Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 4
Date: February 1, 2018
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon and Edward P. Lustig

Outline

I. Motions for immediate relief related to the First Nations Child and Family Services Program and 1965 Agreement

[1] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada's implementation of this Panel's decision and orders in *First Nations Child and Family Caring Society of Canada (FNCFCS) et al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada (INAC)), 2016 CHRT 2 ("the *Decision*"). Canada and the Canadian Human Rights Commission (Commission) filed submissions in response to the motions. The motions were heard from March 22 to March 24, 2017 in Ottawa.

[2] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to immediate relief.

II. Summary of Canada's further actions in relation to the First Nations Child and Family Services Program and 1965 Agreement

[3] Canada submits, in sum, that since the *Decision* it has increased funding for the First Nations Child and Family Services (FNCFS) program over the next five years through new investments of $634.8 million in Budget 2016. In 2016/2017, among other items, it will provide $71 million for prevention and front-line support to agencies, with increases to follow in each of the next four fiscal years. According to Canada, the purpose of the increased funding is to address the immediate needs of FNCFS Agencies that had been underfunded under the impugned funding models.

[4] On the Canadian Human Rights Tribunal's (Tribunal) order to cease the practice of having agencies cover deficits in maintenance funding with funds from their operations and/or prevention funding streams, Canada states that it has directed that cost overruns from maintenance are not to be recovered from operations and/or prevention funding streams.

[5] Canada indicates that it has allocated a further $20 million to FNCFS Agencies to respond to funding pressures identified in 2015/2016 and 2016/2017 in areas such as

maintenance pressures, deficits and payments resulting from the impacts of provincial reform. According to Canada, this additional funding to address maintenance pressures provides needed support for the expenditures of children in care and removes the need for agencies to divert spending from prevention or operations funding streams.

[6] With respect to the assumption of 6% of children in care as a basis for funding, Canada indicates that the assumption is now used as a minimum only. Where the number of children in care is above 6%, Canada is basing funding on the actual number of children receiving care.

[7] With respect to the other assumption that 20% of families require service, Canada only uses the assumption as a minimum standard. While data is not available on the actual number of families in need of services, where there is a greater number than 6% of children in care, Canada is also adjusting the 20% upward. According to Canada, to the extent that this can be achieved in the interim without data on the actual number of families that use, or would use, prevention services if they were available, Canada has complied.

[8] For small agencies and the Tribunal's order that Canada cease the practice of reducing funding to agencies that serve less than 251 eligible children, Canada confirms it has set the minimum threshold for core operational funding for agencies at the level previously provided to agencies with a minimum child population served of 300 children (0 to 18 years). This is an interim approach while further engagement is undertaken with agencies and other partners.

[9] With regard to the *1965 Agreement*, Canada provided immediate relief funding of $5.8 million for 2016/2017. The $5.8 million was distributed according to a formula agreed on by INAC, the province of Ontario and the Chiefs of Ontario (COO).

[10] Additionally, Canada confirmed that approximately $64 million was allocated to First Nations mental health programming in Ontario for the 2016/17 fiscal year, along with a $69 million investment over a three-year period to address the mental health needs of First Nations and Inuit communities across the country.

[11] Canada submits that it is working with the province of Ontario and First Nations leadership as well as other partners to look specifically at the government's support for child and family services through the application of the *1965 Agreement*. Discussions began with a focus on immediate relief investments for 2016/17 and draft Terms of Reference for the working group are currently being finalized. A work plan is being developed with the following items being discussed: consideration of funding formula options for 2017/2018; review of the *1965 Agreement*; Band representatives; mental health; the Ontario study and remoteness; and development of longer-term policy and funding approaches. According to Canada, the work of this group will help to ensure a solution to these issues that has the input of Ontario's First Nations communities and the province of Ontario.

[12] Overall, Canada believes it has responded to the Tribunal's rulings and has implemented substantive changes to remediate the discriminatory impacts of the impugned funding regime while medium and long-term program reform is underway. There is no basis for a finding of non-compliance and the motions should be dismissed.

[13] The Panel believes that Canada has complied with many of its orders and/or findings and is encouraged by this progress. Canada has implemented a number of changes and has taken a number of initiatives. In sum, Canada provided additional funds for prevention services and for agencies' funding pressures; it provided additional funding to Ontario including amounts to address some mental health needs, the 6% and 20% assumptions of children in care are now used as minimal amounts only; Canada sent a letter to agencies to enquire about their specific needs and offered funding associated to the preparation of the agencies' reports; Canada offered funding for the agencies to develop culturally appropriate standards; Canada confirmed agencies are no longer expected to recover deficits in maintenance from their operation and prevention funds; Canada ceased the practice of reducing funding for small agencies that serve less than 251 children; it made adjustments in funding to address salaries on an average basis; it made small increases to legal costs funding; it increased the child purchase service amount; it provided some funding for intake and investigation and it made small adjustments to staff travel funding. Canada established a working group to improve Non-

Insured Health Benefits (NIHB) supports, it started addressing remoteness by arranging some transportation for children to access various therapy and other services not covered by NIHB. It re-enacted the National Advisory Committee (NAC) in partnership with the Assembly of First Nations (AFN) and the Caring Society including the funding to participate at the NAC and, provided the funding of the Aboriginal component of the Canadian Incidence Study of Reported Child Abuse and Neglect, among other things).

[14] Between the motions' hearing and this ruling, Canada entered into agreements with the Nishnawbe Aski Nation (NAN) and the COO that will be discussed in separate sections below. It is important to note at the onset of this ruling, this positive progress improving the lives of Indigenous children. The Panel wishes to acknowledge the COO, the NAN and Canada for these agreements.

[15] Insofar as Canada's actions, it is incorrect to assert it did nothing. It is also incorrect for Canada to say it did everything that it could do and everything that what was asked of it in the immediate term, which has now become mid-term. The Panel finds it important to raise this perspective, which is informed by the evidence before it both at the hearing on the merits and at the motions' hearing.

[16] It is useful to provide an overview of the context of this case and to review the legal principles applicable before analyzing the different requests and submissions.

A. Legal arguments

i. Burden of proof and compliance

[17] While the parties debated who had the burden of proof in these motions, as analyzed in 2017 CHRT 14, absent a gap in the evidentiary record, the burden of proof is not a material issue in determining the present motions. That is, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial.

[18] Similarly, and despite some of the Complainants and Interested Parties' requests for orders or declarations of non-compliance by Canada, the Panel reiterates its purpose in

retaining jurisdiction in this matter and crafting orders for immediate relief is: to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. Orders or declarations of non-compliance do not fulfill this purpose. That is not to say that Canada's approach to compliance or its lack thereof, is not relevant to the determination of the present motions. The Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular context in which these motions are brought and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date and this evidence can be used by the Panel to make findings and to determine the motions of the parties (see 2017 CHRT 14 at paras.23-34).

[19] In the *Decision*, the Panel wrote that: The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by Aboriginal Affairs and Northern Development Canada (AANDC). (…) While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see the *Decision* at paras. 483 and 484).

[20] Some of the Panel's questions were still outstanding at the time of the motions' hearing in March 2017 and, ruling on immediate relief requests still pending. Therefore, the Panel considers this ruling to be essentially the continuation of immediate relief while dealing with some compliance to previous orders made by this Panel. Aside from compliance reports, the Panel hopes to close the immediate relief orders phase with this ruling.

ii. Separation of powers

Tribunal's jurisdiction/authority to make orders on public spending of funds and separation of powers

[21] The Panel wants to address a number of legal questions that arose as part of these ongoing proceedings and that are contentious amongst the parties. This section will touch briefly on the separation of powers between different branches of government and the Tribunal's framework and, the purpose of the *Canadian Human Rights Act* (*CHRA)* and its relation to the Tribunal's remedial powers under the *Act.*

[22] The Commission and the Attorney General of Canada (AGC) rely on *Ball v. Ontario (Community and Social Services),* 2010 HRTO 360 to support the position that the Tribunal should leave the precise method of remedying the discrimination to the government so as not to upset the separation of powers between the different branches of government. The Human Rights Tribunal of Ontario (HRTO) in its analysis relies on (*Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62) which analyzed remedies under section 24 of the Charter.

[23] The Panel finds that the case at hand and its factual matrix is far more complex and far more reaching than the *Ball* case and therefore it can distinguish the *Ball* case from this case.

[24] The *McKinnon v. Ontario (Ministry of Correctional Services), [1998], OHRBID, No 10, 32 CHHR D/1 and [2002] OHRBID, No 22,* decisions from the HRTO followed a different approach informed by the specific facts in the case and was affirmed on appeal (see *Ontario v. McKinnon*, 2004 CanLII, 47147, (ONCA). The Panel believes the *McKinnon* case is more similar to this case than the *Ball* case.

[25] The Panel also continues to rely on its *Decision* that addressed at length Canada's legal arguments and in subsequent rulings that were accepted by Canada.

[26] The Tribunal's jurisdiction is statutory in nature and is established by the *CHRA*. Parliament's intent is clearly expressed in the *CHRA*'s purpose under section 2 of the Act.

[27] Section 2 of the *Act* provides that:

> 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 with 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, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (emphasis ours). This legislation applies to the federal government.

[28] The Tribunal's mandate derives from the *CHRA* which is an *Act* adopted by Parliament and, characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for example *Robichaud v. Canada (Treasury Board), [1987] 2 SCR 84 at pp. 89-90 [Robichaud]; Canada (House of Commons) v. Vaid, 2005 SCC 30 at para. 81;* and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53 at para. 62 [Mowat]).*

[29] The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 S.C.R. 145, 158, and further articulated by the Supreme Court of Canada *in Winnipeg School Division No. 1 v. Craton* [1985] 2 S.C.R. 150, at p. 156 where the court stated:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577)

[30] It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered, rather than through the lens of the Treasury board authorities and/or the *Financial Administration Act,* R.S.C., 1985, c. F-11. The separation of powers argument is usually brought up in the context of remedies ordered under section 24 of the *Charter (see for example Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62), which distracts from the proper interpretation of the *CHRA*. Moreover, the AGC did not demonstrate that the separation of powers is part of the *CHRA* interpretation analysis.

None of the case law put forward by Canada and considered by the Panel changes the Panel's views on remedies under the *CHRA*.

[31] The Panel provided an overview of the Tribunal's broad and flexible remedial authorities in 2016 CHRT 10 (paras. 10-19) which was not judicially reviewed.

[32] In making its orders the Tribunal does not seek to usurp the powers of other branches of government. It is operating under its Statute that permits it to address past discriminatory practices, and prevent future ones from occurring. This is provided for in the *Act* under section 53 (2) (a): *that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures,* ***to redress the practice or to prevent the same or a similar practice from occurring in future, including*** (...)*.* (emphasis added).

[33] Consequently, any order made by the Tribunal, especially in systemic cases, has some level of impact on policy or spending of funds. To deny this power to the Tribunal by way of decisions from the executive would actually prevent the Tribunal from doing its duty under the *Act* which is quasi-constitutional in nature. Throughout its existence, the Tribunal has made orders on numerous occasions that affect spending of funds. Sometimes orders amounting to millions of dollars are made (see for example *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para.1023 affirmed by the Supreme Court of Canada, see *Public Service Alliance of Canada v. Canada Post Corp*., [2011] 3 SCR 572, 2011 SCC 57). In addition, specific remedies impacting policy are often made to remedy discrimination. This was addressed by the Tribunal and the Supreme Court of Canada.

[34] Section 53(2)(a) of the *CHRA* gives this Tribunal the jurisdiction to make a cease and desist order. In addition, if the Tribunal considers it appropriate to prevent the same or a similar practice from occurring in the future, it may order certain measures including the adoption of a special program, plan or arrangement referred to in subsection 16(1) of the *CHRA* (see *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health & Welfare) T.D.3/97*, pp. 30-31). The scope of this jurisdiction was considered by the Supreme Court of Canada in *CN v. Canada (Canadian Human Rights Commission),*

[1987] 1 SCR 1114, [Action Travail des Femmes]). In adopting the dissenting opinion of MacGuigan, J. in the Federal Court of Appeal, the Court stated that:

> ...s. 41(2)(a), [now 53(2)(a)], was designed to allow human rights tribunals to prevent future discrimination against identifiable protected groups, but he held that "prevention" is a broad term and that it is often necessary to refer to historical patterns of discrimination, in order to design appropriate strategies for the future..... (at page 1141)

[35] The Supreme Court also said in reference to the Order made by the Tribunal in that case:

> ...When confronted with such a case of "systemic discrimination", [as was the case with Canadian National Railway], it may be that the type of order issued by the Tribunal is the only means by which the purpose of the Canadian Human Rights Act can be met.
>
> In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed, there is no prevention without some form of remedy... (at pages 1141 to 1142)

[36] The Court pointed out that:

> Unlike the remedies in s. 41(2)(b)-(d), [now Section 53], the remedy under s. 41(2)(a), is directed towards a group and is therefore not merely compensatory but is itself prospective. The benefit is always designed to improve the situation for the group in the future, so that a successful employment equity program will render itself otiose. (at page 1142)

[37] As in the *NCARR* case referred to above, the Panel is not dealing with employment equity issues however, there is nothing in the *CHRA* that restricts remedies under section 53 (2) (a) to employment equity issues. Similar to the analysis in *NCARR*, the Panel believes this is applicable to the case at hand.

[38] In fact as an example, the words in section 16 (1) of the *CHRA* are not earmarked for employment situations only:

> **Special programs**
>
> 16 (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to **prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages** that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of

> discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group. (emphasis added).

[39] Moreover, the Federal Court of Canada in regards to remedies stated in *Grover v. Canada (National Research Council*) (1994), 24 CHRR D/390 (FC) at para. 40 [Grover], "[s]uch a task demands **innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the *Act* is structured so as to encourage this flexibility." (emphasis added).**

[40] The Tribunal made extensive findings in 2016 CHRT 2 and provided very detailed reasons as to how it arrived at its findings. The Panel specifically mentioned that reform must address the findings in the *Decision*. This case is about underfunding, policy, authorities and, the National Program that were found to be discriminatory. The AGC is advancing that no remedies can be awarded by the Tribunal in terms of policy or public spending. The appropriate way to challenge this was by way of judicial review which was not done here. It appears that the AGC's previous arguments that the Tribunal has no jurisdiction in this complaint is now being disguised as the separation of powers argument in which it claims the Tribunal can make no orders in relation to public spending and in terms of policy.

[41] Canada must accept that liability was found and that remedies flow from this finding. The *Decision* was not a recommendation; it is legally binding.

[42] To the same extent that funds must be provided to comply with Court decisions, funds must also flow from the Tribunal's *Decision*. Treasury Board decisions cannot be above the *CHRA* when it comes to expenses for liability.

[43] The Panel to date has not made orders prescribing specific amounts of funding. It has chosen to make orders flowing from its findings which were accepted by Canada.

[44] The Panel is concerned that if Canada continues to take the position that the Tribunal does not have the power to make remedies on policy and public funds, especially in a case where underfunding and policy are the center of the complaint that was substantiated and not judicially reviewed, Canada would then be preventing the Tribunal

from fulfilling its quasi-constitutional mandate to protect fundamental human rights. To put it in the words of the Supreme Court, human rights legislation is “the final refuge of the disadvantaged and the disenfranchised” (see *Zurich Insurance v. O.H.R.C* [1992] 2 S.C.R. 321).

[45] If all that Canada has to do is to argue the separation of powers argument to stop the Tribunal from making any orders on policy or public funds, in our view this infringes the proper administration of justice and reduces the Tribunal’s role to making findings and general orders that can only be implemented at Canada’s discretion, akin to a Commission of inquiry. This is not the intent of Parliament expressed in section 2 of the *CHRA*. Nor is it consistent with the wording of s. 53 of the *CHRA*. Given that human rights legislation aims to eliminate and prevent discrimination (see for example *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84 at para. 13 [Robichaud], *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114 at p. 1134 [Action Travail des Femmes]). The Panel believes that agreeing with Canada’s position would strip the Tribunal and the *CHRA* of any significance.

[46] It is also important to reiterate that this case is about Indigenous children, families and communities who have been recognized by this Panel and the Courts, including the Supreme Court, as a historically disadvantaged group. The best interest of children is not advanced by legalistic positions such as Canada’s. It is also sending a message that the Tribunal has no power and human rights can be violated and are remedied only if Canada finds money in their budget. This is in our view, a misapplication of the *CHRA* and of the Executive powers especially given that the Bona Fide Occupational Requirement (BFOR) cost defense provided for in the *CHRA* was not advanced in this case.

[47] **More importantly, this case is vital because it deals with mass removal of children. There is urgency to act and prioritize the elimination of the removal of children from their families and communities.**

[48] While the Tribunal wants to craft responsive remedies to address the discrimination, it is not interested in drafting policies, choosing between policies, supervising policy-drafting or unnecessarily embarking in the specifics of the reform. It is

interested in ensuring previous discriminatory policies are reformed and no longer used, especially two years after the *Decision*, and that concrete measures to remedy discrimination are taken.

[49] The Panel's orders to date flow from the *Decision* and its findings, and are based on the best information before it to address the main adverse impacts of the discrimination. Moreover, it found for the complainants who are Indigenous peoples representing numerous Indigenous voices and who are asking for the remedies addressed in this ruling.

[50] In retaining jurisdiction, the Panel is monitoring if Canada is remedying discrimination in a responsive and efficient way **without repeating the patterns of the past.**

[51] Indeed, the Supreme Court in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) has also directed human rights tribunals to ensure that their remedies are effective, creative when necessary, and respond to the fundamental nature of the rights in question:

[52] 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 (…) Thus, in 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*. (see at para. 26),(emphasis ours).

[53] If the past discriminatory practices are not addressed in a meaningful fashion, the Panel may deem it necessary to make further orders. It would be unfair for the Complainants, the Commission and the interested parties who were successful in this complaint, after many years and different levels of Courts, to have to file another complaint for the implementation of the Tribunal's orders and reform of the First Nations' Child welfare system.

[54] It is important to distinguish policy choices made by Canada that satisfactorily address the discrimination, in which the Panel refrains from intervening, from policy choices made by Canada that do not prevent the practice from reoccurring. To explain this, if the Panel finds that Canada is repeating history and choosing similar or identical ways to provide child welfare services that amounted to discrimination, the Panel has justification to intervene.

[55] Finally on this point, while Canada advances that it needs to consult with all First Nations' communities, which in our view remains paramount for long term reform, the Panel does not think consultation prevents Canada from implementing immediate relief. In so far as Canada's position is that it cannot unilaterally make decisions, the Panel finds Canada has done so: namely to maintain the *status quo* in some areas even when the needs of specific communities or groups have been clearly identified and expressed in numerous reports filed in evidence in this case and, referred to, in the *Decision'*s findings.

[56] The Panel finds troubling that important issues addressed at length in the unchallenged *Decision* are advanced again by Canada. Here are some areas of concern for the Panel:

[57] The focus remains on the provinces' role rather than on Canada's own role despite our findings concerning INAC's control and our findings on section 91(24) of the *Constitution*. There is over-emphasis on tripartite meetings and discussions before action, and incremental approach to funding despite our findings that the Enhanced Prevention Focused Approach (EPFA) roll-out had flaws. These arguments were made at the hearing and were addressed in the *Decision* and subsequent rulings.

[58] While there is no doubt for this Panel that Canada has to work with provinces, territories and all Indigenous governments, and that all have a part to play, this argument alone is not a valid one to redirect responsibility to the provinces. Canada has argued at the hearing on the merits that health and social services is the provinces' responsibility under the *Constitution* and that section 88 of the *Indian Act* enables provincial legislation to apply on reserves. It also supported its assertions by pointing out that it is the provinces who delegate authorities to First Nations agencies. The Panel reminded Canada of section

91(24) and Canada's constitutional obligations towards "Indians". (see the *Decision* at paras.78-110). Moreover, the Panel explained in detail in the *Decision* how INAC and its National program exert control over the services offered and being held out to the children. (see also the *Decision* at paras 74, 85 and 113).

[59] Canada simply cannot hide behind the provinces' responsibilities to shield itself from its own responsibilities.

[60] This legal argument was advanced for years before the Tribunal. It was answered and put to rest in February 2016 when the *Decision* was not challenged. INAC cannot act as judge and party in relation to the *Decision* and grant itself a stay and a *post facto* successful judicial review. This is not how our justice system is designed.

[61] Canada has also accepted all 94 of the Truth and Reconciliation Commission's (TRC) recommendations. It undertook to implement them and to rebuild the Nation-to-Nation relationship with Indigenous peoples. To our knowledge, while the provinces and Indigenous peoples need to be full partners, Canada has accepted its part and responsibility. The Panel can turn its mind to any barriers Canada has to overcome in order to address the discrimination and recognizes that there may be some, but the Panel would need more than just assertions unsupported by evidence from Canada in order to inform its findings and orders.

[62] Another argument advanced by Canada to support leaving some of the immediate relief for later is that not all groups are represented before the Tribunal, and that it is best left for discussions with all partners in the long term. On that point, the Panel would like to stress how important it is to address the issue of **mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views

from one Nation to another, surely the need to keep the children in their communities as much as possible is the same.

[63] In 2017 CHRT 14, the Panel wrote at para. 133: The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[64] The *Decision* is where all remedies flow from and it is unnecessary to repeat in great detail all the findings and reasons identified in the *Decision*. This is why the Panel wrote at para.481: AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* **to reflect the findings in this decision**.

[65] It is expected that immediate relief is supported by the findings and inform remedies.

[66] This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other.

[67] Insofar as Canada asserts it is gathering specific information to address specific needs as ordered by the Panel, it is difficult to reconcile this approach with the disregard of specific demands from specific Nations and Indigenous organizations to improve the child welfare delivery while long term reform is underway (see for example COO's request for Band representatives, Mushkegowuk Council and NAN's requests filed in evidence). If a

Nation identifies its specific needs, why impose on them the need to complete consultations with all Nations to respond to those specific needs? Nations are distinct and have distinct needs. A one-size fits all approach is not helpful and was found to be discriminatory in the *Decision*. This is why the Panel has previously ordered to respond to specific needs while reforming and consulting with partners, Indigenous communities, Indigenous governments, First Nations' agencies, provinces and parties in this case. As a matter of fact, Canada already made agreements with specific communities to respond to specific needs and improve the well-being of many.

[68] **To be clear, we acknowledge there has been some progress and encouraging agreements.** We simply do not accept some of the arguments advanced by Canada in response to these motions especially in regards to Band representatives, mental health, prevention funds and actual costs for least disruptive measures and other important items.

International Law

[69] The *CHRA* is a result of the implementation of international human rights principles in domestic law (see the *Decision* at paras 437-439).

[70] In *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The Court held the Minister's decision should follow the values found in international human rights law.

[71] As described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special circumstances.

UNDRIP and child welfare

[72] Of particular significance especially in this case is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the UNDRIP). It outlines the individual and

collective rights of Indigenous peoples. In May 2016, Canada endorsed the UNDRIP stating that “Canada is now a full supporter of the Declaration, without qualification.

[73] UNDRIP Articles 3, 4, 5, 14, 15, 18, 21 support the rights of equal and just services and programs for Indigenous, with consultation on their social, economic and political institutions.

[74] UNDRIP Articles 7, 21 (2), 22 (1) (2), state that Indigenous peoples have the right to live in freedom and shall not be subject to violence including the forceful removal of their children; that Indigenous people have the right to the improvement of their economic and social conditions; and states will take measures to improve and pay special attention to the rights and special needs of children.

[75] UNDRIP Articles (Article 2, 7, 22) relate directly to the protection of Indigenous children and their right to be free from any kind of discrimination.

[76] Article 8 of UNDRIP reminds governments of their responsibility to ensure that forced assimilation does not occur and that effective mechanisms are put into place to prevent depriving Indigenous peoples of their cultural identities and distinctive traits, disposing them of their lands, territories or resources, population transfer which violates or undermines Indigenous rights, forced assimilation or integration, and discriminatory propaganda.

[77] In addition, in 2015, Canada has accepted to fully implement the 94 Truth and Reconciliation calls for action. Child welfare and Jordan’s Principle are the numbers 1 to 5 calls to action.

[78] The TRC Calls to Action 8, 10, 11, and 12 ask the government to eliminate the discrepancy in federal funding for First Nations, while Calls to Action 18 and 19 call upon the government to address the current state of Aboriginal health and to establish goals to close the gaps.

[79] The TRC calls for cooperation and coordination between all levels of government and civil society to implement its calls to action, and for government to fully adopt and implement the UNDRIP as the framework for reconciliation.

[80] Canada recognized the need to renew the Nation-to-Nation relationship with Indigenous communities.

[81] Furthermore, the Panel believes that national legislation such as the *CHRA* must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the UNDRIP.

[82] **In 2016, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) recommended that Canada review and increase its funding to family and child welfare services to Indigenous Peoples living on reserve and to fully comply with the Tribunal's January 26, 2016 *Decision***, (see Affidavit of Dr. Blackstock at par. 33 and Exhibit L: CESCR March 23, 2016, Concluding Observations).

[83] The above informs the Panel's reasons and orders in this ruling.

B. Context and further orders requested

i. The FNCFS Program and Prevention

[84] The AFN is particularly concerned with INAC's failure to fund prevention services on the basis of need and in light of the historically disadvantaged circumstances of First Nations children and families on reserve, while fully funding apprehensions.

[85] The AFN requests an order that INAC immediately develop, in consultation with the AFN, the Caring Society, COO, NAN and the Commission, a protocol grounded in the honor of the Crown, for engaging in consultations with First Nations an FNCFS agencies that are affected by the *Decision and* the Remedial Orders herein. The AFN requests that INAC engage in consultations in a manner consistent with the protocol and the honor of the Crown, to address the elimination of discrimination substantiated in the Panel's *Decision*.

[86] The AFN has requested at paragraph 146 of its written submissions, dated February 28, 2017, "An Order that pending long term reform of its funding models, INAC immediately eliminate that aspect of its funding models that creates a perverse incentive resulting in the unnecessary apprehension of First Nations children from their families

and/or communities. To this effect, the AFN requests that INAC be ordered to immediately implement a system for funding the cost of prevention/least disruptive measures, which operates on the same basis as INAC's current funding practices for funding maintenance costs, that is by fully reimbursing actual costs for these services, as determined by the FNCFS agencies to be in the best interests of the child".

[87] The AFN further requests "An Order that INAC cease its discriminatory funding practice of not funding prevention on the basis of need, and that INAC develop an alternative means for funding prevention services for First Nations children and families on-reserve and the Yukon. They request that this alternative means of funding be based on actual needs, especially in light of the historically disadvantaged circumstances of First Nations, and additionally, that INAC be given 60-days to develop and implement the methodology and report back to the Panel. The AFN submits that proper and genuine consultations by Canada with First Nations, that are necessary to arrive at medium and long-term reforms, should not be an excuse to delay immediate relief especially funding prevention services based on need as the continuation of underfunding of prevention is a continuation of discrimination.

[88] The AFN submits that the Tribunal is obligated to provide meaningful and effective remedies, which is not possible if Canada refuses to comply. INAC has accepted the Panel's *Decision* that underfunding prevention services is discriminatory. Canada is bound by the *Decision* and the compliance orders, and it has admitted that there is nothing stopping it from complying with the remedial orders. There is ample information available to allow Canada to take meaningful actions to end discrimination and implement the methodology and report back to the Panel."

[89] In its written reply dated March 17, 2017 the AFN adds that Canada is trying to avoid compliance with the Tribunal's *Decision* and compliance orders for immediate relief by mischaracterizing the Moving Parties' arguments as being a disagreement with Canada's "policy choices". This cannot be allowed to stand as it would mean that discrimination would continue until some unknown time in the future when Canada decided to choose policies that complied and eliminated discrimination. The rule of law is directly dependant on the ability of the Tribunal to enforce its process and maintain respect

for remedial orders otherwise the *CHRA* is meaningless as a tool to eliminate discrimination.

[90] In its oral submissions and oral reply the AFN argues as follows:

[91] The underfunding of prevention is the key and if it is not stopped, the discrimination continues. The Tribunal has jurisdiction to deal with this in an immediate relief as a basic rule of law as it has made a finding of discrimination against Canada for underfunding and Canada has failed to meet its onus to prove compliance. Therefore orders are now called for.

[92] Stopping the removal of children is the dominant interest of AFN to achieve self-determination and rebuild sustainable First Nations communities. That is not possible with the perverse incentive that takes children away from home as a consequence of flawed funding formulas based on flawed assumptions. It is the Residential School experience all over again. (emphasis added).

[93] The fundamental core of Canada's systemic discrimination is that it fails to fund First Nation Child Welfare based on need, including addressing and redressing historical disadvantages. The Panel in its decision wrote that it's "...focus is whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and the communities". Actual costs for prevention services should be the policy not just at the onset but also on an ongoing basis similar to the apprehensions framework.

[94] If the Tribunal issues the order for actuals for prevention, the AFN is prepared to give Canada time to develop a methodology to make sure that it's workable. The AFN submits it's fully reimbursable in BC, Alberta and Québec, so these could be used as a basis for the methodology.

[95] At paragraph 69 of its written submissions the Caring Society refers to Ms. Lang's January 25, 2017 affidavit indicating that with regard to prevention funding, "INAC is considering [...] reimbursing or funding [FNCFS] agencies based on actual costs, similar to what is done in the case of maintenance". However, when asked in cross-examination

about this in the context of immediate relief by paying matters like legal services, intake services, or building repairs while INAC engages in further conversations with its partners, Ms. Lang is quoted as saying in part that "...some of those actuals could potentially be large amounts of money, that may be beyond the department's resources...and would need a request within the federal government and we would need... supporting information and evidence...to have the request considered." Further in her evidence in cross-examination Ms. Lang tried to distinguish Canada's funding of actuals for maintenance costs which she referred to as covering "specific bills" as opposed to prevention costs which she argued were not really clear or known yet.

[96] Consistent with its position on the funding of actuals, based on the evidence available to date, and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that an order to fund prevention services is appropriate at this time. Instead, the Commission submits that the best approach for this item would be an order that gives Canada (i) four months from the date of the order to consult with the other parties and the Commission about the best methods for addressing this item, and put in place concrete measures to address the item; and (ii) an additional two months to deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

[97] In sum, Canada argues that the challenge in reforming the program, in the manner directed by the Panel, based on actual needs, is that there are information gaps regarding the needs of agencies. Canada is currently working to address this challenge by taking various preliminary steps in consultation and information gathering, including providing funding to assist the agencies to identify their actual needs. The process of reforming the program will take time including the time to consult and negotiate with various other parties across Canada.

[98] In addition, the AGC argues that the case is extremely complex and far reaching in its effects on many groups across Canada with a lot of different actors and decision

makers. Canada cannot therefore act unilaterally in reforming the program. Where it has the authority to act alone it has complied with the orders of the Tribunal.

[99] The AGC admits that the evidence adduced at the hearing shows First Nations agencies do lack funding to provide prevention services they deem necessary but basing the funding on the number of families receiving the funding would not be prudent. There are gaps in the information currently available to provide funding on the basis of actual needs. Canada is working with the agencies to determine what the actual needs are.

[100] The AGC advances that although Budget 2016 was prepared before the *Decision*, nonetheless it was responsive to the Tribunal' s orders and represents the best evidence available at the time as such, is a reasonable and informed policy decision. Moreover, the *Decision* ordered Canada to fund on the basis of need but not a specific amount.

[101] The AGC of Canada also submits the Panel did seem to be comfortable with the Budget 2016 incremental policy decision made by Canada. The AGC relies on paras 23 and 28 of the 2016 CHRT 16 ruling.

[102] The AGC argues that funding actuals immediately requires informed policy decisions based on dependable current information, and that Parliament is ultimately the authority that is accountable to authorize appropriation of public funds and must make those decisions on an informed basis. Canada wants to have a process that can obtain that information as soon as possible but not based on information from the early 2000's.

[103] Moreover, the AGC submits that the October 28, 2016 letter (October 28 letter) it sent to the agencies is intended to do that and is very broad and flexible and directed to the agencies who know their needs best (see affidavit of Ms. Cassandra Lang, January 25, 2017, at Exhibit 2, Annex A).

[104] In addition, the AGC contends, the AFN's request for a methodology to fund actuals within 60 days is not reasonable as the process of obtaining the necessary information about need is ongoing, and the June 30, 2017 deadline for responses to the Oct 28 letter would fall at the same time as the 60 day requirement. That would mean there would be no time to allow Canada to analyse the data received, consult, obtain the approval of the

policy decision makers or obtain necessary authorities to fund. In addition, it would run afoul of the Constitutional principles and separation of powers. The Tribunal has broad authority but it is not limitless.

[105] The Panel agrees it found Canada's explanation of Budget 2016 to be reasonable and also to be providing more funds than what was outlined in the 2012 Way forward presentation.

[106] However, the Panel does not agree that this was meant as an approval that Budget 2016 addressed all immediate relief ordered by the Panel and that providing funds incrementally was acceptable. In fact, the next paragraphs in the same ruling indicate that the Panel had more questions and sought additional information in an effort to understand if Budget 2016 was addressing the needs of the First Nations' children and if it was responsive to its findings found in the *Decision*.

[107] At this time, after consideration of all the evidence before us, the Panel finds while Budget 2016 is providing more funds allocated to address prevention; it does not fully address all the orders made so far for the reasons explained below.

[108] The Panel also agrees with the AFN and the Caring Society's positions with some variations in terms of the requests made and will provide additional reasons and findings at the end of the next section.

Request for Actual costs – legal fees, building repairs, and intake and investigations

[109] The Caring Society seeks orders that Canada be required to fund legal fees, building repairs, intake and investigations, and the child service purchase amount based on their actual costs, until the Complainants and Canada have agreed upon the appropriate measures necessary to end the discriminatory practices. Until such time as the FNCFS Program is reformed, the Caring Society submits that funding these expenses based on their actual cost is the only option available to the Tribunal that will ensure that the adverse impact of INAC's funding formulas are not perpetuated. The Caring Society adds that Canada has presented no evidence to demonstrate that funding these items at actuals would be inappropriate or cause it to experience undue hardship.

[110] For the funding of legal fees, the Caring Society submits that Canada has failed to demonstrate that its current approach is related to the actual needs of FNCFS Agencies or is reasonably comparable to those provided off-reserve. In fact, given that Canada's approach provides for an FNCFS Agency's legal budget to be based solely on the criterion of the province in which the FNCFS Agency is located, it is not possible that the needs of FNCFS Agencies have been taken into account. This results in a wide variance in legal budgets available to FNCFS Agencies across Canada.

[111] With respect to building repairs, Canada has stated that it will "…consider requests related to minor capital expenditures […] on a case-by-case basis (see Affidavit of Ms. Cassandra Lang, January 25, 2017, at Exhibit 2, Annex B). However, according to the Caring Society, it is not clear that this information has actually been passed on to FNCFS Agencies or if they have sought funding through this process. It is also unclear what the criteria will be to make these case-by-case assessments.

[112] On the issue of funding for intake and investigations, Canada submits that it has provided additional funding to agencies for this item, however, that this is "not generally a requirement under provincial standards". The Caring Society submits that Canada has not provided any evidence to demonstrate how it has calculated the amounts attributed to agencies for this item. Furthermore, the Caring Society submits that Canada's submissions relating to intake and investigations reveal a grave misunderstanding of the role of FNCFS Agencies. It is patently false that intake and investigations are not required in most regions. Whether or not provincial legislation requires these functions, intake and investigations are core functions of child welfare agencies and are essential to prevention services aimed at keeping children safely in their homes. According to the Caring Society, Canada's refusal to provide funding for intake and investigations perpetuates the very discriminatory conduct identified by the Tribunal and reinforces existing incentives to remove children from their home.

[113] Based on the evidence available to date, and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that orders to fund these actual costs are appropriate at this time. Instead, the Commission submits that the best approach for

these immediate relief items would be an order that gives Canada (i) four months from the date of the order to consult with the other parties and the Commission about the best methods for addressing these items, and put in place concrete measures to address the items; and (ii) an additional two months to deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

Analysis, findings, reasons and orders on actual costs for prevention, intake and investigation, legal fees and building repairs

[114] The Panel recognizes the Indigenous peoples' right to self-government and Canada's goal to rebuild the Nation-to-Nation relationship and the TRC's recommendation to use the UNDRIP as a framework for reconciliation.

[115] Upholding this goal, the Panel makes its immediate-mid-term orders in addressing a broken system that is harming children and removing them from their communities instead of allowing them to remain safely in their homes with the benefit of sufficient culturally appropriate prevention services. This was exemplified in the *Decision*:

> 'However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services **by the application of the FNCFS Program and other funding methods'**. (see at para.383) (emphasis added).

[116] 'While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are **based on funding levels and formulas that can be inconsistent with the applicable legislation and standards'.** Given that the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and **least disruptive measures.** It is difficult, if not impossible, for many FNCFS Agencies to comply with

provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, **to even provide child and family services'**. (see at para.389).

[117] In its September 2016 ruling (2016 CHRT 16 at para.36), the Panel said as follows: "The Panel reiterates its immediate relief orders that all items identified in paragraph 20 of 2016 CHRT 10, and not limited to the items that were underlined, must be remedied **immediately**, including the adverse effects related to the assumptions about children in care, families in need of services and population levels; remote and/or small agencies; inflation/cost of living and for changing service standards; and salaries and benefits, training, legal costs, insurance premiums, travel, multiple offices, capital infrastructure, culturally appropriate programs and services, and **least disruptive measures.**"

[118] The orders are made in the best interests of children and are meant to reverse incentives to place children in care.

[119] The Panel finds that the current manner in which prevention funds are distributed while unlimited funds are allocated to keep children in care is harming children, families, communities and Nations in Canada.

[120] The best way to illustrate this is to reproduce Ms. Lang's answer to the AFN's question: AFN: So if every child in Ontario that's on First Nations was apprehended, INAC would pay costs for those apprehensions correct? (…) So my question is, it's kind of peculiar to me that the federal government has no qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me that just does not make sense. Now as a Program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions? Ms. Lang: for eligible expenditures, yes. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. II at p. 323, lines 16-18 and p. 324 lines 9-18, [Transcript of Cross-Examination of Ms. Lang]).

[121] This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under **policy**. While the necessity to **account for public funds is certainly legitimate** it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it. There is a need to **shift this right now** to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings.

[122] Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions proceedings. She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.

[123] Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. The day they remember most vividly was the day they were taken from their home. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system.

[124] Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of

residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system.

[125] In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care.

[126] According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.

[127] The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care.

[128] In terms of funding actual costs for other items ordered by the Tribunal such as building repairs, and intake and investigations, Ms. Lang testified: I don't think we have all the calculations we need for some of the pieces. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 108, lines 21-22, [Transcript of Cross-Examination of Ms. Lang]).

[129] She also admitted that some of those actuals could potentially be large amounts of money that may be beyond the department's resources. "We would need to put forward a request within the federal government, and we would need support, and we would need clear way to establish calculations, clear support and be able to provide a solid case to move forward with the request. We can't just have something- We need to have something that is sound in terms of the background and support, the supporting information and evidence that we can bring forward, to have the request considered." (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa,Vol. I at p. 107, lines 10-21, [Transcript of Cross-Examination of Ms. Lang]).

[130] Ms. Lang added: “we would need to have data to be able to calculate that. The rationale for this is that in the past the government has been criticized for just going ahead and providing a number without having those conversations, so we’re trying to take steps to, based on what we understand of what kind of numbers we might be able to calculate, but also have those conversations. So it’s trying to balance two pieces in order to put a sound case going forward.” (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa,Vol. I at p. 111, lines 12-20, [Transcript of Cross-Examination of Ms. Lang]).

[131] The Panel understands this to be the usual and reasonable process for any financial request. It is to be expected and followed in normal circumstances. This is not the case here. Canada was found liable under the *CHRA* for having discriminated against First Nations children and their families. Canada has international and domestic obligations towards upholding the best interests of children. Canada has additional obligations towards Indigenous children under UNDRIP, the honor of the Crown, Section 35 of the Constitution and its fiduciary relationship, to name a few. All this was discussed in the *Decision*.

[132] Ms. Lang’s evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short term plan was presented to address this matter. The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children.

[133] The Panel finds that no satisfactory response was provided by Canada to prevent Canada from funding now all actual costs for prevention services and actual costs for legal fees, building repairs and intake and investigations, or to elaborate an appropriate method, costing exercise and plan for accountability. There is a real need to make further orders on this crucial issue to stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities. The orders will take into consideration the need for specific deadlines, a clear plan, a costing analysis and an accountability framework.

[134] The Panel recognizes that Canada has provided new money to increase prevention. At mid-term Canada has presented a plan to assess the agencies' needs to deliver services by June 2017 in response to our ruling. In our view, this is very helpful and will inform the parties' methodology moving forward. We also recognize Canada's efforts and information gathering especially on specific need which will be helpful to inform the actual costs analysis and data collection.

[135] However, the Panel finds Canada's phased approach problematic.

[136] According to Canada, the "full implementation" of Budget 2016 investments will be reached in Year 4 (2019-2020). In its October 31, 2016 Compliance Report, Canada stated that INAC's rationale for using this "phased approach" was based on previous reports that had noted that FNCFS Agencies experienced challenges in staff hiring and retention. The October 31, 2016 Compliance Report goes on to state that "this approach was used in order to mitigate the risk of lapsing or failing to expend funding."

[137] Canada is also relying on three reports to assert that it is the First Nations agencies themselves who have indicated that they had no immediate capacity to provide prevention services and that they needed funding in an incremental fashion. (1) INAC's April 2012 Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia; (2) INAC's June 2014 Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program; and (3) The New Brunswick Office of the Ombudsman and Child and Youth Advocate's February 2010 Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick.

[138] The Panel accepts that some First Nations agencies have stated this and have mentioned challenges to hire qualified staff to deliver prevention services. However, some agencies have also mentioned it takes time to develop their prevention programs. It is informative to analyze the reports in their entirety to fully understand the issues experienced by the agencies. Some agencies have indicated in these reports that some of the challenges they face were due to large geographical distances and the costs associated with these. The report says that agencies overall have cited that demanding

workloads lead to staff burnout and inevitably issues with staff retention. Some agencies have noted the negative impact of a lack of support to assist in reporting. Other issues mentioned in the report for difficulty in recruitment and retention of staff included rural/remoteness factor, salary levels, high caseloads with many children with high risk and high need. The 2012 report (report 1 above) mentions that more than half of agencies believe the funding is insufficient to meet their needs particularly around salaries, training, the rising costs of institutional care and the need for capital infrastructure. The report shows overall indicators were not viewed as being inappropriate but it was noted that AANDC does not measure indicators with regards to culturally appropriate services. There is concern that the EPFA funding mechanism will not allow FNCFS agencies to keep up with provincial changes without negatively impacting their ability to provide consistent and quality programming.

[139] In 2016 CHRT 2 para. 289, the Panel discussed the 2012 report relied upon by Canada named: Key findings Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia; the 2012 evaluation found it was unclear whether the EPFA is flexible enough to accommodate provincial funding changes (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at p. 51). It noted both the Saskatchewan and Atlantic regional offices struggle to effectively perform their work given staffing limitations, including staffing shortages, caseload ratios that exceed the provincial standard, and difficulty recruiting and retaining qualified staff, particularly First Nation staff (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at p. 51). Capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards, but also as making FNCFS Agencies a more desirable place to work. However, these expenditures were not anticipated when implementing the EPFA and were identified as often being funded through prevention dollars (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at p. 49).

[140] “[i]ncreasing the budget for basic services would enable [FNCFS Agencies] to retain and train staff and meet the increased costs of maintaining operations (e.g. cost of

living adjustment, legal fees, insurance, remoteness)" (at p. 6). (see the *Decision* at para. 264).

[141] Insofar as those reasons are the reasons why some agencies face challenges, it is unreasonable to use the reports to justify incremental funding for all agencies as advanced by Canada that is to say for the Budget 2016 to be rolled-out incrementally over 5 years. This should not inform the entire immediate relief and prevention process for the Nation as a whole.

[142] The reports are focused on specific regions and specific agencies which expose different views, as demonstrated above. Upon consideration of the reports, the Panel accepts INAC's argument that for some agencies incremental funding may be advisable. However, the Panel is concerned that Canada came to that conclusion for all agencies and as a result, translated this in Budget 2016.

[143] This is contrary to the Tribunal's order to provide services based on need, which requires Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children.

[144] Under cross-examination, Ms. Lang stated that concerns about "agency capacity" was only "one of the issues" that caused Canada to adopt its phased approach to funding FNCFS agencies. Another issue was the time needed to "set up a structure that took into account these new roles". Ms. Lang also explained that Canada's budget cycle was one of the reasons for the phased approach (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 129, lines 14-24 and p.130 lines 1-4, [Transcript of Cross-Examination of Ms. Lang]).

[145] When asked whether INAC's concerns about capacity and budget cycles could be addressed by phasing in funding in year one and fully funding agencies in year two, INAC's witness stated that "that's a possibility for consideration." (see Gillespie Reporting

Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 130, lines 19-23, [Transcript of Cross-Examination of Ms. Lang]).

[146] The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*. Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief.

[147] Insofar as the spending of public funds and sound fiscal policy is concerned, the Panel touched the issue in the *Decision* at para.178:

[148] Of particular note, Wen:De Report Three recommends a new funding stream for prevention/least disruptive measures (at pp. 19-21). At page 35, Wen:De Report Three indicates that increased funding for prevention/least disruptive measures will provide costs savings over time:

[149] Bowlus and McKenna (2003) estimate that the annual cost of child maltreatment to Canadian society is 16 billion dollars per annum. As increasing numbers of studies indicate that First Nations children are over represented amongst children in care and Aboriginal children in care; they compose a significant portion of these economic costs (Trocme, Knoke and Blackstock, 2004; Trocme, Fallon, McLaurin and Shangreaux, 2005; McKenzie, 2002). A failure of governments to invest in a substantial way in prevention and least disruptive measures is a false economy – The choice is to either invest now and save later or save now and pay up to 6-7 times more later (World Health Organization, 2004.)

[150] Canada cannot justify paying enormous amounts of money for children in care when the cost is much higher than prevention programs to keep the child in the home. This is not an acceptable or sound fiscal or social policy. This is a decision made by Canada unilaterally and it is harming the children. Moreover, the evidence discussed in the *Decision* also shows that maintenance fees increase - by 7% to 10% annually (see the *Decision* at paras. 262 and para. 297).

[151] Canada has taken a step in the right direction by increasing prevention money in its budget. However, it also admitted it left some immediate relief items for mid to long term, thus creating again a piecemeal approach to responding to the *Decision'*s findings, and orders. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa,Vol. I at p. 112, lines 19-25 [Transcript of Cross-Examination of Ms. Lang]).

[152] Ms. Lang testified that the agencies have the flexibility to use the prevention funding however they wish. She also testified that they had gaps in information preventing them to fund some items ordered by the Tribunal. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa,Vol. I at p.24, lines 1-10 and p.117, lines 10-18, [Transcript of Cross-Examination of Ms. Lang]).

[153] The Panel understands her explanation that also confirms the concerns that we had expressed in the 2016 CHRT 16 Ruling at para. 29, namely how can they know it is sufficient? :

[154] As stated in the *Decision* at paragraph 482, "[m]ore than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice." The Panel is concerned to read in INAC's submissions much of the same type of statements and reasoning that it has seen from the organization in the past. For example, that it is up to each FNCFS Agency to determine how they allocate their funding for such things as prevention and cultural programing (see the *Decision* at paras. 187-189, 311, 313 and 314). **This prompts the same question as at the time of the hearing: what if funding is not sufficient to allow for that flexibility?** How has INAC determined that each agency has sufficient funding to comply with provincial child welfare standards and is still able to deliver necessary prevention and cultural services? <u>The fact that key items, such as determining funding for remote and small agencies, were deferred to later</u> is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada, numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been

aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them. ''.

[155] Canada says it needs data and information to understand specific needs and therefore it needs to discuss the same with all its partners. This is all legitimate. However, now a clear plan needs to be established to ensure this will be done and not perpetuate the negative cycle: I cannot fully fund because I do not have the data.

[156] At the present time, it is clear that the 5 year budget has gaps in information to address the actual needs of children. While informed by reports and other information in the preparation of Budget 2016, because Canada has not done a comprehensive costing analysis, it cannot be sufficiently responsive to the orders found in the *Decision* and subsequent rulings.

[157] To be fair, Canada has invested new funds to increase prevention that will assist in reducing the children coming into care. It also started a data collection process to understand what the agencies' needs are in order to comply with the Panel's orders. This is very helpful.

[158] Now that the Panel has some of its questions answered with new supporting evidence, it determines Budget 2016 does not address all the immediate relief orders.

[159] The Panel has sufficient information to make further orders in terms of actual costs for prevention and specific items.

[160] This is the time to move forward and to take **giants steps** to reverse the incentives that bring children into care using the findings in the *Decision*, previous reports, the parties' expertise and also everything gathered by Canada through its discussions since the *Decision*.

[161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services.

[162] In the words of Elder Robert Joseph who testified at the hearing: We can't make the same mistake twice.

[163] The Panel has always believed that specific needs and culturally appropriate services will vary from one Nation to another and the agencies and communities are best placed to indicate what those services should look like. This does not mean accepting the unnecessary continuation of removal of the children for lack of data and accountability. While at the same time, refusing to fund prevention on actuals resulting in, the continuation of making more investments in maintenance.

[164] It is of paramount importance to assist First Nations agencies who are the front line service providers to help keep children safe in their homes and communities when removal is not necessary.

[165] **As stated above, the *CHRA*'s objectives under sections 2 and 53 are not only to eradicate discrimination but also to prevent the practice from re-occurring. If the Panel finds that some of the same behaviours and patterns that led to systemic discrimination are still occurring, it has to intervene. This is the case here.**

[166] It is important to remind ourselves that this is about children experiencing significant negative impacts on their lives. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (*see the Decision at paras.341-347*).

[167] The TRC recognized that children's rights, enshrined in the UNDRIP and other international instruments as well as in domestic law have to be a priority. The child welfare services have to be deemed essential services and the services must be prevention oriented rather than removal oriented if Canada wants to reverse the perpetuation of removal of children that is 3 times higher than at the heights of the residential school era.

[168] While ongoing discussion with Indigenous peoples, provinces and, territories are necessary to reform the system, the Panel believes it can be done at the same time as immediate-mid-term relief is allocated. It will also allow Canada and all partners to obtain current data informing long term reform.

[169] Canada argues that it cannot act unilaterally on a number of items. However, this argument runs counter to examples where it has actually done so. For instance, it did so with Budget 2016.

[170] The October 28, 2016 letter to assess specific needs came after the Budget 2016 announcements so Canada did not have all the data and the specific information to inform its budget.

[171] Canada admits it lacks data to address some of the Panel's immediate relief orders so it unilaterally decided they were best left to mid-term or long term without seeking leave from the Tribunal. It has treated some of the orders as recommendations rather than orders.

[172] While it is true that Canada needs to work with its partners including the provinces, the Nations and the parties, this cannot be used as an excuse to avoid funding in a meaningful way to eliminate the most discriminatory aspects of the National First Nations Child and Family Services Program (FNCFS).

[173] On February 25, 2016, shortly after the Tribunal's *Decision*, National Chief Perry Bellegarde addressed a letter to Minister Carolyn Bennett, Indigenous and Northern Affairs Canada, on behalf of the AFN. The letter sought INAC's confirmation that it would not seek judicial review of the Tribunal's *Decision*. The letter also expressed the AFN's concern that "no efforts or program changes have been made to date to end the discriminatory practices by your department". The correspondence expressed the AFN's willingness to assist INAC in identifying the immediate relief that could be implemented in compliance with the Tribunal's order without delay. (see Affidavit of Mr. Jonathan Thompson, December 20, 2016, para.16 and at Exhibit F).

[174] On March 1, 2016, Minister Bennett responded in writing to National Chief Bellegarde confirming that INAC accepted the Tribunal's *Decision*, its findings, and conclusion regarding the inadequacy of the FNCFS Program, and would not be filing for judicial review.

[175] Minister Bennett also expressed that meaningful program reform requires working in partnership with agencies and front-line service providers, First Nations communities, organizations and leadership, as well as other federal departments and provinces and territories. More specifically, Minister Bennett said the following:

[176] "Action cannot be taken unilaterally on matters like the *1965 Ontario Welfare Agreement*, and given the changes to Jordan's Principle will have an impact beyond the immediate parties, engagement with a wide range of stakeholders must be pursued. I have asked my officials to start this engagement work right away by reconstituting, with you and other parties, the National Advisory Committee and Regional Tables. Department officials will reach out to you to organize a meeting in the coming days to initiate this dialogue and begin configuring the Committee to include provincial and territorial representation and to add new members as needed". (see Affidavit of Mr. Jonathan Thompson, December 20, 2016, para.17 and at Exhibit G).

[177] Nonetheless, Canada still went ahead with Budget 2016 for 5 years. The Panel agrees with what Minister Bennett has said above for the long term reform aspect of things. It is inevitable, consultations need to be meaningful and broad, including rights holders, different Indigenous governance, Indigenous youth, the parties and experts. However, the parties and the Tribunal had valuable information to assist the immediate relief aspect which was meant to provide remedy quickly. This is why the Panel distinguished between immediate and long term relief.

[178] Mr. Raymond Shingoose, Executive Director of the Yorkton Tribal Council Child and Family Services Inc. (YTCCFS), affirms in his Affidavit that the sixteen First Nations Chiefs and communities his agency serves lie within the same region and are certainly aware of the difficulties within their region. But they are also aware that the discrimination continuing against First Nations children in the FNCFS Program is occurring elsewhere and on a National scale. Issues related to child protection/prevention services for the sixteen communities that Mr. Shingoose represents need a greater infusion of immediate federal funding resources. The YTCCFS' organization <u>has the capacity to manage the application of those resources if they are provided in a timely manner</u>.

[179] The lack of prevention programs results in apprehension and placement of children into care. In addition, parents lose hope and eventually stop trying to make changes in their lives as no supports are provided to them. In some cases, children receive less than adequate care or no access to services for their needs. (see Affidavit Mr. Raymond Shingoose, December 20, 2016 at pages 1-14). Mr. Shingoose's evidence further exemplifies the need for a swift shift in practices.

[180] The Panel reiterates that the best interest of the child is the primary concern in decisions that affect children. See, for instance, UNCRC, article 3 and article 2 which affirm that all children should be treated fairly and protected from discrimination. (see also the *Decision* at paras.447-449). The Panel found that removing children from their families as a first resort rather than a last resort was not in line with the best interests of the child. **This is an important finding that was meant to inform reform and immediate relief (see the *Decision at* paras 341-349).**

[181] Canada continues to focus its attention on the specific amount of funding it provides to FNCFS Agencies. It refers to the 2016-17 federal Budget whereby $71 million in additional funding was allocated to the FNCFS program and, since then, an additional $20 million. While the Panel recognizes Canada's progress and investments, funding for prevention continues to be set on a specific dollar amount, which is not necessarily in line with the Panel's orders. Additionally, stating amounts of funding without knowing if the amount is responsive to needs is unhelpful.

[182] Other situations contradicting Canada's assertions that it cannot fund or do more now without the assistance of the provinces and partners and suggesting that delays may be on their partners' end are illustrated by the provinces of Manitoba, Ontario, Indigenous organizations and Parliament examples below.

[183] On October 26, 2016, nine months after the release of the Tribunal's January 2016 *Decision*, the Legislative Assembly of Manitoba passed a motion condemning Canada for failing to comply with the Tribunal's January 2016 *Decision* and urging immediate compliance. This motion decried Canada's "inaction in equitably funding social services for First Nations people. Debate on the motion repeatedly referenced Canada's failure to

comply with the Canadian Human Rights Tribunal decisions and the impacts such a failure has on children and families. Specifically, The Honourable Member for Fort Rouge, Mr. Wab Kinew, who moved the motion noted:

[184] **"Again the reason that we are debating this today is because, for the first time in the history of this country, the character of discrimination against First Nations peoples living on reserve has been brought into stark relief thanks to the decision rendered by the Canadian Human Rights Tribunal."** (see Manitoba Legislative Assembly, Debates and Proceedings, Official Report, (Hansard), First Session-41st Legislature, at p.2409).

[185] Referring to the 5 year roll out of Budget 2016 amounts for First Nations child and family services, Mr. Kinew states: [A]nd really, any reasonable person, when looking at what the federal Liberals announced this funding that's rolled in-rolled out in stages, going up to 2018, 2019, 2020, and 2021. Any reasonable person should ask why should First Nations kids have to wait for equality until after the next federal election? It doesn't make any sense. **We should have equality now. We should have had equality a generation ago. And yet we have an opportunity with this Tribunal ruling to move forward in a good way.** All MP's present from all parties voted in favor of the motion. (see Manitoba Legislative Assembly, Debates and Proceedings, Official Report (Hansard), First Session – 41st Legislature at p 2409. Referenced in Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para.38). (emphasis added).

[186] On October 27, 2016, the New Democratic Party introduced an opposition motion to the House of Commons calling on Canada to comply with the *Decision*. On November 1, 2016, the opposition motion passed in the House of Commons unanimously. The motion called on Canada to immediately comply with the Tribunal's January 2016 *Decision*, properly and fully implement Jordan's Principle, inject $155 million in new funding for the delivery of child welfare services for First Nations children and families and to stop fighting First Nations families in court who are trying to access government services for their children. (See Affidavit of Dr. Cindy Blackstock, December 17, 2016, at paras.39-40).

[187] This was over a year ago.

[188] On November 1, 2016, **UNICEF Canada** issued a statement supporting the adoption of the House of Commons motion. (see Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para.41, Exhibit S).

[189] In July 2016, the AFN's Special Chiefs' Assembly discussed INAC's lack of progress in implementing the orders made in the *Decision*. Therefore, the Chiefs in Assembly, passed a resolution to call upon INAC and Canada to take immediate and concrete actions to implement and honour the Tribunal's findings in its 2016 CHRT 2 *Decision* and all subsequent remedial orders and to implement Jordan's Principle across all First Nations and all Federal Government Services (62/2016). In addition, (at paragraph G of resolution 62/2016), it also states that Canada's unilateral actions with respect to budget allotments for First Nations child and family services and Jordan's Principle were without meaningful consultation, are inconsistent with the United Nations Convention on the Rights of the Child and articles of the United Nations Declaration on the Rights of Indigenous Peoples. (see Affidavit of Mr. Jonathan Thompson, December 20, 2016, at para.9).

[190] In December 2016, the AFN's Special Chiefs' Assembly unanimously passed another resolution (No. 83/2016) expressing deep concern regarding Canada's failure to immediately and fully comply with the *Decision* and the ensuing compliance orders. The resolution called on Canada to immediately comply with any and all orders issued by the Tribunal without reservation and to establish the NAC and Regional Tables. (See Affidavit of Dr. Cindy Blackstock, December 17, 2016, at paras. 45-46., Exhibit X).

[191] **The United Nations CESCR recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 *Decision*.** The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools. (see Economic and Social Council, CESCR, concluding observations on the sixth periodic report of Canada, March

23, 2016, E/C.12/CAN/CO/6, paras.35-36; See also Affidavit of Dr. Cindy Blackstock, December 17, 2016, at para.33, Exhibit L). (emphasis ours).

[192] In May 2016, Canada advised the Tribunal it wanted to flow new funding to Ontario as soon as possible however, Ontario refused the funding with explanations in a letter. The Panel directed INAC to provide a copy of this letter that was later introduced into evidence. Ontario's response is not at all how INAC characterized it. It was deferential to the Tribunal and had the proper interpretation of our *Decision.* The officials appeared to have really grasped the Panel's findings and they wanted to comply with them. They understood that the Panel had found the 1965 *Agreement* to be in need of reform because its current application amounted to discrimination. Ontario originally wanted to proceed outside of the 1965 *Agreement* so as to be unencumbered by the challenges of the 1965 *Agreement* and consistent with the Tribunal's findings. It later agreed to INAC'S proposal to flow the funds through the 1965 *Agreement*. We will discuss the 1965 Agreement and Ontario further below. (see INAC's response to the Tribunal's order of September 14, 2016, Exhibit F).

[193] The above are examples that speak to what some of Canada's partners have expressed and what action they would like to see occur to support this. Furthermore, it weakens Canada's assertions that they need to discuss more before further immediate relief can be implemented.

[194] The Panel agrees with the Caring Society that absent any idea of what information gaps need to be filled to implement immediate relief, Canada did not provide any specific targets for when the engagement/collaboration/information on needs exercises will be completed and First Nations children can therefore expect any further relief from Canada's discriminatory conduct. More problematic still is the fact that, as of now, there is no additional funding forecasted in Canada's five-year budget for increased service levels resulting from Canada's "multi-pronged engagement process".

[195] This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal

costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children. The orders are included in the order section below.

Intake and investigation:

[196] In response to the Caring Society's argument that Canada has not clearly demonstrated that it has complied with the Tribunal's orders with respect to intake and investigation, Canada states that it added a budget line for intake and investigations in all regions other than Alberta because this is "not generally a requirement under provincial standards".

[197] As said above, the Caring Society argues that Canada's submissions relating to intake and investigations reveal a grave misunderstanding of the role of FNCFS Agencies. In addition, it is inaccurate to think that intake and investigations are not required in most regions. Whether or not provincial legislation requires these functions, intake and investigations are core functions of child welfare agencies and are essential to prevention services aimed at keeping children safely in their homes.

[198] The Caring Society respectfully requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief and order Canada to remedy this issue on the first reasonable occasion.

[199] The Panel agrees with the Caring Society. Canada's own witness Ms. Barbara D'Amico, acknowledged during the hearing on the merits that "FNCFS Agencies are doing more intake and investigation as part of their prevention strategies" and that "EPFA does not include funds for intake and investigation." (see the *Decision* at para.145).

[200] Given that intake and investigations are essential to prevention, Canada's funding policy ought to aim to enable FNCFS Agencies to conduct this core function in order to develop and implement culturally appropriate strategies that will help keep their children in the home.

[201] Canada's approach to the funding of intake and investigations is based on flawed assumptions regarding the functions of FNCFS Agencies and the actual needs of children and families. Moreover, Canada has failed to provide a response to Dr. Loxley's expert

opinion that its approach to determining the appropriate funding levels for receipt, assessment and investigation of child protection report is “questionable”. In light of this, Canada has failed to “clearly demonstrate” that it has addressed the discriminatory aspects of its funding of intake and investigations.

[202] As mentioned above, this was an immediate relief item ordered by the Panel. Therefore, the Panel makes a finding that Canada is not in full compliance with regards to this item of immediate relief. The order is included in the order section below.

Legal costs

[203] Canada submits it took immediate steps to increase the amounts for legal costs based on its best estimates. This is an interim step until information is received from the agencies and long term reform is undertaken. It also has advised that it is in the process of aligning each region with the corresponding provincial/territorial practices and requirements as they vary in each region. While this task is underway, Canada has stated it will address this in the longer-term and has confirmed that in the shorter term, it will consider any requests for additional funding for legal fees on a case-by-case basis. Canada has requested that the regional offices communicate this information to the agencies.

[204] The Panel acknowledges the increase made to the agencies’ budgets and the interim steps made by Canada.

[205] It is important to bear in mind that even if legal fees and funding were aligned with provincial practices and requirements, it may in some instances not be sufficient for some agencies. The agencies’ specific needs must be taken into consideration in order to eliminate discrimination. This was explained in the *Decision* (see for example at paras. 386-394, 458), the Panel made findings about travel distances and remoteness, caseloads ratios amongst other things that impacted the agencies’ service delivery.

[206] This is why trying to comply with the Panel’s findings and *Decision* using a line by line approach can only contribute to repeat history. This comment is valid for any item discussed in this ruling. It basically continues to use EPFA as a reference when it was found to be discriminatory. The Panel understands that Canada needed to start

somewhere. However, it should now prove it has advanced its specific needs' approach as ordered by the Panel. The formulas used by Canada caused adverse impacts, gaps, denials and discrimination. Their use should be eliminated at the first reasonable occasion. The Panel will see submissions from the parties next year to address mid-to long term relief including the funding formulas and the National Program that this Panel ordered to be reformed.

[207] The Panel understands that Canada may be concerned that some lawyers would multiply unnecessary procedures and charge large amounts of money coming out of public funds that should otherwise go to the children. This was not brought up in the evidence rather it is in the public domain. However, it is a reasonable concern since this was done by some lawyers in the Indian Assessment Process which re-victimized Indian residential schools survivors. The Panel shares this concern.

[208] The Panel believes this concern can be addressed in a costing analysis based on actual needs.

[209] It is also important to realize that if a child is properly represented her or his rights, culture, opinion, family and community views can be shared within the justice system. It also enhances the culturally appropriateness of the process, and can assist judges in understanding the challenges Indigenous children face. Moreover, it is inequitable to provide legal representation to all other children and not to Indigenous children.

[210] Legal representation can prevent apprehensions or facilitate reunifications that are paramount to the best interests of children. Basing funding on children in care is not appropriate as it is apprehension focused and not prevention focused.

[211] The Panel had requested more information on how funding for legal costs were calculated and Canada has provided some information to that effect. The Panel had also ordered legal costs funding to be addressed in the immediate relief. The Panel finds that this was only addressed in part. By now, Canada has received the agencies' specific needs. Therefore, the Panel finds it is justified to make a further order to this item of immediate relief. The order is included in the order section below.

Building repairs

[212] Canada has advised that the Program authorities include minor capital expenditures. Minor capital expenses may include maintenance and repairs/upgrades/renovations to facilities to include compliance with building codes. If funds are required, Canada will work with agencies on a case-by-case basis to address this issue.

[213] The Panel considers it is unclear if this practice is now implemented or if it will only be implemented in the future. It is also unclear when the funding will be made available to agencies that identify the need for building repairs. Therefore, the Panel finds it is justified to make a further order to this item of immediate relief. The order is included in the order section below.

The Tribunal's authority to make further orders

[214] The Tribunal has statutory authority to issue the orders requested by the AFN and the Caring Society for Canada to cover the actual costs incurred by FNCFS agencies in providing the services requested, as an immediate remedy, pending Canada's reform of the First Nations Child and Families Services Program and the 1965 *Agreement* with Ontario. This authority is derived from sections 53 (2) (a) and (b) of the *CHRA*.

[215] In its *Decision* and rulings, the Panel found that Canada was responsible for funding to cover the costs of providing family and child welfare services to First Nations on reserves. It found that this responsibility included funding to cover the costs of providing services to First Nations children on reserves in need of care, in a manner that was culturally appropriate and substantively equal to the manner that the services were provided to non-First Nations children in Canada. It found that the basis upon which Canada was calculating and providing the funding was flawed in various respects, resulting in insufficient funding (ie underfunding) to provide the services in the manner hereinbefore described, and to meet the needs of First Nations children on reserve. It found that Canada was underfunding the services now being requested by the Moving Parties to be paid on an actual cost basis as immediate relief in this case. It found that Canada knew that it was underfunding the services and that the underfunding of

prevention services, in particular, while Canada fully funded maintenance and apprehension expenses, created a perverse incentive to remove far too many First Nations children on reserve from their homes and families. It found that this underfunding of services was one of the discriminatory practices engaged in by Canada in this case, and that Canada needed to take immediate steps to eliminate this discriminatory underfunding and to fully reform the Program in the longer term.

[216] Canada has accepted the Tribunal's *Decision* and rulings that it is discriminating against First Nations children by underfunding the services and, that both immediate steps and longer term reform are needed to be undertaken by it to eliminate this discriminatory underfunding of services to First Nations children on reserve.

[217] All of the parties agree that the Tribunal's remedial powers are to be interpreted broadly to give effect to the objectives of the *CHRA* in eliminating discrimination when there has been a determination by the Tribunal that discrimination has occurred and an order to cease has been made, in order to ensure that the discrimination does not continue.

[218] Canada argues that the Tribunal is not a Royal Commission (see *Moore v. British Colombia, (Education),* 2012 SCC 61 at paras.57 and 64) and its remedial powers, while broad, are not limitless. It contends that it is not necessary to make an extensive inquiry into the entire public administration of services to Indigenous peoples in order to determine what remedies ought to be ordered. The AGC further contends that by virtue of constitutional law principles and the separation of powers, the Tribunal does not have the legal authority or jurisdiction to make the immediate orders requested by the Moving Parties for the funding of First Nations agencies' actual costs of providing the services, as that would interfere with or take over from Canada's legal authority, as the executive and legislative branch of government, to make proper and informed decisions for the allocation of public funds and development of public policy. (see *R v. Imona-Russel*, 2013, SCC 43 at paras. 5, 15 and 28 and *Ball*).

[219] Canada says that it has complied with the *Decision* and rulings of the Panel on immediate relief by taking the actions described above. It argues that despite the fact that

over a year has elapsed since the *Decision*, it needs an unspecified further amount of time to inform itself through information gathering, consultations with many parties across Canada and further analysis, in order to properly make the policy choices and allocate funds to implement the complex task of reforming the FNCFS Program and amending the 1965 *Agreement* with Ontario based on need and in the manner determined by the Panel in its *Decision*.

[220] Canada also contends it would be unfair to ask them to gather information on specific needs and then condemn them for consulting. This is not the case at all here. We are pleased that Canada is consulting and seeking to obtain specific information on needs however it is not a replacement for immediate relief. It is a means to improve immediate relief with agency, community and, Nation specific needs in order to aim for substantive equality and culturally appropriate programs.

[221] The Panel is not making an extensive inquiry into the entire public administration of services to Indigenous peoples in order to determine what remedies ought to be ordered. The Panel is following its findings and reasons in the *Decision* that clearly outline the discriminatory aspects of the National Program, funding formulas and authorities, adverse impacts, gaps and denials, Jordan's Principle and other issues.

[222] The Panel ordered Canada to cease its discriminatory practices immediately, knowing that reform of the program would take time. Accordingly, it ordered both immediate and long term remedies. The point of the immediate order was to eliminate Canada's discriminatory practices including by ensuring that sufficient funding was provided by Canada to First Nations agencies at the next reasonable occasion in accordance with section 53(2) (a) and (b) of the *CHRA*. Budget 2016 and the other efforts described above, while certainly helpful, have only partially addressed the continuation of the discriminatory practice. The evidence establishes that the additional amounts provided for child welfare prevention in Budget 2016, based on data collected before the *Decision* was rendered, are not yet at sufficient levels to meet actual needs of First Nations children on reserves and provide substantive equality in a culturally appropriate manner. Moreover, Canada has not yet addressed funding of the rest of the services. The provision of a "slush fund" for legal expenses and small capital improvements, on an ad hoc basis,

which may not even be known by the agencies, does not address these needs. Nor does the promise to consult across Canada on Band Representation.

[223] No evidence was produced to indicate the existence of an alternative method to fund actual costs of eliminating the adverse impacts of the services in the short term while the program is reformed. Nor is there any evidence that Canada had conducted any exercise to determine the costing of funding actual costs; or that payment of actual costs would cause Canada undue hardship. In the absence of any evidence to the contrary, funding the payment of actual costs incurred by the agencies for providing the services in the manner determined by the Panel appears to be the only immediate method of eliminating discriminatory underfunding of these costs while the program is being reformed.

[224] Canada has by now received from over 80 % of agencies' responses to its October 28, 2016 letter (which were due by June 30, 2017) requesting current information from agencies that it has said it required in order to assess needs. Therefore, it should be able to seek expert advice in consultation with the parties in this case, in order to analyse this information, together with the information referred to below, in order to choose a methodology, including necessary checks and balances, for the payment of actual costs of the services.

[225] Canada already has abundant information about the needs of the agencies and costs of the services from dealing with the agencies over the years, and it stated it was able to use this information to develop Budget 2016. As well, Canada also has abundant relevant information from work that was done by the Auditor General in its reviews of the program in 2008 and 2012 and by the National Advisory Council through the Wen:De reports.

[226] Simply stating that this is old information and that it needs more current information is unhelpful. If there was inequality in the early 2000's and recommendations were later addressed only in part through the EPFA leading to findings of discrimination, continuing to refuse to amend its policies temporarily to include <u>all</u> the items left out in the EPFA to this date will perpetuate discrimination.

[227] No explanation was provided by Canada as to why these studies cannot be updated while the long term reform is completed. The Barnes report is from 2006, a year after the last Wen:De report. Yet, Canada agreed to use it as a source of information and to update it in the short term. Moreover, the Panel explained in the *Decision* that INAC was using Wen:De as a reference however, it was applying it in a piece meal fashion, a way that Wen:De recommended not to do. (see the *Decision* at para. 176).

[228] **The National Program, funding formulas and agreements need a full-scale reform not just support pillars put in place (see the *Decision* at para.463**)

[229] Canada is also well aware of how the services are provided and paid for in the Provinces under Provincial child welfare legislation. This point is major. If Canada had absolutely no information in terms of specific needs, which is not the case here, the provincial requirements, while not fully culturally appropriate for Indigenous peoples, are indicative of the minimal requirements. If even those minimal requirements are not met by Canada's Child Welfare Program, the inequality persists for Indigenous children. Moreover, Canada was ordered to immediately address the item of least disruptive measures which was detailed in the Panel's findings in the *Decision.*

[230] Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the *Decision* and rulings*.* It incentivizes the removal of children rather than assisting communities to stay together. Based on the findings and reasons in the *Decision* and subsequent rulings and the additional information provided to the Panel's questions, the Panel finds there is a need for further orders to eliminate the discriminatory practices explained above.

Orders

[231] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA*, orders Canada to analyze the needs' assessments completed by First Nations agencies in consultation with the Parties, interested parties **(see protocol order below),** and other experts and to do a

cost-analysis of the real needs of First Nations agencies, including prevention/least disruptive measures, intake and investigation, building repairs and legal fees related to child welfare, taking into account travel distances, case load ratios, remoteness, the gaps and/or lack of surrounding services, and all particular circumstances they may face.

[232] Canada is ordered to complete this analysis and report to the Tribunal by **May 3, 2018**.

[233] The Panel, pursuant to Section 53 (2) (a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families on-reserve and in the Yukon. This system is to be based on actual needs and operate on the same basis as Canada's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child. Canada is to develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[234] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of prevention/least disruptive measures, building repairs, intake and investigations and legal fees. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare to be reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.

[235] In line with Canada's approach, the spirit of the UNDRIP and reconciliation, the Panel makes the orders above for actual costs for child welfare prevention/least disruptive measures, intake and investigations, building repairs, legal fees to be reimbursed following the accountability framework and methodology agreed to by the parties and also following and according to the parameters below.

[236] Until such time as one of the options below occur:

1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.

2. Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling.

3. Reform is completed in accordance with best practices recommended by the experts including the NAC and the parties and interested parties, and Eligibility of reimbursements from prevention/least disruptive measures, building repairs, intake and investigations and legal fees services are no longer based on discriminatory funding formulas or programs.

4. Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel.

[237] The Panel also recognizes that in light of its orders and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

C. Further orders requested

i. Child service purchase amount

[238] Canada has increased the child service purchase amount from $100 to $175 per child. According to the Caring Society, although this represents an increase of 75% to the per child amount, there has been an increase of 72% in the cost of living since 1989, when the per child amount was last adjusted. As such, the Caring Society submits there has been almost no increase in the real value of the child service purchase amount. It is

unclear what, if any, criteria or factors were considered to determine the new child service purchase amount, including whether this amount is linked to the actual needs of FNCFS Agencies or is reasonably comparable to what is provided elsewhere across the country.

[239] The Commission notes that the Tribunal's decisions to date have not found that an increase to the child service purchase amount is necessary to ensure the elimination of the discriminatory practices. It may be that other options or mechanisms that could equally or better contribute to the establishment of an overall system that complies with the *Act* are available to Canada. In the circumstances, the Commission believes it would be premature on the current record, and inconsistent with general principles regarding the separation of powers, to order now that Canada increases the child service purchase amount. Instead, the Commission recommends that this topic be included in the scope of a longer-term order directing consultation, the putting in place of concrete steps to eliminate discrimination, and reporting.

[240] The Panel believes that given it is unclear if the current increase is sufficient or if an increase to $200 per child will be sufficient considering the real needs of First Nations children, the best course of action to address this is not to order a specific amount of $200 per child as requested. Rather, in light of the orders above and the work that is underway, the Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to develop an alternative system for funding child service purchase amount services for First Nations children and families on-reserve and in the Yukon, based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[241] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of child service purchase amount. In order to ensure proper data collection and to be responsive to the real needs of First nations children and families, the Panel orders Canada, to provide funding on actual

costs for child service purchase amount in child welfare to be reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.

Small agencies

[242] Canada has now set a child population of 300 as the lowest threshold for scaling funding. According to the Caring Society, this new threshold is not based on the actual needs of agencies or the financial pressures they face. Rather, the new threshold was chosen because it is the next level up from the current scale. Accordingly, the Caring Society submits that Canada has failed to clearly demonstrate that it has addressed the discriminatory aspects of its funding for small agencies. It requests that INAC immediately replace the population threshold for core FNCFS Agency funding with funding increments per every 25 children on reserve as recommended in *Wen:De*, adjusted for inflation, retroactive to January 26, 2016.

[243] Consistent with its submissions on the child service purchase amount, the Commission notes that the Tribunal's decisions to date have not found that a specific funding alternative is necessary to ensure the elimination of discrimination facing small agencies. It may be that other options or mechanisms are available to Canada that could equally or better contribute to the establishment of an overall system that complies with the *Act*. In the circumstances, the Commission believes it would be premature on the current record, and inconsistent with general principles regarding the separation of powers, to order now that Canada makes the specific changes to its practices requested by the Caring Society. Instead, the Commission recommends that this topic be included in the scope of a longer-term order directing consultation, the putting in place of concrete steps to eliminate discrimination, and reporting.

[244] The Panel notes that in response to the Tribunal's September 14, 2016 order, INAC also offered additional funding of $1.9 million for prevention services and small agencies. Ms. Lang confirmed that this is not, however, "new money" but funds that have been reallocated from elsewhere within the department. Documents produced in relation to the cross-examination confirm that the funds are being reallocated from INAC's Infrastructure

budget. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 170, lines 1-6, [Transcript of Cross-Examination of Ms. Lang]).

[245] According to Dr. Loxley's opinion, "while being a step in the right direction, the underlying problem of inadequate funding for small agencies and large step increases in funding for relatively small increases in the child population still remain". Dr. Loxley went on to observe that the solution proposed in Wen:De of adjusting funding smoothly for every increase in children of 25 above a minimum and up to a maximum threshold would seem to address both of these problems. (see Affidavit of Dr. John Loxley, January 5, 2017, Exhibit A, para. g).

[246] Canada provided no response to Dr. Loxley's expert evidence that its current funding remains inadequate for small agencies and does not address the negative consequences of large step increases of funding for relatively small increases in child population. Likewise, Canada has failed to demonstrate that its approach to funding small agencies is linked to their actual needs.

[247] Given that Canada has made submissions it will address this as part of its long term reform. The Panel finds Canada has unilaterally postponed addressing this to the long term even when ordered to immediately address it. While Canada complied to stop reducing the agencies' funding for those who serve less than 251 children, the Panel finds Canada not in full compliance with its previous orders. This Panel ordered Canada to eliminate population thresholds and levels and, to immediately address adverse impacts for small agencies who encounter the greatest challenges especially, if they are isolated. (see at 2016 CHRT 10 at paras. 20 and 23).

[248] At this stage, two years after the *Decision*, the Panel would now be reluctant to order anything linked to the Directive 20-1 given it was found discriminatory.

[249] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA* orders Canada to analyze the needs assessments completed by First Nations agencies in consultation with the Parties, interested parties (see protocol order below), and other experts and to do a cost-analysis of the real needs of small First Nations agencies related to child welfare

taking into account travel distances, case load ratios, remoteness, the gaps and/or lack of surrounding services and all particular circumstances they may face.

[250] Canada is ordered to complete this analysis and report to the Tribunal by **May 3, 2018.**

[251] The Panel, pursuant to Section 53 (2) (a) of the *CHRA* orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[252] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies' costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs small first nations agencies' for reimbursed retroactive to January 26, 2016 by **April 2, 2018**. This order complements the order above.

Data collection, analysis and reporting

[253] The Caring Society is concerned that, over one year after the decision was rendered, INAC officials have still not taken the steps necessary to determine the cost of funding the immediate relief sought by the Complainants and Interested Parties at their actual costs, or to address the areas of concern identified by the Tribunal. On

October 28, 2016, the Director General of INAC's Children and Families Branch wrote a letter to all FNCFS Agency directors to advise agencies they could apply for up to $25,000 to provide INAC with information about their distinct needs and circumstances in order to inform new funding approaches.

[254] According to the Caring Society, INAC retained no outside expertise to assist it in formulating the request for information on needs from agencies in order to ensure that the information provided would be reliable and consistent. Furthermore, according to economist Dr. Loxley's, an expert retained by the Caring Society, it is unlikely that INAC has the internal capacity to collect and interpret the information obtained from FNCFS agencies from this letter. Therefore, the Caring Society requests an order requiring Canada to provide a reliable data collection, analysis and reporting methodology, as well as ethical research guidelines respecting Indigenous peoples, that include protection of Indigenous intellectual property, for approval by the Tribunal upon further submissions by the parties, to guide the data collection process launched following its October 28, 2016 letter to FNCFS Agencies.

[255] The Caring Society also requests an order requiring Canada to provide FNCFS Agencies with a minimum amount of $25,000 for data collection for small agencies, which amount shall be scaled proportionality upwards for large agencies and multi-site agencies where required for an FNCFS Agency, to prepare for costing exercises.

[256] The Commission submits that in the absence of greater evidence demonstrating that the amounts actually offered will not permit Agencies to meaningfully participate in the Agency survey, the Commission believes the Tribunal should decline to issue the requested Order, at least at this time.

Analysis:

[257] While the October 28, 2016 letter came late in the year, at the time of the motions hearing, 80% of the agencies had indicated that they would identify their needs via this process and some agencies had asked for an extension beyond June 2017 to participate in the process.

[258] Also on this issue, the Panel understands that some parties disagree with the October 28, 2017 letter and the process. They suggest the Tribunal's *Decision* should have been attached to the letter. Upon review of the October 28, 2017 letter, the Panel finds it was carefully and broadly crafted to try to encompass as many situations as possible and respecting the Panel's orders to find out about specific needs. While attaching the decisions to the letter is a helpful idea to guide and inform agencies on what they may request, it is not the only way to proceed. This in our view is an example where, when Canada tries to comply with the Panel's orders, we should not interfere unless there is evidence that it is not responsive to our orders to eliminate discrimination. This is the appropriate way to not invade policy decision making. This being said, it appears that the other parties were not involved or consulted in the process and this is, in part, the area of contention. Moving forward, Canada will consult AFN, the Caring Society, the Commission, the COO and the NAN, especially in the way it will analyze the information collected. If this process is unresponsive to address agencies and children and families' specific needs, the evidence can be tested at the Tribunal for the Panel's consideration. Otherwise, this October 28 letter was something that encouraged the Panel in seeing some movement to assist in understanding the specific needs of each child, family and agency that may differ from one child to another, a family to another and a community to another (See 2016 CHRT 16 para. 33).

[259] This being said, Canada admits it lacks data on the actual needs of agencies and the children they serve and this is why it acted on the Panel's orders. INAC sent the letter and offered the funding to the agencies to inform INAC of their specific needs.

[260] While consulting with the parties and experts would have been ideal to guide the process, **the Panel notes that Canada tried to comply with the Panel's order and this is very positive. Canada chose action instead of *status quo* on this issue and this is really encouraging for the Panel. The Panel would like to stress the importance of recognizing when real efforts to comply with the orders are made even if not considered optimal by all.**

[261] It is not too late to refine this process in allowing the parties and other experts to provide input on data collection, analysis and reporting.

[262] INAC's witness also testified in cross-examination and admitted at that time, no expert was retained to assist in the analysis of the data collected as a result of the agencies' responses to the October 28, 2016 letter. Ms. Lang testified they were in the process of potentially retaining an expert to assist with this task (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at pp. 185-204, [Transcript of Cross-Examination of Ms. Lang]).

[263] On the issue of additional funds for data collection for small agencies, the Panel agrees with the Commission that in the absence of greater evidence demonstrating that the amounts actually offered will not permit Agencies to meaningfully participate in the Agency survey, the Panel should decline to issue the requested Order, at least at this time.

[264] However, there is a real need for reliable data collection, analysis and a reporting methodology to inform funding on actual needs moving forward.

[265] The Panel pursuant to section 53 (2) (a) and (b) orders Canada by **March 5, 2018,** to provide a reliable data collection, analysis and reporting methodology, as well as ethical research guidelines respecting Indigenous peoples that include protection of Indigenous intellectual property, that will be applied to said research, for approval by the Panel upon further submissions by the parties, to guide the data collection process launched following its October 28, 2016 letter to FNCFS Agencies and to guide the data collection process resulting from all the orders for actual costs in this ruling.

Reallocations

[266] The Caring Society submits that Canada has not ceased its practice of reallocating funding for FNCFS agencies from other INAC programs for First Nations Peoples. According to the Caring Society, INAC has already reallocated $20 million from its infrastructure budget to fund FNCFS Agencies. Much of this funding is not aimed at providing immediate relief in accordance with the *Decision*, but to "respond to pressures" faced by individual agencies. In addition to this, INAC has also reallocated $1.9 million to fund prevention for families at risk and small agencies; $1.5 million to implement a cultural vision for their programming; and, $1.975 million to fund FNCFS Agencies to identify their

“actual needs and distinct circumstances”. The Caring Society submits that INAC’s ongoing reallocation of funds from infrastructure is a clear breach of the *Act*. Accordingly, pursuant to section 53(2)(a) of the *Act*, the Caring Society requests that INAC be ordered to cease its discriminatory practice of reallocating funds from other First Nations programs in order to fund its FNCFS Program.

[267] At paragraph 35 of its reply submissions dated March 17, 2017 the Caring Society has also added that “In the event that this Tribunal is of the view it cannot make an order prohibiting Canada to reallocate funds from other INAC programs towards child welfare, the Caring Society respectfully requests that the Tribunal make an order requiring Canada to pay actual costs of certain expenses of FNCFS Agencies and specify that the funds used to pay the cost of these expenses may not be drawn from other INAC programs.”

[268] The Commission submits that the Tribunal appears to have concluded in a previous ruling (2016 CHRT 16 at para. 61) that the reallocation of funding from other programs was “outside the four corners of this complaint.” As a result, the Commission does not now join the Caring Society in seeking an Order prohibiting the practice.

Analysis:

[269] INAC admitted it had reduced but not eliminated the practice of reallocating funds from other Social Programs including reallocating funds from housing.

[270] Canada’s own evaluation and performance study dated June 2014 linked the situation of poor housing and overcrowded homes as a main reason to remove children from their homes (see INAC’s June 2014 Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program, Exhibits to the Cross-Examination of Ms. Cassandra Lang, on her Affidavit, January 25, 2017, tab 11 page 18). The *Decision* also made findings to that effect (see at paras 373, 390 and 393). The Panel notes that the Auditor general described this practice as: ‘’*the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in*

Alberta to deal with these issues and is committed to doing the same in other provinces by 2012". (emphasis added).

[271] The Panel agreed and included the above in its findings. We are now in 2018, six years after INAC's commitment to deal with these issues by 2012. Of note, the Auditor General was analyzing a decade of policy-decision making when it made this finding.

[272] While not all 5 INAC social programs were part of this complaint, and recognizing that the Tribunal has limits in terms of adjudicating the claim that is before it, a number of comments are worth mentioning. Canada's practice of reallocating funds from other programs is negatively impacting housing services on reserve and, as a result, is adversely impacting the child welfare needs of children and families on reserve by leading to apprehensions of children. This perpetuates the discriminatory practices instead of eliminating them.

[273] The Panel addressed this issue as part of its findings in the *Decision* and identified it was part of the adverse impacts on First Nations children and families.

[274] This does not mean the Tribunal can now look at all Programs and make any type of order outside of its findings for this complaint. This was addressed in 2016 CHRT 16 para.61.

[275] However, the Panel can make orders under section 53 (2) (a) and (b) to cease the discriminatory practice and prevent it from reoccurring if it has evidence to that effect. This exercise is based on the evidence at the hearing on the merits and, new evidence before the Tribunal as part of the motions proceedings. Moreover, the current situation in this case is a clear example of policy decision-making repeating historical patterns that lead to discrimination and that warrant intervention to ensure it is eliminated.

[276] It is also in the best interest of First Nations' children and families to eliminate this practice as much as possible. Some reallocations may be inevitable in Federal government.

[277] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to stop unnecessarily reallocating funds from other social programs especially housing if it has the

adverse effect to lead to apprehensions of children or other negative impacts outlined in the *Decision* by **February 15, 2018.**

[278] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities by **February 15, 2018**.

[279] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to evaluate all its Social Programs in order to determine and ensure any reallocation is necessary and does not adversely impact the First Nations children and families by **April 2, 2018.**

ii. 1965 Agreement

Mental health services

[280] The COO submits that the Tribunal has identified the gaps in mental health services available to First Nations children as a discriminatory effect of the *1965 Agreement* and that Canada is aware, generally, that such gaps exist. According to the COO, the budget was not increased to provide Band Representative services or mental health services (or any other services other than prevention services), even after the Tribunal's *Decision* that the failure to provide Band Representatives and children's mental health services is discriminatory.

[281] COO says it is easy to establish which mental health services are provided to Ontario children under the *Child and Family Services Act*, and how they are provided. All Canada must do is speak to Ontario, which currently funds such services for children and youth off-reserve as part of its child welfare programming. The arrangements under the *1965 Agreement* are a simple way to allow agencies to provide such services to First Nations children and youth until longer-term reform occurs. The COO asks the Tribunal to order Canada to develop a mechanism to deliver such services in a way that reduces the discriminatory gaps in children's mental health services available to First Nations children and youth in care.

[282] The NAN adds that there is no mechanism in place, by either INAC or Health Canada, to address the gaps in mental health services created by the *1965 Agreement*,

beyond a general commitment to broad reform and continued engagement with relevant partners. Even then, NAN submits that INAC has no plan to address the gaps in mental health services in Ontario on the short term and unilaterally views mental health services as part of a longer term reform. According to NAN, an order that INAC fund mental health services is clearly required to prompt INAC to act. NAN seeks a non-compliance order in that INAC has failed to comply with the Tribunal's orders and an order that INAC fund mental health services.

[283] The Commission agrees that there are critical gaps in the provision of mental health services in Ontario that demand immediate attention. However, in the immediate term, it believes that those gaps are best addressed through Jordan's Principle. In the longer term, Canada can consult with Ontario about any changes to the *1965 Agreement* touching on the provision of mental health services to First Nations children in the province.

[284] Canada submits it has allocated $64 million for the First Nations Mental Health Programs in the First Nations and Inuit Health Branch (FNIHB) regional operation in funding to Ontario in 2016-2017. It did so, in addition to regular mental health programs such as, the NIHB mental health benefits. It adds that from January 2016 to March 2017, 10 children have been approved for mental health coverage under the Child First Initiative. $69 million was invested over a 3 year period to address the mental health needs of First Nation and Inuit communities across the country. Canada submits that this funding is in line with the AFN endorsed First Nation Mental Wellness continuum Framework. It will increase the number of Mental Wellness Teams in communities and support the creation of Mental Health Crisis Intervention teams to help remote communities, including those in Northern Ontario.

[285] FNIHB Regional offices allocate funding to the First Nations communities and organizations based on annual operations plans. The annual plan in Ontario is developed with the participation of the Chiefs of Ontario Health Coordinating Unit and the final plan is shared with First Nations partners.

[286] Canada submits Health Canada is working proactively to improve NIHB supports. A joint review of the NHIB framework is currently underway with the AFN and Health

Canada. In 2015, a NAN-led NIHB working group was established. This led to some updates.

[287] The Panel identified gaps in mental health services in the *Decision*. This is not a new issue. However it is an important one that requires immediate attention. (see at paras.223, 239-241, 392, 458).

[288] Canada has not allocated for increases in mental health services for First Nation children in Ontario in its 2016-2021 budget, announced in 2016.

[289] In response to the assertion of COO's affiant Deputy Grand Chief Denise Stonefish that there was no increase in children's mental health funding in the Budget, Health Canada's affiant, Ms. Buckland, pointed to existing $300 million of federal mental health funding available to all First Nations for people of all age groups across all of Canada. She also stated there was an additional $69 million of new mental health funding nationally for all age groups which was announced since the Budget (see Affidavit of Ms. Robin Buckland, January 25, 2017 at para 24). However, neither Health Canada nor INAC provided any evidence demonstrating that this funding has alleviated discrimination with respect to failure to provide children's mental health services.

[290] Ms. Lang said that INAC "would have" had a "couple" of conversations with Health Canada to discuss children's mental health services, but could recall only one such "conversation" specifically. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p.59, lines 7-12, [Transcript of Cross-Examination of Ms. Lang]).

[291] However, Ms. Lang did not know about the breadth of Health Canada's services nor Ontario's services available to First Nations children, saying that this was information INAC had not yet identified. Despite being aware that it has no internal understanding of the gaps in children's mental health services, INAC has yet to take steps to internally identify the gaps in children's mental health services for First Nations children in Ontario. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at pp. 51 to 65 and more specifically at p. 52, line 6, p. 53, line 7; p. 57, lines 3-9; pp. 51 to 65, [Transcript of Cross-Examination of Ms. Lang]).

[292] INAC has not established a plan or deadlines for addressing these information gaps. When pressed about when INAC was likely to reach an internal understanding of the gaps in children's mental health services, Ms. Lang said INAC was "making an effort" but that "it's going to take time". When pressed as to how much time, she failed to provide any timeframe.

[293] Ms. Lang stated that the work of determining what mental health services may be needed is, in her view, a "medium to long term" question. When asked when INAC was going to start coordinating with Health Canada or Ontario on children's mental health issues, Ms. Lang was not able to point to a specific timeframe for when that work would be started or completed, saying only "we need to have those conversations. I can't speak to how long it will take to have those conversations, but we need to undertake that engagement which we are doing". (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 53, line 8 – p. 55, line 4; p. 60, line 24 –p. 66, line 15, [Transcript of Cross-Examination of Ms. Lang]).

[294] Regardless of how the gaps are addressed currently with Jordan's Principle or mental health funding while the Program is being reformed, the outcome should still be that the gaps are addressed. It is clear from INAC's evidence that there is a need for an assessment of the gaps and funding according to need and not an uninformed arbitrary process or formula with no specific deadlines.

[295] Canada needs to do an analysis of <u>all its programs</u> that fund mental health for First Nations on reserve and in the Yukon and clearly establish which ones fund what in order to identify gaps which would accord with sound fiscal accountability in order to respect social work principles and the best interests of children. This cycle of not entirely knowing is harming children and quite frankly, is not logical.

[296] This argument has been advanced for years by INAC and Health Canada and needs to end. They are the ones who decided to set up the Programs this way, and they are the ones who need to ensure they know how services are funded. It is not up to this Panel or the parties to try numerous attempts to understand this when Canada has not done this exercise. This is one of the most problematic issues for First Nations on reserve

in need of services. The Panel can accept that this would take some time. However, close to two years after the *Decision*, it should have been completed. Moreover, answers from INAC or Health Canada often mention funding amounts for different health and social benefits and use those numbers to justify compliance with the Panel's orders. However, when asked, they are unclear of the gaps. This is a clear indication that Canada cannot possibly address the children's real needs or really know what the funding requirements are for prevention services or mental health services at this time.

[297] The Panel was expecting that this would be done very early after the *Decision* was released, and not just for Ontario. This illustrates the clear need for a **shift in service delivery**. The Panel and the other parties kept asking for more information simply to understand. Canada has mentioned that it needs finality, as everyone does, moving forward. If there is a meaningful analysis done in a reasonable time-frame, we may all reach our goal.

[298] The Province of Ontario and Indigenous peoples come into play in terms of their unavoidable role in child welfare and health. However, they have no control over Canada's Programs or the clarity or lack thereof. The Panel hopes that Canada's public decision to split INAC in two and to create an Indigenous Services Department with an assigned Ministry and Minister will greatly assist in that regard.

[299] **The Panel does not question the need for a multi-pronged approach or large and numerous consultations with Canada's partners. The Panel does not dispute that Canada cannot reform the child welfare system alone and that it needs to do it with its partners at tripartite tables and in other forums.**

[300] The Panel takes issue with the fact that the above was always advanced to justify delay, and denials of equitable services leading to discrimination. The Panel discussed this at length in the *Decision*, highlighting many politicians and Program Managers saying the same thing over and over: we need the provinces at the table, we need to gather information, we need to work with our partners, we have to seek approvals, other programs may cover this, etc. This has been going on for years, yet the Panel found discrimination.

[301] Moreover, this was all argued by Canada at the hearing on the merits and the Panel dismissed it. This is precisely one of the reasons why the Panel ordered immediate relief so that the long term reform would not prevent action now for Indigenous children.

[302] Another example is, that Canada has argued in its final submissions on these motions, that it was working on a number of working tables with the AFN, COO and NAN and yet, it is still unclear of what the gaps are.

[303] The Panel wants to make it clear that discussions with no comprehensive plan or specific deadlines attached to it can go on for a very long time and seeing these types of arguments is a source of concern. Also, as already discussed in the *Decision*, a piecemeal approach is to be discouraged. This rationale applies to all the orders in this ruling.

[304] For the reasons outlined above, the Panel finds the need for a further order to complement the findings and general orders made in the *Decision* and immediate relief orders. The Panel agrees with the COO and NAN that there is a need for the order to be specific and accompanied by a deadline.

[305] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to analyze all its programs that fund mental health for First Nations on reserves and in the Yukon and clearly establish which ones fund what in order to identify gaps in services to First Nations children by **April 2, 2018**.

[306] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA* orders Canada to fund actual costs of mental health for services to First Nations children and youth in Ontario with CFI or otherwise retroactive to January 26, 2016 by **February 15, 2018**.

Band representatives

[307] The COO submits that the Tribunal has already found that the lack of funding for Band Representatives is one of the main adverse impacts of Canada's discrimination, and a way that Canada fails to provide culturally appropriate services to First Nations children and families in Ontario. The role of a Band Representative is clear and the program is already defined. The Ontario *Child and Family Services Act* sets out the role of Band

Representatives in the provincial child protection scheme. Canada is familiar with this role from its prior funding of the Band Representative program. Many communities already have a Band Representative that they pay with their own source revenue. There is no real question about what a Band Representative does, or how they do it. According to the COO, all that INAC has to do is create a budget line that communities wishing to provide this service can access. COO submits that INAC should be ordered to make reasonable funding available for Band Representative programs in Ontario, at actuals, until such time as any studies are completed or until the Tribunal makes a further order on the subject matter.

[308] Consistent with its position on the funding of actuals, and based on the evidence available to date and bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that an order to fund Band Representative services in Ontario is appropriate at this time. Instead, the Commission submits that the best approach for this item would be an order that gives Canada (i) four months from the date of the order to consult with the other parties and the Commission about the best methods for addressing this item, and put in place concrete measures to address the item, and (ii) an additional two months to deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

[309] The Chiefs of Ontario have requested at paragraph 98 (ii) of its written submissions dated February 28, 2017: "An order that Canada shall fund Band Representative services for Ontario First Nations, at actual cost of providing those services, until further order of the Tribunal, within 30 days of the Tribunal’s order."

[310] At paragraph 52 (c) of its written submissions the COO quotes several references from the Tribunal’s *Decision* in support of its position that the Tribunal has found Canada to be discriminating by not providing for Band Representative funding.

[311] Canada has already said it needs to consult regionally and nationally before considering funding for Band Representatives.

[312] Therefore, the COO argues that a meaningful, effective and robust remedy is required by the Tribunal to provide for Band Representative funding as immediate relief because Canada has demonstrated in the many months since the *Decision*, and despite the previous compliance orders, that it has no intention to fund this service unless the First Nations take the cost thereof from their allocation of prevention funding in Budget 2016, which is already deficient. Further, even when specific proposals were made (ie the Mushkegowuk Council proposal) for this funding, it was denied.

[313] In its written submissions, the COO relies on various cases including *McKinnon*, *Hughes*, *Ball* and distinguishes *Moore* as not applying to a systemic case such as this one. The COO argue that the Tribunal has the authority to make the specific, robust, immediate remedial, order for actuals it requested. Moreover, the COO submits the Tribunal should do so to eliminate the continuing discrimination by Canada and, its lack of compliance with the *Decision* and orders, by failing to provide for funding for Band Representation.

[314] In its written reply dated March 17, 2017 the COO contends that continued discrimination is not a permissible policy choice for Canada and that further consultation is not required to move forward on restoring funding to the Band Representative program under the *Child and Family Services Act*, as a crucial tool required now to promote the best interests of the child to alleviate discrimination while broader reforms are undertaken. It is time for action not endless “conversations”.

[315] In its oral submissions and oral reply, the COO argues as follows:

> INAC shields itself behind reasons like capacity, needing to have conversations, needing to understand their role, but that is just "smoke and mirrors". By not responding to the *Decision* and compliance Orders, INAC is making a policy choice to continue discrimination by refusing to fund the Band Representative Program. That is a policy choice that the Tribunal can and should intervene in.

[316] The Program is the “low hanging fruit” that is not complex to implement. It is specifically designed to help families and children to access culturally-specific services. It

is covered in the Provincial legislation and First Nations are already presently funding the Program out of one of the sources of revenue. INAC funded this Program until 2006 directly under a Comprehensive Funding Agreement.

[317] INAC should investigate the costs of actuals for 30 days and then release a pod of funding or put it in a First Nations Comprehensive Funding Agreement and through that, provide for transparency and accountability. The COO is already funding agencies on this basis for this service and would be happy to provide INAC with the information it needs to make it a line item and create a funding pool.

[318] Section 53(2)(b) of the *CHRA* enables the Tribunal to make orders that it considers necessary to eradicate and prevent discrimination; to retain jurisdiction to oversee the implementation of its orders; and where the Tribunal feels it is warranted to offer clarification and further guidance on the orders it has made.

[319] If the Tribunal ordered actual costs for Band representation, the COO would be happy to report back to the Tribunal in 30-90 days with information on the costs and how the implementation of such an order was going.

[320] The COO submit the *Ball* case is similar to this case because the Tribunal ordered Ontario to provide special diet benefits to individuals who had certain medical disabilities within 3 months. It was not open ended and it did not give Ontario choices over different mechanisms to assist people with those conditions. It responded to a gap in the legislation for providing diets. This is the same in this case where the *1965 Agreement* has a gap in Band representation.

[321] The remedy proposed by the Commission for Canada to come back in 4 months with concrete measures it “believes” will address this and other items in the Commission’s list for this remedy will be ineffective because it invokes intentions, not discriminatory effects, as per *Robichaud.*

[322] COO submit that the orders for immediate relief should have short time lines while for long term relief and reform there can be longer time lines. If Canada is to be given more time to implement Band representation, it ought to be retroactive to the date of the

Decision when the discrimination was found to have occurred, but consultation by Canada is not required for Band representation and other immediate relief.

[323] Canada submits it needs more information to make an informed decision on funding Band representation and has undertaken efforts on a national and regional basis to obtain the information to make informed decisions.

Analysis:

[324] The Panel has already found in the *Decision* that the lack of funding for Band Representatives is one of the main adverse impacts of Canada's discrimination, and a way that Canada fails to provide culturally appropriate services to First Nations children and families in Ontario (see at paras 392, 425-426).

[325] The Panel's conclusions were echoed by the Ontario Superior Court in *Catholic Children's Aid Society of Hamilton v G.H., T.V. and Eastern Woodlands Métis of Nova* Scotia, 2016 ONSC 6287, a case dealing with the exclusion of Metis children from the "very significant protections" set out in the *Child and Family Services Act*.

[326] The Court said at paragraph 35:

> I have already discussed in these Reasons how the definitions of Indian child, Native person and Native child impact both children and their parents in numerous significant ways during the course of a child protection proceeding. For instance, the provisions requiring that a representative of the child's band or Native community be given notice and the right to participate in the proceedings increase the opportunities that considerations relating to the family's Aboriginal heritage will be brought to the forefront in the litigation. They support the interest of both the child and the parents in having their cultural heritage protected and given the appropriate weight in the child protection proceeding. The involvement of a band or community representative also allows for the possibility of another party supporting the parents' plan and position in the litigation.

[327] The Court also added on the Band representatives' role at para. 89 and citing the *Decision*: *These representatives play a vital role in ensuring that child welfare staff and the courts have a full appreciation of the child's cultural heritage, traditions and needs before making decisions about the child. They work to ensure that the child receives culturally appropriate services and placements. Furthermore, they often support the plan advanced*

by a parent and assist that parent in advancing the plan by highlighting how it will foster the child's ties to their Aboriginal community (First Nations Child and Family Caring Society, para. 229).

[328] Budget 2016 was not increased to provide Band Representative Services or mental health services (or any other services other than prevention services), even after the Tribunal's decision that the failure to provide Band Representative and children's mental health services is discriminatory. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p.28, line 10- p.29 line 4, [Transcript of Cross-Examination of Ms. Lang]).

[329] INAC's affiant Ms. Lang stated in cross-examination that if Band Representative Services were required or permitted by INAC in the future, funding for such services would have to come from the existing funding envelopes as set out in the budget for 2016-2021. However, because the budget is calculated with the aim of increasing prevention funding to a certain amount, this means that First Nations who decided to provide these services in the future would necessarily have to take from their allocation for prevention services. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at p. 49, line 13 – p. 51, line 17, [Transcript of Cross-Examination of Ms. Lang]).

[330] INAC has not sought increased funding authority for Band Representative Services or children's mental health services for future years. (see Gillespie Reporting Services, transcript of Cross-Examination of Cassandra Lang, Ottawa, Vol. I at page 50, line 4 – page 51, line 17, [Transcript of Cross-Examination of Ms. Lang]).

[331] Therefore, as it stands, even if Canada allows expenditures for Band Representative Services in future years, to fund such services First Nations or First Nations agencies would be required to take away from the prevention moneys that have been allocated, which are already in total less than what Canada judges is necessary to bring children into the discriminatory EPFA formula.

[332] As previously mentioned in the *Decision*, the *Child and Family Services Act*, sets out the role of Band Representatives in the provincial child protection scheme. Canada is familiar with this role from its prior funding of the Band Representative program. According

to COO, many communities already have a Band Representative that they pay with their own source revenue (see *Decision* at paras 223, 241).

[333] As already said in the *Decision*, *the discordance between the objectives and the actual implementation of the program is also exemplified by the lack of funding in Ontario, for Band Representatives under the 1965 Agreement. Not only does the Band Representative* ***address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together*** *and is directly provided for in Ontario's Child and Family Services Act.*

[334] (…) There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof. Tellingly, AANDC's position is that it is not required to cost-share services that are not included in the *1965 Agreement*. (see at paras.348, 392). (emphasis added).

[335] There is no need to complete discussions and a National review to provide Band representative funding to Ontario First Nations agencies as an immediate relief. It is a provincial requirement and was part of the Panels' findings in the *Decision.* Specific communities and governance such as COO in Ontario have requested it. If Canada funds on the basis of need it can fund Band Representatives in Ontario while it reforms the *1965 Agreement*.

[336] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, at the actual cost of providing those services retroactive to January 26, 2016 by **February 15, 2018** and until such time as studies have been completed or until a further order of the Panel.

[337] INAC shall not deduct this funding from existing funding or prevention funding, until such time as studies have been completed or until a further order of the Panel.

Remoteness Quotient

[338] Since joining these proceedings as an interested party in May 2016, NAN has sought to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario. It has advocated that a new remoteness quotient be developed to ensure funding to remote northern communities reflecting the high cost of living and the extraordinary cost of providing services in those communities.

[339] This was recognized by the Panel in its *Decision* where it found the ability of remote FNCFS Agencies to recruit and retain staff, and to deliver services was adversely impacted by the FNCFS Program. The Panel ordered INAC to immediately address how it determines funding for remote FNCFS Agencies. Current funding does not account for such things as travel to provide or access services, the higher cost of living and service delivery in remote communities, the compounded effect of reducing core funding for remote agencies that may also be smaller agencies (see paras. 213-233 and 291 of the *Decision*). In its subsequent ruling in 2016 CHRT 16, the Panel ordered INAC to provide detailed information to clearly demonstrate how it is determining funding for remote FNCFS Agencies that allows them to meet the actual needs of the communities they serve (see 2016 CHRT 16, at para. 81).

[340] INAC and NAN have agreed to terms on the development and implementation of a remoteness quotient for the three FNCFS Agencies that serve NAN communities. INAC will fund the development of this quotient. The specific Terms of Reference of their agreement were attached as Annex "A" of the 2017 CHRT 7 ruling. The Panel adopted those terms as set out in the order in 2017 CHRT 7 ruling and pursuant to section 53(2)(a) of the *Act*. The Panel retained jurisdiction over the orders should it need to modify or clarify them in the future.

[341] The Agreement is intended to allow NAN and Canada to collaborate in the spirit of reconciliation on solutions to the deficiencies in remoteness funding for Indigenous child welfare that were found by the CHRT. The objective is to develop a remoteness quotient that can be used for funding First Nation child welfare agencies that serve various remote

communities. NAN and Canada will develop a process for obtaining expert advice on this remoteness quotient. NAN and Canada will develop mutually agreeable remedies related to a remoteness quotient for joint presentation to the Tribunal for implementation in the remedy phase of the Caring Society proceedings NAN and Canada will discuss the needs of NAN communities relating to remoteness in the context of the Tribunal's order that Canada "cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings" of its *Decision*. The agenda for these discussions will be informed by the expertise of child welfare providers, First Nation leadership, and appropriate government representatives. NAN and Canada do not speak for any of the other parties to the Caring Society proceedings, but recognize that the work of the Table may inform remedies that will affect other organizations.

[342] INAC and NAN were to provide an update to the Tribunal by September of 2017 concerning the progress of data collection and analysis in relation to the Terms of Reference and every six months thereafter as long as the Panel remains seized of this order.

[343] The Tribunal received an update on September 8, 2017.

[344] The NAN informed the Panel that following the March 29, 2017 ruling, INAC and NAN jointly agreed to update the Remoteness quotient Table’s Terms of Reference and have prepared a Phase I Report they jointly filed with the Tribunal.

[345] In accordance with the Terms of Reference, for Phase II, INAC and NAN have agreed to further work to update the report using 2016 Census data that NAN and INAC agree upon with a view of developing a remoteness quotient.

[346] INAC and NAN will report to the Tribunal every six months hereafter as ordered.

[347] The Panel is encouraged by NAN and INAC’s progress that will lead to a real positive outcome for children.

The NAN's Choose life "order'' request and working table

[348] As part of its motion's order requests, the NAN was seeking a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal (akin to the Wapekeka proposal) identifying children and youth at risk of suicide.

[349] On March 22, 2017, Health Canada committed to establishing a Choose Life Working Group with NAN aimed at setting out a concrete, simplified process for communities to apply for Child First Initiative (Jordan's Principle) funding. As such, NAN has asked this Panel to adjourn *sine die* its motion for a "Choose Life" order. NAN proposed to report back to the Panel with respect to the Choose Life Working Group by September 6, 2017 and indicate whether or not it continues to seek an adjournment of its request for a "Choose Life" order. The Panel granted NAN's request to adjourn its motion for a "Choose Life" order and said it was really encouraged by the Choose Life Working Group initiative. (See 2017 CHRT 7).

[350] On June 8, 2017, the NAN provided an early progress report and indicated that the Choose Life working Group had successfully finalized the creation of a fast track pilot application process. The working group is co-chaired by Sol Mamawka of NAN and Valerie Gideon of Health Canada. The report in sum, mentioned it had already had many meetings. The working group determined that the process contemplated is best implemented by ensuring that a single Health Canada official (Choose Life Application Focal Point) is responsible for the review and applications of all Choose Life applications. The position was then created. The Choose Life Application Process and three key documents were filed with the Tribunal.

[351] First, a Choose Life Application template founded as much as possible on the Wapekeka proposal.

[352] Second, a Choose Life Pilot Project Group Request Approval Process that sets out a single point person within NAN and within Health Canada, respectively, along with a timeline that sees completed applications receiving determination from Health Canada within twelve hours of receipt.

[353] Finally, a Choose Life Pilot Group Reporting Form, developed to ensure that any accountability requirements following the receipt of funding and implementation of a Choose Life Program would not pose an undue burden on the First Nation.

[354] With the above, the NAN has advised that there is now a streamlined process in place for NAN communities with children and youth at risk of suicide. This process is intended to begin to address the gaps in mental health services for First Nations children and youth, and allow NAN communities to begin to develop their own in-community services to prevent the loss of their youth.

[355] The Panel was very happy to learn this streamlined process was in place and so expeditiously, less than 3 months after the March 29, 2017 Consent order.

[356] The NAN reported as planned on September 6, 2017 and indicated to the Panel it is no longer seeking a continued adjournment of its Request for a Choose Life order.

[357] The NAN has informed the Panel that since its June 8, 2017 report, the Choose Life Working Group has become an effective mechanism and has brought to life both the initial agreement between NAN and Health Canada and the March 29, 2017 order of this Panel.

[358] Since the June 8 Report, twenty-one (21) NAN communities have received funding through the Choose Life process, approving Choose Life Applications totaling $10, 962,915.58 in funding and affecting 4,686 children. More Choose Life Applications are being developed and/or reviewed by Health Canada for approval.

[359] The NAN also advises the Choose Life program has been extended to secondary service providers, in order to support the student safety of NAN youth, while attending school and away from their home communities.

[360] Again, the Panel is very pleased to learn about this significant agreement that will have positive and real impact on the lives of Indigenous children.

[361] It is also a sign that meaningful agreements can be made in a relatively short time frame in the best interest of children. The Panel is impressed by the proactive, timely and effective work leading to this historical agreement.

Ontario special study

[362] According to the COO, in its compliance reports to date and on cross-examination, Canada has identified that it is aware that there are information gaps, and cited those gaps as a barrier to addressing the discrimination that arises out of its approach to service provision. The COO submits that in the past 13 months, Canada has made little progress in addressing those gaps, or even identifying the gaps. To ensure that medium and longer term relief measures will be designed and implemented, the COO requests that the Tribunal order Canada to conduct an Ontario Special Study, to be conducted by independent expert(s) accepted by COO and NAN and fully funded by Canada.

[363] Bearing in mind the need to allow Canada some flexibility in selecting the precise methods by which discriminatory practices are to be eliminated, the Commission does not feel that orders to fund these studies are appropriate at this time. Instead, the Commission submits that the best approach for these items would be an order that gives Canada (i) four months from the date of the order to consult with the other parties and the Commission about the need to conduct some or all of the requested studies, and the terms of any studies that are to be conducted, and put in place concrete measures to move forward with any approved studies, and (ii) deliver a detailed report to the Tribunal, explaining the concrete measures that have been put in place, how they have been communicated to staff, stakeholders and the public, and how they are expected to eliminate the adverse discriminatory impacts identified by the Tribunal.

[364] On October 13, 2017, Canada advised the Tribunal in writing that it was pleased to announce that the Child Welfare and Family Well-Being Technical Table, which includes the Chiefs of Ontario, independent Ontario First Nations, INAC and the government of Ontario, had agreed to move forward on a special study of issues related to First Nations on-reserve child welfare services in Ontario. INAC and the government of Ontario will provide funding for the proposed study, and will work with the Child Welfare and Family Well-Being Technical Table, on the development of a statement of work for a special study, the hiring of a consultant, and providing technical support as needed to complete the study. In light of this positive development, COO and Canada seek to adjourn this order request *sine die*. The Panel sought submissions from the other parties and there

was no objection to the adjournment. The Panel agreed and adjourned this request *sine die*.

[365] COO and Canada reported back to the Tribunal on November 28, 2017, on progress towards the Ontario Special Study. The letter mentioned that on November 6, 2017, the Child Welfare and Family Well-Being technical table launched the request for proposals. The deadline for submissions was November 27, 2017. The COO and Canada propose to report back to the Tribunal on the progress towards the Ontario Special study on January 31, 2018 and expect to provide a timeline for further reporting to the Tribunal. The COO and Canada would also reserve the right to bring the motion back to the Tribunal at any time, so long as the Tribunal retains jurisdiction over the matter.

[366] The Panel is encouraged by this positive step forward and looks forward to COO and Canada's progress report on January 31, 2018.

[367] The Panel retains jurisdiction on this matter until **December 10, 2018** when it will revisit the need to retain jurisdiction beyond that date.

NAN agency-specific relief

[368] The NAN seeks agency-specific relief for the three child welfare agencies which operate within the NAN territory: (1) that INAC fund the current debts and deficits of these agencies; and, (2) that INAC fund a capital needs assessment study for each agency.

[369] Each of the Executive Directors of the three agencies provided an affidavit outlining the accumulated funding shortfalls they face and the negative impact this has on service delivery. Additionally, all three Executive Directors indicated that each agency is facing chronic capital needs which remain unaddressed, and that a capital needs assessment study would be a helpful immediate relief step.

[370] The Commission submits that none of the Tribunal's decisions to date have commented on whether the funding of debts and deficits is necessary or required to redress the discriminatory practices it identified. In the circumstances, the Commission believes it would be premature on the current record to order that Canada pay the full

debts and deficits of these Agencies. Instead, the Commission recommends that the topic of debts and deficits for all Agencies – not just the NAN-mandated Agencies – be included in the scope of a longer-term order directing consultation, the putting in place of concrete steps to eliminate discrimination and reporting.

[371] In the *Decision*, the Panel discussed the adverse impacts some agencies faced because of INAC's underfunding, including the ones who had deficits and some being on the verge of closing because of those deficits. (see at paras.72, 384, 389) Deficits impact service delivery and the children who receive those services. Agencies should be able to operate without the burden of deficits. The Panel also believes that the 3 NAN agencies referenced above and all First Nations agencies across Canada that are in deficits as a result of Canada's discriminatory practices should receive funds to cover their deficits as long as they are linked to child welfare or health service delivery to First Nations children.

[372] The Panel, pursuant to Section 53 2 (a) orders Canada to identify which First Nations agencies including the NAN agencies above mentioned have child welfare or health services related deficits, and assess those deficits, and report to the Tribunal by **May 3, 2018**.

[373] There is no doubt that capital needs of agencies have to be assessed and studies are helpful in that regard. The Panel has made previous orders to assess specific needs of agencies across Canada including agencies in Ontario.

[374] Similar to the order for agency deficit relief, the Panel believes that assessing the capital needs of all agencies across Canada, along with all their other specific needs, has to inform immediate, mid-term and long term reform. Therefore, it considers this request as part of the assessment of all the needs of agencies addressed above.

[375] The Panel understands the need to move this matter expeditiously and has considered this in the fashioning of deadlines incorporated in the orders crafted in this ruling.

iii. General

Unfairness of the process argument:

[376] The AGC, in its submissions, raises the point that since the *Decision* in 2016, there have been efforts to expand the scope of the Tribunal's remedy process to include matters that were not raised or dealt with at the original hearing. For example, the parties have devoted considerable time and resources to have an inquiry into mental health funding even when information about funding was provided.

[377] The AGC submits the parties continued efforts to raise new issues and seek more information raises concerns about the fairness of the process, which is in danger of becoming open-ended and indeterminate, with more sessions being scheduled as more allegations are being raised. The parties are entitled to clarity and information on when to expect the process to end.

[378] The Panel understands the AGC's position and has a number of comments to make on this point:

[379] Mental Health formed part of the evidence at the hearing on the merits, it was also addressed in the *Decision* (see paras.239-242 and 392) therefore it is not a new issue. The Respondent has been found to discriminate and ordered to cease the discriminatory practice in accordance with the Panel's findings. It is for the Respondent to clearly demonstrate it has complied and how it addressed the discriminatory practice.

[380] It is true that information and funding amounts were shared with the Tribunal and the parties. However, they were not shared in a way that clearly demonstrates how the discriminatory practice is remedied or how the gaps are being addressed. The numerous questions were possibly a result of the lack of clarity and information on how these funding amounts were addressing the discrimination.

[381] As stated above, the evidence also shows that Canada has yet to analyse the gaps and which programs addresses what need. The Panel and the parties have been asking questions to understand how Canada arrived to its numbers.

[382] NAN was granted interested party status after the hearing to bring its unique perspective on communities in Northern Ontario. Mental health and youth suicides, while unfortunately not unique to NAN, sadly form part of this perspective.

[383] The Panel acknowledges that the part about respite care was not specifically referred to in the *Decision*. However, it is linked to gaps and denials that the Jordan Principle can address.

[384] While the Panel agrees that this remedy phase should not be an occasion to add anything and everything and new issues which would be unmanageable, this is not what has happened here.

[385] There is no unfairness to Canada here. The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long term relief that will address the discrimination identified and explained at length in the *Decision*. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long term relief.

[386] Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc.

[387] It took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now.

[388] Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here.

[389] In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination.

NAN's directed verdict and orders request:

[390] The Panel has reviewed the case law and submissions and, after consideration, the Panel believes this argument is applicable to Courts in the context of a judicial review and not directly applicable to the Tribunal. While the Tribunal has broad powers under the *CHRA,* its powers are statutory and the *CHRA* does not provide a Court Status with inherent jurisdiction to the Tribunal. In any event, section 53 of the *CHRA* is broad and sufficient to allow the Tribunal to make wide-ranging orders such as the orders made in this ruling.

Dissemination of information

[391] According to the Caring Society, Canada has consistently failed to confirm in writing its policies relating to funding and to demonstrate that it is clearly communicating these polices to FNCFS Agencies in a timely manner. Therefore, it asks that any immediate relief ordered by the Tribunal be communicated clearly to FNCFS Agencies in order to ensure that these measures are implemented fully and properly and in a manner to reduce the adverse impacts on First Nations children.

[392] The Commission agrees that it is critically important to ensure that key information about the Tribunal decisions, and resulting changes to policies and procedures, are quickly and consistently communicated to employees of Canada who are responsible for implementing the policies and procedures, Agencies, other stakeholders and the public. For this reason, the Commission joins the request for an order that underscores Canada's obligation to properly publicize any changes to the FNCFS Program and *1965 Agreement*. It submits, however, that the details of such obligations be left as a matter for the parties to discuss as part of the consultations that the Commission encourages the Tribunal to order, and that the communications strategies actually used be described in detail as part of the corresponding reporting obligations.

[393] Given the history of communication in this case and the different views shared by the parties, the Panel agrees with the Commission on this issue.

[394] The Panel orders Canada to communicate clearly to FNCFS Agencies any immediate relief ordered by the Panel in order to ensure that these measures are implemented fully, properly, and in a manner to reduce the adverse impacts on First Nations children by **March 15, 2018.** The details of such obligations will be left as a matter for the parties to discuss as part of the consultations ordered below, and the communications strategies used shall be described in detail as part of the corresponding reporting obligations.

Consultation

[395] The AFN submits that INAC cannot avoid immediate relief by claiming it must first consult with its partners and FNCFS Agencies. INAC has the information it needs to eliminate the discrimination according to the Panel's findings. According to the AFN, INAC's efforts to consult may not be in good faith, but rather a delay tactic used to avoid complying with the Panel's remedial orders. Furthermore, INAC and Health Canada are engaged in consultations with FNCFS Agencies about reforming the FNCFS Programs. The AFN submits that, for unknown reasons, INAC and Health Canada decided to unilaterally exclude both co-complainants from these consultations, despite both parties being national organizations that represent First Nations and FNCFS Agencies across Canada, respectively. Therefore, the AFN requests that INAC be required to enter into a protocol with the AFN and the other complainant parties on consultations to ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision*.

[396] The Commission submits the time is right for the Tribunal to make a binding order under section 53(2)(a) of the *Act*, requiring Canada to consult not only with the Commission, but also directly with the Moving Parties. Including the voices of the Complainants and Interested Parties in the reform of services that directly affect their interests, and the Indigenous children and communities they serve, will further the objective of reconciliation, giving voice to those who have historically been excluded from

decision-making processes. Section 53(2)(a) of the *Act* should be expansively interpreted to allow this to happen.

[397] The Commission also submits that a number of recent decisions and reports have lamented the suffering that resulted when past decisions about the welfare of Indigenous children were made without the direct involvement of Indigenous stakeholders. Using section 53(2)(a) of the *Act* to require consultation with Indigenous stakeholder organizations will help to ensure that the current reform of the FNCFS Program and the *1965 Agreement* does not repeat the mistakes of the past.

[398] Furthermore, according to the Commission, the Caring Society and the AFN have invaluable expertise to contribute to any discussion about reform of the FNCFS Program and *1965 Agreement*, and COO and NAN share expertise on such matters as they relate to their constituent communities in Ontario. Indeed, the Commission notes that the Tribunal has already recognized that INAC is not itself an expert in the delivery of child welfare services, and that consulting with experts (such as the Caring Society) should therefore be a priority.

[399] In a previous ruling, the Panel discussed consultation (see at 2017 CHRT 14 paras 113-120) for a specific issue. For the same reasons outlined and, relying on its previous ruling, the Panel makes the following order:

[400] Canada is ordered under section 53(2)(a) of the *Act,* to consult not only with the Commission, but also directly with the AFN, the Caring Society, the COO and the NAN on the orders made in this ruling, the *Decision* and its other rulings. INAC is ordered to enter into a protocol with the AFN, the Caring Society, the COO, the NAN and the Commission on consultations to ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision* by **February 15, 2018**. The parties will report on the progress of the implementation of this order and any issues that arise to the Tribunal by **February 8, 2018**.

Future reporting

[401] Consistent with what was decided in 2017 CHRT 14, the Panel would like an opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[402] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[403] The Panel, pursuant to sections 53 (2) (a) and (b), orders Canada to serve and file a report and affidavit materials detailing its compliance with each of the orders in this ruling by **May 24, 2018.**

[404] The Complainants and the Interested Parties shall provide a written response to Canada's report by **June 7, 2018** and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

[405] Canada may provide a reply, if any, by **June 21, 2018**.

[406] Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions.

IV. Order

[407] The orders made in this ruling are to be read in concurrence with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 7, 2017 CHRT 14 and 2017 CHRT 35). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[408] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA*, orders Canada to analyze the needs assessments completed by First Nations agencies in consultation with the Parties, interested parties (see protocol order below), and other experts; and to do a cost-analysis of the real needs of First Nations agencies including prevention/least disruptive measures, intake and investigation, building repairs and legal fees related to child welfare taking into account travel distances, case load ratios, remoteness, the gaps and/or lack of surrounding services and all particular circumstances they may face.

[409] Canada is ordered to complete this analysis and report to the Tribunal **by May 3, 2018**.

[410] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders INAC to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, and building repairs services for First Nations children and families on-reserve and in the Yukon, based on actual needs which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with

AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), **by April 2, 2018**. and report back to the Panel **by May 3, 2018**.

[411] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of prevention/least disruptive measures, building repairs, intake and investigations and legal fees. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada, to provide funding on actual costs for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare to be reimbursed retroactive to January 26, 2016 **by April 2, 2018**. This order complements the order above.

[412] In line with Canada's approach, the spirit of the UNDRIP, and reconciliation, the Panel makes the orders above for actual costs for child welfare prevention/least disruptive measures, intake and investigation, building repairs, legal fees to be reimbursed following the accountability framework and methodology agreed to by the parties and also following and according to the parameters below.

[413] Until such time as one of the options below occur:

1. Nation (Indigenous)-to Nation (Canada) agreement respecting self-governance to provide its own child welfare services.
2. Canada reaches an agreement that is Nation specific even if the Nation is not yet providing its own child welfare services and the agreement is more advantageous for the Indigenous Nation than the orders in this ruling.
3. Reform is completed in accordance with best practices recommended by the experts including the NAC and the parties and interested parties, and eligibility of reimbursements from prevention/least disruptive measures/, building repairs, intake and investigations and legal fees services is no longer based on discriminatory funding formulas or programs.
4. Evidence is brought by any party or interested party to the effect that readjustments of this order need to be made to overcome specific unforeseen challenges and is accepted by the Panel.

[414] The parameters above will also apply to the orders below.

[415] The Panel also recognizes that in light of its orders, and the fact that data collection will be further improved in the future and the NAC's work will progress, more adjustments will need to be made as the quality of information increases.

[416] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to develop an alternative system for funding child service purchase amount services for First Nations children and families on-reserve and in the Yukon, based on actual needs, which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018.**

[417] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the costs of child service purchase amount. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs for child service purchase amount in child welfare, to be reimbursed retroactive to January 26, 2016 by **April 2, 2018.** This order complements the order above.

[418] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA*, orders Canada to analyze the needs assessments completed by First Nations agencies in consultation with the Parties, interested parties (see protocol order below), and other experts and to do a cost-analysis of the real needs of small First Nations agencies related to child welfare taking into account travel distances, case load ratios, remoteness, the gaps and/or lack of surrounding services and all particular circumstances they may face.

[419] Canada is ordered to complete this analysis and report to the Tribunal by **May 3, 2018**.

[420] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada, pending long term reform of its National FNCFS Program funding formulas and models, to eliminate that aspect of its funding formulas/models that creates an incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, and pursuant to Section 53 (2) (a) of the *CHRA*, the Panel orders Canada to develop an alternative system for funding small first nations agencies based on actual needs, which operates on the same basis as INAC's current funding practices for funding child welfare maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by the FNCFC agencies to be in the best interests of the child; and develop and implement the methodology including an accountability framework in consultation with AFN, the Caring Society, the Commission, the COO and the NAN (see protocol order below), by **April 2, 2018** and report back to the Panel by **May 3, 2018**.

[421] The Panel, pursuant to Section 53 (2) (a) of the *CHRA*, orders Canada to cease its discriminatory funding practice of not fully funding the small first nations agencies' costs. In order to ensure proper data collection and to be responsive to the real needs of first nations children, the Panel orders Canada to provide funding on actual costs small first nations agencies, to be reimbursed retroactive to January 26, 2016 **by April 2, 2018.** This order complements the order above. The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA*, orders Canada, to provide by **March 5, 2018** a reliable data collection, analysis and reporting methodology, as well as ethical research guidelines respecting Indigenous peoples that include protection of Indigenous intellectual property for approval by the Panel upon further submissions by the parties, to be applied to said research, guide the data collection process launched following its October 28, 2016 letter to FNCFS Agencies, and to guide the data collection process resulting from all the orders for actual costs in this ruling.

[422] The Panel, pursuant to section 53 (2) (a) of the *CHRA* orders Canada to stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the *Decision* by **February 15, 2018**.

[423] The Panel, pursuant to section 53 (2) (a) of the *CHRA*, orders Canada to ensure, that any immediate relief investment does not adversely impact indigenous children, their families and communities by **February 15, 2018**.

[424] The Panel, pursuant to section 53 (2) (a) of the CHRA, orders Canada to evaluate all its Social Programs for Indigenous peoples by **April 2, 2018**, in order to determine and ensure any reallocation is necessary and does not adversely impact First Nation children and families.

[425] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to analyze all its programs that fund mental health for First Nations on reserve and in the Yukon and clearly establish which ones fund what in order to identify gaps in services to First Nations children by **April 2, 2018**.

[426] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to fund actual costs of mental health for services to First Nations children and youth in Ontario with CFI or otherwise retroactively to January 26, 2016, by **February 15, 2018**.

[427] The Panel, pursuant to Section 53 2 (a) and (b) of the *CHRA*, orders Canada to fund Band Representative Services for Ontario First Nations, at the actual cost of providing those services retroactively to January 26, 2016 by **February 15, 2018** and until such time as studies have been completed or until a further order of the Panel.

[428] Canada shall not deduct this funding from existing funding or prevention funding, until such time as studies have been completed or until a further order of the Panel.

[429] The Panel, pursuant to Section 53 2 (a) orders Canada to identify which First Nations agencies including the NAN agencies above mentioned have child welfare or health services related deficits, and assess those deficits, and report to the Tribunal by **May 3, 2018**.

[430] The Panel orders Canada to communicate clearly to FNCFS Agencies any immediate relief ordered by the Panel in order to ensure that these measures are implemented fully, properly, and in a manner to reduce the adverse impacts on First Nations children by **March 15, 2018**. The details of such obligations will be left as a matter

for the parties to discuss as part of the consultations ordered below, and the communications strategies actually used shall be described in detail as part of the corresponding reporting obligations.

[431] Canada is ordered, under section 53(2)(a) of the *CHRA*, to consult not only with the Commission, but also directly with the AFN, the Caring Society, the COO and the NAN on the orders made in this ruling, the *Decision* and its other rulings. Therefore, INAC is ordered to enter into a protocol on consultations with the AFN, the Caring Society, the COO, the NAN and the Commission to ensure that consultations are carried out in a manner consistent with the honor of the Crown and to eliminate the discrimination substantiated in the *Decision* by **February 15, 2018.** The parties will report to the Tribunal on the progress of implementation of this order and any issues that arise by **February 8, 2018**.

[432] The Panel, pursuant to section 53 (2) (a) and (b) of the *CHRA*, orders Canada to serve and file a report and affidavit materials detailing its compliance with each of the orders in this ruling **by May 24, 2018**.

[433] The Complainants and the Interested Parties shall provide a written response to Canada's report by **June 7, 2018** and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

[434] Canada may provide a reply, if any, by **June 21, 2018.**

[435] Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions.

[436] Should First Nations refuse to receive additional prevention funds for any given reason, in line with their specific needs, Canada can obtain a sworn declaration from an official and file it with the Tribunal for consideration by the Panel, after receiving submissions from the parties.

[437] This is an opt-out provision, for an Indigenous Nation, that allows specific needs to be addressed in respect with Indigenous self-governance and Canada's goal to renew the Nation-to-Nation relationship.

[438] Canada has advanced that it cannot do things unilaterally. However, the Panel found it did a number of things unilaterally. The Panel recognizes that in some circumstances delays could occur for other reasons. Should Canada be delayed in implementing the Panel's orders because of situations out of its control involving a province, Canada can obtain a sworn declaration from a provincial official and file it with the Tribunal for consideration by the Panel after receiving submissions from the parties.

[439] This being said, the Tribunal does not have jurisdiction over the provinces. The services analysis in the *Decision* which was not judicially reviewed was under the Federal National Program that discriminated against Indigenous children and families. It was also analyzed under section 91 (24) of the Constitution and the fiduciary relationship and the honor of the Crown in the *Decision.*

[440] While we understand that reform needs to be done in partnership with all the Indigenous rights holders, provinces and territories, there is also no indication in the evidence before us that the absent partners disagree with the AFN, the Caring Society, the COO, the NAN, the Commission and this Panel on immediate relief orders or general orders made so far. The Provinces have expressed through their legislation the need for least disruptive measures in child welfare as sound social work practice. Why would anyone oppose this? Respecting this and, adding specific needs, culturally appropriate programs and self-determination will only better the situation for Indigenous children.

[441] Moreover, the AFN, COO and NAN have all expressed that while they are not the rights holders, they are governance bodies not groups who have elected officials mandated by resolutions to represent the interests of their members who are Indigenous Peoples.

[442] Canada already works with the Caring Society, AFN, COO and NAN on a number of important Committees. The NAC is composed of the Caring Society and the AFN.

[443] The Panel encourages Canada in the future to provide evidence to the Tribunal if a province, territory or First Nation resists or acts as a roadblock to Canada's implementation of the Panel's rulings. This will assist the Panel in understanding their views and Canada's efforts to comply with our orders and, will provide context and may

refrain us to make orders against Canada. Absent this evidence, the Panel makes orders to eliminate the discrimination in the short term while understanding the importance of the Nation-to-Nation relationship.

[444] The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented, and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **December 10, 2018** when it will revisit the need to retain jurisdiction beyond that date. Given the ongoing nature of the Panel's orders, and given that the Panel still needs to rule upon other outstanding remedial requests such as mid-to long term and compensation, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by Canada.

[445] While the Panel recognizes the parties' right to seek judicial review of this ruling, the Panel encourages the parties to write to the Tribunal to seek any clarification and/or modification of these orders directly with the Tribunal even if it is seeking judicial review. The matter is complex and the Panel would appreciate the opportunity to address if possible, any concern or need for clarification as a result of this ruling. We believe that this is **in the best interest of children**.

[446] The parties have all received an advanced confidential copy of this ruling on **December 18, 2017** to allow them to consult and make suggestions if any, to the Panel. The parties had until **January 30, 2018** to request an extension of time or, indicate their suggestions to the Tribunal. Otherwise, all the orders in this ruling were to come into effect on **February 1, 2018.**

[447] On January 29 and 30, 2018, the parties indicated to the Tribunal that they have been in productive discussions on the consultation protocol, the implementation of the Tribunal's orders included in this ruling and, on the potential clarifications requests to be made on of some of the orders. Their discussions and proposed changes were not finalized before the upcoming release. In spite of this, all the parties were in agreement that this ruling should be released as scheduled on February 1st, 2018.

[448] On January 30, 2018, the COO requested some minor amendments to the Ontario specific orders in this ruling however, it was the end of the day and the suggested changes were not yet agreed to by the other parties. In addition, the NAN was not in a position to provide submissions before February 6, 2018. The Panel hopes to address the COO's request expeditiously once all the parties have provided their submissions.

[449] Finally, on the same day, the AGC sent a letter confirming the items included in paragraph 447 above and, **indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.**

[450] The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree.

Conclusion

[451] It is important to look at this case in terms of bringing **Justice** and not simply the Law, especially with **reconciliation** as a goal. This country needs **healing** and **reconciliation** and the starting point is the **children and respecting their rights**. If this is not understood in a meaningful way, in the sense that it leads to **real** and **measurable change**, then, the TRC and this Panel's work is trivialized and unfortunately the suffering is born by vulnerable children.

Panel Chair's final remarks:

[452] Given the recognition that a Nation is also formed by its population, the systematic removal of children from a Nation affects the Nation's very existence.

[453] The building of a Nation-to-Nation relationship cannot be more significant than by stopping the unnecessary removal of Indigenous children from their respective Nations. Reforming the practice of removing children to shift it to a practice of keeping children in their homes and Nations will create a **channel of reconciliation**. **This is the true spirit of reconciliation. This is the goal. This is hope. This is love in action. This is justice.**

[454] The Panel wishes to thank everyone involved for working tirelessly on this important case. The Panel hopes this approach will spur productive discussions amongst the parties to potentially reach additional agreements. The Panel also trusts that change has started and has accelerated in the last few months. The Panel is really hopeful for what is coming ahead for Indigenous children in Canada.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
December 18, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: February 1, 2018

Date and Place of Hearing: March 22-24, 2017; Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke and Sébastien Grammond, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party