particularly in relation to the treatment of small agencies, the lack of prevention services, the need for increased investments in capital, and legal expenses and to restore inflation losses, and finally the need to recognize the higher needs of First Nations children and the adverse impact of jurisdictional disputes between different level of government.[598] The last report, *Wen:de: the Journey Continues*, recommended an evidence-informed funding formula for First Nations agencies that would allow for equitable and culturally appropriate services that take into account the greater needs of First Nations children as well as mechanisms to regularly review and update the formula.[599]

525. Canada itself has recognized that its FNCFS Program does not provide equal child welfare services to First Nations children. In 2007, the following text appeared on INAC's own website:

> the current federal funding approach to child and family services has not let First Nations Child and Family Service agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding of First Nations Child and Family Service Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for agencies to meet their mandated responsibilities[600]

526. In addition to this, internal AANDC staff working within the FNCFS Program acknowledged and voiced concerns about the unequal level of services provided to First Nations

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[596] Hon. Robert D Nault, *Letter Regarding the Final NPR Report* (CBD, Vol 6, Tab 76, p 2).
[597] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 89-90, lines 4-25, 1-12). Dr. Blackstock testified that one of the recommendations "moved forward".
[598] These reports are Bridging Econometrics with First Nations Child and Family Services (CBD, Vol 1, Tab 4); *Wen:de: We are coming to the light of day* (CBD, Vol 1, Tab 5); *Wen:de The Journey Continues* (CBD, Vol 1, Tab 6). See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 121-126).
[599] See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, pp. 127-128).
[600] AANDC, *Fact Sheet - First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).

children. An undated internal document described the circumstances for First Nations agencies as "dire."[601] In a paper examining the issue of provincial comparability of the FNCFS Program, Vince Donoghue, former INAC staff, called the level of funding "woefully inadequate."[602] His paper also recognized that the inequitable services available through the FNCFS Program was one of the "important contributing factors" to the disproportionate number of First Nations children in care.[603] One government official testified that child welfare workers are perceived as "baby snatchers" or "bad guys" in many First Nations communities.[604]

527. As in *Johnstone*, external actors also voiced repeated concerned about the Respondent's discriminatory treatment. From 2000 to 2012, Canada received letters from representatives of the provinces of New Brunswick, Nova Scotia, Alberta, Saskatchewan and British Columbia expressing concerns that the FNCFS Program was not comparable to the child welfare services available off-reserve and did not meet the needs of First Nations children.[605] In 2009, the Minister of Children and Family Development and the Minister of Aboriginal Relations and Reconciliation for the Province of British Columbia, wrote to then-INAC Minister Strahl to express their concerns about Direction 20-1 and urged the Respondent to take measures to ensure equity in child welfare services to First Nations children.[606]

528. In 2008, the Auditor General of Canada undertook an extensive review of the FNCFS Program. The key findings of the Auditor General were summarized as follows:

- The funding INAC provides to First Nations child welfare

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[601] *First Nations Child and Family Services (FNCFS): Q's and A's* (CBD, Vol 6, Tab 64, p 1).
[602] Vince Donoghue, *Issue : To ensure that First Nations families and children on reserve have access to provincially comparable Child and Family Services*, September 24, 2010 (CBD, Vol 11 Tab 234, p 2).
[603] *Ibid* (CBD, Vol 11 Tab 234, p 2).
[604] Barbara D'Amico Examination in Chief, March 18, 2014 (Vol 51, p 94, lines 1-13).
[605] Hon. Joanne Crofford, *Letter to the Hon. Andy Scott Regarding Upcoming Amendments to the Child and Family Services Act*, January 17, 2005 (CBD, Vol 10, Tab 207); Hon. Iris Evans, *Letter to the Hon. Robert D. Nault Regarding Federal Funding of Child and Family Services*, March 15, 2000 (CBD, Vol 14, Tab 370); Hon. Iris Evans, *Letter to Hon. Jane Stewart Regarding Delay in Announcing Release of Early Childhood Development Funding for Aboriginal Peoples in Alberta*, March 11, 2003 (CBD, Vol 14, Tab 371); Hon. Heather Forsyth, *Letter to the Hon. Andy Scott Seeking a Federal Commitment to Include Early Intervention Funding in Anticipated On-Reserve Funding Model*, August 19, 2005 (CBD, Vol 14, Tab 373); Hon. Stephanie Cadieux, *Letter to the Hon. Bernard Valcourt and the Hon. Rona Ambrose Regarding the Enhanced Prevention Funding Agreement*, February 5, 2014 (CBD, Tab 416).
[606] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69). The then Minister of Indian and Northern Affairs declined the request for a meeting stating he did not have time in the near future: Hon. Chuck Strahl, *Letter of Reply to the Hon. Mary Polak and the Hon. George Abbott Regarding Jordan's Principle*, January 21, 2010 (CBD, Vol 6, Tab 70).

> agencies for operating child welfare services is not based on the actual cost of delivering those services. It is based on a funding formula that the Department applies nationwide. The formula dates from 1988. It has not been changed to reflect variations in legislation and in child welfare services from province to province, or the actual number of children in care. The use of the formula has led to inequities. Under a new formula the Department has developed to take into account current legislation in Alberta, funding to First Nations agencies in that province for the operations and prevention components of child welfare services will have increased by 74 percent when the formula is fully implemented in 2010.
>
> • The Department has not defined key policy requirements related to comparability and cultural appropriateness of services. In addition, it has insufficient assurance that the services provided by First Nations agencies to children on reserves are meeting provincial legislation and standards.
>
> • INAC has not identified and collected the kind of information it would need to determine whether the program that supports child welfare services on reserves is achieving positive outcomes for children. The information the Department collects is mostly for program budget purposes.[607]

529. The Auditor General also noted that Canada had known about the shortcomings of the formula for years.[608] The Standing Committee on Public Accounts, for its part, examined Canada's response to the Auditor General's report regarding the FNCFS Program. In a March 2009 report, the Committee criticized Canada for failing to take measures to remedy the deficiencies identified by the Auditor General the year prior. The report stated:

> The work for the audit on the First Nation Child and Family Services Program was completed on 9 November 2007, and the audit was tabled in Parliament on 6 May 2008. However, the Deputy Minister and Accounting Officer for INAC, Michael Wernick, only provided vague generalities in his opening statement about the Department's actions in response to the audit; though, he did commit to providing a follow-up report to the Committee in April. When asked if he had a concrete and specific action plan to provide to the Committee, Mr. Wernick said "we have an action plan in the sense that we're pursuing these various

[607] OAG Report 2008 (CBD, Vol 3, Tab 11, p 6).
[608] *Ibid* (CBD, Vol 3, Tab 11, p 21).

> initiatives. That was the undertaking I made at the beginning: that it would be going to my audit committee in the month of April and we'd provide it to the committee. It will go through each recommendation and give more specifics on what we're doing or what we already have done.
>
> While the Deputy Minister verbally committed to providing an action plan and follow-up report to the Committee in April, the Committee is very concerned that there is no evidence of an action plan currently in plan, and that it would take too long to finalize an action plan.[609]

530. The Auditor General of British Columbia also brought the inequalities in Canada's FNCFS Program to Canada's attention in 2008. In his report, he confirmed what the Auditor General of Canada had concluded. He wrote:

> Neither government takes policy requirements sufficiently into account when establishing levels of funding for child welfare services. Under federal and provincial policies, Aboriginal children, including First Nations children, should have equitable access to a level and quality of services comparable with those provided to other children. Funding for the services needs to match the requirements of the policies and also support the delivery of services that are culturally appropriate — which is known to take more time and resources. Current funding practices do not lead to equitable funding among Aboriginal and First Nations communities. [610]

531. The report also reiterated the findings of the NPR and the Wen:de reports regarding the perverse outcomes of the inequitable child welfare services provided through the Respondent's FNCFS Program. The report stated:

> The federal funding formula does not limit the options for services a delegated Aboriginal agency may provide; however, in the view of the delegated agencies the amount of funding was insufficient to cover the cost of providing out-of-care options (such as placing a child at risk with extended family). Furthermore, both the National Policy Review in 2000 and the Wen:de report in 2005 concluded that federal funding rates are insufficient to pay for providing services

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[609] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 3-4).

[610] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 2).

> comparable with those for non-First Nations children. The unintended consequence was that children were removed from their families (taking the child into care), as the funding for this option was being covered by INAC.[611]

532. The BC Representative for Youth and Children also took issue with Canada's lack of leadership and failure to take an active role in ensuring that the needs of First Nations children are met. She wrote:

> In terms of silence, the absence of any real effort by Aboriginal Affairs and Northern Development Canada (AANDC) to take an active role in fulfilling its fiduciary role to children and youth with special needs or mental health needs living on-reserve is deafening. Even in terms of ensuring that the child welfare system operates – a system it funds and endorses – this investigative report found no concern or leadership by the federal department. That standard is too low given the known risk of harm to girls such as this one.[612]

533. Canada has also been faced with international pressure to address the inequalities in its FNCFS Program. In particular, the United Nations Committee on the Rights of the Child expressed concerns regarding Canada's lack of action following the Auditor General's 2008 report regarding the FNCFS Program and urged the government to address the inequalities in children welfare services available to First Nations children.[613]

534. External child rights experts also called on Canada to put an end to jurisdictional disputes that caused First Nations children to experience delays or to be denied essential government services. In a 2010 report, the New Brunswick Youth and Child Advocate recognized that such disputes were systemic, rather than isolated incidents. The 2010 report stated:

> When one reviews the saga of these lengthy, plodding federal-provincial-First Nations negotiations against the backdrop of rampant rates of teen suicides, Fetal Alcohol Spectrum Disorder, youth incarceration and low scholastic achievement, it is hard to escape the conclusion that what is happening here is a Jordan's

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[611] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 32).
[612] British Columbia Representative for Children and Youth, *Lost in the Shadows: How a Lack of Help Meant a Loss of Hope for One First Nations Girl*, February 2014 (RBD, R13, Tab 24).
[613] UN Committee on the Rights of the Chid, *Consideration of reports submitted by State parties under article 44 of the Convention – Concluding Observations: Canada*, October 5, 2012 (CBD, Vol 5, Tab 57, p 9, para 42).

Principle scenario played out on a systemic scale.[614]

535. Canada has provided no reasonable explanation as to why it has failed to take measures to remedy the numerous inequities identified by both internal and external experts and reports since 2000. When asked why Canada continued to determine levels of funding to agencies based on the assumption that only 6% of children were in care, after the Auditor General found that this led to inequities in services, Barbara D'Amico replied that she did not know.[615] Sheilagh Murphy was also questioned about the Auditor General's conclusion that the child welfare services on reserves were not comparable to those provide off-reserve. She simply replied "it's an observation by the Auditor General."[616] On the subject of the flaws identified by the Auditor General regarding EPFA, she testified that she was not sure about the specifics that she was pointed to or whether any changes had been made.[617]

536. Ms. Murphy was also cross-examined regarding the 14-year delay in implementing the recommendations made by the NPR in British Columbia. She provided the following response:

> Yes, B.C. is still waiting for the EPFA. As I said yesterday, we have tried to work with them, we have given -- there are some transitional dollars, but certainly, until you have EPFA, you are not going to be a will to do all of the prevention work that other jurisdictions who have transitioned are undertaking.[618]

4. Amount of "special compensation" damages

537. According to the language of section 53(3), "special compensation" damages are awarded where the discriminatory practice is willful or reckless. It follows logically that the gravity of the willful or reckless character of Canada's conduct is the main factor to be taken into account in order to determine the amount of the award. The foregoing discussion highlights the fact that Canada has known for many years that its funding of First Nations child and family services was inadequate and discriminatory, and yet has taken very few steps to stop the crisis in its FNCFS

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[614] Office of the Ombudsman and Child and Youth Advocate (New-Brunswick), *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick*, February 2010 (CBD, Vol 5, Tab 60, p 21).
[615] Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 129, lines 9-10).
[616] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 141, lines 4-5).
[617] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 147, lines 15-19).
[618] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 145, lines 11-19).

system, despite having been urged to do so by a wide array of Canadian and international bodies or officials.

538. Canada's conduct is even more serious when considered in light of the fact that child and family services are an essential public service; inadequacies in this essential public service hampers the development of children and may even put their lives in jeopardy. Moreover, the cultural inadequacy of the FNCFS program breaches Canada's fiduciary duty not to put obstacles to the transmission of First Nations cultures, as noted in the introductory section of this factum. Indeed, in light of the reality that First Nations children are particularly vulnerable to Canada's actions, Canada's failure to rectify its conduct is only the more reckless.

539. As in *Johnstone,* the Respondent in this case has not provided a rational explanation for its continuous failure to respond to internal and external efforts to end the discrimination to which First Naitons children have been subjected in the context of the FNCFS system. Also, much like the respondent in *Johnstone,* the Respondent in this case has apologized for past discriminatory conduct, yet has continuously showed a lack of effort and concern when similar allegations of discrimination have been made against it.[619] In that case, the maximum amount of $20,000 was awarded. In light of the similarities with *Johnstone*, the Caring Society seeks an award granting $20,000 per child in care for the Respondent's willful and reckless discriminatory conduct.

540. It should also be emphasized that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. In that context, it is certainly not unjust or exaggerated to require the federal government pay an amount of $20,000 in respect of each First Nation child taken in care since 2006, that is, one year before the Complaint was filed.

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[619] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10). See also Dr. Amy Bombay, Dr. Kim Matheson and Dr. Hymie Anisman, *Expectations Among Aboriginal Peoples in Canada: The Influence of Identity Centrality and Past Perceptions of Discrimination*, 2013 (CBD, Vol 14, Tab 341) where the AFN's expert witness discussed the impact of the apology on perceived discrimination.

5. Award for willful and reckless discrimination to be put into a Trust to provide redress to First Nations children who experienced discrimination

541. Considering the willful and reckless character of Canada's conduct, the Caring Society seeks an award of $20,000 per First Nations child who was in care from February 2006 to the date of the award.[620] The Caring Society asks that these damages be paid into an independent Trust Fund that will ensure that the damages are used to the benefit of First Nations children who have experienced pain and suffering as a result of Canada's discriminatory treatment. In particular, the objective will be to allow First Nations children to access services, such as language and cultural programs, family reunification programs, counselling, health and wellness programs and education programs

542. While conferring individual remedies under 53(2)(e) into a Trust may be an uncommon approach to compensation under the *CHRA*, the Caring Society submits that such a remedy is appropriate and just in light of the unique circumstances of this case, and would give effect to the Supreme Court of Canada's recognition of "the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[621] Put simply: the magnitude and multi-faceted nature of the prejudice suffered by First Nations children requires an innovative remedy.

543. The Caring Society submits that an in-trust remedy that will lead to the establishment of a program of healing measures directed at persons who have been subjected to substandard child and family services is better suited to offering the children who have been taken into care since 2006 a meaningful remedy than awards of individual compensation could ever be. In this regard, an analogy may be drawn to the component of the Indian Residential Schools Settlement that provided for the payment of amounts to a healing foundation for the purpose of setting up healing programs for the benefit of survivors. A similar approach has also been used in certain class actions where the distribution of money to individual victims is unfeasible or

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[620] The Caring Society seeks compensation for all children who were affected by the Respondent's discriminatory conduct within one year of the filing of its complaint and onwards. An estimation of the number of children involved may be found in CBD, Vol 13, Tab 296.

[621] *Communauté urbaine de Montréal* supra note 548 at para 25.

impractical.[622] Moreover, unlike most human rights complaints, this case involves children. Paying the compensation to which they are entitled into a Trust will help ensure that the award is used in a manner that will redress the harms that these children have suffered and, in light of the intergenerational impacts of such harms, will be of benefit to generations of First Nations children yet to come. As such, the Caring Society submits that conferring the compensation to a Trust is the approach most consistent with the spirit of the CHRA and the objectives of section 53(3).

E. Retaining jurisdiction

544. The Caring Society respectfully requests that the Tribunal retain jurisdiction over this matter until the parties have agreed that the FNCFS Program provides reasonably comparable and culturally appropriate services that take into account the unique needs of First Nations children and that effective mechanisms are in place to prevent the recurrence of discrimination. The Caring Society submits that, given Canada's past inaction when confronted with well-founded allegations of discrimination, the ongoing involvement of the Tribunal is necessary to ensure the full and timely implementation of the Tribunal's orders.

545. In cases where there is evidence that there may be delays or complications in implementing an order, human rights tribunals have accepted to retain jurisdiction over a complaint after issuing an order. In *Ontario (Ministry of Correctional Services),* for example, the Board initially made an extensive remedial order in 1998 based on a finding of racial discrimination that included amongst other things, the publication of the Board's order and the establishment of a human rights training program. The Board retained jurisdiction "until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of any aspect of them". Four years later, the complainant returned to the Tribunal to seek to enforce aspects of the order that had not been complied with.[623] Likewise, the Ontario Human Rights Tribunal, for example, has ordered its members to monitor the implementation of systemic remedies, such as the development and

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[622] In *Sutherland v Boots Pharmaceutical PLC*, [2002] OJ No 1361 (Ont SCJ) (QL) at para 9, the Ontario Superior Court of Justice approved a class action settlement according to which an aggregate amount was to be distributed to non-profit organizations rather than individuals. See also *Clavel c Productions musicales Donald K Donald Inc*, JE 96-582, [1996] JQ no 208 (CSQ)(QL) at paras 43-45.

[623] *Ontario v McKinnon* supra note 577 at para 10; affirmed [2004] OJ No 5051, 2004 CarswellOnt 5191 (Ont CA).

implementation of an accessibility plan.[624] More recently in *Hughes*, this Tribunal accepted to remain seized of a matter, although the evidence established that the respondent in that case was already attempting to address many of the systemic problems regarding accessibility that had been identified in the Complaint.[625]

546. The Caring Society submits that the Respondent in this case has not demonstrated the goodwill to meaningfully address known problems in its FNCFS Program that cause First Nations children to experience discrimination and to suffer irreparable harm. As demonstrated by the evidence, the Respondent was first formally made aware that it was not providing equal child and family services to First Nations children in 2000. Nearly 15 years later, numerous individuals within the Respondent's staff, First Nations governments, FNCFSA, provincial governments, youth advocates and international child rights experts continue to voice concerns regarding Canada's discriminatory First Nations child welfare services. Canada has provided no reasonable justification as to why it has not remedied this situation. The evidence has also established that the consequences of this discrimination are grave for the over 163,000 children the FNCFS Program currently serves. Given that this case involves vulnerable children and their families, the Caring Society respectfully requests the Tribunal remain seized of this matter to ensure that its orders are fully implemented in a timely manner.

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[624] *Lepofsky v TTC,* 2007 HRTO 23 (CanLII), 61 CHRR 511 at paras 12-14.
[625] *Hughes v Election Canada* supra note 545 at para. 99. It is noted however, that all of the parties had agreed upon this.

F. Specific Remedies Sought

DECLARATORY RELIEF

Pursuant to s. 53(2) of the *CHRA* the Caring Society seeks the following declarations with regard to the Respondent's discriminatory practices in its provision of the First Nations child and family services program:

General

1) The *Canadian Human Rights Act* requires the Respondent to provide First Nations child and family services that (a) are culturally appropriate; (b) take into account the unique needs and historic disadvantage of First Nations communities; and (c) are funded to a level that ensures the provision of services in a manner that is reasonably comparable to services offered off-reserve, and that the Respondent has failed to fulfill that duty;

2) The Respondent's failure to provide adequate and sustained levels of funding for primary, secondary and tertiary prevention services to maintain children safely in their family homes is discriminatory on the basis of race and national or ethnic origin contrary to section 5 of the CHRA;

3) The Respondent's failure to coordinate services with other Federal Departments to ensure First Nations children and families are not denied, delayed or adversely affected in the access to services available to the public is discriminatory on the basis of race and national or ethnic origin contrary to section 5 of the CHRA;

4) The Respondent's failure to fund all child and family services mandated by provincial/territorial legislation is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

5) The Respondent's practice of providing higher levels of funding with fewer reporting requirements and more flexibility to non- Aboriginal recipients than it provides to First

Nations child and family service agencies is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

6) The Respondent's failure to provide funds for culturally based standards and program development, operation and evaluation is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

7) The Respondent's failure to adjust its practices to ensure children served by a First Nations child and family service agency serving less than 1000 eligible children on reserve receive comparable and culturally appropriate services is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

8) The Respondent's failure to fund costs related to First Nations child and family service agencies with multiple offices is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA;

9) The Respondent's failure to adequately fund First Nations child and family service agency staff salaries, benefits and training at levels comparable to those received by non-Aboriginal child and family service agency staff is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA; and

10) The Respondent's failure to fund capital costs for First Nations child and family service agencies to ensure buildings, computers and vehicles meet building codes, are child safe, accessible by persons with disabilities and support comparable child and family services is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA.

Jordan's Principle

1) The Respondent's current definition of Jordan's Principle causes First Nations peoples to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA; and

2) The Respondent's current implementation of Jordan's Principle causes First Nations peoples to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA.

Directive 20-1

1) Directive 20-1 causes First Nations children in need of child welfare services to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA; and

2) Directive 20-1 disadvantages First Nations families by providing a differential level of service and denial of services, contrary to section 5 of the CHRA.

EPFA

1) The Respondent's current structure and implementation of EPFA causes First Nations children in need of child welfare services to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA.

Ontario

1) The Respondent's failure to comply with all provisions of Ontario's *Child and Family Services Act* is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;
2) The Respondent's failure to provide prevention services to all First Nations children and families on reserve in Ontario is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA; and

3) The Respondent's failure to provide funding that takes into account increased costs in remote areas is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA.

ORDERS TO CEASE DISCRIMINATORY CONDUCT

Pursuant to s. 53(2)(b), the Caring Society seeks orders that the Respondent make available to First Nations children the rights, opportunities and privileges that are being denied to First Nations children as a result of the Respondent's discriminatory practices in its provision of the First Nations Child and Family Services program by:

General

1) Fully reimbursing maintenance costs related to children in care in the year in which they are incurred;

2) Fully reimbursing all legal and staffing costs related to child welfare statutes and inquiries as maintenance, including legal costs related to child welfare investigations, child removals and the application of ongoing orders;

3) Providing upwards adjustments according to real figures for agencies where the proportion of children in care exceeds Respondent's assumption of 6% and where the proportion of families receiving services exceeds Respondent's assumption of 20%;

4) Using the Consumer Price Index, immediately increasing the rates for the reimbursement of expenses to take into account the lost purchasing power resulting from the Respondent's cessation of inflation adjustments since 1996;

5) Providing annual inflation adjustments based on the Consumer Price Index on an ongoing basis;

6) Immediately increasing the rates for costs included in the operations base amount currently valued at $143,000 per annum according to the formula as set out in *Wen:de: the Journey Continues* (CHRC Documents, Tab 6, pages 24-25) that were established in 1989 to take into account current cost values;

7) Fully reimbursing corporate legal costs and ceasing to cap those costs at $5000;

8) Providing adjustments for taking into account the remoteness factor in the reimbursement of costs according to the formula set out in *Wen:de, the Journey Continues* (CHRC Documents, Tab 6, pages 25-26);

9) Funding emergency repairs and routine maintenance for buildings to ensure child and family services offices maintain compliance with building codes and maintain reasonable comparability to child and family services facilities off reserve;

10) Ceasing reducing operations funding by 25% quantums pursuant to AANDC's arbitrary population thresholds of 251, 501, 801;

11) Allowing First Nations Child and Family Services Agencies to retain the CSA for quality of life programs for children and cease any reductions in funding allocations for First Nations child and family service agencies related to the CSA;

12) Ceasing the practice of recovering program cost over-runs from other programs for First Nations Peoples;

13) Examining requests for new First Nations child and family service agencies that meet the exception criteria set out in the 2012 AANDC policy and approving them if they meet the criteria;

14) Reimbursing costs for the participation of band representatives in child protection legal proceedings where that participation is provided for in provincial or territorial legislation; and

15) Ensuring that all funding increases pursuant to these orders are made with new funding, and not through reallocation of existing funding within the department.

Jordan's Principle

1) Applying Jordan's Principle to disputes between federal government departments;

2) Applying Jordan's Principle to all First Nations children and with respect to all educational, health and social services customarily available to children;

3) Becoming the payer of first resort in all cases covered by Jordan's Principle; and

4) Gathering and publicly listing the names and contact details of the Jordan's Principle focal point in every region and at headquarters.

Directive 20-1

1) Ceasing to apply Directive 20-1 within six months; and

2) Transitioning the jurisdictions currently regulated by Directive 20-1 to EPFA within six months, subject to the orders requested above. The value and structure of this initial transition from Directive 20-1 to EPFA is further subject to the recommendations of the National Advisory Committee and regional tables described below.

EPFA

1) Discontinuing the practice of requiring agencies to draw on their operations and prevention budgets to make up for increases in maintenance activities.

Ontario

1) Performing, within one year, a special study of the application of FNCFS in Ontario, through a mechanism developed through the agreement of the parties and with accompanying funding that allows for the meaningful participation of First Nations child and family service agencies, First Nations governments, AANDC, and the Province of Ontario to determine the adequacy of the 1965 Agreement in achieving: 1) comparability

of services; 2) culturally appropriate services; and 3) ensuring the best interests of the child are paramount;

2) Providing full reimbursement of activities that are mandated by the Ontario *Child and Family Services Act*; and

3) Providing an additional 5 million dollars for prevention services to First Nations child and family service agencies in Ontario.

NATIONAL ADVISORY COMMITTEE, REGIONAL TABLES AND PERMANENT MONITORING

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent take the following measures, in consultation with the Commission and the Complainants, to redress the Respondent's discriminatory practices in relation to its provision of Jordan's Principle and the First Nations child and family services program and to prevent the same or similar discriminatory practices from occurring in the future:

1) Establish and fund meaningful participation in a National Advisory Committee composed of staff from AANDC Headquarters, AANDC regional offices, the Complainants, and which allows for equal participation of First Nations child and family services regional representatives (including funding to support the meaningful participation of First Nations child and family services regional representatives) to examine, make recommendations and monitor the implementation of a funding formula that ensures that First Nations children receive child welfare services that are reasonably comparable, culturally appropriate, and that take into account the unique needs of First Nations children, in all regions;

2) Participate in a negotiation process in which the above-mentioned National Advisory Committee examines, makes recommendations to the Respondent, and monitors the implementation of recommendations regarding, the following:

General

a) General funding structure, stacking provision considerations and considerations of eligible costs;
b) Provisions for First Nations children not served by a First Nations child and family services to ensure comparable and culturally appropriate services;
c) Provisions for extraordinary costs related to unusual occurrences that engage higher child welfare costs such as natural disasters, substantial increases in mental health or substance misuse, and unusual requirements for mandatory staff participation in inquiries;
d) Provisions for organizational networking and learning to promote the sharing of research and best practices amongst First Nations child and family service agencies;
e) A process for economically modelling revisions to funding policy and formula and evaluating the efficacy of such changes on an ongoing basis to ensure they are non-discriminatory and safeguard the best interests of the children;
a) A funding structure that takes into account costs related to historic disadvantage; and
b) Staff salaries, benefits, and training.

Maintenance

a) Calculation of yearly maintenance;
b) Appeal mechanisms regarding eligible maintenance expenses;
c) Reimbursement of legal costs; and
d) Funding of support services intended to reunite children in care with their family.

Operations

a) Baseline assumptions of children in care for funding of agencies;
b) Inflation losses and annual adjustment;
c) Corporate legal costs;
d) Funding of remote agencies;

e) Funding for records management, policy development and human resources management, liability insurance, audits, janitorial services and security;
f) Funding of costs related to the receipt, assessment and investigation of child welfare reports for all agencies that hold delegation for these functions including costs for after-hours service delivery;
g) Funding of capital costs that takes into account increased need due to augmentation of prevention staff, services and programs;
h) Funding of emergency repairs and maintenance of buildings;
i) Funding for staff travel and travel costs related to children and families receiving child welfare services;
j) Definition of eligible child; and
k) Any changes to the funding structures to FNCFSA or their reporting requirements.

Prevention Funding

a) Funding for the adequate and sustained provision of primary, secondary and tertiary prevention services; and
b) Funding for the development and evaluation of culturally based prevention programs.

Jordan's Principle

a) The implementation of an inclusive definition of Jordan's Principle;
b) The creation of a non-discriminatory and transparent process for reporting Jordan's Principle cases;
c) The creation of non-discriminatory and transparent assessment criteria and assessment processes for reports of Jordan's Principle cases; and
d) The creation and implementation of an appeal process for Jordan's Principle cases.

Accountability

a) Funding for the periodic assessment of each agency's program; and

b) The creation of publicly funded mechanism to act as a national and publicly accessible repository for all non-privileged information relevant to First Nations child welfare services.

3) Establish and meaningfully fund participation in regional tables to complement the National Advisory Committee, to be composed of regional representatives of the Respondent and the Complainants, and which allow for the equal participation of the First Nations child and family services agencies of the region concerned, with the mandate of reaching agreement on a non-discriminatory funding formula for First Nations child and family services in the region concerned, taking into account the specific situation and cultural needs of the region concerned. The Respondent will provide adequate and sustained funding to enable the meaningful participation of the Complainants and First Nations child and family service agencies;

4) In a spirit of reconciliation and in accordance with international standards, the foregoing measures must be applied in good faith and with the objective of reaching agreement on the measures that need to be taken to ensure a non-discriminatory provision of First Nations child and family services; and

5) The creation of an independent permanent expert structure with the authority, resources and mandate to monitor and publicly report on the Respondent's performance in maintaining non-discriminatory and culturally appropriate First Nations child and family services and in fully implementing Jordan's Principle. This independent structure will provide a detailed public report on at least an annual basis.

POSTING OF INFORMATION

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent cease its discriminatory practices in relation to its First Nations child and family services system and take the following measures:

1) Without delay, and on an annual basis thereafter, post non-identifying data on the number of children in care and the number of days of care by region and nationally;

2) Without delay, post and keep up-to-date all funding formulas, policies, manuals, directives and appeal mechanisms and distribute electronic and hard copies of such information to all First Nations child and family service agencies;

3) Without delay, post and keep up-to-date information regarding its implementation of Jordan's Principle, including its definition of Jordan's Principle, assessment criteria and process, remediation and appeal mechanism;

4) Without delay, and on an annual basis thereafter, post non-identifying data on the number of Jordan's Principle referrals made, the disposition of those cases and the time frame for disposition as well as the result of independent appeals; and

5) Without delay, provide all First Nations and First Nations child and family agencies the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and First Nations child and family agencies in question of any changes of such.

TRAINING

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent cease its discriminatory practices in relation to its provision of the First Nations child and family services program and take the following measures:

1) Develop and implement, in consultation with the Commission and the Complainants and within six (6) months of the Tribunal's Order a training program for all AANDC staff working within the First Nations child and family services program on the following issues:

   a) First Nations' culture and history;
   b) Factors causing over-representation of First Nations children in child welfare, including the intergenerational impacts of Residential Schools; and
   c) The history of AANDC's First Nations child and family services program, including the reviews and evaluations conducted from 2000 to 2011 and the findings of the Tribunal.

2) Develop and implement, in consultation with the Commission and the Complainants and within six (6) months of the Order a training program for all Jordan's Principle focal points on the following issues:

   a) The story of Jordan River Anderson; including a description of the child's needs, hospital discharge plan, the nature of the jurisdictional disputes; parties to those disputes; the nature of the dispute resolution processes engaged in the case and the result of those dispute processes and the effect on the child and his family;
   b) The history of Jordan's Principle including the definition documented in the Wen:de reports, Motion-296, the Federal Response to Jordan's Principle, independent commentary and reviews of the Federal Response to Jordan's Principle, the *Pictou Landing v. Attorney General of Canada* case, First Nations and provincial/territorial views on Jordan's Principle and the findings of the Tribunal; and
   c) Services relating to child welfare available on and off reserve in every region.

MONETARY ORDERS

Pursuant to s. 53(3) of the *CHRA*, the Caring Society seeks an order that the Respondent:

1) Pay an amount of $20,000 as damages under section 53(3) of the CHRA, plus interest pursuant to s. 53(4) of the CHRA and Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child on reserve and in the Yukon Territory that has been taken into out-of-home care since 2006;

2) Provide to the Tribunal and the parties a detailed account of the number of First Nations children taken into out-of-home care on reserve and in the Yukon Territory since 2006; and

3) Pay these damages, plus interest, into a trust fund that:

    a) will be used to the benefit of First Nations children who have experienced pain and suffering as a result of the Respondent's discriminatory treatment;
    b) will provide First Nations children with access to services, such as culture and language programs, family reunification programs, counselling, health and wellness programs and education programs; and
    c) will be administered by a board of seven Trustees appointed jointly by the Complainant, the Commission and the Respondent or, if the latter fail to agree, by the Tribunal.

MONITORING BY THE TRIBUNAL

Pursuant to the Tribunal's jurisdiction by necessary implication, the Caring Society requests that the Tribunal retain jurisdiction over the Complaint and hold reporting hearings involving the Commission, the Complainants, and any relevant Interested Parties to receive reports of the following information from the Respondent within six (6) months following the date of the Order and every six (6) months thereafter until the Tribunal is satisfied, based on submissions from all parties, that substantive equality has been achieved in the Respondent's First Nations child and family services system:

1) The Respondent's actions to ensure that the services provides by the Respondent's First Nations child and family services program meet or beat provincial standards in all provinces and territories;

2) The Respondent's actions to ensure that the First Nations child and family services program reflects any changes in provincial statutes, salaries and generally accepted social work practices;

3) The Respondent's actions to ensure that Jordan's Principle is implemented in a way that ensures that First Nations children are able to access services normally available to the public on the same terms as other children;

4) The Respondent's actions to ensure that all of its staff working within the First Nations child and family services program are receiving appropriate training as ordered by this Tribunal;

5) The Respondent's actions to implement the recommendations of the National Advisory Committee and Regional Tables in good faith; and

6) The Respondent's actions to ensure that any changes made to the First Nations child and family services program are consistent with the CHRA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 29, 2014

for Robert W. Grant / Sébastien Grammond
Anne Levesque / Sarah Clarke
Michael A. Sabet / David Taylor

Counsel, First Nations Child and Family
Caring Society of Canada

PART V - LIST OF AUTHORITIES

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