

**CANADIAN HUMAN RIGHTS TRIBUNAL**

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 NISHNAWBE ASKI NATION  
and AMNESTY INTERNATIONAL CANADA and GEORGINA ISLAND FIRST  
NATION and TAYKWA TAGAMOU NATION**

Interested Parties

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**BOOK OF AUTHORITIES OF THE MOVING PARTIES, CHIEFS OF ONTARIO AND  
NISHNAWBE ASKI NATION  
VOLUME I**

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- 50 UN Human Rights Council, *Rights of the indigenous child under the United Nations Declaration on the Rights of Indigenous Peoples*, 48th Sess, UN Doc [A/HRC/48/74](#) (2021)
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- 52 Kent Roach, “1.2.5 Choices of Remedies and Proportionality” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)
- 53 Kent Roach, “9.1 Introduction” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)
- 54 Kent Roach, “9.5.1 Indigenous Self-determination and Negotiated Remedies” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)
- 55 Kent Roach, “9.6 Conclusion” in *Remedies for Human Rights Violations: a Two-Track Approach to Supra-National and National Law* (Cambridge University Press, 2021)

- 56 Elsa Stamatopoulou, "Indigenous Children and Children's Rights" in *Oxford Handbook of Indigenous Peoples and International Law*, online eds (Oxford University Press, 2025)

## **Other**

- 57 Chief Archie Wabasse's remarks at the Chiefs of Ontario Special Chiefs Assembly, "Special Chiefs Assembly: Strength in Unity" (10 October 2025), <https://www.youtube.com/live/BjpoRyvHEdQ?t=14266s>
- 58 Chief Joe Miskokomon's remarks at the Chiefs of Ontario Special Chiefs Assembly, "Special Chiefs Assembly: Strength in Unity" (10 October 2025), <https://www.youtube.com/live/BjpoRyvHEdQ?t=13741s>



TAB 1

# Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817

Source: Supreme Court of Canada

Date: 1999-07-09

File number: 25823

Other citations:

174 DLR (4th) 193 — 243 NR 22 — 89 ACWS (3d) 777 — AZ-99111041 — 14 Admin LR (3d) 173 — 1 Imm LR (3d) 1 — [1999] CarswellNat 1124 — EYB 1999-13279 — JE 99-1412 — [1999] FCJ No 39 (QL) — [1999] SCJ No 39 (QL) — [1999] ACS no 39

## Citation:

**Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817, <<https://canlii.ca/t/1fqllk>>, retrieved on 2026-01-02**

## Most recent unfavourable mention

**Saeedy v. Canada (Citizenship and Immigration), 2025 FC 354 (CanLII)**

[...] [23] Given that the Applicant was self represented, many of the issues he discussed related to procedural fairness despite not using the term. Baker outlines several factors that are relevant in determining the content of the duty of fairness, including the nature of the decision, the statutory scheme, the importance of the [...]

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

**Mavis Baker** *Appellant*

*v.*

**Minister of Citizenship and Immigration** *Respondent*

and

**The Canadian Council of Churches,**

**the Canadian Foundation for Children, Youth and the Law,**

**the Defence for Children International-Canada,**

**the Canadian Council for Refugees,**

**and the Charter Committee on Poverty Issues** *Interveners*

**Indexed as:**Baker v. Canada (Minister of Citizenship and Immigration)

File No.:25823.

1998:November 4; 1999:July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

on appeal from the federal court of appeal

*Immigration -- Humanitarian and compassionate considerations -- Children's interests -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Application denied without hearing or formal reasons -- Whether procedural fairness violated -- Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) -- Immigration Regulations, 1978, SOR/93-44, s. 2.1 -- Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.*

*Administrative law -- Procedural fairness -- Woman with Canadian-born dependent children ordered deported -- Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad -- Whether participatory rights accorded consistent with duty of procedural fairness -- Whether failure to provide reasons violated principles of procedural fairness -- Whether reasonable apprehension of bias.*

*Courts -- Appellate review -- Judge on judicial review certifying question for consideration of Court of Appeal -- Legal effect of certified question -- Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).*

*Immigration -- Humanitarian and compassionate considerations -- Standard of review of humanitarian and compassionate decision -- Best interests of claimant's children -- Approach to be taken in reviewing humanitarian and compassionate decision where children affected.*

*Administrative law -- Review of discretion -- Approach to review of discretionary decision making.*

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court -- Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

*Held:* The appeal should be allowed.

*Per* L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the

decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

*Per Cory and Iacobucci JJ.:* The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

## Cases Cited

By L'Heureux-Dubé J.

**Applied:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; **disapproved:** *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4; *Shah v. Minister of Employment and Immigration* (1994), 1994 CanLII 19725 (FCA), 170 N.R. 238; **not followed:** *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157; *Gheorlan v. Canada (Secretary of State)* (1995), 1995 CanLII 19485 (FC), 26 Imm. L.R. (2d) 170; *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62; *Marques v. Canada (Minister of Citizenship and Immigration)* (No. 1) (1995), 116 F.T.R. 241; *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646; **referred to:** *Ramoutar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2972 (FC), [1993] 3 F.C. 370; *Minister of Employment and Immigration v. Jimenez-Perez*, 1984 CanLII 127 (SCC), [1984] 2 S.C.R. 565; *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643; *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 1987 CanLII 9887 (FC), 3 Imm. L.R. (2d) 81; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879; *Kane v. Board of*

*Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105; *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525; *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 1995 CanLII 19400 (FC), 33 Imm. L.R. (2d) 57; *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71; *Taabea v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748; *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3.

By Iacobucci J.

**Applied:** *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141; **referred to:** *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038.

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*Immigration Act*, R.S.C., 1985, c. I-2, ss. 3(c), 9(1), 82.1(1) [rep. & sub. 1992, c. 49, s. 73], 83(1) [*idem*], 114(2) [*ibid.*, s. 102].

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APPEAL from a judgment of the Federal Court of Appeal, 1996 CanLII 3884 (FCA), [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 1995 CanLII 19414 (FC), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

*Roger Rowe and Rocco Galati*, for the appellant.

*Urszula Kaczmarczyk and Cheryl D. Mitchell*, for the respondent.

*Sheena Scott and Sharryn Aiken*, for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

*John Terry and Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

*Barbara Jackman and Marie Chen*, for the intervener the Canadian Council of Churches.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

1 L'Heureux-Dubé J. -- Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

## I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her "direct custody". (No info on who has ghe [sic] other two).

There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -

Letter of Aug. '93 from psychiatrist from Ont. Govm't.

Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.

Lawyer says PS [sic] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.



This case is a catastrophe [sic]. It is also an indictment of our “system” that the client came as a visitor in Aug. ’81, was not ordered deported until Dec. ’92 and in APRIL ’94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence - see charge of “assault with a weapon” [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

## II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

**82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court -- Trial Division.

**83.** (1) A judgment of the Federal Court -- Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court -- Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

**114.** . . .

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person’s admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

*Immigration Regulations*, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person’s admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

*Convention on the Rights of the Child*, Can. T.S. 1992 No. 3

### Article 3

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

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

#### Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### III. Judgments

#### A. Federal Court -- Trial Division (1995), 1995 CanLII 19414 (FC), 101 F.T.R. 110

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this

situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. *Federal Court of Appeal*, 1996 CanLII 3884 (FCA), [1997] 2 F.C. 127

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

#### IV. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

- (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
- (2) Were the principles of procedural fairness violated in this case?
  - (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
  - (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
  - (iii) Was there a reasonable apprehension of bias in the making of this decision?
- (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

## V. Analysis

### A. Stated Questions Under Section 83(1) of the Immigration Act

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a “serious question of general importance” be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

The certification of a “question of general importance” is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 2972 (FC), [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a “question of general importance” has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

### B. The Statutory Scheme and the Nature of the Decision

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister’s power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person’s admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as “H & C decisions”.

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, 1984 CanLII 127 (SCC), [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in

practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, has become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

### *C. Procedural Fairness*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects “the rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 1987 CanLII 9887 (FC), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 1994 CanLII 19725 (FCA), 170 N.R. 238 (F.C.A.).

#### (1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the “terms of the statute pursuant to which the body operates”: *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface, supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 1995 CanLII 19400 (FC), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 9488 (FCA), [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 1994 CanLII 18483 (FC), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans, supra*, at pp.

7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

### (2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

### (3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court -- Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result -- the claimant and his or her close family members -- and this leads



to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply “minimal”. Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children’s Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

#### (4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker’s reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 1995 CanLII 19485 (FC), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v.*

*Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the decision-making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at paras. 180-81.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 4972 (FCA), [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it “might in some cases induce a lack of candour on the part of the administrative officers concerned”. Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of “archival” reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, “Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate” (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v.*

*Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531, imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 1992 CanLII 878 (BC CA), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 1982 CanLII 3265 (NS CA), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Refugee Status Advisory Committee*, 1980 CanLII 4166 (FC), [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 1996 CanLII 4829 (NB CA), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams, supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L’Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz’s comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker’s mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist’s letter, which stated that, with treatment, Ms. Baker

could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

#### D. Review of the Exercise of the Minister's Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

#### (1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1

S.C.R. 554, at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231. A general doctrine of “unreasonableness” has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker’s jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038).

54 It is, however, inaccurate to speak of a rigid dichotomy of “discretionary” or “non-discretionary” decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker’s freedom of choice, sometimes referred to as “structured” discretion.

55 The “pragmatic and functional” approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is “polycentric” and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The

spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the “proper purposes” or “relevant considerations” involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

## (2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court -- Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a “serious question of general importance” by the Federal Court -- Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively “open-textured” legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor,

too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

### (3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam, supra*, at para. 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the "serious question of general importance" stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H & C factors", read as follows:

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam, supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an



unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of “deference as respect” as follows:

Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .

(D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon “compassionate or humanitarian considerations” (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person’s admission should be facilitated owing to the existence of such considerations. They show Parliament’s intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children’s interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) *The Objectives of the Act*

68 The objectives of the Act include, in s. 3(c):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament’s objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(c).

(b) *International Law*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, 1956 CanLII 79 (SCC), [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications, supra*; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697.

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that “childhood is entitled to special care and assistance”. A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child “needs special safeguards and care”. The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) *The Ministerial Guidelines*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a

useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the “humanitarian” and “compassionate” considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal’s holding in *Shah, supra*, at p. 239, that a s. 114(2) decision is “wholly a matter of judgment and discretion” (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister’s guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.

#### E. Conclusions and Disposition

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

78 Iacobucci J. - I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

*Appeal allowed with costs.*

*Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.*

*Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.*

*Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.*

*Solicitors for the intervener Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.*

*Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.*

TAB 2

# Ball v. Ontario (Community and Social Services), 2010 HRTO 360 (CanLII)

Source: Human Rights Tribunal of Ontario  
 Date: 2010-02-17  
 File number: HR-1443-07; HR-1519-07; HR-1656-08; HR-1692-08; HR-1732-08; HR-1788-08  
 Other citation: 69 CHRR 300

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**Ball v. Ontario (Community and Social Services), 2010 HRTO 360 (CanLII),**  
 <<https://canlii.ca/t/285qv>>, retrieved on 2026-01-02

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Most recent  
 unfavourable  
 mention

**Leach v. Ontario (Community and Social Services), 2019 HRTO 204 (CanLII)**  
 [...] However, the facts in Ball are distinguishable because the complainants in that case alleged discrimination on the basis of their particular disability in the provision of a special diet allowance program under OW and ODSP, and the Tribunal analyzed whether the differences in benefits given to persons with different [...]

Ball v. Ontario (Community and Social Services) (No. 8)  
 HR-1519-07,HR-1443-07,HR-1656-08,HR-1788-08,HR-1732-08,HR-1692-08  
 2010-02-17  
 2010 HRTO 360

## Ontario Human Rights Tribunal

CHRR Doc. 10-0419

Brian Ball and the Complainants Listed on Schedules A, B and C\*

Complainants

and

Ontario Human Rights Commission

Commission

v.

Her Majesty the Queen in Right of Ontario as Represented by the Minister of  
 Community and Social Services

Respondent

Date of Decision:

February 17, 2010

Before:

Human Rights Tribunal of Ontario, David A. Wright

File Nos.:

HR-1443-07 to HR-1519-07 and HR-1656-08 to HR-1692-08 and HR-1732-08 to HR-1788-08

Appearances by:

Sarah Shartal, Counsel for the Complainant Brian Ball

Cynthia Wilkey, Lesli Bisgould, Mary Marrone and Colleen Sym, Counsel for the Complainant S.

Andrew Bolter and Jill Houlihan (Student-at-Law), Counsel for the Complainant W.

Cathy Pike and Christine Elwell, Counsel for the Commission

Robert E. Charney, Rochelle Fox, Sophie Nunnelley and Bruce Ellis, and Richard Ogden and Megan Howatt (Students-at-Law), Counsel for the Respondent

BENEFITS — PUBLIC SERVICES AND FACILITIES — social assistance benefits inadequate — special diet allowance — DISABILITY — discriminatory treatment of the disabled — financial assistance program discriminatory — temporary disability — definition of disability

AFFIRMATIVE ACTION — definition, purpose and application of special program — EQUALITY — equality rights and the disabled — CANADIAN CHARTER OF RIGHTS AND FREEDOMS — s. 15(1) (equality) — s. 15(2) (affirmative action programs) — DAMAGES — social assistance benefits

JURISDICTION — jurisdiction to hear complaint concerning government regulation — INTERPRETATION OF STATUTES — definition of "disability" — PROCEDURE — lead case proceedings

**Summary:** The Human Rights Tribunal of Ontario ruled on three complaints alleging that the special diet allowance, which is one component of Ontario Disability Support Program ("ODSP") benefits, discriminates between individuals with different types of disabilities. The complainants alleged either that they have disabilities that require



special diets that are not funded at all, or that the special diet that they require is funded at a lower proportion of actual expenses than the special diets for other disabilities.

The three complaints heard by the Tribunal are "lead cases" among many that have been filed alleging that the special diet allowance is discriminatory. The Tribunal in this decision sets out a legal framework for determining whether there is discrimination in the special diet allowance scheme.

The special diet allowance is one of four components that make up basic financial assistance under the Ontario Disability Support Program Act, 1997. ODSP is an income security program of last resort. The four components are the shelter allowance, basic needs (which is intended to cover all other necessities including food), the northern allowance for those living north of the 50th parallel, and the special diet allowance.

Before November 2005 the special diet schedule was set out in a policy, not a regulation, and was not based primarily on medical conditions. The schedule identified various diets or nutritional products. An approved health practitioner had to fill out a form to authorize a special diet allowance. Some of the diets set out in the pre-2005 schedule were based on medical conditions, such as the diabetic diet and cystic fibrosis diet. Other categories reflected specific needs, such as a high fluid diet, or vitamins/minerals and herbal supplements. There was also a discretionary category for special diets other than, or in addition to, those set out in the schedule.

Since 2005 the special diet allowance schedule is set out in a regulation. The schedule is based entirely on medical condition. Monthly benefit amounts are specified for each listed medical condition, which range from \$10 to \$240. After the implementation of the new 2005 schedule, 23 percent of ODSP recipients saw an increase in their special diet allowance, 58 percent saw a decrease and 19 percent saw no change.

The Tribunal acknowledged the difficulty of addressing discrimination in a program which, by definition, must make categories. Funding is not customized to the particularized needs of each recipient. The Tribunal's role, it pointed out, was not to decide what would be the best or fairest way to set up the special diet program, but to determine whether the current program discriminates on the basis of disability.

The Tribunal found that the purpose of the special diet allowance is to assist social assistance recipients who have an existing medical condition, which the Ontario medical community recognizes as warranting a special diet, and the special diet imposes costs in excess of a regular, healthy diet.

The Tribunal determined that in order to establish discrimination related to the special diet allowance a complainant must show:

1. *that the claim is based on a disability or disabilities;*

- 2. that there is general recognition in the Ontario medical community that modifications to a healthy diet should be made because of the disability;*
- 3. the diet leads to additional food costs;*
- 4. there is no funding for the additional costs or the funding is significantly disproportionate (up to the maximum of \$250).*

The Tribunal rejected the argument of the Minister of Community and Social Services that the Tribunal has no role in evaluating the amount of funding provided for the different medical conditions. While there must be some deference given to the amounts specified in the schedule, the Tribunal said, when the amount allocated is significantly disproportionate to the amount of the additional costs as compared with other disabilities, there must be a finding of discrimination.

The Tribunal also rejected an argument by the Minister that because the special diet program is designed to relieve hardship and economic disadvantage, it is a special program as defined in s. 14(1) of the Code, and the Tribunal cannot find that it violates the complainant's Code rights.

Section 14(1) says: "A right [to non-discrimination] is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage..."

But the Tribunal found that when a challenge to a program comes from a person whom the program is designed to assist, the general prohibitions against discrimination apply. The role of s. 14 is to address challenges from those who are not the intended beneficiaries of a particular program.

W. is a 57-year-old woman who lives in Sarnia. She has a history of various medical conditions, including heart disease, cardiovascular disease, osteoarthritis, bipolar affective disorder, hypercholesterolemia, hypothyroidism, hypoproteinemia, and hypertension. She receives a monthly special diet allowance of \$42, which includes \$10 for cardiovascular disease, \$10 for hypertension and \$22 for hypercholesterolemia. Prior to 2005, W. received an allowance of \$244. W. alleges that the present special diet allowance schedule discriminates against her by failing to include hypoproteinemia (protein deficiency), a medical condition which requires her to eat extra protein. The schedule also discriminates against her because the amounts allowed for hypertension, hypercholesterolemia and cardiovascular disease are significantly lower than the increased costs of the special diets required as a result of these medical conditions.

The Tribunal concluded that W. was discriminated against in two ways: because there was no funding for hypoproteinemia and because the funding for the combination of hypertension and hypercholesterolemia was insufficient.

S. is a 32-year-old man who lives in Burlington. His complaint was brought on his behalf by his litigation guardian, his mother. S. has a clinical condition similar to Prader-Willi syndrome, and is developmentally delayed. He has behaviour problems, including a psychological compulsion to eat. He is "morbidly obese" and needs a diet of high fibre, low-calorie food that provides volume high enough to satisfy his drive to eat without compromising weight control. He currently receives a special diet allowance of \$20 per month, which is insufficient to provide him with the foods he needs.

The Tribunal concluded that S. was discriminated against as a result of an insufficient amount of special diet allowance for obesity.

B. is a 47-year-old man who lives in Toronto. He suffers from major depression, ulcers, asthma, and osteoarthritis. He has been hospitalized many times for his depression, suicidal and homicidal behaviour. He receives \$52 dollars per month because of hyperlipidemia, hepatic disorder and hypercholesterolemia. Prior to 2005, he received a monthly special diet allowance of \$250. He alleges that in 2006 and 2007 he was unable to afford healthy food, lost weight, and his depression worsened. After a new assessment, his monthly dietary allowance has gone back up to \$250, but B. claims that the special diet schedule discriminates against him because it does not provide benefits for those who have severe mental health disabilities with a risk of weight loss.

The Tribunal allowed B.'s complaint in part, finding that during the 2006—2007 period, there was a significant underfunding for hypercholesterolemia.

The Tribunal ordered the Minister of Community and Social Services to rectify the discrimination against these three complainants, by including special diet allowances for those conditions that were not included in the schedule and increasing the amounts for other conditions, as indicated.

However, the Tribunal declined to make a more detailed order regarding the regulation. The Minister may choose various ways of addressing other changes to the special diet allowance that may be necessary as a result of the principles set out in this decision. Should the Minister fail to take appropriate action, there are many other complaints before the Tribunal in which other remedies could be requested.

See also (No. 1) (2008), CHRR Doc. 08-166, 2008 HRTO 19; (No. 5) (2008), CHRR Doc. 08-626, 2008 HRTO 88 and (No. 9) (2010), CHRR Doc. 10-1503, 2010 HRTO 1277.

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## INTRODUCTION

[1] This decision is about whether the Province of Ontario discriminated against three complainants with respect to services because of disability, contrary to s. 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"). The alleged discrimination is in the amount of the special diet allowance they received as a component of their Ontario Disability Support Program ("ODSP") benefits. The complainants allege that the special diet program discriminates between individuals with different types of disabilities who have dietary needs that fall within the purpose of the program.

[2] At the heart of this case is a significant tension inherent in the design of large-scale benefit programs for people with disabilities. On one hand, an important value of human rights law is responsiveness to individual characteristics and needs that stem from disability. On the other, the effective, fair, and consistent administration of benefit programs that promote equality for persons with disabilities may be better done through the use of categories. This decision requires balancing of these sometimes conflicting values in determining whether and how the special diet program violates the *Code*.

[3] The three complaints addressed in this decision are "lead cases" heard in accordance with the process set out in previous interim decisions: see 2008 HRTO 24 (CanLII) [ CHRR Doc. 08-207 ], 2008 HRTO 29 (CanLII) [ CHRR Doc. 08-266 ], 2008 HRTO 72 (CanLII) [ CHRR Doc. 08-585 ], 2008 HRTO 207 (CanLII) [ CHRR Doc. 08-787 ], and 2008 HRTO 420 (CanLII) [ CHRR Doc. 08-1080 ]. Two other lead cases were settled by the parties. Hearings before the Tribunal were held on 14 days between March and June 2009. The Tribunal heard oral evidence from the lead complainants and two witnesses on behalf of the Ministry of Community and Social Services (the "Ministry"). Evidence was also received in the form of affidavits and transcripts of cross-examination. Counsel for each party presented detailed written and oral final argument.

## OVERVIEW OF THE ANALYSIS

[4] The special diet allowance is a component of social assistance provided within the ODSP and Ontario Works ("OW") social assistance programs. As the program currently operates, there is a schedule of medical conditions with corresponding monetary amounts. An individual with a condition or conditions listed on the schedule receives additional monthly funding as part of his or her social assistance

benefits, to compensate for additional costs of the special diet or diets. The program design changed in 2005. Before that, the schedule included a list of diets, and amounts paid corresponded to each diet. There was also a category pursuant to which a medical practitioner could certify that an individual required a diet not listed elsewhere on the schedule.

[5] The three complainants in the lead cases allege that the special diet program discriminates against them as compared with others with different disabilities. They say that they have or had disabilities that require special diets that are not funded, or that are funded at a lower proportion of the actual expenses than individuals with other disabilities.

[6] Determining whether there has been discrimination in these circumstances depends principally on the definition of the purpose of the program. The Tribunal must determine whether the complainants' circumstances fall within this purpose, and therefore whether they experience substantive discrimination as compared with others who receive benefits. This is a legal determination, which involves an analysis of the evidence in light of the guidance of the courts, principally the Supreme Court of Canada.

[7] Applying this guidance, this decision concludes that a claimant challenging the special diet program has demonstrated discrimination contrary to the *Code* if it is established: (i) that he or she has a disability or disabilities; (ii) that there is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of the disability or disabilities; (iii) that the diet leads to additional food costs as compared with a regular healthy diet for a person without the disability or disabilities; and (iv) that there is no funding for the additional costs or the funding is significantly disproportionate to the additional costs (up to a maximum of \$250).

[8] I highlight at this point some key findings regarding issues in dispute between the parties, which are analyzed in detail later in this decision:

- Where an individual has a disability or disabilities as defined in the *Code*, resulting in dietary needs within the purpose of the program, but which are not a specific, diagnosed medical condition, a failure to provide a special diet allowance is discriminatory.
- To make a successful claim that the failure to fund his or her special diet is discriminatory, a claimant must show that there is general recognition in the Ontario medical community that modifications to a regular, healthy diet should be made to treat the disability or disabilities. It is not sufficient to show that a medical professional recommends a specific diet for him or her.



- The purpose of the program is to fund additional costs of food. Accordingly, it is not a violation of the *Code* that the program does not cover the costs of supplements or food preparation.
- There is discrimination when those with different disabilities have significantly different proportions of the additional expenses of their special diet funded. The government is, however, entitled to significant deference in the costing process. Only where costs are significantly disproportionate, using equivalent costing methodology, will the amount of funding lead to a finding of discrimination.
- Section 14 of the *Code*, which provides for a defence based on "special programs", does not change the analysis under s. 1 of the *Code* in these circumstances.
- One lead complaint (W.'s) is allowed in part, based on the failure to fund hypoproteinemia and significantly disproportionate funding of hypertension and hypercholesterolemia. Another lead complaint (S.'s) is also allowed in part, based on significantly disproportionate funding of extreme obesity. The third complaint (B.'s) is allowed in part, based on significantly disproportionate funding of hypercholesterolemia.
- The Tribunal orders that the lead complainants be provided with retroactive and future benefits in accordance with the *Code*, and that special diet benefits for hypoproteinemia, hypertension, hypercholesterolemia and extreme obesity be provided in accordance with the *Code* principles set out in this decision.
- No damages are awarded for injury to dignity, feelings and self-respect. The parties agree that, in the circumstances of this case, because the claims relate to government regulations, there is a specific legal test that applies. I find that, in relation to the violations of the complainants' *Code* rights, this test has not been met and no damages should be awarded.
- Any policy decisions about how to ensure the special diet scheme is made consistent with the *Code* are for the government. The Tribunal makes no orders about general changes to the special diet regime.

[9] Given the large number of adjourned complaints and applications, it is appropriate to make some further comments at the outset about the nature of this decision and its impact on those cases. The Tribunal's role is not to decide what is or would be the best or fairest way to set up the special diet program. This decision is about whether the current program discriminates against the lead complainants on the basis of disability contrary to the *Code*. General policy decisions are for the government, not the Tribunal, and the Tribunal's role is very different from that of the Cabinet or the Legislature. At the same time, if the evidence and arguments of the parties show discrimination on the basis of prohibited grounds, it is the Tribunal's duty, assigned to it by the Legislature in the *Code*, to make such findings and provide a remedy.

[10] There was no submission at the hearing that the *Code* requires a particular special diet program or prevent[s] changes from being made to the program as it was structured prior to 2005. No party took the position that every person who has been denied a special diet allowance, or who experienced a reduction in special diet allowance in 2005, experienced discrimination contrary to the *Code*. In their pleadings and written submissions in advance of final argument, certain statements on behalf of the Commission and complainants suggested that the *Code* required that the schedule include a discretionary category in which conditions not included elsewhere on the schedule could be funded. In oral argument, counsel confirmed that their position is that individuals who have needs within the purpose of the program must not be excluded or disadvantaged because of disability. They are not arguing that this must necessarily be done through a discretionary category or that the failure to include one is a violation of the *Code*.

[11] My decision in these cases relates to the specific discrimination alleged by the lead complainants, given their disabilities. Although the lead complainants and the Commission presented evidence and submissions on some other conditions and circumstances, in my view it would not be appropriate for the Tribunal to make findings about matters that do not arise in the three lead complaints. The application of this decision to the facts of other complaints should be made if such disputes are directly before the Tribunal. Although the principles discussed and remedies ordered in this decision may affect others, I make no findings about any facts that are not raised in the complaints of the three lead complainants. Parties to the adjourned complaints and applications may wish to review particularly carefully § 89–109, which discuss in more detail what must be proven when making a claim that the special diet allowance discriminates. At § 176–79, I set out the next steps in the adjourned cases, and require that the claimants and/or Commission provide written submissions in each case that address the four criteria that must be proven.

[12] The decision continues with a discussion of the evidence regarding the special diet program and changes made to it. Next, I outline the evidence and theory of discrimination of each of the lead complainants. I then turn to the legal analysis. I consider first the legal approach to determining discrimination in these circumstances. I then address the purpose of the special diet program, and what must be proven in order to establish that it discriminates against a particular claimant. I next address the respondent's defence under s. 14 of the *Code*. Then, in light of the legal analysis, I consider the claims of the lead complainants, and finally the appropriate remedies.

## BACKGROUND

### The Special Diet Allowance as Part of Social Assistance

[13] The special diet allowance may be provided as part of income support under the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B ("*ODSPA*") or basic financial assistance under the *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A ("*OWA*"). ODSP and OW are programs of last resort. To be eligible, a recipient's family income and assets must be within allowable limits. The special diet allowance is one of the four components that make up budgetary requirements, together with the shelter allowance, basic needs and the northern allowance for recipients living above the 50 parallel without year-round road access. ODSP and OW recipients also receive drug coverage, dental and vision care coverage, and other supplementary benefits.

[14] Each piece of legislation begins with a statement of its purpose:

(*ODSPA*, s. 1)

1. The purpose of this Act is to establish a program that,
  - (a) provides income and employment supports to eligible persons with disabilities;
  - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
  - (c) effectively serves persons with disabilities who need assistance; and
  - (d) is accountable to the taxpayers of Ontario.

(*OWA*, s. 1)

1. The purpose of this Act is to establish a program that,
  - (a) recognizes individual responsibility and promotes self reliance through employment;
  - (b) provides temporary financial assistance to those most in need while they satisfy obligations to become and stay employed;
  - (c) effectively serves people needing assistance; and
  - (d) is accountable to the taxpayers of Ontario.

[15] The special diet allowance is only available to those who otherwise qualify for OW or ODSP. To qualify for ODSP, a person must have a substantial physical or mental impairment, expected to last one year or more, that has a substantial restriction on personal care, function in the community, and/or function in the workplace (*ODSPA*, s. 4). As of February 2009, there were 348,515 people receiving

ODSP and 396,647 people receiving OW. The basic needs and shelter amounts for ODSP recipients are considerably higher than those under OW. All three of the lead complainants are ODSP recipients.

[16] The special diet allowance application form must be completed by an approved health professional. The form includes a list of medical conditions. The health professional must mark a box next to each medical condition for which the applicant requires a special diet, indicate the length of time the special diet is required for the medical condition, and sign a statement confirming that the individual requires a special diet for each medical condition indicated.

[17] A schedule in the regulations establishes specific monthly benefit amounts for each listed medical condition, which range from \$10 to \$240. If an approved health professional confirms more than one medical condition for a single member of the benefit unit, the amounts for each condition are added together, to a maximum of \$250 per month per member of the benefit unit. The schedules are identical in the regulations governing ODSP (O. Reg. 562/05) and OW (O. Reg. 564/05).

[18] For many conditions, the schedule provides a single monthly amount for all individuals with that condition who require a special diet. The monthly amount varies by age for some conditions, notably celiac disease, milk/dairy allergies, and wheat allergies. The amounts are designed to compensate for additional costs such as additional servings from certain food groups, decreased intake of certain types of foods, and special products (such as Ensure or infant formula).

[19] For two groups of conditions set out in the schedule that may cause weight loss, the amount of the benefit varies depending upon the amount of weight lost. For the first group of conditions, there are four possible benefit amounts, depending upon the percentage of usual body weight lost (0–2 percent, 2–5 percent, 5–10 percent or more than 10 percent). For four other listed conditions, there are only two possible amounts (0–2 percent or more than 2 percent). Changes have been made to the first group since November 2005: amyotrophic lateral sclerosis ("ALS") was added in October 2006, and multiple sclerosis and lupus were added in January 2009. Evidence put forward in these proceedings was among the considerations the government took into account in making the 2009 change.

[20] For dysphagia/swallowing or mastication difficulties, the regulations also provide for a one-time payment of \$75 "to compensate for cost of purchasing a blender" (O. Reg. 562/05, s. 2(6), O. Reg. 564/05, s. 2(6)).

#### Changes to the Special Diet Allowance

[21] The current special diet schedule came into effect in November 2005. The previous special diet schedule was different in three principal ways. First, it was set out in a policy, not a regulation. Second, it was not based primarily upon medical

conditions. The schedule identified various diets or nutritional products that the approved health practitioner could indicate were required as a result of a medical condition, with a set amount for each. Some diets were based on medical conditions, such as the diabetic diet and cystic fibrosis diet. Other categories reflected specific needs, such as a high fluid diet, vitamins/minerals and herbal supplements, and cranberry juice. The medical practitioner signed the form indicating that the diet was required as a result of a medical condition. Third, there was a discretionary category for "special diet other than or in addition to a diet set out above", which had certain exceptions. The approved practitioner was required to provide details of the special diet required, and such diets were reviewed every 12 months.

[22] The amounts in the pre-2005 schedule were established through a detailed costing process in 1999, carried out by dietitians, which involved a determination of the additional costs of each particular diet.

[23] The Ministry explains that the 2005 changes came about as a result of several concerns that it had about program design and the use of the program for unintended purposes. In particular, the Ministry had concerns that some medical practitioners were indicating the need for special diets, particularly those such as bottled water, iron-rich foods, or prunes, in the absence of specific medical conditions that required them. In February 2005, the Ministry learned of a campaign by the Ontario Coalition Against Poverty ("OCAP") that included tip sheets to explain how to maximize the amount of the allowance, "special diet clinics" where health care providers were available at a particular location to make diagnoses and complete the form. At least some physicians taking part in the clinics took the position that, given low social assistance rates and the effects of poverty on health, anyone on social assistance would qualify for the maximum \$250 special diet benefit.

[24] At about the same time, the Ontario Medical Association informed the Ministry that many of its members had raised concerns about strong pressure from patients to complete the special diet allowance form where the patient's medical condition did not justify it. In a letter dated September 29, 2005, to the Minister of Community and Social Services, the Executive Director — Health Policy of the OMA stated that "a crisis has been building in the medical profession over the last weeks concerning the Special Diet Supplement Form".

[25] As a result of these and other concerns about the existing design of the program, the Ministry made the decision to move to a condition-based schedule contained in a Minister's regulation. Ministry staff, including its Chief Medical Advisor, Dr. Greg De Marchi, designed the draft schedule by preserving the condition-based diets on the previous schedule, and attempting to determine the conditions for which the other listed diets were intended. Three diets — vitamins

and minerals, organic diet, and bottled water — were not included on the new schedule because the Ministry concluded that they were not required for any known medical condition or did not fit the policy intent of the program.

[26] The design and review of the new schedule took place extremely quickly. Dr. De Marchi testified that the redesign of the schedule was considered "urgent". Following the design of the draft schedule, the Ministry formally retained five dietitians to provide written comment on the schedule. They were each asked to review it for "errors (diets incorrectly specified), deletions (diets that you feel should not be there)". The letter stated, "It is important to tie diets to specific medical conditions". Each dietitian was authorized to spend a maximum of three hours on the project without further authorization, and required to respond within three days.

[27] Dr. De Marchi also consulted with various physician specialists during several days in late August, primarily through brief verbal discussions with them at their places of work. He testified that, given the limited time and the busy schedules of those with whom he consulted, he spoke with them wherever he could find them. As part of an agreement with the OMA regarding forms that require a physician's signature, the new form was submitted to the OMA for approval.

[28] To establish the amounts payable for each medical condition on the new schedule, the Ministry transferred amounts from the diets on the old schedule to the associated medical conditions. According to Dr. De Marchi, there was no consensus among the consulted experts about whether certain medical conditions required a special diet or whether there was an increased cost associated with the diet. He stated that it was decided to err on the side of overinclusion and to add those conditions to the schedule. They were assigned a monthly special diet allowance of \$10, after consulting with a clinical dietitian who advised in each case that if there were increased costs, they would be less than \$10 per month.

[29] Following the implementation of the new schedule on November 4, 2005, the Ministry conducted a review of all recipients of the special diet allowance, pursuant to the transitional provisions contained in the relevant regulation. These review provisions applied to all special diet allowances, including those that health professionals may have indicated were "permanent" under the special diet allowance regime prior to November 2005.

[30] As part of the province-wide review, persons in receipt of special diet allowance prior to the November 2005 amendments were sent a new special diet allowance application and required to submit it, completed, to the Ministry within 90 days. During this period (or any extensions granted to it) the special diet allowance did not change. Once the completed form was returned or at the end of the specified

period, the amount of the special diet allowance was determined in accordance with the new regulations, except that certain individuals under the weight loss categories were grandparented at the old amount.

[31] The review was completed by mid-2007. After the implementation of the November 2005 schedule, 23 percent of ODSP cases who had been receiving a special diet allowance pre-November 2005 saw an increase in their special diet allowance amount, 58 percent saw a decrease, and 19 percent saw no change.

#### Modifications to and Review of the Schedule

[32] The Ministry has stated as part of its evidence in this proceeding that it "is committed to ensuring that the schedule includes medical conditions for which a special diet is generally recognized by the medical community as an adjuvant to the treatment of that condition, and where the diet imposes costs in excess of a regular, healthy diet". Indeed, in the Transition Directive dated November 4, 2005, the Ministry stated as follows:

The Ministry will review the Schedule six months after introduction and periodically after that to confirm that it reflects medical conditions that require a special diet. Based on the review, the Schedule will be revised as required.

In addition, where new medical conditions are identified between the scheduled reviews, an *ad hoc* review will be undertaken and the Schedule revised as needed.

[33] Since 2005, the schedule has been amended only to group certain weight loss conditions together, and to add the three new conditions discussed above to the weight loss group.

[34] In June 2006, the Ministry appointed the Special Diet Allowance Expert Review Committee (the "Expert Review Committee"), an arms-length committee that included six physicians, six registered dietitians, a registered nurse and a community health worker. The Expert Review Committee is co-chaired by Dr. De Marchi.

[35] Its Terms of Reference, as set out by the Ministry, provide that its key roles are to:

- Conduct periodic reviews to help ensure that the Special Diets Schedule accurately reflects evolving medical knowledge and practice;
- Advise whether all medical conditions requiring a special diet for which there are additional costs are listed in the schedule and on the application form;

- Provide advice about the costs of a special diet associated with each medical condition listed on the schedule (costs that are in excess of a regular, healthy diet); and
- Conduct, as necessary, *ad hoc* reviews for medical conditions identified between periodic reviews.

[36] To carry out these roles, the Committee is mandated by the Terms of Reference to:

- Construct a list of medical conditions that require a special diet;
- Determine the special diet required by each condition;
- Determine the extraordinary costs of the special diets required by each of the medical conditions listed above;
- Address any other issues related to the Schedule raised by the Ministry;
- For *ad hoc* requests, determine whether the medical condition in question requires a special diet and, if so, determine the extraordinary costs of the required special diet.

The Terms of Reference also provide that the Committee "will not address issues regarding the Special Diet Allowance policy, individual cases, or social assistance in general".

[37] Committee members were selected based upon the following criteria:

- Extensive clinical experience with patients requiring special diets;
- Experience managing a sufficient volume of patients such that he or she would have likely seen all the conditions requiring a special diet in Ontario;
- Excellent academic credentials, including training in nutrition and disease (preferably at the post-graduate / doctoral level); and
- Experts in food science who are engaged by major universities and/or hospitals / health organizations to provide the scientific foundation for the clinical diets.

The Terms of Reference also provide that Committee members would be selected "to construct the most effective team possible, including consideration of the breadth and depth of the committee's expertise as a whole".

[38] The Committee's detailed final report was issued in April 2008. The 80-page report details various suggested changes to the schedule. It includes recommendations for removal of certain medical conditions, addition of others,



changes to categories, and changes to certain benefit amounts. It explains briefly why it recommends removing certain conditions. The report includes a detailed explanation of how the Committee determined the additional cost of each condition's diet as compared with a regular, healthy diet. The report's recommendations have not been implemented.

## THE COMPLAINANTS' ALLEGATIONS

### W.'s Discrimination Claim

[39] W., the first complainant, is a 57-year-old woman who lives in Sarnia. She has a history of various medical conditions, including myocardial infarction (heart disease), cardiovascular disease, osteoarthritis in her ankles, knees and wrists, bipolar affective disorder, post-traumatic stress disorder, hypercholesterolemia (also known as dyslipidemia), hypothyroidism, hypoproteinemia, intermittent hypertension and nicotine dependence.

[40] W. currently receives a monthly special diet allowance of \$42. This results from the schedule amounts of \$10 for cardiovascular disease, \$10 for hypertension, and \$22 for hypercholesterolemia. Prior to the change in 2005, she received an allowance of \$244. This was reduced to \$22 on February 16, 2006, when the province-wide review took place, on the basis of her physician's indication on the form that the only condition on the schedule she had was hypercholesterolemia. On March 13, 2006, her special diet allowance was increased to the present amount as a result of her physician's indication on a new form that she also has cardiovascular disease and hypertension.

[41] W. alleges that the present special diet allowance schedule discriminates against her on the basis of disability in various ways. First, she argues that the schedule discriminates against her by failing to include hypoproteinemia (protein deficiency), a condition which a dietician, Elke Sengmueller, identified in February 2009. Supported by evidence from Ms. Sengmueller, who examined and made dietary recommendations for W. in 2009, she argues that, as a result of her medical condition, she has a medical need for extra protein, in the form of one additional low-fat meat serving per day. She estimates the additional cost of this food to be \$36 per month. She states that the program discriminates against her because funding is provided for special diets required as a result of other disabilities, but not this condition.

[42] Second, W. alleges that the schedule discriminates against her by failing to include a category for bipolar disorder. She alleges that omega-3 fatty acid and vitamin C supplements are recommended for this condition and fall within the purpose of the program, but in failing to provide them, the program discriminates against her. The cost of omega-3 supplements is estimated at \$36 per month, and cost of vitamin C at \$1.50 per month. This allegation raises the more general issue of

whether the failure to include funding for supplements in the schedule is discriminatory, since supplements are not included in the costing for any medical conditions.

[43] Third, W. alleges that the amounts provided for hypertension, hypercholesterolemia, and cardiovascular disease are significantly lower than the increased costs of the special diets required as a result of those medical conditions. She argues that this constitutes discrimination because the benefit for other medical conditions is at a level equal or closer to the increased costs of the relevant special diets.

[44] For hypercholesterolemia (called dyslipidemia in the Expert Committee report) and hypertension, she currently receives \$32 for the combination of these conditions. The Expert Review Committee calculated the total increased cost of special diets as a result of these two conditions at \$86. The Expert Review Committee calculated the amounts for dyslipidemia at \$51 and hypertension at \$86. However, both conditions are in a group which has similar dietary modifications. The Expert Review Committee stated that only the higher amount payable should be provided to individuals with multiple conditions in this group.

[45] Finally, she argues that the \$10 allocated for cardiovascular disease is insufficient. She argues that omega-3 fatty acid supplementation is also recommended for this condition, at a monthly cost of \$36. She acknowledges that only one amount should be paid for such supplements, and that she should not receive this amount for both bipolar disorder and cardiovascular disease.

[46] In summary, W. argues that a non-discriminatory special diet program should provide her with a monthly benefit of \$159.50, rather than the \$42 she currently receives. Of this, \$122 represents alleged increased food costs as compared with a normal healthy diet, due to hypoproteinemia (\$36 per month), and dyslipidemia and hypertension (\$86 per month). The remaining amount, \$37.50, represents alleged increased costs of supplements arising from bipolar disorder and cardiovascular disease.

### S.'s Discrimination Claim

[47] S. is a 32-year-old man who lives in Burlington. This proceeding is brought on his behalf by his litigation guardian, his mother. S. has a clinical condition with many of the features of Prader-Willi syndrome. A chromosomal analysis has not shown the particular defect to the chromosome 15 that is required for this diagnosis. The lack of a specific diagnosis based on chromosomes is common with developmentally delayed patients.

[48] Like individuals diagnosed with Prader-Willi syndrome, S. is developmentally delayed, has behaviour problems and has a psychological compulsion to eat. He may become aggressive when access to food is denied and food sources are disrupted. In the words of his specialist, he is "morbidly obese" and has "obligatory eating to the point of gorging himself". S. lives in his own apartment but requires extensive supervision of his diet. His parents assist with this, as do personal support workers who are funded through the Special Services at Home program.

[49] S. currently receives a special diet allowance of \$20 per month, for "extreme obesity: class III BMI>40". In the Expert Review Committee's proposed schedule, an amount of \$51 is recommended for obesity, defined as a BMI (Body Mass Index) of greater than 30.

[50] S. alleges that the amount he receives does not accurately take into account the costs of the special diet related to his medical condition, which he says is different from other situations of obesity. S. alleges that dietary management is central to the treatment of his disability, so that he can avoid weight gain while managing the drive to eat. As recommended by a dietician who has treated him, he eats high fibre, low calorie food that provides volume high enough to satisfy the drive to eat without compromising weight control. The dietician recommends that he eat 13 servings of vegetables and 5 servings of fruits per day, as compared with the recommendation of 7–10 servings in the Canada Food Guide. She estimates an additional cost of at least \$67 per month for the additional servings. His diet also leads to the use of whole grain products instead of refined grains, low calorie protein sources, and unsweetened products to substitute for high calorie drinks. His family also purchases some products such as cheese in individual servings, which assists him in managing his eating so he can unwrap them and eat the "whole thing". Taking time to unwrap the packages also leads to less overeating.

#### B.'s Discrimination Claim

[51] B. is a 47-year old man who lives in Toronto. He has major depression with a history of suicidal ideation and suicide attempts. He also has a history of homicidal urges. He also has post-traumatic stress disorder, ulcers, asthma, and osteoarthritis. He has been hospitalized many times for his depression, suicidal and homicidal behaviour.

[52] Prior to April of 2005, B. received social assistance through OW. On or about April 11, 2005, B. was found to be eligible for ODSP benefits as of January 2004. For the period from January 2004 until April 2005, he received a special diet allowance of \$145 per month (high protein diet (\$75 per month), high calcium diet (\$30 per month) and vitamins/minerals (\$40 per month)). Between April 2005 and April 2006, B. received a monthly special diet allowance of \$250. This was based upon his family physician's certification that he required a high protein diet of less than 300

kcal per day (\$75), vitamins/minerals (\$40), organic diet (\$190), iron-rich foods (\$30), prunes (\$10), bottled water (\$30), fat/cholesterol and/or high fibre diet (\$22), and sodium/salt restrictions diet (\$12).

[53] As part of the special diet review in 2006, B. was required to complete a new special diet allowance application. His physician certified that he had the following medical conditions: chronic constipation (\$10), hepatic disorder (\$10), hyperlipidemia (\$10) and hypercholesterolemia (\$22). Accordingly, his special diet allowance was reduced to \$52 per month in May 2006.

[54] B. states that, after the significant reduction in his monthly allowance, he was unable to afford healthy food such as fresh vegetables as he had during the period when he was receiving the \$250 allowance. His health deteriorated. He lost 20 pounds within six months. He began to have frequent loose bowel movements up to six to eight times daily with blood. His energy level decreased, his depression worsened, and his suicidal ideation increased as did his anger. According to his physician, the reduction in his allowance resulted in a feeling of nobody caring about his health and welfare and increased both his anger toward the social assistance system and his weight loss. This caused a relapse in his depression and feelings of low self-esteem and worthlessness, and worsened his depressive symptoms such as fatigue, insomnia, memory loss, decreased intellect, muscle aches and hopelessness.

[55] In April 2007, B.'s physician completed a new special diet form which confirmed new conditions that made him eligible for the \$250 per month allowance again. As of March 23, 2007, his physician certified that he had celiac disease (\$131 per month), chronic constipation (\$10 per month), dysphagia/swallowing difficulties (\$25 per month and a one-time payment of \$75 for a blender), food allergy — milk/dairy or lactose intolerance (\$35 per month), hyperlipidemia (\$10 per month), hypertension (\$10 per month), hypercholesterolemia (\$22 per month), microcytic anemia (\$30 per month), and osteoporosis (\$10 per month). His physician confirmed on cross-examination that, as of April 2007, B. had each of these conditions but that he did not have them or they had not been diagnosed in 2006. B. continues to receive the \$250 per month allowance now.

[56] B. argues that the special diet schedule discriminated against him for the period he did not receive the maximum because it does not provide benefits for those who have severe mental health disabilities with a risk of weight loss if their mental health is destabilized. His claim is based upon the months in 2006–07 that he did not receive the full allowance and the consequences for his health.

[57] More generally, B. argues that the schedule and its design fail to take into account the needs and disadvantage of individuals with mental health disabilities as compared with those with other disabilities. He notes that individuals with mental health disabilities are often unable to prepare or purchase foods because of problems

with cognition and low energy and argues that special diet allowances for individuals with mental health disabilities should provide allowances for the increased cost of obtaining foods as a result. He argues that individuals with mental health disabilities may be impacted by food insecurity: fear of not knowing whether they will be able to have sufficient food.

[58] Through his counsel, B. also makes various arguments about the policy development process by which the new special diet schedule was developed. He argues that at least 55 percent of all ODSP recipients have serious mental health disabilities, and that the Ministry had a *Code* obligation to "take into account all of the disabilities, impairments and restrictions of ODSP recipients when undertaking policy reviews and reviews of the 'business practices' that arise out of those policies". He argues that the Ministry was "wilfully blind" by failing to adequately consider the needs of those with mental health disabilities in the design or implementation of the 2005 changes, and argues that far more attention was paid to the needs of those with other disabilities.

## ANALYSIS: GENERAL PRINCIPLES

### The Code

[59] The complainants rely upon ss. 1, 9 and 47 of the *Code*:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of... disability.

9. No person shall infringe or do, directly or indirectly anything that infringes a right under this Part.

47(1) This Act binds the Crown and every agency of the Crown.

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

[60] The respondents rely upon the defence in s. 14(1) of the *Code*:

A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

[61] I note at the outset that there is no dispute between the parties that the provision of benefits under the special diet allowance program is a "service" within the meaning of the *Code*: see generally *Zaki v. Ontario (Community and Social Services)*, 2009 HRTO 1595 (CanLII) [ CHRR Doc. 09-2130] at § 11.

## The Analytical Approach to Determining Discrimination

[62] I will consider first the question of whether there is discrimination against the complainants contrary to s. 1 of the *Code*. The respondent suggested that its s. 14 defence should be considered first, because if it is successful on this issue, there is no need to analyze whether there is discrimination. It notes that this was the approach taken by the Supreme Court of Canada to s. 15(2) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in *R. v. Kapp*, 2008 SCC 41 (CanLII). In my view, it is preferable in this case to first consider whether there is discrimination contrary to s. 1. As outlined in my discussion of s. 14(1) below at § 110–24, I find that in the circumstances of this case, s. 14 does not affect the determination of whether the *Code* was violated, given the nature of the analysis under s. 1.

[63] There was considerable discussion in the parties' written submissions about whether the analytical approach to discrimination under the *Code* is the same as that under s. 15(1) of the *Charter*. This reflects varying approaches to this issue in the jurisprudence. In analyzing discrimination under the *Code*, the Divisional Court in *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* (2005), 2005 CanLII 34365 (ON SCDC), 78 O.R. (3d) 194 and *Ontario (Attorney General) v. Ontario (Human Rights Commission)* (2007), 2007 CanLII 56481 (ON SCDC), 88 O.R. (3d) 455 [ 62 C.H.R.R. D/315] ("*Braithwaite*") applied the s. 15 analysis from *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, which set out a three-part analysis of whether there is discrimination contrary to the *Charter*.

[64] Since these decisions, the Supreme Court has refined and simplified its approach to s. 15. In *Kapp* at § 17, *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 (CanLII) at § 188, and *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII) at § 109, the Court confirmed that the following two questions are involved in determining whether there is discrimination contrary to s. 15: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[65] In *Kapp*, the Court emphasized that the focus of the equality analysis under s. 15 is on whether there is substantive discrimination through the perpetuation of disadvantage and stereotyping (at § 23–24):

The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination...

Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping. [Emphasis added.]

[66] Following *Kapp*, the Divisional Court again considered the issue of whether the s. 15 approach applies under the *Code*. In *Ontario (Director, Disability Support Program) v. Tranchemontagne* (2009), 2009 CanLII 18295 (ON SCDC), 95 O.R. (3d) 327 [CHRR Doc. 09-2271] (Div.Ct.), a case under the *Code*, the Divisional Court found that there is no need to consider or prove the concept of human dignity in the *Code* context, and that the test established in *Ontario (Human Rights Commission) and O'Malley v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 [7 C.H.R.R. D/3102], should apply, "informed by" the *Charter* jurisprudence.

[67] The Court went on to state as follows, at § 105:

Adapted for the present human rights context, in a case such as this involving the provision of services pursuant to a government benefit program, the test might read as follows:

1. Has the complainant established a *prima facie* case demonstrating that the service creates a distinction based on a prohibited ground under the *Human Rights Code*?
2. Has the respondent established, on a balance of probabilities, that the distinction does not create a disadvantage by perpetuating prejudice or stereotyping?  
Alternatively, has the respondent established a statutory defence under the *Code*?

The respondent and the Commission both take issue with the formulation of this test and suggest that it is not consistent with the jurisprudence, particularly in light of the burdens of proof it establishes.

[68] In my view, this case does not require the Tribunal to decide whether to apply the test from *Tranchemontagne* or *Braithwaite*, or to decide when and whether, in general, the approach to analyzing discrimination is the same under the *Charter* and the *Code*. This is because, whether the *Code* or the *Charter* jurisprudence applies, the important question in determining whether there is discrimination in a case such as this one is whether the complainants are denied benefits, on the basis of their disability, that fall within the purpose of the benefit scheme.

[69] This has been the approach of the Supreme Court in cases involving alleged discrimination on a prohibited ground under human rights legislation. In *Brooks v. Canada Safeway*, 1989 CanLII 96 (SCC), [1989] 1 S.C.R. 1219 [ 10 C.H.R.R. D/6183], the Supreme Court of Canada found that a group insurance plan that provided income replacement benefits for other health-related conditions, but not pregnancy, was discriminatory on the basis of pregnancy and sex, noting that the plan provided compensation for other health-related absences from work but not pregnancy. In *Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 S.C.R. 566 [ 27 C.H.R.R. D/87], the income replacement plan provided by an employer gave benefits for individuals with mental disabilities that were inferior to those with physical disabilities. The Court held that there was discrimination between individuals with mental disabilities and those with physical disabilities, noting that the "true character or underlying rationale of the insurance plan was to provide income replacement for those unable to work because of disability" [at § 39]. In each case, the Court engaged in a comparative analysis of whether there was discrimination between the claimant and another covered group in light of the purpose of the plan.

[70] The analysis was explained at § 33 of *Gibbs* as follows:

... The first step is to determine, in all the circumstances of the case, the purpose of the disability plan. Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination — it is understandable that insurance benefits designed for disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as a result of characteristics that are not relevant to this purpose, discrimination may well exist. [Emphasis added.]

[71] In *Charter* cases, the Supreme Court has set out a similar approach in addressing allegations that government benefit programs are underinclusive on the basis of an enumerated or analogous ground in s. 15. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (CanLII), the Court stated, at § 42:

... Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory; it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address. [Emphasis added.]



[72] In *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 (CanLII), the Court explained, at § 24 and 26:

The usual starting point is an analysis of the legislation (or state conduct) that denied the benefit or imposed the unwanted burden. While we are dealing in this appeal with access to a government benefit and the starting point is thus the *purpose* of the legislative provisions, a similar exercise is required where a claim is based on the *effect* of an impugned law or state action.

...

Nevertheless, in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis. [Emphasis added.]

[73] In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, the Court put it this way, at § 94:

Another vital consideration in a case such as this one is the overall purpose of the legislative scheme at issue: see *Gibbs, supra* at para. 34; *Granovsky, supra*, at para. 62. A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation.

See also *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28 (CanLII) at § 62.

[74] This must be a comparative analysis, considering the claimants' circumstances in comparison with those who receive the benefit in question: see, for example, *Gibbs* at § 32; *Auton* at § 57; and *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143 at 164 [ 10 C.H.R.R. D/5719 at § 41746].

[75] *Kapp* directs decision-makers to avoid taking a formulaic or formalistic approach to analyzing a discrimination claim. It makes clear that there is no need to apply each step of a detailed test, but rather, the analysis should focus on whether there is substantive discrimination in the impugned provisions. *Tranchemontagne*, in my view, reflects this need for flexibility in its statement that the test "might" read as set out in that case. This decision follows that direction by avoiding formulas and focusing on the central substantive issue.

[76] The jurisprudence is clear that analyzing discrimination in circumstances like these requires a consideration of the purpose or underlying rationale of the special diet allowance, and whether individuals with different disabilities are given different benefits in a manner that is inconsistent with that purpose. The analysis must

consider the differential treatment, as it relates to the purpose of the program, between the benefits received by others and the claims of the complainants. As noted in *Auton, supra*, at § 41, the Legislature is "free to target social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner".

### How to Determine the Purpose of the Program

[77] I now turn to a consideration of the purpose or underlying rationale of the special diet program. This is a legal analysis, in that the Tribunal is not making a factual determination about what was in the minds of those of those who developed and implemented the current version of the special diet program. Rather, I must determine, based upon the legislation and regulations and appropriate extrinsic evidence, the objective or goal of the program.

[78] The approach to determination of purpose must be "consonant with the goals of human rights legislation": *Gibbs, supra*, at § 39. Relevant considerations include the social assistance scheme as a whole and a consideration of what is included in it: *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989 at § 17–20. In my view, in considering the purpose of a scheme enacted by [the] Minister's regulation, the relevant policy documents, correspondence, recollections and assertions of those who assisted in developing the scheme may also be of assistance.

[79] The complainants argue that the Tribunal can determine whether certain types of expenses fall within the purpose of the program by looking to what was funded prior to 2005. They note that one of the government witnesses (Norman Helfand, Director of the Ontario Disability Support Program) agreed in cross-examination that the purpose of the program did not change in 2005 when the schedule was redesigned. They argue that benefits that were provided under the special diet allowance prior to 2005 (like vitamins and minerals) must therefore continue to fall within the purpose of the current program.

[80] I am not persuaded by this submission, for several reasons. First, if the legal purpose is the same, it may be that the prior funding of such expenses was not consistent with or required by the purpose or underlying rationale of the program. Removing coverage through reform of the program may be "closing a loophole", which the government is entitled to do. Second, "purpose" in the context of this legal discussion has a particular meaning, which may be different than what a policy maker understands by the term when giving evidence. An answer of a witness that the "purpose" is the same does not decide the Tribunal's determination of purpose, which requires a legal analysis. Although the history of the program may be of assistance in determining purpose, the analysis should focus on the current regulatory scheme, which underwent significant change in 2005.

### The Purpose of the Special Diet Allowance: Generally

[81] The respondent defines the purpose of the program as follows in its written submissions:

The evidence is that the purpose of the special diet allowance is to assist social assistance recipients and members of their benefit units who have an existing medical condition for which a special diet is generally recognized by the Ontario medical community as an adjuvant to the treatment of that medical condition, and where the special diet imposes costs in excess of a regular, healthy diet.

[82] The complainants and Commission do not generally dispute this definition. W. and S., for example, articulate the purpose as follows in their written submissions:

The Special Diet Program provides additional funding for recipients who have a medical condition for which a special diet is generally recognized by the Ontario medical community as an adjunct to the treatment of that medical condition.

[83] I will not attempt to describe the purpose of the program in a sentence or two. Despite their general agreement on the descriptions, the parties fundamentally disagree about whether the types of expenses at issue here fall within the purpose. While they agree on the words, they disagree on their meaning. It is more helpful to discuss various aspects of the purpose of the special diet program in a general way, and then address the specific issues in this case.

[84] The special diet program is an aspect of Ontario's two social assistance programs, OW and ODSP, which are programs of last resort for those in financial need. These are programs that serve the most economically vulnerable in Ontario society. The Legislature's statements of purpose quoted at § 14 above set out a commitment under both programs to provide financial assistance to those in need, together with the need to be accountable to taxpayers. They establish a shared responsibility for support between the government and others. In the *OWA*, the Legislature emphasizes the temporary nature of the support provided and that recipients must become and stay employed. The *ODSPA* provides that communities, families and individuals share responsibility for financial support of eligible persons with disabilities.

[85] The establishment of ODSP — a program with higher benefit amounts for individuals with disabilities — reflects a decision by the Legislature that financial hardship caused by disability is appropriately treated differently from other circumstances, and suggests a special public responsibility to support such individuals. It recognizes the financial disadvantage that may occur as a result of disability, and establishes a particular role for the government in addressing that disadvantage.

[86] Like other large-scale social benefit programs, OW and ODSP allocate funding, to a large extent, through generalized categories. Although there are some particularized programs and benefits, funding is not customized to the particular needs of each recipient. This is, as the Supreme Court recognized in *Martin, supra*, at § 82, almost always a necessary part of any benefit program:

Of course, government benefits or services cannot be fully customized. As a practical matter, general solutions will often have to be adopted, solutions which inevitably may not respond perfectly to the needs of every individual. This is particularly true in the context of large-scale compensation systems, such as the workers' compensation scheme under consideration. Such systems often need to classify various injuries and illnesses based on available medical evidence and use the resulting classifications to process the claims made by beneficiaries. This approach is necessary, both for reasons of administrative efficiency and to ensure fairness in processing large numbers of claims. In addition, the beneficiaries themselves benefit from the reduced transaction costs and speed achieved through such techniques, and without which large-scale compensation might well be impossible. [Emphasis added.]

[87] It is significant, in my view, that the special diet allowance is one of the four "budgetary requirements" components of social assistance, together with basic needs, the shelter allowance and the northern allowance. All four amounts are designed to fund basic expenses of living, such as food, shelter, toiletries, clothing, etc. The housing and shelter allowances are available to all persons on the programs. The shelter allowance funds housing costs, while the basic needs amount is a global amount to fund other basic expenses.

[88] The other two allowances — the special diet allowance and the northern allowance — are available only to members of certain groups. It appears that they recognize exceptional basic expenses for these individuals. The special diet allowance recognizes that the basic dietary requirements of certain persons lead to higher costs than others. It is designed to assist in alleviating the disadvantage of persons with disabilities and to support substantive equality by funding certain additional dietary costs that result from disability.

#### Establishing that a Claim Falls Within the Purpose of the Special Diet Allowance

[89] Having considered the purpose of the program in a general sense, I now address the analysis of when a special diet falls within the purpose of the program and what is necessary to show that a claimant has experienced discrimination. For the reasons that follow, I conclude that an applicant or complainant must prove the following in order to establish disability-based discrimination related to the special diet allowance as currently structured:

1. The claim of discrimination is based on a disability or disabilities;

2. There is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of the claimant's disability or disabilities;
3. The diet leads to additional food costs as compared with a regular, healthy diet for a person without the disability or disabilities;
4. There is no funding for the additional costs, or the funding is significantly disproportionate to the actual costs (up to the maximum of \$250).

[90] In the paragraphs that follow, I expand on the reasons for these findings. I also elaborate on the application of each. These explanations, however, cannot and should not fully address all arguments and situations that might be made in other cases. Accordingly, further elaboration and refinement may be necessary if circumstances raised in other claims give rise to different issues.

#### 1. The Claim of Discrimination Is Based on a Disability or Disabilities

[91] First, the claimant must establish that he or she has a disability within the meaning of the *Code* and the claim that the special diet allowance discriminates is based on that disability. I use the word "disability" rather than "medical condition" as used by the parties for two reasons. First, the Tribunal's powers come from the *Code*, and the basis of the Tribunal's power to hear a claim must flow from it and the statutory definition in the *Code*. Second, and more important, to the extent that the words "medical condition" are used by the respondent to suggest a specific, diagnosed medical condition they are, in my view, too narrow.

[92] The purpose or underlying rationale of the special diet allowance program is to provide funding to all those who have a disability that leads to the dietary needs the program addresses. Some individuals, for example, may have a set of symptoms without a specific diagnosis, or experience particular dietary needs from a combination of conditions. Such circumstances fall within the underlying rationale of the program. It may be that the current schedule does not take account of all such situations.

[93] Mr. Helfand testified that there were various policy considerations related to program design that led to the conclusion that the list should be limited to specific, diagnosed, medical conditions. Such considerations included ensuring consistent treatment of recipients in the same situation, ensuring the government's policy intent was respected by the Social Benefits Tribunal, and ease of administration. In my view these considerations are related to the design of the scheme, but do not change the fact that the underlying rationale of the program is to assist those who have any disability that requires a special diet. Like the ODSP itself, the special diet allowance is aimed generally at people with a certain set of needs. To define the legal

purpose as limited to assisting those with particular diagnosed medical conditions but not other disabilities would, in my view, not be consistent with the *Code*, which protects all individuals with disabilities.

## 2. There Is General Recognition in the Ontario Medical Community that Modifications to a Regular Healthy Diet Should Be Made Because of the Claimant's Disability or Disabilities

[94] It is evident, in my view, that the purpose of the program is to provide funding for diets where this is generally medically recognized as a treatment for the disability experienced by the individual. The program is not intended to fund scientifically unrecognized, experimental, or "fad" diets. It is not intended to fund an individually developed diet tailored to all of a person's characteristics and circumstances, prescribed by a dietician or other health practitioner. It is designed to fund diets in circumstances where, as a result of the individual's disability or disabilities, the need for a special diet is generally recognized in the Ontario medical community. Accordingly, a claimant alleging discrimination must establish that a generally accepted medical response to his or her disability or disabilities would be to prescribe a particular diet.

[95] This purpose is evident throughout the design of the 2005 schedule. While the complainants were able to point to some errors where conditions are funded where this is not generally recognized, these exceptions do not detract from the general principle that the design process of the schedule was to ensure that only generally accepted diets would be funded. This goal is also reflected in the pre-2005 requirement on the form that the medical practitioner certify that the special diet is "required for a medical condition".

[96] In this regard, I emphasize what the Supreme Court said in *Martin, supra*, in the passage cited above at § 86: equality rights do not require that government benefits be fully customized to the needs and circumstances of every individual. While the complainants and Commission have presented evidence that suggests that the list does not reflect how dieticians and physicians practice, that does not mean that it is discriminatory not to customize benefits. There is nothing inherently improper or of concern about the use of a list, and I make no finding that there is a need under the *Code* for a discretionary category for cases that are not on the list. Equality rights do not require that benefit programs be tailored to each individual's particular circumstances: see *Martin, supra*; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R. 429 [ 44 C.H.R.R. D/363] at § 55–56; *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561 at § 56–59 (Ont. C.A.). However, the use of a list in the special diet program cannot exclude situations in which the Ontario medical community would generally recognize that, as a result of a person's disability or disabilities, a special diet would be prescribed.

[97] I note that there was disagreement between the parties about whether the "Ontario medical community" includes physicians only or also dietitians. In my view, this issue is best determined in a case in which it actually arises. There was no evidence that there are in fact disabilities for which one professional group, but not the other, would generally prescribe a special diet. Similarly, there was dispute over whether and what types of special diets for "prevention" fall within the purposes of the special diet program. Given my analysis, these issues do not arise in the lead cases, and nothing in this decision is meant to decide or address either of these issues.

### 3. The Diet Leads to Additional Food Costs as Compared with a Regular Healthy Diet for a Person Without the Disability or Disabilities

[98] I find that the purpose or underlying rationale of the program is to fund additional food costs in addition to those of a regular healthy diet. Food preparation and supplements such as vitamins and minerals do not, in my view, fall within the purpose or underlying rationale of the special diet allowance program. It is undisputed that the program is designed to fund costs above those of a regular, healthy diet. While many are of the view that the basic needs allowance is not sufficient to allow social assistance recipients to eat a healthy diet, the issues before the Tribunal relate to the design of the program, which only covers costs that exceed those of a regular, healthy diet.

[99] The funding of vitamin and mineral supplements does not fall within the purpose of the program. The respondent notes that some supplements are funded under the Ontario Drug Benefit Program ("ODB"), under which social assistance recipients are covered. While, as the complainants point out, the ODB provides limited coverage, the inclusion of supplements under the ODB is an indication that the respondent's intention was to cover this type of expense through the ODB, rather than the special diet allowance. If the complainants believe that the ODB is underinclusive in a discriminatory manner, the proper challenge is to it, not the special diet allowance.

[100] The complainants suggest that supplements and certain preparation costs fall within the purpose of the program, noting that the weight loss categories take into account funding of Ensure, a meal replacement product which provides various "micronutrients" as well as calories and protein. They also note the funding of a one-time payment for a blender for individuals with dysphagia (swallowing difficulties). Neither of these examples detracts from the conclusion that supplements and meal preparation costs, in general, are not targeted by the program.

[101] I turn first to Ensure. I do not believe that funding a complete meal replacement product that supplements calories and protein for individuals who require it and that also includes micronutrient supplements, establishes that the purpose of the program goes beyond food to the funding of supplements. The fact

that a meal replacement is needed by some to maintain or increase their weight does not change the program into one designed to fund vitamin and mineral pills. Indeed, it confirms that the program is aimed at the cost of meals themselves. With the exception of complete meal replacement products, benefit amounts are based upon the cost of food items, and this is, in my view, the strongest indicator of the government's purpose in this regard. Although vitamins and minerals were included before 2005, this does not change the fact that they do not fall under the purpose or underlying rationale of the current program. Similarly, the one-time funding of a low-cost item for individuals who, without it, might be unable to swallow their food, does not suggest a general purpose of covering all food preparation costs that might arise from disabilities.

#### 4. There Is No Funding for the Additional Costs, or the Funding is Significantly Disproportionate to the Additional Costs (up to the maximum of \$250)

[102] The costing analysis done in the Expert Review Committee report and the previous costing analysis in 1999 was based upon the assumption that full funding of the additional costs above those of a regular healthy diet would be provided. For those disabilities that are covered, the government's intention is to fully fund a reasonable estimate of the additional costs for special diets, based on a reasonable approximation and methodology, up to a maximum of \$250 that applies when individuals have multiple conditions. It is clear that the intention and result of the design of the program is full funding of the additional costs for many conditions.

[103] The respondent suggests that the Tribunal has no role in evaluating the amount of the funding. I disagree. It cannot be correct that the program is discriminatory if there is no funding for needs related to a particular disability that meets the other criteria, but that as soon as the government provides some funding, no matter how comparatively different from the funding provided for the needs of those with other disabilities, the Tribunal has no role. There is, in my view, discrimination when those with different disabilities have significantly different proportions of the additional expenses of their special diet funded.

[104] At the same time, there must be significant deference given to the amounts allocated in the schedule. The additional costs of food for special diets are not capable of exact measurement. There is a need for many generalizations to be made in estimating the changes to a healthy diet required and the cost of the additional food. The program is not designed to calculate these amounts on an individual basis or to reflect exact needs of every individual, and programs of this type are designed so that the amount provided is an informed generalization. When those with different disabilities are funded relatively equally through reasonable general estimates, and there are no significant differences in general methodology in the calculation process between different disabilities, there is no discrimination. It is not the role of the Tribunal, in applying the *Code*, to substitute its opinion for the



program designers in making the estimations necessary to establish a complex benefit scheme of this nature. Therefore, only when the amount is significantly disproportionate to the amount of the additional costs as compared with other disabilities should there be a finding of discrimination.

[105] Supreme Court of Canada case law supports this conclusion. At § 82 of *Martin, supra*, the Supreme Court held that the state should "benefit from a certain margin of appreciation" in designing large-scale benefit programs. In *Gosselin, supra*, it stated as follows, at § 55:

... Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution.

At § 56, it emphasized:

... The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15.

These comments, in my opinion, are particularly important in considering costing, which represents one of the most detailed and judgment-dependent parts of designing social benefit programs. Costing food is particularly deserving of deference. This is clear from the evidence of the complainants' witness, Dr. Paula Brauer, who stated that costing of foods is problematic and the source of differences of opinion among professionals.

[106] In considering allegations that the level of funding is discriminatory, it is important to emphasize again that the analysis is comparative. The allegation of insufficient benefits must be based on the fact that individuals with some disabilities receive funding that is greater in proportion to their additional dietary needs. An allegation of insufficient benefits cannot be based upon a method of estimating the additional costs that is inconsistent with the methodology used for other disabilities that in fact receive close to full funding. The methodology must be compatible to show comparative inequality. Moreover, it is open to the government (although I have found that it did not choose to do so in this case) to choose to fund only a portion of additional costs. The finding that the funding provided is compared with the full additional costs stems from my conclusion that the program aims to provide full funding, and does provide it for certain disabilities.

[107] Similar reasoning was used by the British Columbia Human Rights Tribunal in *Chipperfield v. British Columbia (Ministry of Social Services) (No. 2)* (1997), 1997 CanLII 24842 (BC HRT), 30 C.H.R.R. D/262 (B.C.H.R.T.). In that case, the Tribunal held as follows, at § 48:

Of course the amount that any person with a disability spends on transportation expenses will vary with the personal choices and circumstances of the individual. The Ministry is not required to ensure that every person designated handicapped

receives exactly the same degree of financial assistance for transportation costs, regardless of choice and circumstance. That would be to impose a regime of absolute equality. Thus, the fact that different individuals may spend different proportions of the general support allowance on transportation expenses does not by itself amount to discrimination. Nor is the Ministry required to fully subsidize the transportation costs of persons designated handicapped. It is entitled to determine an appropriate level of partial subsidy, taking into account its other fiscal obligations. However, if it chooses to provide general transportation subsidies, the Ministry may not discriminate between persons with different kinds of disabilities so that persons with some disabilities receive a significantly greater degree of subsidy than persons with other kinds of disabilities. [Emphasis added.]

[108] I will not attempt, in this decision, to draw a line or describe in more detail the circumstances in which funding will be found to be significantly inadequate. While line drawing around when inadequate funding leads to discrimination may be difficult, it is necessary and arises because of the variety of disabilities that exist and the needs that result from them. As explained in *Martin, supra*, at § 81:

This approach to the analysis of distinctions drawn between various disabilities allows the courts to take into account a fundamental and distinctive characteristic of disabilities when compared to other enumerated grounds of discrimination: their virtually infinite variety and the widely divergent needs, characteristics and circumstances of persons affected by them... In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person.

When the funding provided is significantly different in relation to the dietary needs of some with disabilities as compared with others, there is a *Code* violation.

[109] In summary, I conclude that a claimant who demonstrates: (i) a disability or disabilities, (ii) that there is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of the claimant's disability or disabilities, (iii) that the diet leads to extra food costs as compared with a regular healthy diet for a person without the disability or disabilities, and (iv) that there is no funding for the additional costs, or the funding is significantly below the additional costs (up to the maximum of \$250) will establish discrimination. In cases where the disability for which the special diet allowance is claimed is not on the schedule, the analysis will generally focus on the first three criteria. If the condition is on the schedule but it is alleged that the funding is inadequate, this will usually establish the first three criteria and the analysis will focus on the fourth.

## SECTION 14 OF THE CODE

[110] I next consider whether s. 14 of the *Code* provides a complete defence to the claims, as the respondent argues. Section 14(1) reads as follows:

14(1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

The respondent argues that, because the special diet program is designed to relieve hardship and economic disadvantage, it is a special program pursuant to s. 14(1) and the Tribunal cannot find that it violates the complainants' *Code* rights.

[111] The Ontario Court of Appeal dealt in detail with the interpretation of s. 14 and its application to government benefit programs in *Ontario (Human Rights Commission) v. Ontario* (1994), 1994 CanLII 1590 (ON CA), 19 O.R. (3d) 387 [ 21 C.H.R.R. D/259] (C.A.) ("*Roberts*"). The complainant in that case applied for funding under the Ministry of Health's Assistive Devices Program for financial assistance in purchasing a closed circuit television magnifier. He was 71 years old and legally blind. However, he was not eligible for the funding as a result of his age, as there was a cut-off at the time of 18 years.

[112] The government argued in *Roberts*, as it does here, that it could not be held that the program discriminated against Mr. Roberts on the basis of age, since it was a special program designed to assist persons who are disadvantaged on the basis of disability. The Court rejected the argument that s. 14 exempts special programs from the application of the *Code* in all circumstances. Rather, it held, at p. 401, that s. 14 only insulates a program from review where the challenge is from "a member from a historically privileged group or a disadvantaged person whose disability the program was not designed to benefit". The Court summarized its conclusions, at p. 407, as follows [at § 51–52 C.H.R.R.]:

Section 14(1) has a dual purpose: the exemption of affirmative action programs from review and the promotion of substantive equality. The Divisional Court erred in law in construing s. 14(1) as having as its only purpose the exemption of special programs from the application of the *Code*. Where a person whom a special program is designed to assist is discriminated against on an enumerated ground prohibited by the *Code*, s.14(1) is to be construed as an interpretive aid aimed at promoting substantive equality. Programs aimed at promoting substantive equality are reviewable depending on the context in which the challenge is brought. The exemptive purpose of s.14(1) is not invoked in this appeal.

... In this case, the Board of Inquiry and the Divisional Court erred in law in finding that the inquiry ends when "special program" status is proven. The inquiry should have considered: (1) whether a particular provision or limitation of a special program results in discrimination against a person or group with the disadvantage the program was designed to benefit, and (2) whether the provision or limitation is reasonably related to the scheme of the special program.

[113] The respondent argues that *Roberts* should be revisited in light of the Supreme Court's approach in *Kapp* to s. 15(2) of the *Charter*. Like s. 14 of the *Code*, s. 15(2) addresses affirmative action programs. Section 15 of the *Charter* reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[114] *Kapp* involved a challenge by commercial fishers, mainly non-Aboriginal, who alleged that their rights to equality under s. 15(1) were violated by a communal fishing licence granting members of three Aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River. The Court held that there was no need to consider s. 15(1) because the purpose or object of the program was the amelioration of the conditions of disadvantaged groups.

[115] In reaching this conclusion, the Court revisited its reasoning in *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), in which it had held that s. 15(2) was primarily an aid in interpreting the meaning of substantive equality under s. 15(1). In *Kapp*, it held that if a program meets the criteria of s. 15(2), it cannot be found to violate s. 15, and there is no need to conduct an analysis under s. 15(1): see § 37–40. At § 41, the Court held as follows:

We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.

In elaborating on this test, at § 49, the Court noted that, for there to be an ameliorative purpose, there should be a correlation between the program and the disadvantage suffered by the target group.

[116] The respondent argues that, because of the similarity of analysis between equality provisions under the *Charter* and the *Code*, the Tribunal must apply the *Kapp* analysis under s. 14 and hold that, if a program is designed to ameliorate disadvantage, it cannot be found to infringe s. 1 of the *Code*. Accordingly, it states, *Roberts* must be revisited.

[117] In my view, *Kapp* does not lead to this conclusion, and the application of s. 14 does not change the analysis carried out above nor does the defence apply in these circumstances. It is important to note the context of *Kapp*. The communal fishing licence was an ameliorative program targeting the disadvantage faced by members of the bands, the Court found. It was challenged by individuals who fell outside that target group. The Court's analysis was based on this situation, and it acknowledged, in its description of the test at § 41, that there may be a need for further refinement of the test to take into account other circumstances. Indeed, in its introduction to the s. 15(2) discussion, at § 28, the Court framed its discussion by noting:

... By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167 [C.H.R.R. § 41749], a law will not "necessarily be bad because it makes distinctions". [Emphasis added.]

[118] When *Kapp* was decided in 2008, it was well established in equality jurisprudence that programs designed to alleviate disadvantage can discriminate by leaving out those identified by a prohibited ground (underinclusiveness). For example, the Supreme Court found in *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493 [ 31 C.H.R.R. D/1], that a human rights regime that provided protection for other disadvantaged groups, but not gays and lesbians, was discriminatory. In *Martin, supra*, it found that a workers' compensation system that did not include coverage for some disabilities violated the *Charter*. In my view, there is no indication that *Kapp* intended to revisit this jurisprudence. On the contrary, the Court explicitly situated its analysis of s. 15(2) firmly within the concept of substantive equality as established in the jurisprudence.

[119] The facts of *Kapp* represent the type of situation in which, following the *Roberts* approach, provisions like s. 15(2) of the *Charter* and s. 14 of the *Code* lead to a finding that there is no discrimination. The claimants in *Kapp* were not within the group the program was intended to benefit. They did not fall within its purpose or

underlying rationale. Accordingly, there was no need to address the type of situation, discussed in *Roberts*, of a challenge from a person within this group, the situation in these cases.

[120] The analysis in *Kapp* does not detract from or contradict the reasoning in *Roberts* about why, when a member of the targeted group is excluded on a prohibited ground, substantive equality is undermined. Madam Justice Weiler, writing for the majority in *Roberts*, explained this eloquently at p. 402 [C.H.R.R. § 36] as follows:

In the context of this case, to say that s.14(1) exempts the age discrimination in the vision aids category of the ADP program from review, is to interpret the section so as to permit substantive equality to be undermined, when substantive equality is one of the section's very purposes. It is to permit unfairness which is antithetical to the overall purposes of the *Code*. Fairness, and the recognition of substantive equality, require that discrimination, in the provision of a service to a person who is a member of a disadvantaged group for whom a special program is designed, not be tolerated and be subject to review. This interpretation does not second-guess the Legislature. Rather, it fulfils one of the purposes of the Legislature and is consistent with the overall purpose of the *Code*.

[121] Therefore, I conclude that the *Roberts* analysis still applies under the *Code*. Considering the *Roberts* test in the circumstances of this case, I conclude that the analysis above regarding the purpose of the program disposes of the s. 14 issue. Under s. 1 of the *Code*, the analysis, following the approach in *Gibbs* and other cases, is to determine whether the claims fall within the purpose or underlying rationale of the program in order to determine whether there is substantive discrimination. *Roberts* provides that s. 14 of the *Code* does not shield a program from scrutiny where the claimant has a disadvantage the program was designed to benefit. The analysis under s. 14 is the same as that under s. 1.

[122] I note that in setting out the test in *Roberts*, the Court held that, if the claimant has a disadvantage the program was designed to benefit, the Tribunal should then analyze whether [at § 52] "the provision or limitation is reasonably related to the scheme of the special program". The respondent has suggested that this means that, where a program meets the definition of "special program", there is a different approach to determining whether there is a violation of s. 1 of the *Code* which is more deferential to the government. It suggests that the respondent should face less scrutiny when its intention is to take positive steps to ameliorate hardship or promote equality.

[123] I do not agree. It is clear that the intention of the Court in *Roberts* was that the general principles of substantive equality should apply when the claimant's disabilities fall within the purpose of the program. *Roberts* was decided before *Gibbs* and the s. 15 cases discussed above that have expanded on the meaning of

substantive equality in the context of allegedly underinclusive benefit programs. The second part of the test it set out must be considered in light of those cases. Moreover, there was not discussion in detail of this aspect of the case because the respondent conceded that there was no rational connection between the disadvantage and the age restriction. In my view, *Roberts* stands for the proposition that, where the challenge is from a person a program was intended to benefit, the general principles of substantive equality apply. Section 14's role is in addressing challenges from those whose needs do not fall within the purpose or underlying rationale of the program.

[124] Therefore, I conclude that s. 14 does not affect the analysis under s. 1 of the *Code* set out above, based on whether the complainants have needs that fall within the purpose of the program. Accordingly, I will proceed to consider the facts of the three lead cases in light of the four criteria set out above.

#### APPLICATION OF THE PRINCIPLES TO THE LEAD CASES

##### The Complainant W.

[125] First, I will deal with W.'s claims for the costs of supplements arising from bipolar disorder and cardiovascular disease. As I have determined that funding for supplements does not fall within the purpose of the program (see § 98–101), this aspect of her claim cannot be allowed, as it cannot meet the third criteria, that the diet leads to additional food costs. What remains are her claims that the lack of funding for a special diet resulting from hypoproteinemia is discriminatory, and that the \$32 paid for the combination of dyslipidemia and hypertension is inappropriately low.

[126] I now consider W.'s claim based upon hypoproteinemia. The first issue is whether W.'s protein deficiency is a disability within the meaning of the *Code*. The respondent argues that it is not. Although I note the Commission's argument that the Tribunal need not determine whether each condition is a disability, I have concluded that W.'s hypoproteinemia is a disability and need not address this argument.

[127] The respondent argues that the protein deficiency only appeared on a blood test in 2009 and that her physician advised in 2005 that she should be on a protein restricted diet. The respondent states that the physician's 2005 report "is more authoritative". Moreover, the respondent argues that short-term impairments do not constitute disabilities under the *Code*, citing *Ouimette v. Lily Cups Ltd.* (1990), 1990 CanLII 12497 (ON HRT), 12 C.H.R.R. D/19 (Ont. Bd.Inq.); *Elkas v. Blush Stop Inc.* (1994), 1994 CanLII 18421 (ON HRT), 25 C.H.R.R. D/158 (Ont. Bd.Inq.); *Yeomans v. Ottawa (City)* (1993), 1993 CanLII 16447 (ON HRT), 20 C.H.R.R. D/502 (Ont. Bd.Inq.); and *Nahal v. Globe Foundry Ltd.* (1993), 1993 CanLII 16468 (BC HRT), 21 C.H.R.R. D/136 (B.C.C.H.R.). It argues that there is "no evidence" that W.'s

hypoproteinemia is an ongoing medical condition. It notes that W. lost weight as a reaction to dye following an MRI and suggests that her weight loss and hypoproteinemia follow from this.

[128] The definition of disability in s. 10(1) of the *Code* reads as follows:

10(1) ...

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*

[129] In my view, there is good reason to suggest that the narrow definition of disability suggested by *Ouimette, Elkas*, and *Yeomans* no longer reflects the state of the law: see, in particular, *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27 (CanLII) [reported 37 C.H.R.R. D/271] ("*Mercier*"), and *Granovsky, supra*. In *Mercier*, the Supreme Court defined the issue as whether a condition is a "normal" ailment that is generally experienced by individuals, not whether it is temporary or transitory. It held as follows, at § 82:

These guidelines are not without limits. Although I believe that health may constitute a "handicap" and thus be a prohibited ground of discrimination under s. 10 of the *Charter*, the same cannot be said of personal characteristics or "normal" ailments. There is not normally a negative bias against these kinds of characteristics or ailments, and they will generally not constitute a "handicap" for the purposes of s. 10. As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of "handicap", although they may be discriminatory for other reasons.



However, there is no need to conclusively determine this issue here because I find that W.'s hypoproteinemia is not merely transitory or temporary, based on the evidence.

[130] This condition was identified by Ms. Sengmueller, who states in her report that "her protein needs are elevated as both recent blood work and weight loss demonstrate inadequate intake and catabolism". She also states, "[s]he is at risk for further protein deficiency, without additional funding, which could have numerous deleterious effects, such as decreased immune function and increased risk of acquiring infections". It is, in my view, implicit in these statements that the condition is more than transitory, and the respondent has provided no expert evidence to suggest that it is short-term, temporary or a "normal ailment". I find that W.'s hypoproteinemia is a disability. Moreover, I note parenthetically that the schedule itself does not allocate funding of diets based on whether a condition is temporary; if hypoproteinemia were on the schedule, W. could receive a special diet allowance based on the dietician's identification of the condition.

[131] The next question is whether W. has shown that there is general recognition in the Ontario medical community that a particular diet helps treat this disability. I must admit to significant concern about the lack of expert evidence on this point. Although the complainants and the Commission entered reports from three experts (Ms. Sengmueller, Dr. Jeejeebhoy, and Paula Brauer, a registered dietician), none of them commented on whether an increased serving of protein is generally recognized as a treatment for protein deficiency. The only expert evidence is Ms. Sengmueller's recommendation of the additional protein for W. and the statement that "her protein needs are elevated as both recent blood work and weight loss demonstrate inadequate intake and catabolism".

[132] Of course, until this decision, the need to demonstrate that the Ontario medical community would prescribe the diet for the disability or disabilities was not established. With the criteria established, claimants in future cases should introduce more specific evidence that shows that the recommendation would be a generally recognized response to the disability.

[133] However, I find that there is a sufficient basis upon which to conclude that W. has established that diet modifications are generally recognized as a treatment for hypoproteinemia. First, in her report, Ms. Sengmueller's conclusion that W. should eat more protein follows directly from the diagnosis of hypoproteinemia. It is not based on W.'s particular circumstances. Second, there is an evident logical link between eating more foods that are high in protein and the treatment of protein deficiency. Third, the respondent did not present any specific evidence to suggest that it is not general medical practice in Ontario to recommend eating additional protein from food sources when hypoproteinemia is diagnosed, nor make this argument in its final submissions. The respondent did not cross-examine Ms.

Sengmueller on the question of whether prescribing an additional serving of protein for hypoproteinemia reflects general medical practice. I am prepared to draw the inference that eating additional protein is generally recognized as appropriate when a person has a protein deficiency.

[134] There is no question that eating additional protein imposes food costs above those of the diet of a person without the disability. There is also no dispute that there is no funding for hypoproteinemia on the current schedule. Accordingly, applying the criteria set out above, I find that W. has been discriminated against as a result of the lack of special diet funding for hypoproteinemia.

[135] I turn next to W.'s claim that the amount provided for dyslipidemia and hypertension does not compensate her for the costs of her special diet in a comparatively equal manner to the funding provided for other disabilities. On this aspect of her claim, since the conditions are on the schedule, there is no dispute that she has a disability, that there is general recognition in the Ontario medical community that modifications to diet help treat the disability, and that the diet leads to additional food costs as compared with a healthy diet for a person without the disability. The issue is whether the funding is significantly below the additional costs.

[136] The Expert Review Committee recommended funding of \$86 per month for hypertension, which is the higher amount as between hypertension and dyslipidemia, which have similar dietary modifications and for which only one amount would be allocated under its model. Under the current schedule, she receives \$10 for hypertension and \$22 for hypercholesterolemia (dyslipidemia). The Expert Review Committee estimated the cost of the hypertension special diet at \$86 and the dyslipidemia special diet at \$51.

[137] The Expert Review Committee's costing of the hypertension diet was based upon the DASH (Dietary Approaches to Stopping Hypertension) eating plan recommended by the Heart and Stroke Foundation. It focuses on increasing fruits and vegetables, low fat dairy products, decreasing saturated and trans fats, limiting salt, and choosing whole grain products more often.

[138] The expert evidence presented by the complainants supports the conclusion of the Expert Review Committee. Dr. Jeejeebhoy is of the view that this diet modification is equivalent to drug therapy. Elke Sengmueller states that W. would benefit from the DASH diet and suggests that there is inadequate funding in the schedule to fund the extra costs. Paula Brauer, the expert who gave evidence on behalf of the Commission, states that the amount for hypercholesterolemia is "clearly... completely inadequate".

[139] The respondent submits that it is not appropriate to compare the costing methodology used by the Expert Review Committee with the existing amounts for several reasons. First, it notes that the Expert Review Committee was asked to adopt its own costing methodology rather than critiquing the methodology of the current schedule. Second, relying upon Dr. Brauer's report, it notes that there are different methodologies and disagreement among professionals in determining the cost of additional foods. Third, it states that the Expert Review Committee's costing was a mechanical process that did not consider the policy concerns the government must consider when it determines the benefit levels in any program. It suggests, for example, that the Expert Committee included foods such as sugar-free jam and Splenda in its recommendations for people with obesity, and that its costing of low-fat diets included products such as low-fat cheddar cheese and low-fat meats that might be substituted with lower fat products. Its counsel have done a revised costing, which changes some of the assumptions (for example regarding the substitution of foods and the number of servings of particular products in Canada's Food Guide) that reduces the disparity between the estimated amounts and the amounts in the schedule.

[140] The problem with these arguments is that they are not supported by any expert evidence suggesting that the disparity between the funding of W.'s conditions as contained in the schedule and as costed by the Expert Review Committee in fact results from different methodology or assumptions about how the costing should be done, or that the methodology is in fact different from that used for other conditions where the costing by the Expert Review Committee was closer to the existing schedule. For various conditions, the amount recommended by the Expert Review Committee was similar to or greater than the amounts currently being paid.

[141] I agree with the respondent that, if different methodology is being used, there is not substantive inequality. However, there is no evidence to suggest this is the case and no evidence about whether the hypothetical modifications to the costings suggested by counsel in fact correspond with any appropriate methodology among those in the field. They were never presented to the complainants' experts. Of course, the burden of proof is on the complainants, but they have presented expert evidence that suggests that the amounts for hypertension and hypercholesterolemia are significantly inadequate, including from a committee of experts appointed by the government. The complainants' experts were not challenged on their statements about the inadequate costing in cross-examination. It is not required that the complainants disprove theories presented by counsel in final argument.

[142] Similarly, the respondent argues that the DASH diet has only recently become accepted as a treatment for hypertension and that the government is not required to be at the forefront of science. In my view, it is clear on the evidence that it is currently generally accepted in the Ontario medical community as a treatment for hypertension. I leave the issue of "emerging" consensus for another case.

[143] The complainants have established that the DASH diet is generally accepted as a treatment for hypertension. I also find that the \$10 for hypertension, and the \$22 for hypercholesterolemia, are significantly below the additional costs of the dietary modifications required and therefore constitute discrimination. In reaching this conclusion, I rely upon the report of the Expert Review Committee, the evidence of Ms. Sengmueller that the amount for hypertension is inadequate to support the costs of the DASH diet, and Dr. Brauer's statement that the amount for hypercholesterolemia is completely inadequate. In my view, the extent of the disparity for each of these conditions, and the combination of them, falls outside the margin of appreciation to which the government is entitled.

[144] To summarize, I conclude that W. has been discriminated against in two ways: through the failure to provide funding for hypoproteinemia and the insufficient funding for the combination of hypertension and hypercholesterolemia.

#### The Complainant S.

[145] I turn next to S.'s claim. There is no question that S. has a disability, whether defined as extreme obesity (the condition under which he receives funding under the program) or Prader-Willi—like symptoms (the disability for which he asserts that he ought to receive funding). The fact that he has not been diagnosed with Prader-Willi would not be an obstacle to a successful claim on this basis, assuming that he established the other elements necessary to prove discrimination. There is no dispute that Prader-Willi-like symptoms are a disability, and in light of my analysis above, the lack of a specific medical diagnosis is not an obstacle to a successful claim.

[146] I do not, however, accept the argument that providing an allowance for S. through the "extreme obesity" category is discriminatory. S. highlights that the dietary modifications for his condition are different from those used by the Expert Review Committee to calculate the cost of the obesity diet. It is, however, not the purpose of the program nor does the *Code* require that precise amounts tailored to an individually developed diet be funded. It is clear that adapting to the individual circumstances of someone like S., including his behaviour, is good practice for dietitians. However, it is not required of the government in designing social benefit programs.

[147] The expert evidence presented on S.'s behalf sets out a diet developed for him, individually, by a registered dietitian. There is no evidence that this is a diet that is generally recognized in the Ontario medical community as appropriate for those with Prader-Willi Syndrome or Prader-Willi—like symptoms. The dietitian has stated that this diet reflects S.'s particular behaviours and physical characteristics, and it is tailored to them, but there is no evidence that this generally reflects what is recommended for individuals with his disability. Indeed, the complainants' expert,

Dr. Jeejeebhoy, states that "[t]here is no standard diet for Prader-Willi because the nutritional and other aspects of the disability manifest differently in different individuals".

[148] There is also no evidence that the amount for obesity — which is a "proxy" amount not meant to respond to the circumstances of each person with obesity — does not, in general, fit the needs of individuals with Prader-Willi or similar symptoms. Dr. Jeejeebhoy states that "patients with Prader-Willi require a nutritional program that can counter the risk of morbid obesity that is associated with the syndrome". S. has not presented any expert evidence that suggests that, in general, dietary treatments for Prader-Willi or similar behaviours impose different costs from those for obesity, or that shows that the obesity amount is not an appropriate general proxy amount for the additional costs of such diets. Accordingly, I find that S. has not established that it is discriminatory to treat him differently from others with extreme obesity.

[149] The complainants also took the position in their written submissions that the obesity diet is underfunded, and the respondents responded to this claim in their written submissions. Since I have rejected the argument that providing S. with special diet funding through the extreme obesity category is discriminatory, I will consider whether the complainants have established discrimination based on the obesity amount. The respondent does not dispute that S. is obese, that this is a disability, that modifications to diet help treat obesity, and that this diet imposes costs above those of a regular healthy diet for a person without obesity.

[150] The differential in the case of obesity is between the \$20 S. receives and the \$51 per month recommended by the Expert Review Committee. As with W.'s claim, the respondent suggests that the costing could be carried out differently, but provides no expert evidence in support of this claim. This argument is rejected for the reasons expressed above with regard to W. In my view, the evidence shows that the costs for obesity are significantly below the additional costs of an obesity diet. The amount paid is only 39 percent of what was estimated by the Expert Review Committee and there is no explanation of any difference in methodology that might account for this. Accordingly, I determine that S. was discriminated against as a result of the amount of special diet allowance for obesity.

#### The Complainant B.

[151] I address B.'s claim next. There is no question that B. had various disabilities, including major depression and post-traumatic stress disorder. The medical evidence also establishes that at least in part because of the reduction in his monthly social assistance cheque that followed the changes in 2006, B. experienced a serious exacerbation of his mental health conditions that affected his physical health as well.

That alone, however, does not establish discrimination. The *Code* does not provide a remedy for effects on individuals' health that result from government policy changes, no matter how severe, unless those changes create discrimination.

[152] B.'s claim, like those of the other complainants, alleges discrimination as compared with others with disabilities whose needs were funded. He must establish needs that fall within the purposes of the program as set out above. The expert evidence he has presented addresses many of the ways in which mental health disabilities affect diet, and the difficulties that many individuals with mental health disabilities have in eating a healthy diet. It is clear that mental health disabilities are often connected with weight loss or weight gain, and frequently interfere with a person's ability to buy and prepare food. Mental health disabilities are prevalent among those receiving ODSP.

[153] However, B. has provided no evidence that suggests that modifications to a regular healthy diet should be made where an individual has a mental health condition or that there is general recognition in the Ontario medical community of this. B. has established that weight loss may be a consequence of mental health disabilities. Assuming that prevention falls within the purpose of the special diet allowance, a matter I do not decide in this case, B. has not presented expert evidence that changes to a regular healthy diet would generally be prescribed or recommended for individuals with depression or post-traumatic stress disorder. Accordingly, his discrimination claim based on his mental health disabilities cannot succeed.

[154] B. also argues that the policy-making process discriminated against people with mental health disabilities because their needs and representation among ODSP recipients was not considered sufficiently. A claimant cannot establish discrimination within the meaning of the *Code* merely by pointing to the considerations taken into account by the government or bureaucracy in the policy-making process, absent showing a discriminatory purpose. As the parties acknowledged, the development and passage of regulations is, like legislation itself, not a "service" within the meaning of s. 1 of the *Code*: see, by analogy, *Malkowski v. Ontario (Human Rights Comm.)*, 2006 CanLII 43415 (ON SCDC), [2006] O.J. No. 5140 (QL) [CHRR Doc. 06-918]; *Freitag v. Penetanguishene (Town) (No. 2)*, 2009 HRTO 1712 (CanLII) [CHRR Doc. 09-2274]. B. argued that the alleged deficiencies in the policy-making process could affect whether the regulations themselves are discriminatory. I disagree. Arguments about the process by which the government developed regulations and the interests considered do not change the fact that B. has not proven substantive discrimination against him in the special diet program, and there is also no evidence of a discriminatory purpose. Finally, B. makes various analogies to tort law and, in particular, concepts of wilful blindness. These legal concepts, which do not apply under the *Code*, do not assist in establishing discrimination.

[155] Finally, B.'s counsel made arguments that the Ministry's letters about changes to the special diet allowance were discriminatory. These allegations, however, were not clearly identified in the pleadings, permitting the respondent to adduce evidence on them or cross-examine the complainant's witnesses. They are also not part of the subject-matter of the complaint referred to the Tribunal. It would not be fair to the respondent or appropriate for the Tribunal to consider them.

[156] Although he did not argue this point, I note that, during the period he received less than the \$250 maximum, B. received funding for hypercholesterolemia. I have found, in W.'s complaint, that the hypercholesterolemia amount was discriminatory. In the circumstances, B.'s complaint should be allowed in part for a period in 2006–07, based on the significant underfunding of hypercholesterolemia.

## REMEDIES

[157] I have found that W. was discriminated against as a result of the failure to provide funding for a hypoproteinemia diet and significantly inadequate funding for the hypertension/hypercholesterolemia diets; that S. was discriminated against as a result of significantly inadequate funding for the obesity diet; and that B. was discriminated against as a result of significantly inadequate funding for hypercholesterolemia. I turn now to the appropriate remedies.

[158] Section 45.2 of the *Code* reads as follows:

45.2(1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

(2) For greater certainty, an order under paragraph 3 of subsection (1),

(a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

[159] Although these complaints were filed before s. 45.2 of the *Code* came into effect on June 30, 2008, it applies as a result of s. 55(2), which provides that the Tribunal shall deal with complaints referred to the Tribunal before that date in accordance with the new Part IV.

[160] W. and S. seek the following remedies:

- A declaration that the special diet program discriminated against the complainants
- An order that the complainants be paid retroactive benefits
- An order that the respondent retain qualified experts to develop a special diet program that does not discriminate on the basis of disability and make the necessary changes to the special diet program within six months
- An order that the Tribunal remain seized so that it can determine whether the new program complies with the *Code* following the six-month period
- Interim monthly payments to the complainants until implementation of a new program
- \$2,500 each in compensation for injury to dignity, feelings, and self-respect

[161] B. requested damages and other remedies based upon his claim on the basis of mental disability, which has been dismissed.

[162] The Commission requested the following remedies in its written submissions, although counsel, in oral argument, accepted that some of the remedies may be too intrusive:

(1) A determination that the respondent's reliance upon:

- paragraph 4 of subsection 30 (1) and paragraph 4 of subsection 33 (1) of Ontario Regulation 222/98; and
- Ontario Regulation 562/05, Schedule 1 to that Regulation

in determining which recipients of benefits pursuant to the *ODSPA* are eligible for a special diet, and the amount to be included in the budgetary requirements of an individual receiving a special diet, is inconsistent with the *Human Rights Code*.

(2) An Order that the respondent:

- (a) retain qualified, external experts to develop a special diet program that:
  - (i) does not deny recipients, as a result of their particular medical condition, access to a special dietary allowance;



(ii) does not place individuals with particular medical conditions at a disadvantage relative to other individuals with comparable needs, and

(iii) permits a discretion on the part of the Director to provide benefits, or benefits in excess of the scheduled amounts to those who require such by virtue of their particular or unique needs.

(b) complete the process set out in paragraph (1) within twelve months of the Tribunal's decision, and forward to the Commission and to the lead complainants a report containing its recommendations for a revised Special Diet program, together with documents relied on in the process of developing that program. If the Commission or the lead complainants are of the view that the proposed new program is inconsistent with the Tribunal's decision or orders, they may seek further orders from the Tribunal, which will remain seized of the matter until such time as the process has been completed.

(3) An order, to have immediate effect, and to cease to be in effect at such time as the process set out in requested order "2" is completed, that the respondent cease its reliance upon Ontario Regulation 562/05, Schedule 1 to that Regulation, and paragraph 4 of subsection 30 (1) and paragraph 4 of subsection 33 (1) of Ontario Regulation 222/98 in determining which recipients of benefits pursuant to the ODSPA are eligible for a special diet, and the amount to be included in the budgetary requirements of an individual receiving a special diet.

[163] This case is about government policy and the design of complex social welfare schemes. The comments about the institutional roles and competence of courts and Legislatures in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII) at § 32–34 apply with equal force to this Tribunal and to remedies under the *Code* in this context:

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government...

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches...

In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. [Emphasis added.]

[164] The Supreme Court 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. In *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII) [reported 49 C.H.R.R. D/129] at § 26:

Despite occasional disagreements over the appropriate means of redress, the case law of this Court, although the law is undoubtedly still in its early stages of development in this area, 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*.

[165] Against this background, I consider first the requests for retroactive and future benefits. The complainants argue that an order that benefits be paid retroactively reflects the well-established principle that monetary remedies should put the complainant in the circumstances he or she would have been in had the discrimination not occurred: *Airport Taxicab (Malton) Assn. v. Piazza* (1989), 1989 CanLII 4071 (ON CA), 10 C.H.R.R. D/6347 (Ont. C.A.); *Smith v. Ontario (Human Rights Comm.)*, 2005 CanLII 2811 (ON SCDC), [2005] O.J. No. 377 (QL) [ 52 C.H.R.R. D/89] at § 28 (Div.Ct.). The respondent states that it would not be appropriate for the Tribunal to make an order for retroactive or future benefits unless the amount of benefits required to achieve equality is clear and well-defined. Counsel argues that the Tribunal could make an order for a person with a condition left out of the unintended weight loss category if it found that was discriminatory, because the amount would be the same as for other conditions in that category. However, when there is no precise comparator on the schedule, as is the case here, the respondent submits that no benefits can be awarded.

[166] The third subparagraph of s. 45.2(1) directs the Tribunal to consider monetary compensation "for loss arising out of the infringement". As the Supreme Court stated in *Doucet-Boudreau, supra*, it is essential that a remedy meaningfully vindicate the claimant's rights. There is no question in this case that the respondent's purpose was to provide benefits to all those who fit within the purposes of the program and no argument that it might have made the choice to have no special diet program rather than providing substantively equal benefits to those in the position of the complainants (for the opposite situation, see *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679). In my view, the complainants are entitled to retroactive benefits from the date that they would have been eligible for them had the program not violated the *Code*.

[167] At the same time, the concerns of the respondent are not without foundation. There is no precise, easily calculable amount that the Tribunal can apply to determine what retroactive and future benefits should be. The costing of the diet is within the institutional competence and discretion of the respondent, provided it complies with the *Code* in doing so. Accordingly, in my view, the appropriate order is that the respondent, within 90 days following this decision, provide the complainants with retroactive benefits and future monthly benefits that reflect the *Code* principles set out in this decision. I will remain seized of their complaints for the sole purpose of dealing [with] any dispute over whether the respondent has complied with this aspect of the order.

[168] I turn next to the question of compensation for injury to dignity, feelings, and self-respect, also known as general damages. The parties agree that, when a *Code* claim relates to government legislation or regulations, specific principles apply. As the Supreme Court of Canada held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), when a law is struck down as unconstitutional, damages will only be awarded if there is conduct that is "clearly wrong, in bad faith, or an abuse of power": see § 79. Later paragraphs of the judgment also refer to "negligence" and "wilful blindness": see § 82–83.

[169] The *Mackin* approach requires an evaluation of whether, evaluated in light of the jurisprudence as it stood at the time, the government's conduct was clearly wrong. Unless, at the time the legislation or regulations were implemented, it was or ought to have been evident that the steps taken were unconstitutional, damages should not be awarded. As the Court stated at § 79:

... Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained.

[170] In *Communauté urbaine de Montréal, supra*, at § 19–22 the Court confirmed the application of these principles to the Quebec *Charter*, which, like the *Code*, is quasi-constitutional human rights legislation. In *Braithwaite, supra*, at § 88, the Divisional Court held that *Mackin* also applies under the Ontario *Code*, stating as follows:

Moreover, the Supreme Court of Canada has held that absent conduct that is clearly wrong, in bad faith or an abuse of power, it is inappropriate to award damages when legislation is subsequently found to be unconstitutional or contrary to provincial human rights legislation (*Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405 at paras.

78—79; *Québec (Commission des droits de la personne et droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30 (CanLII), [2004] 1 S.C.R. 789 [ 49 C.H.R.R. D/129] at para. 23).

[171] Applying the *Mackin* principles that all parties accept, there is no basis to find that in not including hypoproteinemia on the special diet schedule, or in determining the amounts for hypertension, hypercholesterolemia or obesity, the respondent acted in bad faith, was negligent, was clearly wrong or abused its power under prevailing human rights law. Although the complainants criticize the speed and manner in which the respondent made the changes and allege a lack of attention to human rights in how the new schedule was developed, it was not clear under the "prevailing law" that it was clearly or even likely violating the *Code* in the decisions it made about the complainants' particular disabilities. Accordingly, I do not award monetary compensation for injury to dignity, feelings, and self-respect. This conclusion is limited to the particular violations I have found. It may be that other circumstances raise different considerations, and I leave such issues to be determined on their facts.

[172] I turn now to the issue of whether the Tribunal should make an order under the third subparagraph of s. 45.2(1) to ensure compliance with the *Code*. Given the violations that have been found in this case, the appropriate order to remedy this breach is that, commencing within three months, those administering ODSP and OW shall provide special diet benefits for individuals with hypoproteinemia, hyperlipidemia, hypertension, and obesity in accordance with the *Code* principles set out in this decision. The respondent accepts that, while the Tribunal cannot order that legislation or regulations be amended (*Malkowski, supra*, at § 34), it can order that the program be administered in accordance with the *Code*.

[173] The remedy I have awarded relates to the violations of the *Code* that have been proven. Of course, the principles set out may require other changes to the special diet program. The government may choose various ways of addressing this, such as, for example, revising the schedule to include a more comprehensive list of disabilities or to deal with any gaps through a discretionary category. The request for the Tribunal to take a detailed role in the development of a revised special diet program is, in my view, unnecessary and inconsistent with the role of the Tribunal in relation to the Legislature and executive. These are matters for which the Tribunal is not well suited. Requiring experts outside the government to design policy or retaining jurisdiction in order to supervise changes to the program would be an improper interference in the role of the Minister.

[174] The complainants express scepticism that the government would act appropriately without a detailed order, citing, among other things, the few changes to the schedule since 2005 despite the undertaking at that time that it would be reviewed regularly. I do not share the complainants' concerns. I note, in particular,

the strong tradition of compliance with court orders in Canadian society discussed in *Doucet-Boudreau*. Moreover, should the respondent fail to act reasonably or appropriately following this decision, the principles in *Mackin* may support awards of general damages in other cases.

[175] Should the government fail to take reasonable and appropriate action, there remain many complaints and applications about the special diet allowance before this Tribunal in which other remedies could be requested. Moreover, under the current human rights system, an application may be filed with the Tribunal by any recipient of social assistance who believes that his or her rights have been violated, and seek appropriate remedies in that proceeding. The Tribunal's role, given the facts of this case, should be as an arbiter of whether individuals' rights are violated by the program, not in designing or evaluating the program as a whole. Accordingly, I will make no other orders.

#### NEXT STEPS FOR OTHER CASES

[176] The Tribunal held in its interim decision setting up the process for these cases that a case conference would be held following the decision on the lead cases to determine a procedure to address the remaining cases. A case conference will be held at the Tribunal's hearing centre at 655 Bay St., 14 Floor, Toronto, Ontario, on April 13, 2010, commencing at 10:00 a.m. A formal hearing notice will follow with a call-in number for any parties who wish to attend by telephone.

[177] complainants or applicants may choose to be represented by counsel for the lead complainants or counsel for the Commission for the purpose of the case conference, as occurred during the initial case conference on April 11, 2008. Unless advised otherwise, the Tribunal will presume that Ms. Wilkey and Ms. Bisgould are appearing on behalf of the same complainants as at the April 11, 2008, conference.

[178] At the case conference, the Tribunal will hear submissions from the Commission, the remaining complainants, and the respondents about how the remaining complaints and applications should proceed. If any complainants or applicants do not attend the case conference, their cases may still proceed in the manner determined following the case conference.

[179] It is in my view also important that the Commission, applicants, and complainants in the remaining cases consider and advise the Tribunal how their claims fall within the framework established in this decision. This will assist in determining how these matters will proceed. Accordingly, at the latest within four months of this decision, the remaining complainants and/or Commission shall deliver to the other parties to the complaint and file with the Tribunal an outline of the allegations of discrimination, including written answers to the following questions:

1. On what disability or disabilities do you base your claim that the special diet allowance discriminates against you?
2. If this disability or these disabilities are not currently on the special diet schedule, what evidence do you have or will you obtain to show that there is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of your disability or disabilities?
3. If this disability or these disabilities are not on the special diet schedule, on what basis do you allege, and what evidence will you use to show that the diet leads to extra food costs as compared with a regular healthy diet for a person without the disability or disabilities?
4. If the disability or disabilities are on the schedule and you allege that the funding provided is significantly below the additional costs of the diet, explain the basis of this claim and the evidence you will use to support it.

#### ORDER

[180] The Tribunal makes the following orders in the lead cases:

1. The complaints are allowed in part.
2. Within 90 days of this decision, the respondent shall provide W. with retroactive and ongoing special diet allowance for hypoproteinemia, hypertension and hypercholesterolemia in accordance with the *Code* principles set out in this decision. I remain seized of W.'s complaint for six months for the sole purpose of dealing with any dispute over whether the respondent has complied with this aspect of the order.
3. Within 90 days of this decision, the respondent shall provide S. with retroactive and ongoing special diet allowance for obesity in accordance with the *Code* principles set out in this decision. I remain seized of S.'s complaint for six months for the sole purpose of dealing with any dispute over whether the respondent has complied with this aspect of the order.
4. Within 90 days of this decision, the respondent shall provide B. with retroactive special diet allowance for hypercholesterolemia in accordance with the *Code* principles set out in this decision. I remain seized of B.'s complaint for six months for the sole purpose of dealing with any dispute over whether the respondent has complied with this aspect of the order.
5. Commencing within three months, those responsible for administering ODSP and OW shall provide special diet benefits for individuals with hypoproteinemia, hypercholesterolemia, hypertension, and obesity in accordance with the *Code* principles set out in this decision.

#### NOTE

\* Not published here.

TAB 3



# Canada (Attorney General) v. Dominique, 2025 FCA 24 (CanLII)

Source: Federal Court of Appeal

Date: 2025-01-28

File number: A-95-23

**Citation:**

**Canada (Attorney General) v. Dominique, 2025 FCA 24 (CanLII), <<https://canlii.ca/t/kbzb1>>, retrieved on 2026-01-07**

**Most recent unfavourable mention**

Date: 20250128

Docket: A-95-23

Citation: 2025 FCA 24

[ENGLISH TRANSLATION]

CORAM:

LOCKE J.A.

LEBLANC J.A.

ROUSSEL  
J.A.

BETWEEN:

THE ATTORNEY  
GENERAL OF  
CANADA

Appellant

and

GILBERT  
DOMINIQUE (on  
behalf of the  
members of the  
Pekuakamiulnuatsh  
First Nation) and  
CANADIAN  
HUMAN RIGHTS  
COMMISSION

Respondents

Heard at Québec, Quebec, on February 20, 2024.

Judgment delivered at Ottawa, Ontario, on January 28, 2025.

REASONS FOR JUDGMENT BY:

LEBLANC J.A.

CONCURRED IN BY:

LOCKE J.A.

ROUSSEL J.A.

Date: 20250128

Docket: A-95-23

Citation: 2025 FCA 24

CORAM:

LOCKE J.A.

LEBLANC J.A.

ROUSSEL  
J.A.

BETWEEN:

THE ATTORNEY  
GENERAL OF  
CANADA

Appellant

and

GILBERT  
DOMINIQUE (on  
behalf of the  
members of the  
Pekuakamiulnuatsh  
First Nation) and  
CANADIAN  
HUMAN RIGHTS  
COMMISSION

Respondents

## REASONS FOR JUDGMENT

LEBLANC J.A.

### **I. Introduction**

[1] The Attorney General of Canada (the Attorney General) is appealing from a judgment rendered by the Associate Chief Justice (as she then was) of the Federal Court on February 27, 2023 (2023 FC 267). In its judgment, the Federal Court dismissed the Attorney General's application for judicial review of a decision of the Canadian Human Rights Tribunal (the Tribunal), cited as 2022 CHRT 4, allowing a

discrimination complaint filed by the respondent Gilbert Dominique (the Complainant), on behalf of the members of the Pekuakamiulnuatsh First Nation (the First Nation), with the other respondent, the Canadian Human Rights Commission (the Commission).

[2] The context of this complaint is the funding of the operating costs for the self-administered police service that the First Nation chose to establish in 1996 in connection with the First Nations Policing Policy (the Policy) implemented by the federal government and to which was added, for the purposes of its operationalization, the First Nations Policing Program (the Program).

[3] More specifically, the complaint at issue is based on paragraph 5(b) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the Act), which states that it is a discriminatory practice in the provision of services available to the general public to differentiate adversely in relation to any individual on a prohibited ground of discrimination under the Act.

[4] The Complainant submitted that is the case here because the funding provided to him for the First Nation's police service was insufficient and dependent on short-term agreements that the First Nation had no choice but to sign if it did not want to give up its police service. In his view, this resulted in a subpar level of service to the members of the community, a consequence he said is related to their race and national or ethnic origin.

[5] The Tribunal found that the situation reported by the Complainant was a discriminatory practice within the meaning of the Act, and thus allowed his complaint (the Tribunal Decision). As we have seen, the Federal Court refused to intervene, finding that the Tribunal Decision was reasonable. The Attorney General argues that the Federal Court erred in so finding and invites us to set aside the Tribunal Decision, render the decision that the Tribunal should have rendered—i.e. dismiss the Complainant's complaint—or, alternatively, refer the matter back to the Tribunal for reconsideration in light of the problems identified by the Court.

[6] For the reasons that follow, I am of the view that this appeal cannot succeed.

## **II. Background**

[7] It is necessary to provide a little background information.

[8] The Policy and Program at the heart of this case were adopted in the early 1990s. This took place within the broader context of historically difficult relations between First Nations and law enforcement and policing authorities in Canada, as evidenced in a number of investigation reports on the topic, including the report commissioned by the federal government and issued by a cross-departmental task force in January 1990, the Indian Policing Policy Review Task Force Report.

[9] For all intents and purposes, this report gave rise to the Policy, which generally aims to provide First Nations across Canada with access to “police services that are professional, effective, culturally appropriate, and accountable to the communities they serve.” Ultimately, the purpose is “to contribute to the improvement of social order, public security and personal safety in First Nations communities, including that of women, children and other vulnerable groups” (Appeal Book at 4416 to 4418).

[10] The preferred approach to achieve this is to establish partnerships ““based on trust, mutual respect and participation in decision-making””, which pave the way for the negotiation and conclusion of tripartite agreements for the provision of cost-shared funding and related support and assistance between the federal government, the provincial or territorial government concerned and the First Nation looking to establish a self-administered police service that will meet its needs (Appeal Book at 4416 to 4419).

[11] More broadly, the Policy is meant to be “a practical means to support the federal policy on the implementation of the inherent right and the negotiation of self-government” for Indigenous people (Appeal Book at 4418). It rests on the following “principles”:

- (a) First Nations communities should have access to services that are responsive to their particular needs and that are equal in quality and level of service to those found in “communities with similar conditions in the region”;
- (b) The responsibilities and authorities of police officers serving in First Nations communities should be the same as those of other police officers in Canada;
- (c) First Nations communities should be policed by such numbers of persons “of a similar cultural and linguistic background” as are necessary;
- (d) First Nations communities should have access to “at least the same police service models that are available to communities with similar conditions in the region”;
- (e) First Nations should be involved “in the selection of a particular model of police service” that balances “the need for cost-effectiveness” and the particular policing needs of First Nations communities; and
- (f) First Nations communities that have established their own police services adapted to their particular needs should implement institutional mechanisms to ensure “police management and accountability, [in addition to] police independence from partisan and inappropriate political influences.”

(Appeal Book at 4420 and 4421.)

[12] Lastly, the Policy, broadly speaking, sets out the following: (i) the form that the funding will take; (ii) the policing models eligible for such funding; (iii) the criteria for assessing the First Nation’s funding requirements; and (iv) a list of the costs eligible for such funding (administration; recruiting, training and education; salaries and benefits; and expenditures). Furthermore, the Policy stipulates that the federal government will pay 52% of the “government contribution toward the cost of First Nations policing services” while the province or territory will cover the difference, i.e. 48% of this contribution. In this regard, the Policy states that “First Nations communities will, where possible, be encouraged to help pay for the cost of maintaining their police service, particularly for enhanced services” (Appeal Book at 4423 to 4425).

[13] The details of the Policy’s implementation are set out in the Program.

[14] Moreover, the tripartite nature of the agreements concluded under the Policy (and the Program) acknowledges the jurisdiction of the provinces to provide policing services on their territory. In this case, the First Nation is located on the Mashteuiatsh reserve in Quebec. It has around 2,000 residents, although this number varies depending on the season.

[15] The organization and provision of police services in the province are governed by the *Police Act*, CQLR c. P-13.1 (the QPA). The QPA provides for six levels of service based on the population of the agglomerations served, with level 1 representing the base level. According to the QPA, the Sûreté du Québec provides policing services in any municipality with fewer than 50,000 residents. In other words, these municipalities cannot be served by their own municipal police force in the same way that agglomerations with more than 50,000 residents can.

[16] Since the Policy was adopted, the QPA allows for Indigenous communities within the province wishing to establish their own police service to do so, through an agreement with the Quebec government. This service then becomes a police force within the meaning of this act.

[17] The vast majority of Indigenous communities across the province have their own police service. According to section 93 of the QPA, these police forces shall have jurisdiction to prevent and repress both offences under by-laws applicable in the territory in which they are established and statutory

offences applicable across Quebec. The Policy demonstrates the federal government's willingness to contribute—in this case jointly with the Quebec government—to the funding and implementation of such services in accordance with the objectives set out in the Policy.

[18] As noted above, the First Nation established its own self-administered police force in 1996. Prior to that, police services in the community of Mashteuiatsh were provided, depending on the time period, by the Royal Canadian Mounted Police, a so-called Amerindian police force ("peacekeepers"), or the Sûreté du Québec. When the agreements at issue were signed, these services were provided by the Sûreté du Québec.

[19] In concluding this overview, it is important to mention something that both the Tribunal and the Federal Court made reference to: at the same time as the complaint at the heart of these proceedings was filed, an action was brought before the Superior Court of Quebec on behalf of the Mashteuiatsh community, based on the same factual matrix, asserting the Crown's obligations to negotiate in good faith and to act with honour in its relations with First Nations. In this way, the community hoped to recover the monies it believed it should have received had it not been for the failure to comply with these obligations.

[20] This action was unsuccessful in the Superior Court (*Takuhikan c. Procureur général du Québec*, 2019 QCCS 5699 (*Takuhikan CSQ*)). However, the Quebec Court of Appeal reversed that judgment (*Takuhikan c. Procureur général du Québec*, 2022 QCCA 1699 (*Takuhikan CAQ*)), a decision recently upheld by the Supreme Court of Canada (*Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39 (*Takuhikan SCC*)).

[21] I note that the Attorney General of Canada did not appeal from the judgment of the Quebec Court of Appeal, opting instead to comply with it.

[22] Finally, it is important to note that, with the agreement of the parties, the Tribunal bifurcated its review of the Complaint, ruling strictly on whether or not there was discrimination and thereby deferring the debate on the remedies to be granted, should that prove necessary, to a subsequent hearing, once the issue of the merits of the Complaint had been definitively settled.

### **III. The Tribunal Decision**

[23] The hearing before the Tribunal took place over the course of five days. Several witnesses were heard and voluminous documentation was presented to the Tribunal.

[24] The Tribunal analyzed the Complaint based on the three-part test set out in *Moore v. British Columbia (Education)*, 2012 SCC 61 (*Moore*). It explained the test as follows (Tribunal Decision at para. 21):

- (a) Is there a prohibited ground of discrimination under the Act?
- (b) Was there adverse differential treatment (adverse impact) in the provision of a service customarily available to the general public under paragraph 5(b) of the Act?
- (c) Was the prohibited ground of discrimination a factor in the adverse impact?

[25] After setting out its understanding of discrimination law and rejecting two preliminary arguments presented by the Attorney General that are not taken up before this Court, including that the decision in *Takuhikan CSQ* gave rise to estoppel as regards the Complaint based on the doctrine of *res judicata*, the Tribunal analyzed the three elements of the *Moore* test. It started by declaring itself satisfied that there was a prohibited ground of discrimination within the meaning of the Act, given the race and national or ethnic origin of the Complainant and the members of the First Nation (Tribunal Decision at para. 132).

[26] The Tribunal then turned to the second element of the Moore test. In so doing, it outlined the history of policing on reserves across the country in order, as it put it, “to better understand past (and present) issues that are necessarily related to this complaint” (Tribunal Decision at para. 139). It also reviewed the structure of police services in Quebec and traced the history of those provided in the community of Mashteuiatsh.

[27] It concluded that through the implementation of agreements concluded with the First Nation under the Policy and Program, the federal government provided to the First Nation—admittedly, a very small segment of the Canadian public—a “service ... available to the general public” within the meaning of the Act, which, according to the Tribunal, is not limited to the simple funding of the service but also includes ““other actions taken by the Respondent in administering the program, such as reporting, negotiating and providing related assistance”” (Tribunal Decision at paras. 229 to 232).

[28] The Tribunal then considered whether the Complainant had experienced any adverse treatment in connection with the provision of this service and, if so, whether such adverse treatment was based, in whole or in part, on the race or national or ethnic origin of the Complainant and the members of the First Nation.

[29] First, it found that there had been adverse treatment, being of the opinion that the funding made available to the First Nation under the agreements did not allow it to provide the minimum services equivalent to those of the lowest level of service—level 1—provided for in the QPA. The Tribunal went on to argue that, given the very structure of the Program, it was not possible for the First Nation to provide services comparable to those offered by non-Indigenous police forces in comparable situations, even though the mission and responsibilities of its police service were identical to those of the other police forces (Tribunal Decision at paras. 266, 274 to 279).

[30] According to the Tribunal, all parties were well aware that the costs related to the First Nation’s minimum policing needs were higher than the amounts that were provided for in the agreements (Tribunal Decision at para. 251). The Tribunal went on to say that this led to recurring deficits for the First Nation, deficits that were exacerbated by an arbitration award rendered in 2014 ordering it to adjust the salary of the police officers in its employment—which, until then, had been lower than that paid to officers in other police forces in Quebec—to match the provincial standard (Tribunal Decision at paras. 242 to 244). According to the Tribunal, the First Nation was forced to absorb these deficits from a self-sustaining fund that it had created itself and that was used, first and foremost, as economic leverage for the community (Tribunal Decision at para. 253).

[31] The Tribunal then considered whether this adverse treatment in the provision of policing services to the First Nation was due, in whole or in part, to the race or ethnic or national origin of its members and, therefore, whether it constituted a discriminatory practice within the meaning of the Act. To this end, the Tribunal expressed the view that it needed to take judicial notice of both the systemic discrimination and racism that First Nations have experienced—and continue to face—and their historically difficult relations with the police (Tribunal Decision at paras. 307 and 308).

[32] It further considered that, for the purposes of examining this issue, the concept of substantive equality did not require it to conduct, as the Attorney General invited it to, a comparative analysis between groups with the same or similar characteristics. The Tribunal went on to say that it only needed to assess the “real effects, on the ground” of the implementation of funding agreements under the Policy and Program by taking into account the “social, political, economic and historical contexts of First Nations in policing” (Tribunal Decision at paras. 318, 320, 324-326).

[33] The Tribunal thus found that the very structure of the agreements concluded under the Policy and Program “reinforce[d] First Nations’ dependency on the Crown” because, somewhat contrary to what was promised in the Policy, the First Nation was then faced with the following dilemma: either (i) give up the idea of having its own police service and, therefore, accept a police service provided entirely by the Sûreté du Québec and not adapted to its culture or its needs; or (ii) maintain its own police force,

knowing that, because of the very structure of the agreements, it would not be funded to the extent that the community needed it to be (Tribunal Decision at paras. 328 to 331). In this latter regard, the Tribunal understood from the evidence in the record that the implementation of the Policy and Program depended on budget envelopes that, despite occasional assistance through one-time contributions and despite improvements in the situation since 2018, often did not allow for discussions on the real needs of the First Nation's police service, which virtually eliminated any chance of increased and sustainable financial support (Tribunal Decision at paras. 341 to 345).

[34] In short, for the Tribunal, despite the Policy's laudable goals, its implementation through the Program "perpetuate[d] systemic discrimination against the Complainant, the Pekuakamiulnuatsh and First Nations" (Tribunal Decision at para. 349), a situation that was exacerbated by the short duration of the funding agreements, which, the Tribunal added, was yet another manifestation of the "poor implementation of the [Program] and the lack of funding" (Tribunal Decision at para. 363).

[35] In the end, the Tribunal rejected what it understood to be a defence by the Attorney General under subsection 16(1) of the Act. According to this provision, it is not a discriminatory practice within the meaning of the Act to carry out a program designed to prevent disadvantages suffered by any group of individuals when those disadvantages would be based on the prohibited grounds of discrimination. According to the Attorney General, that was the case with the Policy and Program.

[36] However, according to the Tribunal, the sole purpose of subsection 16(1) of the Act is to "protect the adoption or implementation of special programs from challenges by groups of individuals who are not covered by the program." In short, the sole objective of this provision is to protect this type of program against allegations of so-called "reverse discrimination" (Tribunal Decision at paras. 377-378). This would mean that it was being used by the Attorney General in a way that was never intended. The Tribunal therefore concluded that accepting the Attorney General's argument would distort the purpose of subsection 16(1) of the Act (Tribunal Decision at para. 388).

#### **IV. The Federal Court's Judgment**

[37] After outlining the dispute before it and summarizing the Tribunal Decision, the Federal Court started by discussing the applicable standard of review in detail and rejecting the Attorney General's arguments urging it to assess all of the issues raised in the judicial review against the standard of correctness. The Attorney General did not repeat this argument before us, since he is now of the opinion that the applicable standard is reasonableness.

[38] The Federal Court then disposed of the Attorney General's argument that the Tribunal did not have jurisdiction to decide the Complaint because, for all intents and purposes, that required it to rule on the discriminatory effects of the QPA, which is a provincial statute. Once again, the Attorney General did not repeat this argument before us, or at least not in this form.

[39] The Federal Court continued its analysis by considering the impact of Takuhikan CAQ on the analysis of the reasonableness of the Tribunal Decision, which it acknowledged as having "a higher degree of persuasiveness" (Federal Court Decision at paras. 69-71). On the merits, the Federal Court was satisfied that the Tribunal had committed no error warranting its intervention in finding that the Complainant and the members of the First Nation had been victims of discrimination in the implementation of the Policy.

#### **V. Issue and Standard of Review**

[40] It is well established that when this Court hears an appeal from a decision of the Federal Court disposing of an application for judicial review, it must consider whether the Federal Court chose the appropriate standard of review and, if so, whether it applied it correctly. It is also well established that this "approach accords no deference to the reviewing judge's application of the standard of review", which means that this Court is effectively called upon to "perfor[m] a de novo review of the administrative decision" (Northern Regional Health Authority v. Horrocks, 2021 SCC 42 at para. 10;

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36 at paras. 45 to 47 (Agraira); Mason v. Canada (Citizenship and Immigration), 2023 SCC 21 at para. 36; Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), 2024 SCC 4 at para. 15).

[41] The parties are now all of the view—and I agree with them—that the Federal Court selected the appropriate standard of review, that of reasonableness (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at paras. 23 to 25 (Vavilov)). However, they disagree on the way that the Federal Court applied that standard to the issues before it.

[42] This is the only issue before this Court: whether the Federal Court, in concluding as it did, correctly applied the reasonableness standard. As I just mentioned, to resolve this issue, we must examine the Tribunal Decision ourselves in light of the Attorney General’s allegations against it.

[43] The Attorney General essentially argues that the Tribunal erred in three ways:

- (i) For one, by conducting its analysis through a [translation] “lens” that effectively imposes on the federal government the obligation to promptly and completely resolve all of the problems that the Policy was intended to eliminate, an approach that the Attorney General argues is contrary to the teachings of the Supreme Court on equality rights and, in particular, the well-established principle of [translation] “incrementalism” in this field;
- (ii) For another, by ignoring a number of important contextual factors, including the ameliorative effect of the Policy and Program for the First Nation and the comparative evidence of the First Nation’s situation with respect to the provision of police services; and
- (iii) Lastly, by downplaying the province’s role in the development of policing services for Indigenous communities, which ultimately resulted in basing the assessment of whether or not the federal action was discriminatory not on the action itself, but on the province’s choice to place a given service at a given level of service.

[44] As we will see, these allegations overlap in certain respects.

## **VI. Analysis**

[45] Given that this Court must “ste[p] into the shoes” of the Federal Court such that “[its] focus is, in effect, on the [Tribunal’s] decision” (Agraira at para. 46), it is useful at the outset to recall some of the principles that should guide a reviewing court’s action in a judicial review, which aims “to ensure that exercises of state power are subject to the rule of law” (Vavilov at para. 82).

[46] As noted above, reasonableness is a deferential standard. This characteristic is fundamentally based on “the legislature’s institutional design choice to delegate certain matters to [administrative] decision makers” (Vavilov at para. 26). As a consequence of this choice, reviewing courts must avoid “‘undue interference’ with the administrative decision maker’s discharge of its functions” (Vavilov at para. 30).

[47] What this means, in practical terms, is that a reviewing court must refrain from deciding itself the issues that were before the administrative decision maker. In other words, a court “does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the ‘correct’ solution to the problem” (Vavilov at para. 83).

[48] Rather, the role of the reviewing court is to focus on the decision “actually made by the decision maker”. In so doing, it must examine the reasons underlying the decision with “respectful attention”, with the aim of ensuring that these reasons, which need not be assessed “against a standard of perfection”, reflect an “internally coherent and rational chain of analysis” and that the resulting decision



is “justified in relation to the facts and law that constrain the decision maker” (Vavilov at paras. 83-85, 91). Its effort must therefore focus on both the outcome of the decision and the reasoning that led to it (Vavilov at para. 87).

[49] Reasonableness provides for a robust review of administrative decision makers’ decisions, but because it goes to “the constitutional role of judicial review” (Vavilov at para. 82), the reviewing court will only intervene if there are flaws or shortcomings that are “sufficiently central or significant to render the [impugned] decision unreasonable.” This will be the case where the flaw or shortcoming is such “that [the decision] cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (Vavilov at para. 100).

[50] It is with these principles in mind that I undertake my review of the arguments advanced by the Attorney General against the reasonableness of the Tribunal Decision. I begin this review by also noting that the following elements of the Moore test are not in dispute in this case, namely (i) that the Complainant and the members of the First Nation have a characteristic protected by the Act, i.e. race and ethnic or national origin, and (ii) that, through the Policy and Program, the federal government is providing to the First Nation a service that is customarily available to the general public within the meaning of paragraph 5(b) of the Act.

[51] The issue therefore turns on how the Tribunal, using the Moore test, dealt with the issue of whether the Complainant and the First Nation experienced adverse treatment in the provision of this service and, if so, whether there was a link between this adverse treatment and the prohibited ground of discrimination at issue.

[52] As we have seen, the Attorney General advances three main arguments against the Tribunal in this regard: (i) the analytical framework applied to the allegation of prima facie discrimination was flawed; (ii) the Tribunal failed to take into account various contextual factors in this analysis, including, primarily, the ameliorative effect of the Policy and Program and the comparative evidence; and (iii) the province’s role in the development of policing services for Indigenous communities in the province was downplayed.

#### **A. The ““lens”” through which the Tribunal conducted its analysis of the allegation of prima facie discrimination**

[53] Here, the Attorney General argues that the Tribunal considered the allegation of prima facie discrimination through the wrong lens, which effectively imposed on the federal government the obligation to promptly and completely resolve all of the problems that the Policy was intended to address (Memorandum of the Attorney General at para. 67). The Attorney General argues that such an approach is contrary to the Supreme Court of Canada’s teachings that governments are permitted to address social inequalities incrementally, a principle, he points out, that is “deeply grounded in Charter jurisprudence” (Memorandum of the Attorney General at para. 71, citing mainly *R. v. Sharma*, 2022 SCC 39 at para. 65 (Sharma)).

[54] In connection with this first ground of appeal, the Attorney General states that, contrary to what the Tribunal said, he submitted no defence under subsection 16(1) of the Act, which, he acknowledges, applies only to cases of reverse discrimination. Rather, he claims that what he argued was that, in analyzing the allegation of prima facie discrimination, the Tribunal should have taken into account the principles of ameliorative programs underlying the concept of substantive equality, something it allegedly failed to do.

[55] According to the Attorney General, these principles are meant to protect the efforts made by the state to develop and adopt measures aimed at helping disadvantaged groups while affording it some leeway in this regard, which efforts invite [translation] “considerable deference” from the courts (Memorandum of the Attorney General at paras. 75-76).

[56] In short, the approach advocated by the Tribunal ultimately amounted to imposing on the state a general positive obligation to address social inequalities, an approach that the Attorney General goes on to say undermines the principle of the separation of powers, because it opens the door to the courts being pulled “into the complex legislative domain of policy and resource allocation” (Memorandum of the Attorney General at para. 110, citing *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para. 28).

[57] I cannot, for the following reasons, agree with the Attorney General’s allegations on this point, when considered in light of the standard of review applicable in this case.

[58] First, it should be noted that the Attorney General does not take issue with the general two-step analytical approach required to examine a discrimination complaint filed under the Act (Memorandum of the Attorney General at para. 62). The first step places the onus on the complainant to show—on a *prima facie* basis, or on the face of it—that he or she was the victim of a discriminatory practice. It is at this stage that the three-part Moore test comes into play (Memorandum of the Attorney General at para. 63), reiterated in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.*, 2015 SCC 39 at paragraphs 34 to 37 (Bombardier) and more recently in *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at paragraph 24—see, in the specific context of the Act, *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 at paragraph 76 (Johnstone). As the Attorney General correctly points out, at this stage of the analysis, the Tribunal should consider all of the evidence submitted to it, including the evidence adduced by the party against whom the complaint is directed (Memorandum of the Attorney General at para. 64).

[59] Once this first step has been successfully completed, it is up to the party against whom the complaint is brought—in this case, the Government of Canada—to justify its conduct on the basis of exemptions provided for in the Act. If it fails, the complaint will have been successfully established (Memorandum of the Attorney General at para. 65).

[60] That was the analytical framework that the Tribunal applied in the case at bar, although it was careful to add that the intentional or unintentional—or direct or indirect—nature of the alleged discriminatory practice was not relevant to the analysis (Tribunal Decision at paras. 23 to 32), which is entirely consistent with the applicable human rights case law (*Bombardier* at paras. 32, 40; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para. 91; *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 at 1139).

[61] At the heart of the Attorney General’s position on the analytical approach taken by the Tribunal in this case is the role of the case law developed under section 15 of the Charter with respect to the examination of a complaint made under a human rights statute (Memorandum of the Attorney General at para. 66). It sets out the interrelated principles that the Attorney General says the Tribunal was bound to in this case, namely incrementalism, the absence of a positive obligation on governments to remedy social inequalities or enact remedial legislation, and the deference that courts must show to legislative choices “as to just how quickly it should proceed in moving forward towards the ideal of equality” (Sharma at paras. 62-65).

[62] It is correct to say, as the Attorney General does, that the case law relating to section 15 of the Charter is relevant in human rights matters. In *Canada (Attorney General) v. Canada Human Rights Commission*, 2013 FCA 75 (CHRC FCA), this Court said that it “informs the content of the equality jurisprudence under human rights legislation and vice versa” (CHRC FCA at para. 19). In this sense, the case law in these two areas is mutually influential.

[63] I note that in that case, unlike here, the Attorney General criticized the Federal Court for not limiting its analysis to case law dealing specifically with the Act. In a context quite similar to ours (the funding of child welfare services) also involving paragraph 5(b) of the Act, the Federal Court was called upon to decide whether the Tribunal had erred in summarily dismissing the complaint before it on the basis that it was impossible for it to process the complaint without a proper comparator group. The

Federal Court found that the Tribunal had reached an unreasonable conclusion on this issue based on “a rigid and formulaic interpretation of the provision—one that is inconsistent with the search for substantive equality mandated by the Canadian Human Rights Act and Canada’s equality jurisprudence” (Canada (Human Rights Commission) v. Canada (Attorney General), 2012 FC 445 at para. 9 (CHRC FC); CHRC FCA at para. 8).

[64] What is important to remember in this regard is that, despite their obvious kinship, section 15 and human rights legislation do not use exactly the same legal tests in determining what is or is not discriminatory. As the Federal Court noted in CHRC FC, although this evolution did not take place in isolation, “the analytical frameworks under section 15(1) of the Charter and under federal and provincial human rights statutes have evolved separately and have taken distinct forms” (CHRC FC at para. 287).

[65] The differences between the two regimes were noted very early on by the Supreme Court in *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143 (Andrews). They are due in particular to the following:

- (a) Discrimination under subsection 15(1) of the Charter is limited to discrimination caused by the law, whereas discrimination under human rights legislation applies to conduct and behaviour, even private conduct and behaviour;
- (b) The enumerated grounds of discrimination in subsection 15(1) of the Charter are neither exclusive nor exhaustive, unlike those set out in human rights legislation; and
- (c) The exemptions or defences set out in human rights legislation, if established, “generally have the effect of completely removing the conduct complained of from the reach of the Act”, whereas infringements of a right guaranteed by section 15 of the Charter may be justified by the state under section 1 of the Charter. In other words, contrary to the way the Charter operates, acts of discrimination prohibited by human rights legislation—and the defences and exemptions that can be made against them—are “absolute”; there is therefore no “middle ground”, contrary to what the Charter regime contemplates when the state successfully discharges its burden of proof under section 1.

(Andrews at 175-176.)

[66] More fundamentally, this difference stems from the fact that the Charter and human rights legislation have distinct purposes: the Charter is a constitutional instrument, whereas human rights laws are not, even if they should be interpreted as almost constitutional in nature (*Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536 at 547 (Simpsons-Sears); *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at para. 8 (Robichaud)). It has been said that these laws aim to identify discrimination, whether intentional or not, and eliminate it, and that in this way they are essentially remedial, in the sense that they are not aimed at punishing conduct but at providing relief for the victims as well as remedies that are ““effective, consistent with the ‘almost constitutional’ nature of the rights protected”” (*Robichaud* at para. 13; *Simpsons-Sears* at 547).

[67] Finally, I note the warning of the Supreme Court majority in *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, an employment discrimination case that gave rise to a complaint under the Act. In this decision, the majority found that the Charter, absent a Charter challenge, ““cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have”” (Mossop at 582).

[68] What I take from that is that although the case law related to section 15 of the Charter and that related to human rights legislation might be mutually influential, section 15 case law cannot be indiscriminately applied to discrimination cases initiated under human rights legislation, i.e. without regard for the specific purpose and structure of these statutes. In particular, it is far from clear that the principles derived from the case law relating to section 15 of the Charter that the Attorney General raises

here (absence of a positive obligation to eliminate social inequalities, incrementalism, and deference to choices made to this end), which mainly focus on the relationship between Parliament and the courts, can be transposed to this case, nor is, at the very least, the extent to which they can be.

[69] The Attorney General was not very explicit on this point and it is therefore difficult to conclude, in light of the foregoing, that the Tribunal was bound by these principles as legal constraints on its analysis.

[70] In any event, assuming that they do apply, in my view, these principles are of little use to the Attorney General in the particular circumstances of this case, since the Tribunal considered the Government of Canada's conduct in light of its own commitment—made in the context of the historically difficult relations between First Nations and Canada's law enforcement and policing authorities—to contribute to ensuring that First Nations are able to have professional, effective and culturally appropriate police services. In this sense, it can be said that with this specific commitment, the Government of Canada had already established how quickly it would respond to problems arising from this historical context.

[71] The issue to be resolved in connection with the Complaint was therefore not whether the Government of Canada had done enough to address these issues and if, as the case may be, it should have done more, but whether the implementation of its commitment to the First Nation under the Policy had been discriminatory within the meaning of the Act. This was well understood by the Tribunal, such that there is no need for this Court to intervene with respect to the choice of analytical framework used by the Tribunal to conduct its examination of the allegation of prima facie discrimination. In other words, that choice, in these circumstances, bears the hallmarks of reasonableness.

[72] As for the role of the budget envelopes in the implementation of the Policy, which the Attorney General associates with the complex role conferred on Parliament in the allocation of resources, I will simply reiterate the limitations of such an argument by referring to the words of the Supreme Court in Moore. In that case, the elimination of a range of services for students with special needs for budgetary reasons in the context of a financial crisis was found to be discriminatory. There had been no assessment of the impact of these budget cuts on those students, leading the Supreme Court to say that it “will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier” (Moore at paras. 46-50).

[73] I take this to mean that the leeway afforded Parliament and the government in the allocation of resources is not limitless. In this case, according to the Tribunal, all parties were aware that the costs related to the First Nation's minimum needs for police services were higher than the amounts that were provided for in the agreements and, thus, in the budget envelopes. In the Tribunal's view, these envelopes provided no leeway to further support the First Nation's police service (Tribunal Decision at para. 342).

[74] Some might say that it was accordingly less costly to maintain the status quo with regard to the allocation of resources. In my opinion, the Tribunal could reasonably conclude, in the circumstances of this case, that this was not an impediment to the Complaint.

## **B. Consideration of the ameliorative effect of the Policy and Program and of the comparative evidence**

### **i. The ““ameliorative effect of the Policy”” argument**

[75] The Attorney General criticizes the Tribunal for not having given due weight to the ameliorative effect of the Policy and Program for the First Nation (Memorandum of the Attorney General at paras. 80 to 82).

[76] In connection with this ground of appeal, the Attorney General states that, contrary to what the Tribunal said, he is not making this argument as a defence under subsection 16(1) of the Act, which, he acknowledges, only applies to cases of reverse discrimination. Rather, he says that what he is arguing is that, in analyzing the allegation of *prima facie* discrimination, the Tribunal should have taken into account the principles of ameliorative programs [translation] “supporting the principle of substantive equality”, which the Tribunal allegedly failed to do. According to the Attorney General, these principles are meant to protect the efforts made by the state to develop and adopt measures to help groups that are disadvantaged based on a prohibited ground of discrimination, by affording it some leeway in this regard, with which the courts must refrain from interfering (Memorandum of the Attorney General at paras. 75-76).

[77] The respondents maintain that the Attorney General backtracked before this Court, since he did, in fact, raise the defence provided for in subsection 16(1) of the Act, which he now recognizes does not apply in this case. I note that in the Statement of Particulars he filed with the Tribunal, the Attorney General argued that the Program [translation] “may be regarded” as a program within the meaning of that provision (Appeal Book at 11425).

[78] In the alternative, the respondents submit that there is no legal basis for citing the ameliorative effect of the Policy and Program in the first step of the two-step examination of a complaint filed under the Act, i.e. the step where the complainant must establish that he or she has been the victim of *prima facie* discriminatory conduct, and that doing so distorts the *Moore* analytical framework.

[79] In my opinion, it was reasonable for the Tribunal to address the argument of the ameliorative effect of the Policy and Program within the context of subsection 16(1) of the Act, i.e. as a defence against a finding of *prima facie* discrimination rather than as an argument aimed at countering the allegation of *prima facie* discrimination underlying the Complaint. It was open to the Tribunal to do so in light of the submissions made to it in writing (Appeal Book, Respondent’s Statement of Particulars at 11425) and at the hearing (Appeal Book, Oral Argument Transcript at 12307 and 12308). It was also open to it to do so because of the rather shaky legal basis for the proposition that the ameliorative effect of a program should be an element of the first step of the two-step test for establishing the merits of a discrimination complaint under the Act or any other human rights legislation.

[80] This is so for two reasons. The first relates to the fact that nothing in either the Act or any of the case law under human rights legislation states that the analytical framework specific to this first step of the test—the *Moore* framework—allows for the ameliorative effect of a social protection program to be taken into account, even if the alleged perpetrator of the discriminatory conduct is permitted to present evidence at that step of the analysis, as acknowledged by the Tribunal. In my opinion, the right to adduce evidence to counter an allegation of *prima facie* discrimination should not be confused with the legal test that must be met to establish the existence of a *prima facie* discriminatory practice.

[81] The second reason is that agreeing with the Attorney General’s view would, for all intents and purposes, render subsection 16(1) of the Act redundant, since the ameliorative effect of the program at issue would allow for the complaint to be disposed of in the first step of the test and, therefore, without even having to resort to the defence based on the same effect. As noted above, there are certain limitations to this defence that, in theory, could not be used against the alleged perpetrator of the discriminatory practice at this stage of the analysis. It seems to me that Parliament could not have intended such a blurring of lines.

[82] In any event, it is questionable whether the ameliorative effect argument, even when considered for the purposes of determining whether there is *prima facie* discrimination, could have moved the Tribunal’s thinking in the direction sought by the Attorney General. In my view, it could not have done so.

[83] It may seem counterintuitive that a government policy intended to correct historical disadvantages associated with a disadvantaged group could be discriminatory. However, the ameliorative effect argument has its limitations, in the sense that it does not adequately suit cases where, as here, it is the implementation of the policy (e.g. through funding practices that hinder the achievement of its objectives) and not the policy itself that is alleged to be problematic.

[84] Pushed to its limit, this argument would allow for tolerance of discriminatory conduct on the basis that the disadvantaged group is now better off than it was before the policy was adopted, even if the policy's implementation gives rise to equality rights concerns. It seems to me that this would result in indirect condonation of the approach whereby there can be no discrimination if the harm or adverse treatment at issue is now, all in all, minimal, an approach rejected by the Supreme Court as being at odds with the very purpose of human rights legislation, which aims to ensure that there is no discrimination—of any level—without any consequences (Commission scolaire régionale de Chambly v. Bergevin, 1994 CanLII 102 (SCC), [1994] 2 S.C.R. 525 at 543).

[85] Finally, to the extent that the ameliorative effect of the Policy is argued in support of the principle of incrementalism, I reiterate what I said earlier, i.e. that this principle is of little assistance to the Attorney General in the particular circumstances of this case, since the Tribunal was called upon to determine not whether the Policy adequately addressed the problems that it sought to correct, but whether its implementation, intended to lead to the achievement of its objectives, violated paragraph 5(b) of the Act.

## **ii. Comparative evidence**

[86] According to the Attorney General, the Tribunal could not rely solely on the history of difficult relations between Canadian governments and First Nations to make a finding of discrimination; it also had to take into account the First Nation's substantive situation with regard to its police service (Memorandum of the Attorney General at paras. 88 to 91).

[87] The Attorney General further submits that this required a comparative analysis of the situation of the First Nation's police service with that of groups with the same or similar characteristics, something that the Tribunal erroneously refused to do on the grounds that First Nations occupy a unique position within Canada's constitutional structure, making any comparison difficult, if not impossible to carry out.

[88] The Attorney General contends that the Tribunal thus conducted a decontextualized analysis of the Complaint by ignoring, for example, the relatively similar nature of the First Nation's grievances regarding its police service (insufficient funding, inadequate equipment, etc.) compared to those of other police forces across Quebec (Memorandum of the Attorney General at paras. 84 and 85), or the fact that none of the communities adjacent to Mashteuiatsh has its own police service, that all of these communities have to pay for this service, and that they receive no financial contribution for this purpose from governments (Memorandum of the Attorney General at paras. 95 to 99).

[89] I note first that, as the Attorney General also acknowledges (Memorandum of the Attorney General at para. 102), the Tribunal did in fact compare the situation of the First Nation's police service against that of non-Indigenous agglomerations of fewer than 50,000 residents in Quebec receiving the minimal level of police services under the QPA, i.e. level 1. It concluded that the First Nation's police service did not have the means to provide this level of service.

[90] What the Tribunal did not consider itself required to do was to conduct, as the Attorney General invited it to, a comparative analysis of groups having the same or similar characteristics. Relying on Withler v. Canada (Attorney General), 2011 SCC 12 (Withler), which states that, in the search for substantive equality, an approach based on mirror comparator groups "can be detrimental to the analysis", and on this Court's decision in CHRC FCA, where the Court noted "the reduced role of comparator groups in the equality analysis" (CHRC FCA at para. 18), the Tribunal expressed the view

that it was sufficient for it to assess the “real effects, on the ground” of the implementation of the Program/Policy funding agreements by taking into account “the social, political, economic and historical contexts of First Nations” in policing (Tribunal Decision at paras. 316-320, 324-326).

[91] The Attorney General submits that according to the 2022 decision in Sharma, the Tribunal’s analysis “necessarily entail[ed] drawing a comparison between the claimant group and other groups or the general population” (Sharma at para. 31). However, the Supreme Court further reiterated that it no longer requires a “mirror comparator group” for this purpose (Sharma at para. 41). It also took care to specify that it did not intend to alter the two-step test for subsection 15(1) of the Charter, as set out in Withler, among others (Sharma at paras. 33-38).

[92] In CHRC FCA, this Court cited Withler in recalling that discrimination is a “fact-based inquiry. Among other things, it requires ‘going behind the facade of similarities and differences’, and taking ‘full account of social, political, economic and historical factors concerning the group’”. It also noted, again quoting Withler, that “‘the probative value of comparative evidence . . . will depend on the circumstances’” (CHRC FCA at para. 22).

[93] With respect, I see no fundamental flaws in the way the Tribunal assessed the comparative evidence in the record. It compared the basic police services—level 1 policing—available to other residents of Quebec. It found that despite the fact that the mission and responsibilities of the First Nation’s own police service and the training required of its police officers were the same as those of other police forces in the province, the First Nation could not provide the same level of service to its residents, as a result of the structural underfunding associated with shortcomings in the implementation of the Policy, which aims to ensure that First Nations can establish culturally appropriate police services. It then assessed this in light of the past—and in some cases, ongoing—difficult relations between First Nations and the police services imposed on them over the years. To that end, it was also open to the Tribunal to consider that First Nations people are among the most disadvantaged and marginalized members of Canadian society (R. v. Ipeelee, 2012 SCC 13 at para. 60), and that they occupy a unique position within Canada’s constitutional structure (CHRC FC at paras. 334-335).

[94] The Tribunal assessed the Attorney General’s comparative evidence but did not give it any weight, or at least, it did not give it the weight that the Attorney General would have liked. Ultimately, the Attorney General is asking us to reassess the comparative evidence in the hope that we will reach different conclusions. However, as I have already mentioned, according to Vavilov, that is not our role (Vavilov at para. 83).

[95] Again, we need not ask ourselves whether we would have reached the same conclusion as the Tribunal or what we would have decided if we had been in its place. Rather, we must ask whether its assessment of the comparative evidence bears the hallmarks of reasonableness. In my view, it does.

### **C. The Province’s Role in the Development of Police Services**

[96] Finally, the Attorney General submits that the Tribunal downplayed the role of the province [translation] “in developing police services for Indigenous communities”, thus skewing its assessment of the discriminatory nature of the federal action, which, according to the approach taken by the Tribunal, [translation] “will ultimately depend on the provincial legislature choosing to place a given service at a given service level” (Memorandum of the Attorney General at paras. 103-109).

[97] As previously indicated, the problem identified by the Tribunal is one of structural underfunding, which means that the First Nation is unable to provide its population with the lowest level of policing services available to other citizens of Quebec. In these circumstances, and without trivializing the fact that, constitutionally, the provision of policing services in Canada is first and foremost a provincial responsibility—a fact recognized by the Policy and, indeed, by the Tribunal—I find it difficult to see how

it can be said that the assessment of the discriminatory nature of the federal action, in light of the objectives of the Policy, is thus dependent on [translation] “the provincial legislature choosing to place a given service at a given service level”.

[98] The Policy, and the fact that it provides for the creation of self-administered Indigenous police forces responsive to the particular needs of the community, remain a matter of partnerships “based on trust, mutual respect and participation in decision-making.”” These partnerships allow for the negotiation and conclusion of tripartite agreements between the federal government, the provincial or territorial government concerned and the First Nation looking to create such a police force. Again, the creation of such police forces in Quebec also depends, under the QPA, on agreements with the Quebec government. In fact, the Tribunal accepted from the evidence that the Government of Canada works directly with the First Nation and the Quebec government to achieve the Policy’s objectives (Tribunal Decision at para. 225). For the purposes of the Policy, the service levels set out in the QPA serve as indicators and nothing more.

[99] In my opinion, as was the case with the argument that the Complaint was in fact a collateral attack on the QPA and therefore outside the Tribunal’s jurisdiction—an argument that was rejected by the Tribunal itself and by the Federal Court—the Attorney General is raising a false problem here.

## **VII. Conclusion**

[100] In light of the preceding, I agree with the Federal Court that the Tribunal Decision bears the hallmarks of reasonableness.

[101] However, this should not be interpreted as an endorsement of the Federal Court’s treatment of the Quebec Court of Appeal’s decision in Takuhikan CAQ, which the Federal Court found “very persuasive” and which it used “for the purposes of [its] analysis” (Federal Court Decision at para. 73).

[102] As persuasive as that decision was, it concerned—as I had occasion to say at the outset of these reasons—a related case that the Tribunal had actually found, in very detailed reasons, to be irrelevant to what it had to decide because that case raised different issues. In other words, the Tribunal expressly excluded from the constraints imposed on it the judgment on the merits in that case, which, as noted, was favourable to the federal Crown.

[103] In my view, the Federal Court’s analysis should have been guided by the Tribunal’s decision—which it did not challenge—to exclude from its own analysis any considerations regarding this related case. In not doing so, the Federal Court undertook its own review, so to speak, of the issues that were before the Tribunal, based on an element that, in these very particular circumstances, could be qualified as extraneous to the case, i.e. one that was unrelated to the guidelines or constraints that the Tribunal had established to frame its evaluation of the issues to be decided. In my opinion, it was not allowed to do this (Vavilov at para. 83).

[104] In fact, these same considerations apply to this Court with respect to the Supreme Court’s recent judgment in Takuhikan SCC.

[105] For all of these reasons, I propose that the appeal be dismissed with costs to the Complainant. In keeping with its policy, the Commission does not seek costs.

[106] Since the Complainant is seeking costs [translation] “in a lump sum fixed in accordance with Rule 400(1) [of the Federal Courts Rules]”, I would grant the Complainant and the Attorney General a period of 10 days from the date of these reasons to endeavour to reach an agreement regarding such an amount and to notify the Court of the amount they agree upon or that their discussions have failed, as the case may be.

“René LeBlanc”



J.A.

“I agree.

George R. Locke J.A.”

“I agree.

Sylvie E. Roussel J.A.”

Certified true translation

Melissa Paquette, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-95-23

STYLE OF CAUSE:

THE ATTORNEY  
GENERAL OF  
CANADA v.  
GILBERT  
DOMINIQUE (on  
behalf of the  
members of the  
Pekuakamiulnuatsh  
First Nation) and  
CANADIAN  
HUMAN RIGHTS  
COMMISSION

PLACE OF HEARING:

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Quebec

DATE OF HEARING:

FEBRUARY  
20, 2024

REASONS FOR JUDGMENT BY:

LEBLANC J.A.

CONCURRED IN BY:

LOCKE J.A.

ROUSSEL J.A.

DATED:

JANUARY 28,  
2025

APPEARANCES:

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|                                   |                                                                                    |
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| Canadian Human Rights Commission  | For the respondent                                                                 |
| Ottawa, Ontario                   | CANADIAN HUMAN RIGHTS COMMISSION                                                   |

TAB 4

# Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada, 2021 FC 969 (CanLII), [2022] 2 FCR 614

Source: Federal Court  
 Date: 2021-09-29  
 File number: T-1559-20; T-1621-19  
 Other citation: [2021] FCJ No 104 (QL)

## Citation:

**Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada, 2021 FC 969 (CanLII), [2022] 2 FCR 614, <<https://canlii.ca/t/jjblh>>, retrieved on 2026-01-02**

## Acknowledgements:

The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

## Most recent unfavourable mention

T-1559-20

T-1621-19

2021 FC 969

Attorney General of Canada (*Applicant*)

v.

First Nations Child and Family Caring Society of Canada, Assembly of First Nations, Canadian Human Rights Commission, Chiefs of Ontario, Amnesty International and Nishnawbe Aski Nation (*Respondents*)

and

Congress of Aboriginal Peoples (*Intervener*)

**Indexed as: Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada**

Federal Court, Favel J.—By videoconference, June 14-18; Ottawa, September 29, 2021.

*Human Rights — Judicial review of decisions by Canadian Human Rights Tribunal (Tribunal) in 2019 CHRT 39 (Compensation Decision), 2020 CHRT 20 (Eligibility Decision) — Both decisions originating from Tribunal decision in 2016 CHRT 2 (Merit Decision) — Merit Decision establishing that First Nations children, families living on reserve and in Yukon denied equal child, family services under Canadian Human Rights Act (CHRA), s. 5(a) and adversely differentiated under s. 5(b) — Finding of discrimination pertaining to Canada's funding of First Nations Child and Family Services Program (FNCFS Program), funding of Jordan's Principle for related health services to First Nations children — In Compensation Decision, Tribunal awarding compensation to First Nations children, parents, or*

grandparents — In Eligibility Decision, Tribunal confirming that categories of children currently used by Canada appropriate for purposes of Jordan's Principle — However, adding two additional categories of First Nations children eligible for Jordan's Principle — Applicant essentially submitting that Tribunal exceeded its authority under CHRA, that reasonable exercise of remedial jurisdiction must be consistent with nature of complaint, evidence and statutory framework — Also submitting no evidence related to two additional classes of First Nations children, that Tribunal denied it procedural fairness — Arguing that Tribunal only had authority to deal with complaint, that there was insufficient evidence of individual harms before Tribunal — Whether Compensation, Eligibility Decisions reasonable; whether Canada denied procedural fairness — Compensation Decision reasonable — Nothing in language of CHRA preventing awards of multiple remedies — Large, liberal approach to human rights legislation permitting this method — Tribunal not going beyond scope of complaint — Not transforming complaint from systemic discrimination to individual discrimination, therefore not unreasonably awarding damages to individuals — First Nations children, their families identified as subject matter of complaint or, alternatively, as victims — Evidence of both systemic, individual discrimination, evidence of harms entitling Tribunal to award remedies for both — Tribunal properly assessed inter-relationship between complaint, parties' statements of particulars — Complaint form not serving purposes of pleading — Inappropriate to read quasi-constitutional legislation in way that denies victims resolution of their complaint because of technicality — Applicant not prejudiced by alleged transformation of complaint — Applicant could not contest compensatory consequences of systemic harm when appearing to accept finding that widespread discrimination occurred — Tribunal sought to enable negotiation, practical solutions to implementing its order, to give full recognition of human rights — Properly analyzed CHRA, understood that victims, complainants can be different people — CHRA, s. 50(3)(c) giving Tribunal broad discretion to accept any evidence it sees fit — Tribunal not necessarily needing to hear from all alleged victims of discrimination in order to compensate all of them — Nothing in CHRA requiring testimony from small group of representative victims — No need in this case to particularize specific harms flowing from removal of children from their families — Tribunal considered removal itself, harm to dignity — Testimony of children, other victims therefore unnecessary — Tribunal not erring in finding extensive evidence of both individual, systemic discrimination — CHRA not designed to address different levels of damages or engage in processes to assess fault-based personal harm — Open for Tribunal to find that financial awards under CHRA serving particular purposes unique to human rights context — Tribunal's finding of wilful, reckless discrimination not unreasonable — Tribunal reasonably exercised its jurisdiction as permitted under CHRA — Jordan's Principle not beyond scope of Tribunal's inquiry — Eligibility Decision not unreasonable — Inclusion of two additional categories of children not beyond Tribunal's jurisdiction or scope of complaint — Clear nexus between Eligibility Decision, original complaint — Live issue for Tribunal to define meaning of "First Nations child" — Extending eligibility for Jordan's Principle beyond confines of Indian Act not meaning Tribunal acted outside jurisdiction — Eligibility Decision prevented future discrimination — Tribunal enjoying large remedial jurisdiction — Eligibility Decision not determining legal effect of who is First Nations child — Rather, determining parameters to assist parties in deciding who is eligible for Jordan's Principle, compensation — Applicant not denied procedural fairness — Applications dismissed.

These were applications for judicial review of various decisions of the Canadian Human Rights Tribunal (Tribunal), and more specifically, of its decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 39 (Compensation Decision) and in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2020 CHRT 20 (Eligibility Decision).

Both decisions originated from the Tribunal decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (Merit Decision). The Merit Decision dealt with a human rights complaint made by the respondents First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN). The Caring Society and the AFN alleged that Canada was violating the *Canadian Human Rights Act* (CHRA) by discriminating against First Nations children and families who live on reserve by underfunding the delivery of child and family services. It was established in the

Merit Decision that First Nations children and families living on reserve and in the Yukon were denied equal child and family services under paragraph 5(a) of the CHRA and/or were adversely differentiated under paragraph 5(b). The Tribunal's finding of discrimination pertained to Canada's funding of the First Nations Child and Family Services Program (FNCFS Program)[1]<sup>1</sup> and the funding of Jordan's Principle[2]<sup>2</sup> for related health services to First Nations children. The Tribunal ordered that the applicant immediately cease its discriminatory practices and engage in any reforms needed to bring itself into compliance with the Merit Decision. It also ordered the immediate implementation of Jordan's Principle's full meaning and scope. In the Compensation Decision, the Tribunal found that there were victims of Canada's discriminatory practices who were entitled to compensation. The Tribunal found that Canada's practices resulted in First Nations children being removed from their homes, families, and communities. According to the Tribunal, Canada acted with little to no regard for the consequences of the removal of First Nations children. As a result, the Tribunal awarded compensation to First Nations children, parents, or grandparents. The Tribunal ordered Canada to define eligibility for victims, create an appropriate methodology to govern distribution, and consult with the other parties who could provide comments and suggestions about the orders. In the Eligibility Decision, the Tribunal confirmed that the categories of children currently used by Canada were appropriate for the purposes of Jordan's Principle. However, the Tribunal found, *inter alia*, that two new categories proposed by the Caring Society were within the scope of the complaint and thus eligible for Jordan's Principle: First Nations children, without Indian status, who are recognized as citizens or members of their respective First Nations; and First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status. In 2021, the Tribunal approved the parties' compensation framework and its accompanying schedules.

The applicant essentially submitted that the Tribunal exceeded its authority under the CHRA in making the orders in question, that a reasonable exercise of remedial jurisdiction must be consistent with the nature of the complaint, the evidence and the statutory framework, and that both decisions failed on these points. The applicant submitted that there was no evidence related to the two additional classes of First Nations children which the Tribunal ruled were eligible for consideration. The applicant also submitted that the Tribunal denied it procedural fairness by, *inter alia*, changing the nature of the complaint in the remedial phase; failing to provide notice that it was assessing the ongoing nature of the discrimination; and failing to provide sufficient reasons concerning the individual remedies. The applicant argued that the Tribunal only had authority to deal with the complaint, which was in relation to an allegation of systemic underfunding. It also submitted that there was insufficient evidence of individual harms before the Tribunal.

The issues were whether the Compensation and Eligibility Decisions were reasonable, and whether Canada was denied procedural fairness.

*Held*, the applications should be dismissed.

The Compensation Decision was reasonable. The Tribunal's approach to the retention of jurisdiction has precedent. There is nothing in the language of the CHRA that prevents awards of multiple remedies. The large, liberal approach to human rights legislation permits this method. The fact that the Tribunal remained seized of this matter allowed it to foster dialogue between the parties. This dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. The decision in *Canada (Attorney General) v. Grover* supports the basis for the dialogic approach. The Tribunal did not go beyond the scope of the complaint in arriving at its decision. The Tribunal did not transform the complaint from systemic discrimination to individual discrimination and, therefore, did not unreasonably award damages to individuals. It was evident that from the outset, First Nations children and their families were identified as the subject matter of the complaint or, alternatively, as victims. In

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1. The purpose of the FNCFS Program is to ensure that on reserve and Yukon-based First Nations children and families receive culturally appropriate assistance or benefits that are reasonably comparable to services provided to residents in other provinces.  
 2. Jordan's Principle provides that where a government service is available to all other children and a jurisdictional dispute arises regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service.

the present matter, there was evidence of both systemic and individual discrimination and evidence of harms entitling the Tribunal to award remedies for both. Discrimination is not to be understood in a binary way, or to be an “either or” proposition. The Tribunal properly assessed the inter-relationship between the complaint and the parties’ statements of particulars. It stated that the complaint form is just one aspect of the complaint and that it does not serve the purposes of a pleading. This appeared to be consistent with the overall objective of the CHRA. The applicant’s argument that the respondents did not identify the victim of the complaint was technical in nature. It is inappropriate to read quasi-constitutional legislation in a way that denies victims resolution of their complaint because of a technicality. A complaint form only provides a synopsis of the complaint, which will become clearer during the course of the process, and as the conditions for the hearing are defined in the statement of particulars. On the face of the record herein, the applicant was not prejudiced by the alleged transformation of the complaint. The applicant could not contest the compensatory consequences of systemic harm when the applicant appeared to accept the Tribunal’s finding that widespread discrimination occurred. The quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victim, which does not require medical or other type of evidence to be proven. The decisions following the Merit Decision were not an “open-ended series of proceedings.” Rather, the subsequent proceedings reflect the Tribunal’s management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implementing its order and to give full recognition of human rights. The Tribunal properly analyzed the CHRA and understood that victims and complainants can be different people. Paragraph 50(3)(c) of the CHRA gives the Tribunal broad discretion to accept any evidence it sees fit, even if that evidence would not be available in a court of law, including hearsay. The Tribunal does not necessarily need to hear from all the alleged victims of discrimination in order to compensate all of them for pain and suffering. There is nothing in the CHRA that requires testimony from a small group of representative victims either. In this case, there was no need to particularize the specific harms flowing from the removal of children from their families. It is the removal itself and the harm to dignity that the Tribunal was considering. The testimony of children and other victims was therefore unnecessary. The Tribunal did not err in finding that it had extensive evidence of both individual and systemic discrimination. The idea that victims should be barred from individual remedies because of the systemic nature of the harm is unsupported by the language in the CHRA. The CHRA is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim’s loss of freedom from discrimination, experience of victimization, and harm to dignity. This falls squarely within the jurisdiction of the Tribunal. It was open for the Tribunal to find that financial awards under the CHRA serve particular purposes that are unique to the human rights context. The Tribunal’s finding of wilful and reckless discrimination was not unreasonable. The Tribunal properly considered the factual record in determining whether to award damages. There was more than enough evidence in the form of independent reports to ground this finding. The Tribunal reasonably determined definitions for the terms “essential services”, “service gaps”, and “unreasonable delay”. The Tribunal based its determinations on the Compensation Decision and with the overall goal of remedying and preventing discrimination. It reasonably exercised its jurisdiction as permitted under the CHRA. The issues pleaded were broad enough to encompass matters relating to Jordan’s Principle. The Tribunal made rulings in 2016 and 2017 that expressly rejected the applicant’s argument that Jordan’s Principle was beyond the scope of the Tribunal’s inquiry.

The applicant did not succeed in establishing that the Eligibility Decision was unreasonable. The inclusion of two additional categories of children was not beyond the Tribunal’s jurisdiction or the scope of the complaint. It was within the general and remedial jurisdiction of the Tribunal to prevent further discrimination by adding additional categories for eligibility that extend beyond the *Indian Act*. As for the scope of the complaint, there was a clear nexus between the Eligibility Decision and the original complaint. Additionally, it was a live issue for the Tribunal to define the meaning of “First Nations child” because the parties had not yet determined the scope of this term. Just because the Tribunal extended eligibility for Jordan’s Principle beyond the confines of the *Indian Act*, does not mean that the Tribunal acted outside its jurisdiction or that it determined that the status provisions were invalid. The Eligibility Decision prevented future discrimination, which is consistent with the purpose of the Tribunal’s

jurisdiction. The Tribunal enjoys a large remedial jurisdiction and this jurisdiction should be interpreted liberally in light of the quasi-constitutional nature of the CHRA. The Eligibility Decision was not determining the legal effect of who is a First Nations child. Rather, it determined certain parameters to assist the parties in deciding who is eligible for Jordan's Principle and, consequently, compensation.

Finally, the applicant was not denied procedural fairness. The Tribunal afforded all parties a full picture of what was to be determined at each stage of the proceedings and sought submissions from the parties. There were no surprises.

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APPLICATIONS for judicial review of the decisions by the Canadian Human Rights Tribunal awarding compensation to First Nations children, parents, or grandparents (2019 CHRT 39) and adding two categories of First Nations children eligible for Jordan's Principle (2020 CHRT 20). Applications dismissed.

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*The following are the reasons for judgment and judgment rendered in English by*

Favel J:

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### I. Nature of the Matter [table of contents]

[1] This is a judicial review brought by the applicant, the Attorney General of Canada representing the Minister of Indigenous Services Canada (Canada). The applicant requests that various decisions of the Canadian Human Rights Tribunal (Tribunal), all of which are listed below, be set aside and remitted to a different panel. The applications for judicial review, as amended, relate to the following Tribunal decisions:

(1) The September 6, 2019, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 39 (Compensation Decision). This is the decision at issue in the Federal Court File T-1621-19. The following Tribunal Decisions modified the Compensation Decision:

(i) The April 16, 2020, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 7 (Additional Compensation Decision);

(ii) The May 28, 2020, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 15 (Definitions Decision);

(iii) The February 11, 2021, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 6 (Trust Decision); and

(iv) The February 12, 2021, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2021 CHRT 7 (Framework Decision).

(2) The July 17, 2020, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 20 (Eligibility Decision). This is the decision at issue in the Federal Court File T-1559-20. The following Tribunal decisions modified and confirmed the Eligibility Decision:

(i) The November 25, 2020, decision in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2020 CHRT 36 (2020 CHRT 36), as incorporated into the Framework Decision.

[2] The Compensation and Eligibility Decisions originate from a January 26, 2016, Tribunal decision (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (Merit Decision)). The Merit Decision dealt with a February 23, 2007, human rights complaint (Complaint) made by the First Nations Child and Family Caring Society of Canada (Caring Society) and the Assembly of First Nations (AFN). The Tribunal found sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (CHRA). In the Merit Decision, the Caring Society and the AFN established that First Nations children and families living on reserve and in the Yukon were denied equal child and family services under paragraph 5(a) of the CHRA and/or were adversely differentiated under paragraph 5(b) of the CHRA. The Tribunal's finding of discrimination pertains to Canada's funding of the First Nations Child and Family Services Program (FNCFS Program) and the funding of Jordan's Principle for related health services to First Nations children.

[3] Section 5 of the CHRA states that "[i]t is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public **(a)** to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or **(b)** to differentiate adversely in relation to any individual, on a prohibited ground of discrimination."

[4] The application for review of the Compensation Decision is dismissed.

[5] The application for judicial review of the Eligibility Decision is dismissed.

## II. Background and Context [ table of contents]

[6] The background context and procedural history leading to these applications for judicial review are complex to say the least. The underlying matters in this application have been ongoing for over a decade. The submissions and the record in these applications were extensive. While only two sets of decisions are the subject of this judicial review, it is useful to provide an overview of some key concepts and related Tribunal decisions to establish the proper context.

### A. The Complaint [table of contents]

[7] In 2007, the Caring Society and the AFN filed the Complaint with the Canadian Human Rights Commission (Commission). They alleged that Canada was violating the CHRA by discriminating against First Nations children and families who live on reserve by underfunding the delivery of child and family services. They argued that this discrimination was based on race and national or ethnic origin. The Complaint noted the dramatic overrepresentation of First Nations children in foster care, the need for the proper implementation of Jordan's Principle (discussed in more detail below), and the systemic and ongoing nature of the discrimination. The Complaint also described past efforts by the Caring Society, AFN, and others to advocate for program reform and additional funding. The Commission exercised its discretion and referred the Complaint to the Tribunal for a hearing.

[8] Canada filed a judicial review application requesting that this Court quash the Commission's referral decision and prohibit the Tribunal from hearing the Complaint. In November 2009, the application was stayed (*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada* (November 24, 2009), T-1753-08 (F.C.)). Canada sought judicial review of the stay decision and this Court dismissed the application (*Canada (Attorney General) v. First Nations Child and Family Caring Society of Canada*, 2010 FC 343, 187 A.C.W.S. (3d) 426).

### B. FNCFS Program [table of contents]

[9] In Canada, each province and territory has its own legislation that governs the delivery of services to children and families in need. However, First Nations children living on reserve and in the Yukon receive child and family services from the federal government through the FNCFS Program. This is because the federal government has "legislative authority" over "Indians, and Lands reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]. The separation of powers is the driving force behind the types of jurisdictional disputes discussed in this decision.

[10] At the time the Complaint was filed, FNCFS agencies were funded by Canada according to a funding formula known as Directive 20-1 or as the Enhanced Prevention Focused Approach. In Ontario, funding is provided to FNCFS agencies under the 1965 Child Welfare Agreement. Where there are no FNCFS agencies within a province, provinces provide the service and may be reimbursed by Canada.

[11] The purpose of the FNCFS Program is to ensure that on reserve and Yukon-based First Nations children and families receive culturally appropriate assistance or benefits that are reasonably comparable to services provided to residents in other provinces. On reserve and Yukon-based First Nations children and families also receive other kinds of social services and products from the federal government.

### C. Jordan's Principle [table of contents]

[12] Jordan's Principle is named after Jordan River Anderson, who was from Norway House Cree Nation in Manitoba. Jordan had complex medical needs. His parents surrendered him to provincial care so that he could receive the necessary treatment. Jordan could have gone to a specialized foster home

but Canada and Manitoba disagreed over who should pay the foster care costs. Jordan died at age five having never lived outside the hospital. Based on these circumstances, Jordan's Principle was established. Jordan's Principle is described in the Merit Decision as follows [at paragraph 351]:

Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. [Emphasis in original.]

[13] The House of Commons unanimously passed Jordan's Principle on December 12, 2007, in House of Commons Motion 296:

... That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[14] A Memorandum of Understanding on Jordan's Principle (MOU) was signed between Aboriginal Affairs and Northern Development Canada (AANDC) and Health Canada in 2009. The MOU indicated that AANDC's role in responding to Jordan's Principle was by virtue of the range of social programs it provides to First Nations people, including special education, assisted living, income assistance, and the FNCFS Program. The MOU was renewed in 2013.

#### D. Parties before the Tribunal [table of contents]

[15] The Caring Society and the AFN were co-complainants before the Tribunal. The Caring Society is a non-profit organization committed to research, policy development, and advocacy on behalf of First Nations agencies serving the well-being of children, youth, and families. The AFN is a national advocacy organization working on behalf of over 600 First Nations. The Commission represented the public interest. Canada was the respondent. After the Tribunal requested an inquiry into the Complaint, the Tribunal granted interested party status to the Chiefs of Ontario (COO), who advocates on behalf of 133 First Nations in Ontario, and Amnesty International (Amnesty), an international non-governmental organization committed to the advancement of human rights across the globe. Nishnawbe Aski Nation (NAN), representing 49 First Nations' interests in Northern Ontario, and the Congress of the Aboriginal Peoples (CAP), representing off-reserve First Nations, Métis, and Inuit, were added after the Merit Decision.

### III. Procedural History [table of contents]

[16] While it is not possible to summarize every legal argument or submission relied on by the parties in every proceeding, I will summarize the Tribunal's main decisions or rulings and the main submissions that are relevant to disposing of the applications before this Court.

#### A. Canada's motion to strike the Complaint [table of contents]

[17] In December 2009, the applicant brought a preliminary motion at the Tribunal to strike the Complaint. It argued that its responsibility to fund the FNCFS Program and Jordan's Principle did not constitute a "service" within the meaning of the CHRA. It also characterized the Complaint as a cross-jurisdictional comparison of services and argued that such comparisons cannot establish discrimination.



[18] In March 2011, the Tribunal granted the applicant's motion to strike based on the comparison issue. However, in April 2012, this Court quashed that decision and reinstated the Complaint (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, [2013] 4 F.C.R. 545). In March 2013, the Federal Court of Appeal dismissed the applicant's appeal of that decision (*Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120).

#### B. Retaliation [table of contents]

[19] In 2013, the Tribunal held a hearing into the allegations that the applicant had retaliated against the Caring Society's executive director, Dr. Blackstock. The Tribunal found that the applicant had retaliated against Dr. Blackstock by prohibiting her participation in a COO meeting held at the Minister's Office. The Tribunal ordered the applicant to pay \$10 000 for retaliation and \$10 000 for pain and suffering (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [cited above]). The applicant did not seek judicial review of that decision.

#### C. The Merit Decision [table of contents]

[20] The Complaint hearing took approximately 70 days from February to October 2013. There were 25 witnesses and 500 documentary exhibits. Partway through the hearing, there was a three-month delay when the Caring Society discovered that the applicant had knowingly failed to disclose 100 000 documents (Merit Decision, at paragraphs 14–16). Many of these documents were later held to be "prejudicial to Canada's case and highly relevant" (*First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)*, 2019 CHRT 1 (2019 CHRT 1), at paragraph 13). The Tribunal issued a consent order, requiring the applicant to compensate the Caring Society, the AFN, and the COO for "lack of transparency and blatant disregard" for the Tribunal process and because of "the serious impacts it had on the proceedings" (2019 CHRT 1, at paragraph 30).

[21] The applicant's submissions before the Tribunal included an overview of its commitment to the funding of the FNCFS Program, Jordan's Principle, and other programs. It submitted that there was insufficient evidence to substantiate the Complaint and that the documentary evidence should be given little, if any weight. The documentary evidence included Auditor General reports, provincial Children's Advocates reports, the Blue Hills report, and the Wen:De reports. It also submitted that the Tribunal lacked jurisdiction to assess violations of international law or to provide remedies for any such alleged breaches. The Tribunal was also exceeding its jurisdiction by intruding into the role of the Executive branch of the government and formulating policy and funding decisions.

[22] The applicant also submitted that Jordan's Principle was not a child welfare concept. Therefore, it was beyond the scope of the Complaint. Canada's response to Jordan's Principle did not demonstrate a *prima facie* case of discrimination.

[23] The applicant did not argue that the Tribunal lacked jurisdiction to grant financial awards. Rather, Canada argued that there was insufficient evidence brought by the complainants to support the requested monetary award for "victims" or "[children] being removed from their home".

[24] The Tribunal found that the applicant had violated section 5 of the CHRA in two ways. First, the FNCFS Program discriminated against First Nations children and families on reserve and in the Yukon. The FNCFS Program resulted in inadequate fixed funding that hindered the delivery of culturally appropriate child welfare services, created incentives for its agencies to take First Nations children into care, and failed to consider the unique needs of First Nations children and families.

[25] Second, the applicant discriminated by taking an overly narrow approach to Jordan's Principle. This resulted in service gaps, delays, and denials. The Tribunal stated the following about the connection between the FNCFS Program and Jordan's Principle [Merit Decision, at paragraph 362]:

In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan's Principle on the following basis, at page 16:

Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children [...] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSAs in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources. [Emphasis in original.]

[26] The Tribunal found that the applicant was aware that the FNCFS Program was creating inequalities and disparities for First Nations children trying to access essential services. It also noted that there were evidence-based solutions, as referenced in the National Policy Review reports of 2000 and the three *Wen:De Reports*, which Canada participated in. Despite having awareness of the problem and potential solutions, the applicant had failed to make any substantive changes to address the issues (Merit Decision, at paragraphs 150–185). This decision also referred to the 2008 Auditor General Report, the 2008 and 2010 Report on the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General, and various other reports and testimonies (Merit Decision, at paragraphs 186–216).

[27] The Merit Decision recognized that the applicant's discriminatory funding practices caused First Nations children and families living on reserves and in the Yukon to suffer. It found that "these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system" (Merit Decision, at paragraph 459). The Tribunal ordered that the applicant immediately cease its discriminatory practices and engage in any reforms needed to bring itself into compliance with the Merit Decision. It also ordered the immediate implementation of Jordan's Principle's full meaning and scope. Finally, the Tribunal sought submissions on remedies.

[28] The Tribunal remained seized of the Complaint in order to oversee the applicant's efforts to bring itself into compliance with the Merit Decision. It also remained seized to resolve outstanding issues related to victims' financial compensation. The applicant did not seek judicial review of the Merit Decision.

#### D. Decisions following the Merit Decision [table of contents]

[29] After the Merit Decision, the Tribunal held several times that it retained jurisdiction to monitor matters to ensure discrimination ceased. The complexity of this proceeding is reflected in the summaries of certain other decisions, the most pertinent of which are below.

(1) *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10 (2016 CHRT 10) [table of contents]

[30] In April 2016, the Tribunal ordered the applicant to take immediate action on certain findings in the Merit Decision and to provide a comprehensive report on actions taken. While it acknowledged that the applicant was taking immediate steps to consult on ways to remedy the discrimination, it reminded the applicant that it had ordered the immediate cessation of the discrimination. The Tribunal also explained that there is an increased need to retain jurisdiction because remedial orders responding to systemic discrimination can be difficult to implement.

[31] The Tribunal advised that it would address the outstanding questions of remedies in three steps [at paragraphs 4 and 5]:

.... First, the panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

[32] The applicant did not seek judicial review of this decision.

(2) First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 16 (2016 CHRT 16) [table of contents]

[33] In September 2016, the Tribunal found that the applicant was restricting the application of Jordan's Principle to First Nations children on reserve, as opposed to all First Nations children. The Tribunal also found that the applicant was similarly restricting its application to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (2016 CHRT 16, at paragraph 119). The Tribunal clarified that Jordan's Principle extends to all First Nations children, whether they live on or off reserve (2016 CHRT 16, at paragraphs 118–119).

[34] The Tribunal requested that the applicant provide further information on its consultations regarding Jordan's Principle and the process for dealing with claims. It ordered Canada to provide the names and contact information of all Jordan's Principle focal points to each FNCFS agency. The Tribunal noted that the applicant's new formulation of Jordan's Principle once again appeared to be more restrictive than that created by the unanimous House of Commons motion and ordered Canada to address this (2016 CHRT 16, at paragraphs 118–119 and 160). Canada did not seek judicial review of this ruling.

(3) First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 14 (2017 CHRT 14) [table of contents]

[35] In May 2017, the Tribunal found that the applicant had still not brought itself into compliance with the prior rulings on Jordan's Principle. This decision also addressed NAN's submissions concerning a tragic situation in Wapekeka First Nation (Wapekeka), located in northern Ontario.

[36] In July 2016, Wapekeka made a proposal to Health Canada seeking funding for an in-community mental health team. In the proposal, Wapekeka alerted Health Canada to concerns about a suicide pact amongst a group of young girls. In January 2017, two twelve-year-old children tragically took their own lives.

[37] NAN amended its notice of motion seeking remedies with respect to the loss of these children. NAN filed two affidavits to support its amended motion. One affidavit was from Dr. Michael Kirlew, a community and family physician for Wapekeka, and an Investigating Coroner for Ontario's northwest region. Dr. Kirlew's evidence was that a Health Canada official had told him that Health Canada delayed responding to the Wapekeka proposal because it came at an "awkward time" in the federal funding cycle.

[38] The applicant filed an affidavit of Robin Buckland, then Executive Director of the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch (FNIHB) and national lead for Jordan's Principle. In cross-examination, Ms. Buckland agreed that the Wapekeka proposal identified an example of a "service gap" for children. She could not explain why Canada was not meeting the needs identified in the proposal.

[39] NAN submitted that there is a need to define what constitutes a "service gap" under Jordan's Principle. Doing so will help ensure First Nations children properly receive sufficient government services. NAN also argued that a claimant should not automatically be denied compensation eligibility if

they are unable to demonstrate a specific request for a service or support. NAN's submissions informed the definition of "service gap" included in the Tribunal's ordered compensation framework (Compensation Framework).

[40] The Tribunal gave precise directions on how to process Jordan's Principle claims, reiterating two of its key purposes. First, an important goal of Jordan's Principle is to ensure that First Nations children do not experience gaps in services due to jurisdictional disputes. Second, because First Nations children may have additional needs, the delivery of services can go beyond what is otherwise not available to other persons. The Tribunal noted that a key concept of Jordan's Principle is that it is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

(4) First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35 (2017 CHRT 35) [table of contents]

[41] The applicant sought judicial review of 2017 CHRT 14 with respect to certain details about case conferences and timelines but discontinued this application after the Tribunal issued a consent order in November 2017. The Tribunal found that the applicant was in substantial compliance with its directions regarding Jordan's Principle.

[42] The Tribunal set out key points to inform the applicant's definition and application of Jordan's Principle. First, the applicant must eliminate service gaps and engage a child-first approach that applies equally to all First Nations children, whether on or off reserve. Additionally, if a government service is available to all other children, the department of first contact must pay for the service without first engaging in any administrative procedure for funding and approval. Further, the applicant should only engage in clinical case conferencing with professionals who have the relevant competencies and training. These consultations are only required as reasonably necessary to determine the requestor's clinical needs. The department of first contact can seek reimbursement after the recommended service is approved and funding is provided.

[43] The Tribunal further stated that where a government service is not necessarily available to all other children or is beyond the normative standard of care, the department of first contact must still evaluate whether a requested service should be provided. The department of first contact must pay for the service the First Nations child requests, without engaging in any administrative procedure before the recommended service is approved and funding is provided. The applicant may also consult with the family, First Nation community, or service providers to fund services within set timeframes.

[44] Lastly, while Jordan's Principle can apply to jurisdictional disputes between governments and within the same government, such disputes are not a requirement for the application of Jordan's Principle.

(5) First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2018 CHRT 4 (2018 CHRT 4) [table of contents]

[45] In February 2018, the Tribunal again dealt with issues of noncompliance by the applicant. It found that discrimination was continuing to occur on a national scale and the lack of prevention programs was leading to a disproportionate apprehension of First Nations children. The applicant was ordered to pay FNCFS agencies' actual costs for certain matters and create a consultation committee where all the parties would meet to discuss the implementation of the Tribunal's orders.

[46] The applicant raised concerns about the fairness of the Tribunal's approach to remedial jurisdiction. However, the Tribunal found no unfairness and stated that it would remain seized to ensure discrimination is eliminated. Specifically, the Tribunal found that "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" (2018 CHRT 4, at paragraph 389).

[47] The Tribunal reiterated its intent to move forward to the issue of compensation (2018 CHRT 4, at paragraph 385). The applicant did not seek judicial review of this ruling.

[48] While not part of the ruling, I pause to note that on March 2, 2018, the parties signed a Consultation Protocol that covered significant principles governing the parties' discussions. It also acknowledged the Tribunal's three-stage approach to remedies.

(6) First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 7 (Interim Eligibility Decision) [table of contents]

[49] The Caring Society brought a motion for relief to ensure that the definition of "First Nations child" as articulated in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16, and 2017 CHRT 14 was defined. The proposed motion read:

An order that, pending the adjudication of the compliance with this Tribunal's orders of Canada's definition of "First Nations Child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle. [Interim Eligibility Decision, at paragraph 27.]

[50] The Caring Society brought this motion because the Caring Society had recently paid for the medical services of a First Nations child (S.J.). S.J. did not have status under the *Indian Act*, R.S.C., 1985, c. I-5 (*Indian Act*) but had one parent with subsection 6(2) *Indian Act* status. In other words, S.J. lacked status because of the second-generation cut-off rule. For this reason, and because of S.J.'s off-reserve residence, Canada refused to pay for the medical expenses (Interim Eligibility Decision, at paragraph 80).

[51] The Tribunal ordered the following [at paragraph 87]:

The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant to section 53 (2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle.

E. Compensation Decisions [table of contents]

(1) The Compensation Decision: T-1621-19

[52] On March 15, 2019, prior to the hearing on compensation, the Tribunal sent the parties written questions about their respective positions on the topic. In short, the combined submissions of the Caring Society and AFN were that Canada should pay compensation for every child affected by the FNCFS Program that was taken into out-of-home care and that the compensation should be paid to First Nations children and their parents or grandparents. Further, the compensation should be retroactive to 2006 until such time that the Tribunal deemed the applicant compliant with the Merit Decision. The other respondents echoed these submissions. In response, the applicant opposed the claims made for individual financial compensation on the basis that the Tribunal lacked jurisdiction to grant such awards in cases about systemic discrimination.

[53] The Tribunal found that there are victims of Canada's discriminatory practices who are entitled to compensation. At paragraph 11 of the Framework Decision, the Tribunal provided a succinct summary of the Tribunal's ruling in the Compensation Decision:

.... In the *Compensation Decision*, the Tribunal ordered compensation for children who were apprehended from their homes to start as of January 1, 2006. In this decision, the Tribunal determined that children who were apprehended from their home prior to January 1, 2006 but remained in care as of January 1, 2006 were within the scope of the *Compensation Decision* and eligible for compensation (paras. 37-76). Finally, the Tribunal determined that compensation should be paid to the estates of beneficiaries who experienced Canada's discriminatory conduct but passed away before being able to receive compensation (paras. 77-151).

[54] The Tribunal found that Canada's approach to funding was based on financial considerations. Further, Canada's practices resulted in First Nations children being removed from their homes, families, and communities, which led to "trauma and harm to the highest degree causing pain and suffering" (*Compensation Decision*, at paragraph 193). According to the Tribunal, Canada acted with little to no regard for the consequences of removal of First Nations children from their families. As a result, the Tribunal awarded First Nations children, parents, or grandparents \$40 000 each. Pursuant to paragraph 53(2)(e) of the CHRA, the first \$20 000 was for pain and suffering. Pursuant to subsection 53(3) of the CHRA, the remaining \$20 000 was awarded as special compensation for the discriminatory practices under the FNCFS Program and Jordan's Principle.

[55] The Tribunal did not order that Canada immediately pay compensation. Instead, the Tribunal ordered Canada to define eligibility for victims, create an appropriate methodology to govern distribution, and consult with the other parties who could provide comments and suggestions about the orders. The Tribunal directed that the consultations should generate procedures that would allow, but not obligate, First Nations to identify children for the purposes of Jordan's Principle. This interim ruling would remain in effect until a final order. The Tribunal retained jurisdiction.

[56] The applicant judicially reviewed the Compensation Decision and requested a stay pending a decision on the Merit. In response, the Caring Society sought to stay the application for judicial review. Both motions were dismissed (*Canada (Attorney General) v. First Nation Child and Family Caring Society of Canada*, 2019 FC 1529, 313 A.C.W.S. (3d) 136).

## (2) Additional Compensation Decision [table of contents]

[57] Notwithstanding the applicant's pending judicial review application, in February 2020 the applicant, the AFN, and the Caring Society provided the Tribunal with a draft Compensation Framework. The parties also asked the Tribunal for guidance and clarification regarding compensation. In April 2020, the Tribunal clarified that:

- (a) Child beneficiaries should gain unrestricted access to their compensation upon reaching their province's age of majority;
- (b) Compensation should be paid to eligible First Nations children (and to the parents or grandparents) who entered into care before and remained in care until at least January 1, 2006; and
- (c) Compensation should be paid to the estates of deceased individuals who otherwise would have been eligible for compensation (*Additional Compensation Decision*, at paragraphs 36, 75, 76 and 152).

[58] There remained some elements of the draft Compensation Framework that were not agreed upon.

## (3) The Definitions Decision [table of contents]

[59] On May 28, 2020, the Tribunal clarified the terms used in the Compensation Decision including “essential service”, “service gap”, and “unreasonable delay”. The decision also affirmed that eligible family caregivers did not extend beyond parents or grandparents. The Tribunal directed the parties to adopt three definitions to reflect its reasons in the finalization of the draft Compensation Framework.

(4) The Trusts Decision [table of contents]

[60] The Tribunal held that compensation payable to minors and individuals lacking capacity is to be paid into a trust. The Tribunal again retained jurisdiction and was empowered to resolve any individual disputes over compensation entitlements.

(5) The Framework Decision [table of contents]

[61] In this decision, the Tribunal addressed the process for compensation to First Nations children and beneficiaries as well as their parents or grandparents. The Tribunal approved the parties’ revised Compensation Framework and its accompanying schedules. The Compensation Framework was consistent with, and subordinate to, the Tribunal’s orders. One of the features of this decision was that victims could opt out of the compensation process. Within the present judicial review, this decision is being challenged under the Eligibility Decision.

F. Jordan’s Principle Eligibility Decisions [table of contents]

[62] The rulings from 2016 to 2018, including the Merit Decision, did not expressly define the term “all First Nations children” in connection with eligibility under Jordan’s Principle. In February 2017, one of Canada’s witnesses said that status under the *Indian Act* was not a mandatory requirement for receipt of services under Jordan’s Principle. The following decisions contemplated whether non-status First Nations children are eligible for Jordan’s Principle.

(1) Interim Eligibility Decision [table of contents]

[63] In February 2019, the Tribunal issued an interim ruling. The applicant was ordered to provide non-status First Nations children living off reserve who had urgent and/or life threatening needs with the services required to meet those needs, pursuant to Jordan’s Principle. The Tribunal ordered that this interim relief applied to (1) First Nations children without *Indian Act* status who live off reserve but are recognized as members by their Nation, and (2) those who have urgent and/or life-threatening needs. This interim relief order applied until a full hearing decided the definition of a “First Nations child” under Jordan’s Principle.

(2) Eligibility Decision: T-1559-20 [table of contents]

[64] In May 2019, contrary to what was stated by one of Canada’s officials in February 2017 (see paragraph 62 above), the then Associate Deputy Minister Mr. Perron said that “since the beginning” Canada understood the Tribunal’s orders as applying only to children registered under the *Indian Act*. Canada ultimately broadened its approach to include non-status First Nations children who ordinarily reside on reserve. However, the Caring Society remained concerned that this approach was still too narrow and did not comply with 2017 CHRT 14, as it excludes children living off reserve. Accordingly, the Caring Society brought a motion for clarification and interim relief.

[65] At the Eligibility Decision hearing the Caring Society noted that there were three categories of children that Canada agreed were within the scope of the 2017 CHRT 14 Order:

- (a) A child, whether resident on or off reserve, with *Indian Act* status;
- (b) A child, whether resident on or off reserve, who is eligible for *Indian Act* status; and

(c) A child, residing on or off reserve, covered by a First Nations self-government agreement or arrangement (Eligibility Decision, at paragraph 25).

[66] The Caring Society also argued that Canada was improperly excluding the following categories:

(a) Children, residing on or off reserve whom a First Nations group, community or people recognizes as belonging to that group, community or people, in accordance with the customs or traditions of that First Nations group, community or people;

(b) First Nations children, residing on or off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program; and

(c) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status (Eligibility Decision, at paragraph 26).

[67] The applicant argued that it was not appropriate to expand the scope of Jordan's Principle as requested by the Caring Society. The Caring Society's request extended beyond the Complaint, the particulars, the evidence, and the Tribunal's jurisdiction, as evidenced by the lack of consensus amongst the complainants. It also submitted that it was complying with the orders by providing Jordan's Principle eligibility to: registered First Nations children on or off reserve; First Nations children who are entitled to be registered; and Indigenous children, including non-status Indigenous children who are ordinarily resident on reserve (Eligibility Decision, at paragraph 73).

[68] After reviewing submissions on self-government and self-determination, treaties, international obligations, and constitutional principles, the Tribunal found that it was not determining citizenship or membership of First Nations but only eligibility for Jordan's Principle. In so doing, it confirmed that the categories currently used by Canada were appropriate for the purposes of Jordan's Principle. The Tribunal did find, however, that two new categories proposed by the Caring Society were within the scope of the Complaint and the evidence and thus eligible for Jordan's Principle:

(a) First Nations children, without Indian status, who are recognized as citizens or members of their respective First Nations; and

(b) First Nations children, residing on or off reserve, who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

[69] The Tribunal refused to admit the third category (those who lost their connection to their First Nations communities due to the Indian Residential Schools System, the Sixties Scoop, discrimination within the FNCFS Program, or other reasons). The Tribunal further stated that the applicant should let the admitted categories of First Nations children "through the door" (including those who were already being admitted by virtue of Canada's expanded definition) and then assess case-by-case whether the actual provision of services would be consistent with substantive equality principles (Eligibility Decision, at paragraph 215). At this point, Canada sought judicial review of this decision.

(3) 2020 CHRT 36 [table of contents]

[70] The parties made joint submissions on a proposed eligibility process for Jordan's Principle and asked the Tribunal to approve the eligibility criteria. Accordingly, the Tribunal ordered that cases meeting any one of four following criteria are eligible for consideration under Jordan's Principle:

(a) The child is registered or eligible to be registered under the *Indian Act*, as amended from time to time;



(b) The child has one parent/guardian who is registered or eligible to be registered under the *Indian Act*;

(c) The child is recognized by their Nation for the purposes of Jordan's Principle; or

(d) The child is ordinarily resident on reserve.

[71] The Tribunal reconfirmed it would retain jurisdiction for the time being. The Tribunal committed that it would cede its jurisdiction once the parties confirm eligibility criteria and a mechanism for implementation is developed and effective.

(4) The Framework Decision [table of contents]

[72] On February 12, 2021, the Tribunal approved the parties' revised Compensation Framework and its accompanying schedules. This Compensation Framework is consistent with, and subordinate to, the Tribunal's Orders. Under the Compensation Framework, an Administrator will oversee the compensation process and victims can opt out.

IV. Issues and Standard of Review [table of contents]

[73] Having reviewed the parties' submissions and arguments, the issues in this matter are:

(1) Was the Compensation Decision reasonable?

(2) Was the Eligibility Decision reasonable?

(3) Was Canada denied procedural fairness?

[74] The parties agree that the appropriate standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*)), save for any submissions on procedural fairness.

[75] The applicant submits that a reasonableness review is a "robust exercise" where both the reasoning process and the outcome must bear the hallmarks of reasonableness (*Vavilov*, at paragraphs 12–13, 67, 72, 86, 99–100 and 104). It submits that a failure to respect the statutory context or binding jurisprudence renders a decision unreasonable as does the failure to follow a logical line of reasoning or to properly consider the evidence (*Vavilov*, at paragraphs 102 and 122–124).

[76] The Caring Society submits that the applicant is actually proposing a correctness review. It submits that the Tribunal's findings of fact are not open to review in the absence of special circumstances. The Caring Society submits that the "robust exercise" referred to by the applicant finds "its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers." The Caring Society cites *Vavilov*, at paragraphs 5 and 74, in support of this position. Accordingly, this Court should take a position of restraint and pay attention to the Tribunal's expertise in light of a lengthy, complex case comprised of mostly uncontested rulings (*O'Grady v. Bell Canada*, 2020 FC 535, 322 A.C.W.S. (3d) 603, at paragraph 31).

[77] The AFN states that the Court should accord respectful deference to the factual and legal determinations of the Tribunal given the lengthy process and numerous rulings and orders. The AFN also asks this Court to accept the Tribunal's interpretation of the broad remedial provisions of the CHRA. It submits that an administrative decision maker has a large permissible space for acceptable decision-making where: the evidence before that decision maker permits a number of outcomes; the decision maker relies on its expertise and knowledge; and where there is little in the way of constraining legislative language (*Vavilov*, at paragraphs 31, 111–114 and 125–126; *Canada (Attorney General) v. Zalusky*, 2020 FCA 81, [2021] 1 F.C.R. D-17, at paragraph 79).

[78] The Commission also submits that a reasonableness review starts from a position of judicial restraint. Accordingly, this Court must show respect for the distinct role of an administrative decision maker such as the Tribunal. It submits that a reviewing Court is not to ask itself what decision it would have made, but only whether the party challenging the decision has met its burden of showing that an impugned decision was unreasonable (*Vavilov*, at paragraphs 83 and 100).

[79] The remaining respondents generally accept the positions of the Caring Society, the AFN, and the Commission concerning the standard of review.

[80] In light of *Vavilov*, I agree with the parties that reasonableness is the applicable standard for both the first and second issue. This means that a Court should not ask itself what decision it would have made if seized of the matter. Instead, a Court should only consider whether the moving party has met the burden of showing that the impugned decision was unreasonable in its rationale and outcome (*Vavilov*, at paragraphs 15 and 75).

[81] I also agree that, absent exceptional circumstances, a reviewing Court is to leave a decision maker's factual findings undisturbed. If a decision is internally coherent and based on a rational chain of analysis, a Court should defer to it (*Vavilov*, at paragraphs 125 and 85). When reviewing for reasonableness, a Court does not assess the decision maker's written reasons against a standard of perfection (*Vavilov*, at paragraphs 91–92). Minor flaws or missteps in a decision maker's decision will not be sufficient to establish a reversible lack of justification, intelligibility and transparency—"sufficiently serious shortcomings" are required (*Vavilov*, at paragraph 100).

[82] On the issue of procedural fairness, no deference is owed to the Tribunal. The Federal Court of Appeal recently stated in *Canada (Attorney General) v. Ennis*, 2021 FCA 95, [2021] 4 F.C.R. 3 [at paragraph 45]:

In this regard, it is well settled that administrative decision makers are not afforded deference in respect of procedural fairness issues: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraphs 34–56; *Wong v. Canada (Public Works and Government Services)*, 2018 FCA 101, 2018 C.L.L.C. 230-038 (*Wong*), at paragraph 19; *Ritchie v. Canada (Attorney General)*, 2017 FCA 114, 19 Admin. L.R. (6th) 177 (*Richie*), at paragraph 16.

[83] As such, the issue of procedural fairness is reviewable on the correctness standard.

#### V. Parties' Positions [table of contents]

[84] As stated above, the parties' submissions and the record is extensive. Below is a brief overview of the parties' respective positions in the matters before this Court.

#### A. Compensation Decision [table of contents]

##### (1) Applicant's Position

[85] The applicant does not dispute that the FNCFS Program was broken and needed fixing. The applicant also recognizes a need to compensate the children affected. The essence of the applicant's submissions are that the Tribunal exceeded its authority under the CHRA in making the Orders in question. It submits that a reasonable exercise of remedial jurisdiction must be consistent with the nature of the Complaint, the evidence, and the statutory framework. It submits that both decisions fail on these points.

[86] It also submits that the Tribunal did not have jurisdiction to provide compensation similar to a class action, particularly when the Complaint dealt with systemic discrimination. The applicant notes that no individuals entitled to compensation were party to the proceeding or provided evidence before the Tribunal.

[87] The applicant's specific challenges to the reasonableness of the Compensation Decision can be summarized as follows:

- (a) It was inconsistent with the nature of the Complaint;
- (b) It turned the case into a class action;
- (c) It failed to respect the principles of damage law;
- (d) The reasons are inadequate;
- (e) It erred in providing compensation under Jordan's Principle;
- (f) The definitions in the Definitions Decision are unreasonable;
- (g) It erred in finding that Canada's conduct was wilful and reckless; and
- (h) It erred in giving compensation to caregivers.

[88] The applicant submits that the Compensation Decision, in whole or in part, is unreasonable and that it should be remitted to a newly constituted panel of the Tribunal.

(2) Caring Society's Position [table of contents]

[89] The Caring Society submits that the Compensation Decision is reasonable and the Court should not set it aside for the following reasons:

- (a) Victims of systemic discrimination are entitled to individual remedies;
- (b) Canada's arguments about class actions are a red herring;
- (c) Principles of tort law have no application to human rights remedies;
- (d) The estates and trusts orders are reasonable;
- (e) The evidence was clear that First Nations children have endured pain and suffering;
- (f) Canada's knowledge of the harms being caused warrants a finding of wilful and reckless discrimination; and
- (g) The finding of ongoing discrimination under the FNCFS Program is reasonable and supported by the evidence.

[90] The Caring Society also states that the applicant raises arguments about several decisions that are not at issue in this judicial review. Accordingly, the applicant is making an improper collateral attack on them and on the Merit Decision. Alternatively, if the Court finds any part of the Compensation Decision unreasonable, then it should only remit that part of the decision to the same panel of the Tribunal.

(3) The AFN's Position [table of contents]

[91] The AFN echoes the Caring Society's position. The AFN submits that the Tribunal has broad remedial discretion to make victims of discrimination whole again. Further, the Tribunal may address the perpetrator's wilful or reckless conduct. It submits that the applicant mischaracterizes the individual compensation award as a class action by comparing it with the type of damages one may obtain in that type of court proceeding.

[92] Additionally, the AFN argues that the Tribunal properly assessed the evidence. Namely, there was evidence that children suffered harm because they were removed from their families due to the applicant's underfunding of the FNCFS Program. The AFN points out that witnesses testified at the Tribunal about the harms families face when a child is removed from the family unit. Additionally, Canada was aware that underfunding caused harm because Canada has been party to various reports on the topic for the past 20 years. The Tribunal reasonably found that this constitutes wilful and reckless discrimination.

(4) The Commission's Position [table of contents]

[93] The Commission adopts the same position on reasonableness as the Caring Society and the AFN. The Commission states that the Court should approach the Compensation Decision from a position of judicial restraint. It points to the fact that the Tribunal has been seized with this matter for nine years, it has heard from many witnesses, and has received voluminous documentary evidence substantiating both systemic and individual discrimination due to the underfunding of the FNCFS Program. It also points to the many rulings, including the Merit Decision, which Canada has not challenged.

[94] The Commission notes that while aspects of the Compensation Decision may be bold, extraordinary violations of the CHRA appropriately call for extraordinary remedies. The Commission focuses on general principles of the CHRA and leaves the issues of victims and compensation to the respondents.

(5) The COO's Position [table of contents]

[95] The COO focuses on the Eligibility Decision. As such, its submissions are set out below.

(6) NAN's Position [table of contents]

[96] NAN adopts the same position as the Caring Society, the AFN, and the Commission. The focus of NAN's submissions relates to the definition of certain terms found in the Definitions Decision, particularly the term "service gap". It drew the Court's attention, as it did before the Tribunal, to the tragic events in Wapekeka. These events illustrate that systemic and individual discrimination exists, contrary to what Canada claims. It submits that Canada's conduct was wilful and reckless and the financial awards are reasonable.

(7) Amnesty's Position [table of contents]

[97] Amnesty's interest in these proceedings is to ensure that the Compensation Decision and the Eligibility Decision are reviewed in light of Canada's international legal obligations. It submits that the Tribunal properly addressed Canada's international legal obligations.

(8) CAP's Position [table of contents]

[98] The Court granted CAP intervener status with the parties' consent but only with respect to the Eligibility Decision. Therefore, CAP's submissions are set out below.

B. Eligibility Decision [table of contents]

[99] The applicant referred to this Decision as the "First Nations child Definition decision" and the other parties referred to it as the "Eligibility Decision". In looking at the context, I have chosen to refer to it as the Eligibility Decision. As the Compensation Decision and the Eligibility Decision are connected, many of the parties' submissions about these two decisions overlap. Below, I summarize the submissions directly related to the Eligibility Decision.

(1) The Applicant's Position [table of contents]

[100] The applicant submits that the Eligibility Decision is unreasonable because the Tribunal exceeded its jurisdiction under the CHRA.

[101] The applicant submits that the Complaint dealt with discrimination on reserve and in the Yukon. Further, there was no evidence related to the two additional classes of First Nations children which the Tribunal ruled were eligible for consideration:

(a) Non-status children who are recognized by a First Nation as being a member of their community; and

(b) Non-status children of parents who are eligible for *Indian Act* status.

[102] The applicant submits that the first additional category imposes a burden to determine who is eligible within First Nations when these First Nations were not parties to the litigation and not consulted. The second category decides a complex question of identity that was not before the Tribunal and on which there is no consensus among First Nations.

(2) The Caring Society's Position [table of contents]

[103] The Caring Society submits that "all First Nations children" does not mean "children with *Indian Act* status". The Tribunal modified the definition of "First Nations child" to ensure that its Jordan's Principle Orders did not create further discrimination or result in additional complaints.

[104] The Caring Society disagrees with the applicant's characterization of the Eligibility Decision. First, the definition adopted by the Tribunal is limited to the threshold question of whose service requests the applicant must *consider*. Second, there is no obligation on First Nations to render any determinations on recognition of the children. Third, no First Nation has intervened to support Canada's position that consultation should have occurred or that this definition is too expansive or creates any obligations on them.

[105] It states that the Tribunal properly considered issues of First Nations identity, self-determination, international legal obligations, federal legislation, section 35 rights, and the scope of the Complaint. Alternatively, if any part of the Eligibility Decision is found to be unreasonable then only that part should be remitted to the same panel of the Tribunal.

(3) The AFN's Position [table of contents]

[106] The AFN submits that the Tribunal properly considered the colonial aspect of the *Indian Act's* status provisions and assimilationist policies within the context of Treaties and inherent rights. It states that the Tribunal reasonably found that the status provisions in the *Indian Act* did not meet human rights standards. In so doing, the Tribunal was not challenging the *Indian Act* status provisions. Rather, the Tribunal recognized that certain members of First Nations continued to experience discrimination when trying to access health services because of Canada's reliance on the *Indian Act's* definition of "Indian".

[107] In light of this entrenched systemic discrimination, it was open to the Tribunal to take a purposive approach in interpreting the CHRA. The Tribunal acted reasonably in extending eligibility for Jordan's Principle to individuals without Indian status who are recognized by their First Nations as citizens and members.

[108] The AFN requests that if the Court finds any part of the decision to be unreasonable, the Court should remit only that part for re-determination to the same panel of the Tribunal.

(4) The Commission's Position [table of contents]

[109] The Commission echoes the Caring Society and AFN's submissions. The Commission also submits that its interest was to urge the Tribunal to apply a human rights framework while taking into account principles of self-governance and self-determination. It notes that the Tribunal was not delving into First Nations' jurisdiction over citizenship or membership but was merely looking at eligibility under Jordan's Principle. The Tribunal, looking at the context of the *Indian Act's* history, properly noted that the *Indian Act* does not correspond with First Nations' own traditions and that it continues to have a discriminatory impact.

(5) The COO's Position [table of contents]

[110] The COO adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. The COO focuses on the Tribunal's respect for First Nations' rights to self-determination. It also rejects the applicant's submission that consultation and consensus with First Nations were required before the Eligibility Decision could be rendered. Canada cites no authority for its position that consultation with First Nations is required prior to the decision being rendered on this issue. It submits that the Court should endorse the approach taken by the Tribunal in constructing a remedy that accounts for the jurisdiction of First Nations.

(6) NAN's Position [table of contents]

[111] NAN adopts the same position as the Caring Society, the AFN, and the Commission concerning the reasonableness of the Eligibility Decision. It states that the overarching objective was to prevent further discrimination by exercising its remedial jurisdiction while also recognizing First Nations' jurisdiction over citizenship and membership. It states that the Tribunal properly considered eligibility under Jordan's Principle within the context of the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR Res. A/61/295 [being Schedule to the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14] (UNDRIP).

(7) Amnesty's Position [table of contents]

[112] Amnesty's interest in these proceedings is to ensure that the Court reviews the Eligibility Decision in light of the applicant's international legal obligations.

(8) CAP's Position [table of contents]

[113] CAP notes that the applicant accepts the eligibility of non-status children who are ordinarily resident on reserve for Jordan's Principle. CAP submits that the additional two classes of eligibility added by the Tribunal were reasonable in light of the evidence and prior proceedings.

C. Procedural Fairness [table of contents]

(1) Applicant's Position

[114] The applicant submits that the Tribunal denied it procedural fairness by:

- (a) changing the nature of the Complaint in the remedial phase;
- (b) failing to provide notice that it was assessing the ongoing nature of the discrimination;
- (c) failing to provide sufficient reasons concerning the individual remedies;
- (d) requiring the parties to create a new process to identify beneficiaries of the compensation order; and
- (e) inviting the parties to request new beneficiaries in the same decision that it determined who qualifies for compensation.

(2) Position of the Respondents and Intervener [table of contents]

[115] The respondents and intervener generally submit that the applicant was not denied procedural fairness. The Tribunal had not yet completed the remedies stage. Therefore, it was reasonable for the Tribunal to find that discrimination had not ceased. They also submit that the Tribunal provided notice of the issues it was considering to all parties. In particular, the Merit Decision identified various issues that the Tribunal would consider in the future. Further, the applicant did not seek judicial review of that decision.

## VI. Analysis [table of contents]

### A. Preliminary Matter—Motion

[116] The applicant's written submissions included a reference to two Parliamentary Budget Office Reports (PBO Reports) dated March 10, 2021, and February 23, 2021. Prior to finalizing the submissions, the applicant sought agreement from the parties for their inclusion by way of email with a request of three days for reply. The parties did not respond to the applicant's request and its written submissions included references to the two PBO Reports.

[117] The AFN objected to the inclusion of the PBO Reports and stated that their non-response was not an agreement for their acceptance. The AFN states that the applicant did not bring forward a motion seeking to adduce fresh evidence on the matter. Therefore, the inclusion of the reports is improper and the Court should exclude them.

[118] The applicant and the AFN agreed that the Court could dispense with this matter on the materials filed rather than devoting any time to this issue at the judicial review hearing. The Court agreed with this approach.

[119] Generally, an application for judicial review proceeds on the evidence before the decision maker (*Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331). The scenarios where the Court can consider new evidence are limited and include such issues as procedural fairness and jurisdiction (*Gitksan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (FCA), [2000] 1 F.C. 135, *sub nom. Gitksan Treaty Society v. H.E.U.* (1999), 177 D.L.R. (4th) 687 (C.A.); *Reid v. Canada (Citizenship and Immigration)*, 2020 FC 222, 315 A.C.W.S. (3d) 538, at paragraph 33). The applicant has raised the issue of the Tribunal rendering a decision without proper jurisdiction. In certain circumstances, this position can only succeed by bringing new evidence before the Court (*Gitksan Treaty Society v. Hospital Employees' Union* [cited above], at paragraph 13, citing *R. v. Nat Bell Liquors Ltd.*, 1922 CanLII 488 (UK JCPC), [1922] 2 A.C. 128, (1922), 65 D.L.R. 1). I do not find that these circumstances arise here.

[120] I find that the inclusion of the PBO Reports has no bearing on the issues before this Court. The AFN is correct that the PBO Reports were not before the Tribunal in either of the applications for judicial review. As such, to the extent that they are relevant, I will rely on them solely for background purposes.

### B. The Compensation Decision [table of contents]

#### (1) Reasonableness

[121] After considering the parties' submissions and the record before me, I find that the Tribunal has exercised its broad discretion in accordance with the CHRA and the jurisprudence. As a result, the Court defers to the Tribunal's approach and methodology concerning the Compensation Decision, which, when read as a whole, meets the *Vavilov* standard of reasonableness.

[122] The broad, remedial discretion of the CHRA must be considered in light of the context of this extraordinary proceeding, which involves a vulnerable segment of our society impacted by funding decisions within a complex jurisdictional scheme. It is not in dispute that First Nations occupy a unique position within Canada's constitutional legal structure. Further, no one can seriously doubt that First

Nations people are amongst the most disadvantaged and marginalized members of Canadian society (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, [2013] 4 F.C.R. 545 [cited above], at paragraphs 332 and 334). The Tribunal was aware of this and reasonably attempted to remedy the discrimination while being attentive to the very different positions of the parties. The Tribunal's overview of the parties' respective positions at every stage of the proceedings highlighted the fundamentally different perspectives of the applicant and the respondents. These differences were once again illustrated in the submissions on these judicial reviews.

[123] On one hand, the applicant sought clarification and made submissions to focus on the requirement for individualistic proof of harms and the fact that it was attempting to remedy any shortcoming in funding with more funding. On the other hand, the respondents and interveners submit that the Tribunal was taking a holistic view of this matter. According to the respondents, the Tribunal focused on the collective harms to children, families, and communities, from the residential school era through to the impacts caused by the funding of the FNCFS Program and Jordan's Principle.

[124] My reasons concerning the Tribunal's jurisdiction generally, as well as the eight specific challenges submitted by the applicant, are set forth below.

(a) The Scope of the Tribunal's Jurisdiction [table of contents]

[125] There is no dispute amongst the parties concerning the principles governing human rights law and, in particular, the scope of the Tribunal's jurisdiction pursuant to the CHRA. However, the parties do disagree on whether the Tribunal exercised its powers within the parameters of the CHRA.

[126] The Supreme Court of Canada has previously held that the CHRA provides the Tribunal with broad statutory discretion to fashion appropriate remedies. These remedies attempt to make victims whole and prevent the recurrence of the same or similar discriminatory practices (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, at paragraphs 13–15 [pages 92–94]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (*Mowat*), at paragraph 62).

[127] Similarly, the Federal Court of Appeal has held that the appropriate remedies in any given case is a question of mixed fact and law that is squarely within the Tribunal's expertise (*Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202, 420 N.R. 136 (*Walden 2011*), at paragraph 17; *Collins v. Canada (Attorney General)*, 2013 FCA 105, 444 N.R. 259, at paragraph 4).

[128] It is also clear that human rights legislation is fundamental or quasi-constitutional and should be interpreted in a broad and purposive manner (*Battlefords and District Co-operative Ltd. v. Gibbs*, 1996 CanLII 187 (SCC), [1996] 3 S.C.R. 566, at paragraph 18). In other words, human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect (*Jane Doe v. Canada (Attorney General)*, 2018 FCA 183, [2019] 1 F.C.R. D-6 (*Jane Doe*), at paragraph 23).

[129] The applicant argues that the Tribunal only had authority to deal with the Complaint, which was in relation to an allegation of systemic underfunding. It also submits that there was insufficient evidence of individual harms before the Tribunal. The applicant made similar arguments before the Tribunal as set out in the Compensation Decision, at paragraphs 49–58. A brief summary of the Merit Decision, highlighted above, at paragraphs 20–28, also set out some of the applicant's arguments.

[130] The respondents state that the Tribunal canvassed the nature of its jurisdiction, at paragraph 94 of the Compensation Decision. The Tribunal wrote, "[t]he Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the CHRA characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation." In that same paragraph the Tribunal also referenced passages it wrote on its authority to grant remedies in 2018 CHRT 4, which was unchallenged. 2018 CHRT 4 states [at paragraph 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*.

[131] The applicant also argues that the Tribunal improperly exercised its authority by retaining jurisdiction over its subsequent rulings. According to the applicant, the Tribunal effectively abdicated its adjudicative responsibilities by directing the parties to try to reach agreements and by remaining seized to oversee implementation.

[132] I disagree with the applicant. I am persuaded by the respondents' submissions that the Tribunal's approach to the retention of jurisdiction has precedent. In *Hughes v. Elections Canada*, 2010 CHRT 4 (*Hughes 2010*), Elections Canada was deemed to have engaged in discriminatory practice by failing to provide a barrier-free polling location. In that case, the Tribunal awarded broad public interest remedies and remained seized until the order in question and any subsequent implementation orders were carried out. The Tribunal also ordered the parties to consult with one another about various aspects of the Order, including their implementation (*Hughes 2010*, at paragraph 100).

[133] Tribunals have also adopted this approach in various cases involving financial remedies for a single victim and large groups of victims (*Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 20, at paragraphs 15 and 23; *Public Service Alliance of Canada v. Canada (Treasury Board)* (1998), 32 C.H.R.R. D/349, 1998 CanLII 3995, at paragraph 507, Order No. 9). The Tribunal also referenced that there was precedent for remaining seized with a case for up to ten years to ensure discrimination was remedied, mindsets had the opportunity to change, and settlement discussions occurred (Compensation Decision, at paragraph 10. See also 2018 CHRT 4, at paragraph 388; *McKinnon v. Ontario (Ministry of Correctional Services)*, 1998 CarswellOnt 5895, 1998 CanLII 29849 (ON HRT), 32 C.H.R.R. D/1).

[134] Additionally, the Tribunal pointed out that there is nothing in the language of the *CHRA* that prevents awards of multiple remedies (Compensation Decision, at paragraph 130). I agree. The large, liberal approach to human rights legislation permits this method.

[135] The fact that the Tribunal has remained seized of this matter has allowed the Tribunal to foster dialogue between the parties. The Commission states that the leading commentators in this area support the use of a dialogic approach in cases of systemic discrimination involving government respondents (Gwen Brodsky, Shelagh Day and Frances Kelly, "The Authority of Human Rights Tribunals to Grant Systemic Remedies" (2017), 6:1 *Can. J. of Hum. Rts* 1). The Commission described this approach as bold considering the nature of the Complaint and the complexity of the proceedings.

[136] The dialogic approach contributes to the goal of reconciliation between Indigenous people and the Crown. It gives the parties opportunities to provide input, seek further direction from the Tribunal if necessary, and access information about Canada's efforts to bring itself in compliance with the decisions. As discussed later in my analysis of the Eligibility Decision, this approach allowed the Tribunal to set parameters on what it is able to address based on its jurisdiction under the *CHRA*, the Complaint, and its remedial jurisdiction.

[137] The Commission states that the dialogic approach was first adopted in this proceeding in 2016 and has been repeatedly affirmed since then. It submits that the application of the dialogic approach is relevant to the reasonableness considerations in that Canada has not sought judicial review of these prior rulings.

[138] I agree with the Tribunal's reliance on *Grover v. Canada (National Research Council)*, 1994 CanLII 18487 (FC), [1994] F.C.J. No. 1000 (QL), *sub nom. Canada (Attorney General) v. Grover*, 1994 CanLII 18487, 24 C.H.R.R. D/390, 80 F.T.R. 256 (F.C.T.D.) (*Grover*) where the task of determining "effective" remedies was characterized as demanding "innovation and flexibility on the part of the Tribunal" (2016 CHRT 10, at paragraph 15). Furthermore, I agree that "the [CHRA] is structured so as to encourage this flexibility" (2016 CHRT 10, at paragraph 15). The Court in *Grover* stated that flexibility is required because the Tribunal has a difficult statutory mandate to fulfill (at paragraph 40). The approach in *Grover*, in my view, supports the basis for the dialogic approach. This approach also allowed the parties to address key issues on how to address the discrimination, as my summary in the Procedural History section pointed out.

[139] Finally, given that Parliament tasked the Tribunal with the primary responsibility for remedying discrimination, I agree that the Court should show deference to the Tribunal in light of its statutory jurisdiction outlined above.

(b) Scope of the Complaint [table of contents]

[140] I am not persuaded by the applicant's argument that the Tribunal transformed the Complaint from systemic discrimination to individual discrimination and, therefore, unreasonably awarded damages to individuals. The applicant is correct that the Complaint was brought by two organizations rather than individuals. However, when one reviews the proceedings and rulings in their entirety, it is evident that from the outset, First Nations children and their families were identified as the subject matter of the Complaint or, alternatively, as victims.

[141] More importantly, the Merit Decision addressed all of the applicant's submissions on this as well as the remaining issues. The applicant did not challenge the Merit Decision. It cannot do so now. Nevertheless, I will review each of its submissions.

[142] The opening sentence of the Complaint reads as follows:

On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula.... [Emphasis added.]

[143] The applicant states that the Tribunal's Rules of Procedure require that the nature of a complaint be spelled out in the Statement of Particulars, to allow the respondent awareness of the case to be met. It states that in this case there were no victims identified at the outset. The applicant relies on *Canadian National Railway Company v. Canadian Human Rights Commission*, 1985 CanLII 5531 (FCA), [1985] 1 F.C. 96, *sub nom. Re C.N.R. Co. and Canadian Human Rights Commission* (1985), 20 D.L.R. (4th) 668, 1985 CanLII 5531 (C.A.) (*CNR*), which states [at page 102 of F.C.]:

This is not to say that such restitution is in every case impossible. On the contrary, paragraphs (b), (c) and (d) provide specifically for compensation, in kind or in money. Such compensation is limited to "the victim" of the discriminatory practice, which makes it impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination where, by the nature of things, individual victims are not always readily identifiable.

[144] The applicant also cites *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (*Moore*) where the Supreme Court of Canada emphasized that remedies must flow from the claim as framed by the complainants. The applicant also cites *Moore* for the proposition that the Tribunal is not, in the words of the applicant, a "roving commission of inquiry" (*Moore*, at paragraphs 64 and 68–70).

[145] I agree with the principle that remedies must flow from the Complaint. However, I also note that the Court in *Moore* was still cognizant of the need for evidence in order to consider whether an individual or systemic claim of discrimination was established [at paragraph 64]:

... the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centred on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether *Jeffrey* was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission.

[146] Clearly, the Court in *Moore* focused on the absence of evidence related to systemic discrimination and noted that the evidence related to individual discrimination. In the present matter, there was evidence of both systemic and individual discrimination and evidence of harms entitling the Tribunal to award remedies for both.

[147] It is also important to note that at paragraph 58 of *Moore* the Court stated that discrimination is not to be understood in a binary way, or to be an “either or” proposition:

.... It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several.

[148] Regarding the statement of particulars, the Commission clearly identified who the Complaint sought to benefit. At paragraph 16 of its updated/amended statement of particulars, the Commission stated numerous times that the Complaint concerned “First Nations children and families normally resident on reserve.” Similarly, at paragraph 17 of its updated/amended statement of particulars, the Commission described the issue as follows:

Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children and families, or adversely affected them, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin? [Emphasis added.]

[149] The Commission also clarified that the Caring Society and the AFN were seeking compensation for those removed from their communities and the full and proper implementation of Jordan’s Principle, pursuant to House of Commons Motion 296.

[150] In the Eligibility Decision, the Tribunal also noted at paragraph 200 that it had “already addressed the scope of the claim (complaint, Statement of Particulars, evidence, arguments, etc.) as opposed to the scope of the complaint in previous rulings and what forms part of the claim (see 2019 CHRT 39 at paras. 99-102).” The Tribunal went further at paragraph 201 to state that “[t]his question was already asked and answered. The only other question to be answered on the Tribunal’s jurisdiction here is if this motion goes beyond the claim or not. The Panel’s response is that for issues I and II of this ruling it does not.” The reference to “issues I and II” relate to the two additional categories of First Nations children.

[151] The applicant, having been provided with the statements of particulars, responded with its own particulars. The respondent also provided an updated statement of particulars in February 2013, which responded to the same issues it is now raising in this application.

[152] In addition, paragraphs 486, 487 and 489 of the Merit Decision set forth the positions of the Caring Society, the AFN, and the applicant concerning compensation. There is no question that compensation was being sought for First Nations children and their families.

[153] I find that the Tribunal properly assessed the inter-relationship between the Complaint and the parties’ statements of particulars. The Tribunal stated that the complaint form is just one aspect of the Complaint and that it does not serve the purposes of a pleading (*Polhill v. Keeseekoowenin First Nation*,

2017 CHRT 34 (*Polhill CHRT*), at paragraph 13). This would appear to be consistent with the overall objective of the CHRA, where proceedings before the Tribunal are “intended to be as expeditious and informal as possible” (*Polhill CHRT*, at paragraph 19).

[154] The applicant’s argument that the respondents did not identify the victim in the Complaint is technical in nature. It is inappropriate to read quasi-constitutional legislation in a way that denies victims resolution of their complaint because of a technicality. Furthermore, a complaint form only provides a synopsis of the complaint, which will become clearer during the course of the process, and as the conditions for the hearing are defined in the statement of particulars (*Polhill CHRT*, at paragraph 36). If the applicant is suggesting it was prejudiced by this alleged transformation of the Complaint, I do not see it on the face of the record before me.

[155] I agree with the respondents that the applicant’s arguments concerning individual versus systemic remedies could have been made earlier. For example, this argument could have been raised when the Merit Decision was released. At paragraphs 383–394, the Merit Decision includes various findings made in relation to First Nations children and their families. These findings are in reference to the First Nations children and families identified in the Complaint and the statements of particulars filed by the parties themselves. The Merit Decision’s “summary of findings” section analyzes, in detail, the findings in relation to the FNCFS Program and Jordan’s Principle and it gave advance warning that damages would be addressed in the future. All of the Tribunal’s findings in the Merit Decision are tied to First Nations children and their families. These findings are reflected in virtually every subsequent decision, whether challenged or not.

[156] I agree with the Caring Society and the AFN that the applicant cannot contest the compensatory consequences of systemic harm when the applicant appears to accept the Tribunal’s finding that widespread discrimination occurred. I note that, although the applicant disagrees with the Tribunal’s reasoning process and outcome, it recognized “a need to compensate the children affected” in its opening statement at the hearing for this judicial review. I also agree that the quantum of compensation awards for harm to dignity are tied to seriousness of the psychological impacts and discriminatory practices upon the victim, which does not require medical or other type of evidence to be proven.

[157] The Tribunal reviewed the Complaint and Statement of Particulars and noted that the Caring Society and AFN requested compensation for pain and suffering and special compensation remedies. At paragraphs 6–10 of the Compensation Decision the Tribunal reproduced its three-stage approach to remedies from 2016 CHRT 10 and its prior rulings to indicate that compensation was going to be addressed. Prior to the Compensation Decision, the Tribunal sent all the parties written questions concerning compensation and it invited submissions. That document also indicated the positions of the Caring Society and the AFN on damages. The applicant’s memorandum of law at paragraph 54 acknowledges that the Caring Society’s request for a trust fund was to provide some compensation to removed children. The applicant went on to suggest that the Caring Society did not request compensation be paid directly to individuals. Both of these statements indicate awareness that individual remedies were being contemplated.

[158] Compensation awarded pursuant to paragraph 53(2)(a) of the CHRA is, of course, to compensate individuals for the loss of their right to be free from discrimination and the experience of victimization (*Panacci v. Canada (Attorney General)*, 2014 FC 368, 452 F.T.R. 302, at paragraph 34). It is also intended to compensate for harm to dignity (*Jane Doe*, at paragraphs 13 and 28). At paragraph 467 of the Merit Decision, the Tribunal acknowledged that the harm in question is the removal of First Nations children on the children and their families. At paragraphs 485–490 of the Merit Decision, the Tribunal summarized the parties’ positions on compensation. It was clearly set forth that individual compensation was being sought. The Tribunal concluded by indicating it would send the parties some questions prior to determining compensation.

[159] Canada did not challenge the rulings prior to the Compensation Decision. Rather, Canada responded to the questions posed by the Tribunal on March 15, 2019. It is particularly important to note the third question posed by the Tribunal and its associated issues:

3. The Panel notices the co-complainants have requested different ways to award remedies in regards to compensation of victims under the CHRA.

The Caring Society requested the compensation amounts awarded should be placed into an independent trust that will fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services. The Caring Society submits that an in-trust remedy that will lead to the establishment of a program of healing measures directed at persons who have been subjected to substandard child and family services is better suited to offering the children who have been taken into care since 2006 a meaningful remedy than awards of individual compensation could ever be. In this regard, the Caring Society specified that an analogy may be drawn to the component of the Indian Residential Schools Settlement that provided for the payment of amounts to a healing foundation for the purpose of setting up healing programs for the benefit of survivors.

The Panel is aware of the IAP process for residential schools' survivors and also knows there were both a healing foundation established and a fund for individual compensations for people that attended residential schools and then, there was an adjudication process for victims of abuse in the residential schools.

The AFN requested the financial compensation be awarded to the victims and their families directly with its assistance to distribute the funds rather than placed in a healing fund.

Why not do both instead of one or the other?

The Panel would not want to adopt a paternalistic approach to awarding remedies in deciding what to do with the compensation funds in the event a compensation is awarded to the victims.

Some children are now adults and may prefer financial compensation to healing activities. Some may want to start a business or do something else with their compensation. This raises the question of who should decide for the victims? The victims' rights belong to the victims do they not? [Emphasis added.]

[160] At the Tribunal, the applicant asserted that individual compensation must be predicated on individual victims being a party to the Complaint. The Tribunal addressed this argument by pointing out that subsection 40(1) of the CHRA allows a group to advance a complaint. The Tribunal also noted that pursuant to AFN resolution 85/2018 the AFN is empowered to speak on behalf of First Nations children that have been discriminated against by Canada. This was a reasonable finding.

[161] The above passage indicates that the Tribunal considered systemic reforms and individual compensation at the heart of the Complaint. Further, over the course of many hearings the applicant never adduced evidence in response to this proposition. The applicant only ever stated that they disagreed with it or that the evidence was lacking. The Tribunal gave abundant consideration to the evidence before awarding relief, and was entitled to receive and accept any evidence it saw fit pursuant to paragraph 50(3)(c) of the CHRA.

[162] I disagree with the applicant's characterization of the decisions following the Merit Decision as an "open-ended series of proceedings." Rather, the subsequent proceedings reflect the Tribunal's management of the proceedings utilizing the dialogic approach. The Tribunal sought to enable negotiation and practical solutions to implementing its order and to give full recognition of human rights. As well, significant portions of the proceedings following the Merit Decision were a result of motions to ensure Canada's compliance with the various Tribunal orders and rulings.

[163] Additionally, I find that the Tribunal properly analyzed the CHRA and understood that victims and complainants can be different people (Compensation Decision, at paragraphs 112–115). The Tribunal has awarded non-complainant victims compensation before, in a pay equity case (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 (*PSAC CHRT*), at paragraph 1023, Order No. 1). It is also true that, in that same case, the Tribunal declined to award compensation for pain and suffering where no victims testified (*PSAC CHRT*, at paragraphs 991–992). However, these paragraphs emphasize that other evidence substantiating the claim of discrimination was lacking. As discussed below, this is unlike the present case because here, the Tribunal relied on extensive evidence. This evidence was referred to throughout the various decisions.

[164] Paragraph 50(3)(c) of the CHRA gives the Tribunal broad discretion to accept any evidence it sees fit, even if that evidence would not be available in a court of law, including hearsay. In *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135, [2011] 1 F.C.R. D-9 (*Walden FC*), affd *Walden 2011*, this Court held that the Tribunal does not necessarily need to hear from all the alleged victims of discrimination in order to compensate all of them for pain and suffering (at paragraph 73). There is nothing in the CHRA that requires testimony from a small group of representative victims either. The Tribunal has the discretion to rely on whatever evidence it wishes so long as its decision-making process is intelligible and reasonable.

[165] It is also important to clarify what pain and suffering the Tribunal was considering. The applicant argues that individual complainants were required to provide evidence to particularize their harms. However, the Tribunal's overview of the evidence makes it clear that the harm in question includes harms to dignity stemming from the removal of children from their families (Compensation Decision, at paragraphs 13, 82–83, 86, 147–148, 161–162, 180, 182, 188, 223 and 239A). As such, there was no need to particularize the specific harms flowing from the removal. It is the removal itself and the harm to dignity that the Tribunal was considering. The testimony of children and other victims was therefore unnecessary.

[166] I also find that the Tribunal did not err in finding that it had extensive evidence of both individual and systemic discrimination. At paragraphs 406–427 of the Merit Decision, the Tribunal discussed the impact that removal of a child has on families through the lens of the residential school system. The Tribunal referred to the evidence of Dr. John Milloy, Elder Robert Joseph, and Dr. Amy Bombay.

[167] In the Compensation Decision, the Tribunal referred to the evidence it was relying on, which it fulsomely canvassed at paragraphs 156–197. I find that this treatment of the evidence is consistent with the principles regarding the sufficiency of evidence as found in *Moore*. In short, the Tribunal had a basis upon which to decide the way it did.

[168] I note that the Tribunal rejected Canada's individual versus systemic dichotomy as did the Court in *Moore* (Compensation Decision, at paragraph 146; *Moore*, at paragraph 58). The applicant's argument that it is necessary to have proof of individual harm and the effect of removal of children from families and communities highlights this dichotomy. Clearly, the parties' different perspectives toward the nature of this dispute and the perspective of whether discrimination was being remedied resulted in the multiplicity of proceedings.

[169] I find that individual and systemic discrimination are not mutually exclusive for the purposes of such a compensation order. Furthermore, the idea that victims should be barred from individual remedies because of the systemic nature of the harm is unsupported by the language in the CHRA (*Moore*, at paragraph 58; *Hughes 2010*, at paragraphs 64–74).

[170] The Commission submits that the applicant relies heavily on a statement made by the Federal Court of Appeal that it would be impossible to award individual compensation to groups as they are not always readily available (*Canadian National Railway Company v. Canadian Human Rights Commission*, 1985 CanLII 5531 (FCA), [1985] 1 F.C. 96, (1985), 20 D.L.R. (4th) 668 (C.A.) [cited above], at paragraph 10). The respondents note that the Supreme Court of Canada reversed this judgment

(*Canadian National Railway Co. v. (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114). Therefore, they request that this Court disregard the applicant's submission. Notwithstanding the Supreme Court's decision, I agree with the Commission that the statement relied on by the applicant is distinguishable because, as already pointed out above, it is not necessary for individuals to be present and provide evidence.

[171] The Commission states that the Tribunal reasonably concluded that the CHRA allows it to compensate non-complainant victims of discrimination. The Commission submits that the Tribunal properly distinguished *Canada (Secretary of State for External Affairs) v. Menghani*, 1993 CanLII 3018 (FC), [1994] 2 F.C. 102, (1993), 110 D.L.R. (4th) 700 (T.D.) (*Menghani*). The applicant submits *Menghani* as an authority for not granting a remedy to a non-complainant. Having reviewed *Menghani* and the Tribunal's reasons, I find that the Tribunal properly distinguished the case in light of its review of the applicant's argument that child victims testify. The issue in *Menghani* was the lack of standing under the CHRA for the non-complainant, which is not the case in the present matters.

[172] Further, in the Compensation Decision, the Tribunal's response to the applicant's submission was as follows [at paragraphs 108–109 and 144]:

It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

...

The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal's findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal's findings of the children's suffering in past and unchallenged decisions in this case. [Emphasis added.]

[173] The applicant also submits that the categories of people entitled to compensation as set out in paragraphs 245–251 of the Compensation Decision is quite different from what the Caring Society and AFN asked for. In those paragraphs, the Tribunal refers to the terms “necessarily removed” children, “unnecessarily removed” children, children affected by Jordan's Principle as well as parents and caregiving grandparents. In my view, the Tribunal reasonably considered the various ways that underfunding of the FNCFS Program and Jordan's Principle led to the removal of children from families and communities for the complex and multifaceted reasons that the applicant pointed out. It was reasonable to make finer distinctions between the reasons for removal, but regardless of the reason, the affected children were removed and were denied culturally appropriate services in their own communities. Again, this was the basis of the Complaint and the Orders are not so different than what the Caring Society and the AFN were asking for.

[174] For all of the above reasons, I find that the Tribunal did not go beyond the scope of the Complaint in arriving at its decision.

(c) Class Action [table of contents]

[175] The applicant submits that the Order the Tribunal made was equivalent to a class action settlement without the proper representation of class members. As such, the Tribunal improperly extended its powers beyond what the legislation intended, which rendered the decision unreasonable (*Vavilov*, at paragraph 68). I disagree.

[176] The applicant mischaracterizes the compensation award. Canada compares the award to the type of damages that one may obtain in a court proceeding. However, awards for pain and suffering under section 53 of the CHRA are compensation for the loss of one's right to be free from discrimination, from the experience of victimization, and the harm to their dignity. A victim is not required to prove loss (*Lemire v. Canada (Canadian Human Rights Commission)*, 2014 FCA 18, [2015] 2 F.C.R. 117, at paragraph 85).

[177] It is clear that the Tribunal did not order compensation for tort-like damages or personal harm as is required in a class action proceeding. Rather, the Tribunal, as highlighted above, had a staged approach to remedies and specifically afforded the parties with an opportunity to present their positions on compensation. Once the submissions were received, the Tribunal considered the arguments and ordered compensation under section 53 of the CHRA.

[178] As seen above, the Tribunal can award both individual and systemic remedies, subject to the sufficiency of the evidence before it. A class action, however, focuses on the individual compensation award and there is no certainty that any systemic remedies will be awarded. The CHRA afforded the Caring Society and AFN with a process where both systemic and individual remedies can be sought and the Tribunal did not err when awarding both. The development of a Compensation Framework was consistent with the goals of determining the process for compensation to individuals.

[179] I also note that there is nothing in the CHRA that prohibits individuals from seeking remedies by way of class actions or separate legal actions. Other court processes can be pursued by the victims should they opt out of the Compensation Framework. As the applicant pointed out, the AFN has commenced a class action for a class of people affected by removals. However, I find that the class action proceeding does not have a bearing on the issues at hand for the reasons just stated. The development of the Compensation Framework also does not suggest that a class action was the preferred way or the only way to proceed. I agree with the Caring Society that the option of a class action does not negate the Compensation Orders. Both remedies can be pursued simultaneously.

(d) Principles of Damages Law [table of contents]

[180] The applicant also submits that the Compensation Decision breaches the principles of damages law. The applicant argues that the Compensation Decision fails to distinguish between children removed for a short time versus children removed for a longer time and between children who experienced different circumstances. The applicant cites many cases related to civil claims, which stand for the proposition that causation and proportionality must be considered when awarding damages (See e.g. *Whiten v. Pilot Insurance*, 2002 SCC 18, [2002] 1 S.C.R. 595). However, I find that these cases are distinguishable due to the statutory framework at play in this case. The CHRA enables the Tribunal to award compensation for one's loss of dignity from discriminatory actions. As stated previously, no actual physical harm is required.

[181] Once again, the applicant submits that the Tribunal should have required at least one individual to provide evidence about the harms they suffered (*Walden FC*, at paragraph 72). It states that it is unreasonable to assume that all removed children, regardless of their unique circumstances, meet the statutory criteria for compensation without evidence thereof.



[182] I disagree. Paragraph 73 of *Walden FC* is a direct answer to the applicant's submission:

.... The Tribunal held that it could not award pain and suffering damages without evidence that spoke to the pain and suffering of individual claimants. This does not, however, mean that it necessarily required direct evidence from each individual. As the Commission noted, the Tribunal is empowered to accept evidence of various forms, including hearsay. Therefore the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[183] The respondents' position has consistently been that they seek to remedy the harms arising from the removal of First Nations children from their families and their communities. They were not seeking individual tort-like loss suffered by each child or their families. The Tribunal reviewed the evidence related to harm in the Merit Decision, the Compensation Decision, and throughout numerous other rulings.

[184] The applicant also cites *Hughes v. Canada (Attorney General)*, 2019 FC 1026, 309 A.C.W.S. (3d) 591 (*Hughes 2019*), at paragraphs 42 and 64, stating that there must be a causal link between the discriminatory practice and the loss claimed. It submits that the Tribunal did not engage in an analysis of the effects that underfunding had on any of the recipients of compensation or the harms they suffered. The applicant also states that the Tribunal did not differentiate between the circumstances of the recipients. The applicant also refers to *Youmbi Eken v. Netrium Networks Inc.*, 2019 CHRT 44 (*Netrium*) for the proposition that the statutory maximum is awarded only in the most egregious of circumstances (at paragraph 70).

[185] I agree with the principles of *Hughes 2019* as pointed out by the applicant. However, unlike the present case, the damages in that case were lost wages and the issue was the cut-off date for the damages. This matter involves an award of compensation for pain and suffering caused by discriminatory conduct resulting in the removal of children from their homes and communities. This is clearly distinguishable from a wage loss complaint. In *Hughes 2019* the Court also noted that causation findings are intensive fact-finding inquiries which attract a high degree of deference (*Hughes 2019*, at paragraph 72). I agree.

[186] The circumstances in *Netrium* are also unlike the circumstances of this matter. The complainant was an adult who suffered a job loss and she was awarded \$7 000. In this matter, we are dealing with the harmful effects of removal on children over a considerable period of time. The awarding of the statutory maximum is within the discretion of the Tribunal to award based on the facts before it.

[187] The applicant states that where the jurisdiction to consider group claims exists in human rights legislation, it is because legislatures have clearly provided it, such as the jurisdiction for tribunals to deal with costs (*Mowat*, at paragraphs 57 and 60). In *Mowat* the appellant argued that the broad, liberal, and purposive approach could lead to a finding that costs or expenses are compensable. That is not the case here. Neither the Caring Society nor the AFN are seeking anything more than what is contained in the CHRA and within the scope of the Tribunal's jurisdiction under the CHRA.

[188] I agree with the respondents that tort law principles do not apply. The harm in this case, as determined by the Tribunal, was the removal of First Nations children from their families because of Canada's discriminatory funding model. As stated above, awards of compensation for pain and suffering are intended to compensate for an infringement of a person's dignity. The loss of dignity resulting from removal is a different harm that is not measured in the same manner as a tort or personal injury.

[189] The CHRA is not designed to address different levels of damages or engage in processes to assess fault-based personal harm. The Tribunal made human rights awards for pain and suffering because of the victim's loss of freedom from discrimination, experience of victimization, and harm to dignity. This falls squarely within the jurisdiction of the Tribunal.

[190] The quantum of compensation awards for harm to an individual's dignity is limited but is tied to the seriousness of psychological impacts upon the victim. The Tribunal considered the approach taken in the Residential Schools Settlement Agreement Common Experience Payment. However, the Tribunal only considered this for a Compensation Framework, not for the application of class action principles. The very purpose of the compensation award is to compensate a biological parent or grandparent for the loss of their child to a system that discriminated against them because they are First Nations.

[191] I agree with the Commission that it was open for the Tribunal to find that financial awards under the CHRA serve particular purposes that are unique to the human rights context. Namely, compensation for pain and suffering and special compensation for wilful and reckless discrimination, which are permitted within the quasi-constitutional CHRA.

[192] In this case, paragraphs 53(2)(a), 53(2)(e), and subsection 53(3) of the CHRA are relevant. They relate to a victim's dignity interests and the seriousness of psychological impacts. Vulnerability of the victim is relevant to the quantum of award, and the Commission submits that this is especially true when the victims are young (*Opheim v. Gagan Gill & Gilco Inc*, 2016 CHRT 12, at paragraph 43).

[193] The Caring Society submits that the quantum of damages awarded in the Compensation Decision is more than reasonable considering that Dr. Blackstock herself received two awards of \$10 000. When this amount is viewed in relation to the category of victims and the harms they experienced, the Caring Society submits that the maximum award is reasonable. I agree with this submission.

[194] Ultimately, the unique context of the harms that were found in this case limits the application of damages law, contrary to the applicant's submissions. In the unchallenged Merit Decision, it was clear that the harm was related to the removal of children from their families and the harm to the children's dignity as opposed to individualized tort-like harms that they suffered from the removal. The Tribunal has already determined what the harms were, who suffered those harms, and that the harms were caused by Canada's discriminatory funding regime (Merit Decision, at paragraph 349).

#### (e) Wilful and Reckless [table of contents]

[195] The applicant submits that the Tribunal's finding of wilful and reckless discrimination was unreasonable and unprecedented because it had no regard to proportionality or the evidence. I disagree.

[196] Once again, the applicant states that this cannot be determined without an inquiry into the facts and circumstances of individual cases. A reasonable decision would assess the causal relationship between the act of underfunding and the harm suffered and award compensation proportional to individual experiences. The applicant states that the Tribunal did not do this. These arguments were already addressed in the previous section of this decision.

[197] The applicant states that Canada did not discriminate wilfully and recklessly but rather made significant investments and changes to policies. For example, Canada commenced the funding of prevention activities. Furthermore, even if underfunding was a contributing factor to adverse outcomes for First Nations children, it was not the only factor in a complex situation. The applicant cites *Canada (Attorney General) v. Johnstone*, 2013 FC 113, [2014] 3 F.C.R. 170 (*Johnstone*) (aff'd 2014 FCA 110, , [2015] 2 F.C.R. 595) where the Court set out the purpose of subsection 53(3) and defined "wilful and reckless" (*Johnstone*, at paragraph 155). Subsection 53(3) is a punitive provision, intended to provide a deterrent and to discourage those who deliberately discriminate. To be wilful, the discriminatory action must be intentional. Reckless discriminatory acts "disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (*Johnstone*, at paragraph 155).

[198] In this proceeding, the applicant pointed to changes it was making when the Tribunal ruled. It also pointed out additional changes it made to specifically address matters identified by the Tribunal. The applicant states that there was no deliberate attempt to ignore the needs of First Nations children.

[199] The Caring Society and AFN submit that extensive evidence was before the Tribunal showing that the applicant was aware of the ongoing harm to First Nations children. Despite this, the applicant chose not to take corrective action. The Tribunal pointed to the various Wen:De Reports, the National Policy Review reports, and the Auditor General Reports which were accepted by the parties in the Merit Decision (see paragraphs 257–305). The Tribunal also heard evidence from many witnesses, all of which was canvassed in the Merit Decision (see paragraphs 149–216) and the Compensation Decision (see paragraphs 33, 90, 144–145, 152, 155–157, 162, 172, 174 and 184).

[200] Based on its review of various internal, external, and parliamentary reports over the course of 20 years, the Tribunal had ample evidence to determine that Canada was aware of these issues. Therefore, it had a basis to award additional compensation up to \$20 000 based on what it considered to be Canada’s wilful and reckless discriminatory behaviour.

[201] When there is evidence that discriminatory practices caused pain and suffering, compensation should follow and be neither in excess of the \$20 000 cap nor too low so as to trivialize the social importance of the CHRA. Special compensation for wilful and reckless conduct is a punitive provision intended to deter discrimination (*Johnstone*, at paragraph 155).

[202] As stated above, proof of loss by a victim is not required. The Commission submits that ‘punitive’ ought to be read in light of *Lemire*. In *Lemire*, the Federal Court of Appeal held that wilful and reckless conduct damages under CHRA are not penal in nature, but are to ensure compliance with statutory objectives of the CHRA (at paragraph 90).

[203] The Tribunal properly considered the factual record in determining whether to award damages for wilful and reckless conduct. There was more than enough evidence in the form of reports, which Canada participated in, and which were independent, to ground this finding. The process and outcome of the Tribunal’s decision amply reflect an internally coherent and rational chain of analysis.

(f) Definitions in the Definitions Decision [table of contents]

[204] The applicant submits that the Compensation Decision and the subsequent decisions, particularly the Definitions Decision, produce unreasonable results. This is true even if the Court finds that some compensation to some children is appropriate for Jordan’s Principle. More specifically, the applicant submits that the combined effect of these decisions is that children and their caregivers are entitled to the maximum compensation even where no request is made; where the failure or delay to provide the service caused no harm; or the delay was not greater than what was experienced by a non-First Nations child. It again points to the lack of proportionality and a lack of evidence of individual harm. It submits that the Tribunal determined that every case is the worst case, which is the wrong way to consider the issue.

[205] As noted above, the Definitions Decision considered three terms used in the Compensation Decision: “essential services”, “service gaps”, and “unreasonable delay”. The parties could not agree on their meaning and had to ask the Tribunal to clarify these terms.

[206] The applicant submits that the term “essential services” was used multiple times in the Compensation Decision without being defined. Additionally, the Tribunal unreasonably rejected the applicant’s submission that an “essential service” was one that was necessary for the safety and security of the child. The applicant takes issue with the Tribunal’s finding that any conduct that widens the gap between First Nations children and the rest of society is compensable, not only when it has an adverse impact on the health and safety of a First Nations child (Definitions Decision, at paragraph 147).

[207] The Caring Society submits that this Court should show deference to the Tribunal’s approach in developing a Compensation Framework for victims, which ultimately referenced these terms. The orders, read together, clearly define the class of victims who will receive compensation. I agree with the Caring Society’s submissions that the Tribunal also logically defined “essential services” in its assessment of compensation, limiting compensation to situations “that widened the gap between First

Nations children and the rest of Canadian society.” The Tribunal stated numerous times that the goal of the exercise of its remedial discretion was to remedy discrimination. Its findings in relation to “essential services” are consistent with the goal of remedying discrimination against First Nation children.

[208] In comparison, the applicant submits that the Tribunal’s definition of the term “service gap” is unreasonable. It submits that the Tribunal unreasonably rejected Canada’s proposed criteria that would have given meaning to this term: the service should be requested; there should be a dispute between jurisdictions regarding who should pay; and the service should normally be publicly funded for any child in Canada (Definitions Decisions, at paragraph 107).

[209] NAN notes that Canada appears to take issue with the fact that the Compensation Framework permits compensation for unmet services absent a “request” being communicated to Canada. NAN agrees with the Caring Society’s position on the issue of “service gaps” and submits that the Tribunal made a reasonable decision in accordance with the evidence and submissions before it. NAN made submissions before the Tribunal on the definition of “service gaps” from the perspective of northern First Nations who routinely face systemic service gaps in essential services. NAN submits that it is clear from the Compensation Framework that the Tribunal carefully considered NAN’s perspective and incorporated its submissions in the “service gap” definition. I find that the Tribunal had evidence and submissions before it to make this finding within the overarching jurisdiction of remedying discrimination.

[210] Regarding the term “unreasonable delay”, the applicant submits that the Tribunal acknowledged that the applicant must provide a much higher level of service in order to remedy past injustices and that it should not have to compensate where there are only minor deviations from those standards. However, it did not impose any reasonable limits (Definitions Decision, at paragraphs 171 and 174). In short, the applicant submits that it is unreasonable to compensate everyone who experiences delay for any service at the levels ordered in the Compensation Decision.

[211] The Caring Society disagrees with the applicant that compensation for any delay is inappropriate, as it is only *unreasonable* delay that factors into compensation. I agree with the Caring Society’s characterization of the Tribunal’s concept of delay. It is clear that not every delay is a factor. Further, the Caring Society takes issue with the applicant’s characterization of the trust orders. Although the applicant is not challenging them, the Caring Society argues that the applicant is attempting to rely on them to raise doubts about the Tribunal’s overall analysis. The Caring Society states that these orders are reasonable and “anchored in sound legal principles”. I agree for the reasons stated above.

[212] The Commission submits that the Tribunal’s decision to compensate estates is justified and reasonable. The CHRA has broad remedial purposes and does not bar compensation to estates, as discussed in *Stevenson v. Canadian Human Rights Comm.*, 1983 CanLII 5020 (FCA), [1984] 2 F.C. 691, (1983), 150 D.L.R. (3d) 385 (C.A.). Canada has not actually pointed to any contrary decisions by a federal court interpreting the CHRA.

[213] The applicant does rely on *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 (*Hislop*), but this case dealt with individuals who were deceased *before* the allegedly discriminatory laws were passed. Further, *Hislop* did not create a general rule that claims under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (Charter) always end upon death. The Tribunal also addressed *Gregoire*, wherein the British Columbia Court of Appeal found that an estate was not a “person” capable of making a claim under British Columbia’s *Human Rights Code*, R.S.B.C. 1996, c. 210 (*British Columbia v. Gregoire*, 2005 BCCA 585, 262 D.L.R. (4th) 186 (*Gregoire*), at paragraph 14). The Tribunal distinguished the present matter from *Gregoire* and found that the claims for First Nations children and families were being pursued on behalf of “victims”—a term not used in British Columbia’s *Human Rights Code*. As stated above, the applicant was not necessarily challenging the finding with respect to estates, but argued it was yet another example of an unreasonable reasoning process.

[214] With respect to compelling public interest considerations, the Tribunal held that compensating estates would serve a dual purpose. It would compensate victims for pain and suffering caused by discrimination and would deter Canada from discriminating again. I agree with the Commission's submission that recent Tribunal rulings, which accept that financial remedies may be awarded to estates, suggests that the panel in this case was not rogue, but rather, reasonable.

[215] As stated throughout this judgment and reasons, the applicant's insistence on individual harms misinterprets the nature of the Complaint advanced by the Caring Society and the AFN. Both were seeking remedies caused by the mass removal of children. As also noted above, the scope of the findings of the Tribunal was an attempt to remedy discrimination, which it has jurisdiction to do. This is common as a proceeding moves through the process, but even more so considering the scope of the Complaint and the unprecedented nature of the claims and proceedings. The evolution of this case is not a departure from the essence of the Complaint. It is but a refinement due to the unique nature of this very complex and precedent-setting process.

[216] After considering the parties' submissions, I find that the Tribunal reasonably determined definitions for the terms "essential services", "service gaps", and "unreasonable delay". The Tribunal based its determinations on the Compensation Decision and with the overall goal of remedying and preventing discrimination. It reasonably exercised its jurisdiction as permitted under the CHRA.

(g) Inadequate Reasons [table of contents]

[217] The applicant submits that the Tribunal's reasons were inadequate because they failed to explain its departure from the *Menghani*, *Moore*, and *CNR* decisions. Furthermore, the reasons were unresponsive to Canada's arguments. For example, the applicant states that the Tribunal concluded that *Gregoire* does not apply because this is a complaint brought by organizations on behalf of victims and *Gregoire* involved a single representative of an individual complainant (Additional Compensation Decision, at paragraphs 133–134 distinguishing *Gregoire*, at paragraphs 7 and 11–12). The applicant submits that the Tribunal did not explain the significance of this difference.

[218] While the applicant is not challenging the Tribunal's findings on compensation for estates, it nevertheless points out the Tribunal's failure to apply the rule in *Hislop*. *Hislop* stands for the proposition that an estate is not an individual and therefore it has no dignity than can be infringed. The Tribunal simply stated that the rule in that case is context-specific, and the human rights context justifies departing from the rule. The applicant states that the Tribunal failed to explain why and that this is an example of lack of reasoning.

[219] The applicant submits that the Tribunal also ignores relevant statutory authority, including sections 52 and 52.3 of the *Indian Act*. Section 52 of the *Indian Act* gives the Minister the authority to deal with the property of beneficiaries lacking competence. Section 52.3 contemplates the Minister working with Band Councils and parents to manage the property of minors within the relevant provincial schemes. Since the complainants did not challenge the constitutionality of the *Indian Act* the Tribunal was obliged to follow it.

[220] All of the above passages throughout this section of my reasons actually illustrate the scope of the Tribunal's analysis as well as the rationale for its findings. I find that the reasons are sufficient to show why it made its findings. The applicant simply disagrees with those findings.

(h) Jordan's Principle Compensation [table of contents]

[221] The applicant states that through a series of decisions the Tribunal has created a new government policy and awarded compensation for a failure to implement that policy. The applicant states that by adopting Jordan's Principle, the House of Commons endorsed the principle that intergovernmental funding disputes should not delay the provision of necessary products and services to First Nations children.

[222] The applicant submits that Jordan's Principle received only passing reference in the Complaint. Over the course of the litigation, the Tribunal transformed Jordan's Principle from a resolution aimed at addressing jurisdictional wrangling, to a "legal rule" that ensures substantive equality to a far greater group than First Nations children on reserve and in the Yukon. The applicant says it "accepted" these rulings because they reflected progressive policy choices and that the results have been impressive.

[223] The Caring Society disagrees with the applicant's assertion that Jordan's Principle never formed part of the Complaint. Rather, they submit that the Tribunal had previously addressed this claim and ruled that Jordan's Principle was intertwined with the FNCFS Program (see paragraph 25 above). Because the applicant previously accepted these findings, they state that Canada cannot argue that they are unreasonable on judicial review. I agree. The applicant has forgone its right to challenge the Merit Decision. Also, as pointed out in paragraph 14 above, the MOU between AANDC and Health Canada also referenced the link between the FNCFS Program and Jordan's Principle.

[224] I agree with the Commission that the issues pleaded are broad enough to encompass matters relating to Jordan's Principle. The Tribunal made rulings in 2016 and 2017 that expressly rejected the applicant's argument that Jordan's Principle was beyond the scope of the Tribunal's inquiry. I agree with the Commission that if the applicant truly believed that Jordan's Principle is beyond the Tribunal's scope, then it should have applied for judicial review of those earlier rulings.

(i) Compensation to Caregivers [table of contents]

[225] The applicant states that there was no basis for awarding compensation to caregivers as there was no evidence of the impact of funding policies on that group. Additionally, family members must advance claims themselves and provide evidence of the harm they suffered, which they have not (*Menghani*, at page 29).

[226] The applicant submits that the Complaint was silent regarding compensation. Furthermore, prior to the AFN's submissions that family members should be compensated, the Caring Society had only submitted that any compensation should be paid into a trust. Since there were no caregiver complainants and no evidence of the harms they suffered, the decision is unreasonable.

[227] In my view, the Tribunal reasonably found that the AFN is empowered via the mandate of the Chiefs-in-Assembly to speak on behalf of First Nations parents and caregiving grandparents as victims of Canada's discrimination. The Tribunal also interpreted the CHRA and found that complaints on behalf of victims made by representatives can occur. The Commission has the discretion to refuse to deal with a complaint if the victim does not consent.

[228] The record also confirms that the Tribunal always used the terms "First Nations children and families" from the Merit Decision onwards. The Complaint, statement of particulars, and numerous passages of the Merit Decision confirm this. In fact, all parties' submissions referred to the victims in this manner.

[229] There was extensive evidence before the Tribunal at the hearing of the Compensation Decision. This evidence particularized the alleged harms and the impact of removal on children, families, and communities. There was extensive evidence from several experts as well as reports that Canada had endorsed, including the Royal Commission on Aboriginal Peoples, which explained the significance of family in First Nations culture. The Tribunal therefore had evidence before it to inform its ruling concerning families.

[230] The Tribunal received and accepted evidence it saw fit pursuant to paragraph 50(3)(c) of the CHRA. It accepted evidence in relation to harms suffered by these victims, which was ample and sufficient to make its finding that each parent or grandparent who had a child unnecessarily removed has suffered. The evidence of the various reports showed that communities and extended families also suffered by the removal of children but the Tribunal did not extend the compensation to all family members. In my view, the Tribunal was sensitive to the kinship systems in First Nations communities

(see e.g. Compensation Decision, at paragraph 255). At the same time, it was also cognisant of the limits to its jurisdiction and the evidence in restricting the compensation only to parents or caregivers despite the general submissions related to ‘families’. Ultimately, the Tribunal’s reasons were clearly alive to the issue of not only children, but families and caregivers as well (Compensation Decision, at paragraphs 11, 13, 32, 141, 153–155, 162, 166–167, 171, 187, 193 and 255). The Tribunal’s finding with respect to compensating parents or caregiving grandparents is transparent, intelligible, and justified.

## (2) Compensation Decision Conclusion [table of contents]

[231] Ultimately, the Compensation Decision is reasonable because the CHRA provides the Tribunal with broad discretion to fashion appropriate remedies to fit the circumstances. To receive an award, the victims did not need to testify to establish individual harm. The Tribunal already had extensive evidence of Canada’s discrimination; the resulting harm experienced by First Nations children and their families (the removal of First Nations children from their homes); and Canada’s knowledge of that harm. Further, the Tribunal did not turn the proceedings into a class action because the nature and rationale behind the awards are different from those ordered in a class action. From the outset, First Nations children and families were the subject matter of the complaint and Canada always knew that the respondents were seeking compensation for the victims. If Canada wanted to challenge these aspects of the Complaint, it should have done so earlier. Canada may not collaterally attack the Merit Decision or other decisions in this proceeding.

## C. The Eligibility Decision [table of contents]

[232] Before delving into the analysis of this issue, there are several things to note about the Eligibility Decision. First, in describing the context, the Tribunal pointed out that the Merit Decision confirmed that “the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the CHRA” (Eligibility Decision, at paragraph 2). Next, the Tribunal described the steps Canada would take to implement the Tribunal’s order and additional findings in 2017 CHRT 14 regarding Canada’s narrow interpretation of Jordan’s Principle. This led to amended orders in 2017 CHRT 35 which were not challenged.

[233] Second, and more importantly, at paragraph 17 of the Eligibility Decision, the Tribunal noted that neither the Tribunal nor the parties had provided a definition for “First Nations child” until the Caring Society brought the motion leading to the Eligibility Decision. The Tribunal did note that the parties had been discussing this issue outside of the Tribunal process but had not reached a consensus on this issue. In the Interim Eligibility Decision the Tribunal concluded that this issue was best determined at a full hearing and it sought submissions on a wide spectrum of issues such as international law and the UNDRIP, discrimination cases under the *Indian Act*, Aboriginal law, human rights law, and constitutional law.

[234] Third, it is helpful to recall the parties’ positions with respect to eligibility and what the Eligibility Decision actually decided. Prior to the Eligibility Decision, the applicant wished to restrict eligibility for Jordan’s Principle to “First Nations children living on reserve” and “First Nations children with ‘disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports’” (Interim Eligibility Decision, at paragraph 12). At the time of the Eligibility Decision the applicant willingly expanded eligibility to (a) Registered First Nations children, living on or off reserve; (b) First Nations children who are entitled to be registered; and (c) Indigenous children, including non-status Indigenous children who ordinarily reside on reserve. In comparison, the Caring Society wanted Jordan’s Principle to apply to First Nations children beyond children with status that live on reserves. The Caring Society proposed three additional categories to the Tribunal. For the sake of simplicity, I will refer to the Caring Society’s additional three categories as the first, second, and third categories in the order that they were addressed by the Tribunal in the Eligibility Decision. The Tribunal made the following ruling regarding the first category [at paragraphs 211–214]:

The question is two-fold. The first part is the following:

Should First Nations children without *Indian Act* status who are recognized as citizens or members of their respective First Nations be included under Jordan's Principle?

The Panel, in light of the reasons outlined above, answers yes to this question...

The second part is the following:

If the previously noted First Nations children are included in the eligibility criteria, does it automatically grant them services or does it only trigger the second part of the process, namely 1) a case-by-case approach and 2) respecting the inherent right to self-determination of First Nations to determine their citizens and/or members before the child is considered to be a Jordan's Principle case?

The Panel believes that it is the latter...

[235] The following excerpts highlight the Tribunal's ruling on the second category [at paragraphs 272–273]:

The Panel pursuant to section 53(2) of the *CHRA* orders the AFN, the Caring Society, the Commission, the COO, the NAN and Canada to include as part of their consultations for the order in section I, First Nations children who do not have *Indian Act* status and who are not eligible for *Indian Act* status, but have a parent/guardian with, or who is eligible for, *Indian Act* status.

Further, Canada is ordered to immediately consider eligible for Jordan's Principle services those First Nations children who will become eligible for *Indian Act* registration/status under S-3 implementation.

[236] The following passages highlight the Tribunal's ruling on the third category, which the Tribunal split into two categories [at paragraphs 274, 280, 283 and 285]:

This last section will deal with two additional categories:

First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to the operation of the Indian Residential Schools System, the Sixties Scoop, or discrimination within the FNCFS Program.

First Nations children without *Indian Act* status, residing off reserve, who have lost their connection to their First Nations communities due to other reasons.

...

This being said, the Panel finds that First Nations children residing off reserve who have lost connection to their First Nations communities for other reasons than the discrimination found in this case fall outside of the claim before it. The claim was not focused on this at all until the 2019 motion and sufficient evidence has not been presented to support such a finding. As the Panel previously said, the Supreme Court of Canada stated in *Moore* that the remedy must flow from the claim.

...

However, the Panel did not make findings in regards to the services First Nations children of Residential School and of Sixties Scoop survivors receive off-reserve who are not recognized as part of a First Nation community given that it was not advanced by the parties in their claim or arguments before this motion and insufficient evidence was presented.

...



Given the lack of evidence in this motion, the Panel is not in a position to make findings let alone remedial orders for the two above categories at this time.

[237] In the end, the Tribunal only added the first and second categories of First Nations children who could be eligible for services under Jordan's Principle. The Tribunal also ordered the parties consult to generate potential eligibility criteria for Jordan's Principle. The parties were to consider the Tribunal's rulings and establish a mechanism to identify citizens/members of First Nations as well as funding sources.

[238] The applicant's arguments regarding the Eligibility Decision, which I address below, relate to one another and necessarily overlap. Ultimately, I find that the Tribunal's definition of the term "First Nations child" falls within a range of possible outcomes which are defensible in respect of the facts and the law.

#### (1) Reasonableness [table of contents]

##### (a) The Scope of the Tribunal's Jurisdiction & the Scope of the Complaint [table of contents]

[239] The applicant submits that the Tribunal exceeded its jurisdiction in making the Orders. Specifically, the decision falls outside the scope of the Complaint and the evidence by adding categories that the Caring Society and the AFN did not even ask for. The applicant also submits that the Caring Society and AFN essentially challenged the provisions of the *Indian Act* and that the Tribunal had no jurisdiction to entertain such submissions.

[240] On the whole, the respondents submit that creating additional categories and defining "First Nations child" beyond the scope of the *Indian Act* is consistent with international law principles; complies with a human rights framework; respects First Nations' rights to self-government and self-determination; and ensures substantive equality.

[241] In my view, the inclusion of two additional categories of children is not beyond the Tribunal's jurisdiction or the scope of the Complaint. With respect to the Tribunal's jurisdiction under the CHRA, I adopt the same reasoning set out above in the section addressing the Compensation Decision. The Tribunal found that a definition of "First Nations child" predicated on the *Indian Act* would perpetuate discrimination. In making this finding, it was not ruling on the validity of the *Indian Act*. It was within the general and remedial jurisdiction of the Tribunal to prevent further discrimination by adding additional categories for eligibility that extend beyond the *Indian Act*. As for the scope of the Complaint, there is a clear nexus between the Eligibility Decision and the original Complaint. The Complaint involved Jordan's Principle and the Tribunal addressed this aspect of the Complaint by creating two additional categories of children who are eligible for Jordan's Principle. Additionally, it was a live issue for the Tribunal to define the meaning of "First Nations child" because the parties had not yet determined the scope of this term.

[242] Although not always stated, at their core, the parties' submissions and the Tribunal's decision centre on the *Indian Act*. This does not mean that the Tribunal acted outside of its jurisdiction when creating new categories of eligibility, however. There is a difference between legally challenging the status provisions of the *Indian Act* and defining "First Nations child" for the purposes of eligibility under Jordan's Principle. Just because the Tribunal extended eligibility for Jordan's Principle beyond the confines of the *Indian Act*, does not mean that the Tribunal acted outside its jurisdiction or that it determined that the status provisions were invalid.

[243] There are numerous examples within the record to support the position that the *Indian Act* was central to the underlying proceedings. The Complaint explicitly referred to discrimination of First Nations children "on reserve". Likewise, both parties' submissions and the Tribunal's decisions about eligibility discussed children living on "reserve" and children with "status". These concepts are creatures of the *Indian Act*. There simply is no "reserve" or "status" system without the *Indian Act*.

[244] Additionally, at the Federal Court hearing, the applicant discussed the affidavit of Dr. Gideon. Of course, Dr. Gideon's affidavit was also before the Tribunal. With this affidavit, the respondent wanted to demonstrate that Canada was taking a liberal view of the definition of "First Nations child" for the purposes of Jordan's Principle. Dr. Gideon's affidavit makes numerous references to the *Indian Act* and the concepts of "reserve" and "status". Indeed, it is difficult, if not impossible, to not consider the terms "reserve" and "status" without also considering the *Indian Act*.

[245] Another example of the applicant's awareness of the *Indian Act*'s effect on the Eligibility Decision can be found in its submissions. The applicant submits that the definition it was employing at the time of the Eligibility Decision was not discriminatory. It included children registered or entitled to be registered under the *Indian Act* who had a connection to a reserve, even if not always resident on it, and children ordinarily resident on reserve even if they did not have *Indian Act* status (2020 CHRT 36, at paragraphs 17–18). The applicant also led evidence from Mr. Perron that First Nations children with *Indian Act* status living off reserve suffered due to jurisdictional disputes. Conversely, there was no evidence related to non-status, off reserve children suffering discriminatory treatment.

[246] Canada's expanded categories are clearly informed by the *Indian Act* as they focus on status and residency on reserves. I acknowledge that these categories are more inclusive than Canada's original positions regarding eligibility and reflect a significant move forward. I recognize Canada's attempt in trying to eliminate discrimination within the context of not only the Complaint, the evidence, and the various decisions and rulings, but also within the existing legislative and constitutional constraints in which the parties operate.

[247] I am not persuaded, however, by the applicant's submissions that the two additional categories are outside the scope of the Tribunal's jurisdiction, the Complaint, or the evidence before the Tribunal. It is true that there was evidence on the relationship between the *Indian Act* (including the status and reserve systems) and Canada's funding decisions. However, as I discuss below, there was also evidence that First Nations children, regardless of status or residency on reserves, suffer because of Canada's funding regime, which is predicated on and influenced by the *Indian Act*. I make this finding notwithstanding Canada's steps to expand eligibility.

[248] The Tribunal clearly contemplated the difficulties that arise when relying on concepts that originate from the *Indian Act*, such as "status" and "reserves" [at paragraph 177]:

.... The Panel believes it is an interpretation exercise to determine if using the *Indian Act* to determine eligibility criteria for Jordan's Principle furthers or hinders the Panel's substantive equality goal in crafting Jordan's Principle orders and the Panel's goal to eliminate discrimination and prevent similar practices from reoccurring.

In this passage, the Tribunal implicitly acknowledges that a definition of "First Nations child" that relies on the *Indian Act* will perpetuate the discrimination the Tribunal seeks to remedy.

[249] The Caring Society submitted, and the respondents and intervener agreed, that the Tribunal reasonably concluded that "all First Nations children" includes certain groups not recognized by the *Indian Act*. In expanding the definition to include the additional two categories, it prevented further discrimination. It was therefore reasonable not to exclude children solely due to the *Indian Act*'s second-generation cut-off rule.

[250] I agree with the respondents. The Eligibility Decision prevented future discrimination, which is consistent with the purpose of the Tribunal's jurisdiction as previously referred to in paragraphs 125 to 128, above. There is no dispute that the Tribunal enjoys a large remedial jurisdiction and that this jurisdiction should be interpreted liberally in light of the quasi-constitutional nature of the CHRA. I also find that this purposive approach is consistent with jurisprudence outlining Canada's relationship with First Nations peoples, most recently articulated in *R. v. Desautel*, 2021 SCC 17, 456 D.L.R. (4th) 1 (*Desautel*).

[251] Although the facts of *Desautel* are quite different from the present case, I am still mindful of the guidance the Supreme Court provided at paragraph 33 regarding the context of proceedings involving Indigenous people:

... an interpretation of “aboriginal peoples of Canada” in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation. The displacement of Aboriginal peoples as a result of colonization is well acknowledged:

Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

(*Report of the Royal Commission on Aboriginal Peoples*, vol. 1, *Looking Forward, Looking Back* (1996), at pp. 139-40)

By contrast, an interpretation that excludes Aboriginal peoples who were forced to move out of Canada would risk “perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers” (*R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139, at para. 53).

[252] The Tribunal’s Eligibility Decision was clearly attempting to remedy past and future discrimination while being mindful not to “perpetuate historical injustice.” This is evident when considering the scope of the evidence the Tribunal considered relating to the history of Indigenous-Crown relations.

[253] The first category acknowledges that there is a distinction between Indian status and First Nations citizenship. Presently, a First Nations child or person may not have *Indian Act* status, but they may be a member or citizen of their First Nation if that First Nation has control over its membership and has enacted such a provision. At present, this is possible through section 10 of the *Indian Act*, which allows for First Nations control over membership. Indian status, however, remains within the purview of Canada. The Tribunal did not act outside its jurisdiction by extending Jordan’s Principle eligibility to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members. I agree with the AFN that it was open to the Tribunal to take a purposive approach in interpreting its home legislation and to accordingly award extended eligibility of Jordan’s Principle to individuals without *Indian Act* status that are recognized by their First Nations as citizens and members.

[254] The respondents and intervenor generally echo the submissions of the AFN and the COO that the *Indian Act* is a form of apartheid law that gives the government unilateral authority to determine who is legally an Indian. They submit that First Nation signatories to the Treaties never agreed that treaty benefits and remunerations would cease when a descendant lost their *Indian Act* status. These submissions are duly noted. However, I need not make specific pronouncements on these submissions as, in my view, the findings of the Tribunal are reasonable without regard to these submissions.

[255] The COO points to the *Act respecting First Nations Inuit and Métis children youth and families*, S.C. 2019, c. 24 (FNIMCYF Act) which acknowledges Canada’s commitment to respecting the UNDRIP and First Nations’ right to self-government or self-determination in relation to child and family services (See FNIMCYF Act at Preamble, section 8). The FNIMCYF Act similarly does not define “Indigenous Child”, “First Nation”, or “First Nations child”. Rather, the statute creates space for First Nations to do it themselves. In Ontario, the *Child Youth and Family Services Act*, 2017, S.O. 2017, c. 14, Sch. 1 (Ont

CYFS Act) acknowledges the UNDRIP in its preamble and recognizes that a First Nations child's "band" or "community" is a band or community of which the child is a member or with which the child identifies (at subsection 2(4)). "First Nations child" is not defined nor confined to the *Indian Act* definition. As the Tribunal recognized at paragraphs 224–226 of the Eligibility Decision, the Ont CYFS Act also has a mechanism to notify First Nations in the same manner as the FNIMCYF Act. As such, the Tribunal's reasoning is not without precedent.

[256] In addition, when viewed through the lens of the Complaint, the Merit Decision, and the Compensation Decision, the second category is not so remote as to not be part of the Complaint. The second category factors in that some First Nations children may become eligible for *Indian Act* status based on their parents' present or future eligibility or because of *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, S.C. 2017, c. 25 (Bill S-3). Bill S-3 amended the *Indian Act* to address sex-based discrimination and will temporarily increase the number status Indians in Canada.

[257] I also find the Eligibility Decision reasonable because, in considering the third category, the Tribunal acknowledged that this category strayed beyond the Complaint. The Tribunal, citing *Moore*, was aware of the parameters of its jurisdiction and determined that the third category had no nexus to the Complaint.

[258] Overall, the Complaint was framed in terms of discrimination in relation to the *Indian Act*, reserves, and the status system. In arriving at its findings in the Eligibility Decision, the Tribunal was cognizant of the scope of the Complaint and its broad remedial jurisdiction. The Eligibility Decision sought to prevent future discrimination, which is consistent with the purpose of the Tribunal's enabling statute. As such, the Tribunal's decision was reasonable.

#### (b) Implications for Compensation Decision [table of contents]

[259] At the hearing for these judicial review applications, the parties noted that the additional two categories affect the Compensation Decision. Canada submitted that these two categories now expand the eligibility of those entitled to compensation. On its face, they do, but I find that the Tribunal reasonably delved into the delicate issue of *Indian Act* status when it sought to cease discrimination. It was a bold approach but one that was within the jurisdiction of the Tribunal based on the Complaint and the evidence in the record.

[260] I am not convinced that the first category will automatically expand the eligibility of those entitled to compensation. It certainly has the potential to do so, but Canada would need to coordinate with First Nations, as set out in the Compensation Framework. First Nations will determine whether children are citizens or members. For various reasons, First Nations may recognize children as members or citizens or they may not. At this stage, it is premature for anyone to ascertain how First Nations will approach this category or determine how many children this will affect.

[261] Similarly, there is also no way to ascertain how many children will fit into the second category. This is particularly true given that it is difficult to know the impact of Bill S-3. However, the second category is still attempting to address the effect of the *Indian Act*'s status and reserve provisions on Canada's funding decisions. The Tribunal determined that these provisions still have the potential to discriminate against certain individuals. The two additional categories attempt to soften the effects that these provisions have on certain children and to give the parties some flexibility in how to work together to assess these complexities.

[262] I also note that the Compensation Framework itself contains provisions that place some limitations on whether certain categories are entitled to compensation for pain and suffering or for special compensation for wilful and reckless discrimination (see for example Articles 4.2.5.2 and 4.2.5.3). Again, this illustrates some restraint on the part of the Tribunal.

#### (c) Alleged Lack of Evidence [table of contents]

[263] The applicant submits that there was no evidence for the Tribunal to make its order concerning the additional two categories. This is not accurate.

[264] In the Interim Eligibility Decision, the Tribunal had evidence of the continuing impact of the narrow interpretation of Jordan's Principle through the circumstances of S.J.. That ruling clearly set forth that there was a denial of Jordan's Principle services simply because of the second-generation cut-off rule (see paragraphs 56–86). S.J. did not have *Indian Act* status because one of her parents was registered under subsection 6(2) of the *Indian Act*.

[265] It is also important to note that S.J. was not resident on reserve. As such, Canada's expanded categories at the time of the Eligibility Decision would not have captured S.J. The applicant submits that there was no evidence before the Tribunal that children other than those accounted for in its expanded categories experienced discrimination. S.J.'s story indicates otherwise. There is no reason to believe that S.J.'s circumstances are unique.

(d) Non-Party First Nations [table of contents]

[266] The applicant also submits that the community recognition concept under the first category is unreasonable because it imposes obligations on non-party First Nations to determine which children are eligible within 48 hours of being made aware of a potential claim (2017 CHRT 35, at paragraph 10). Additionally, the Tribunal avoided addressing the problems it created regarding community recognition and the *Indian Act*'s second generation cut-off rule by instructing the parties to devise a system themselves. Finally, the Tribunal ignored the potential spillover effects of recent legislative efforts to address child and family services issues such as the FNIMCYF Act. I disagree with all of these submissions for the following reasons.

[267] First, the order only required the parties to consult with one another. There was no declaration that it was declaring the *Indian Act*'s citizenship or membership requirements to be improper or unconstitutional. In accordance with its dialogic approach and the difficult role it has within the CHRA, the Tribunal sought to endorse the good faith discussions that the parties had embarked upon outside of the Tribunal's process.

[268] Second, in no way did the order affect the second-generation cut-off rule in the *Indian Act*. There was simply an order for the parties to look at two additional categories of First Nations children who would be eligible for consideration under Jordan's Principle. Eligibility and challenges to the cut-off rule cannot be dealt with where there is no Charter challenge to subsection 6(2) of the *Indian Act*. The Tribunal was aware of this (Eligibility Decision, at paragraph 176). The second-generation cut-off rule, as questionable as it may be in light of First Nations' general opposition to the *Indian Act*'s determination of status, remains unchallenged and in force.

[269] I also agree with CAP's submission that the Eligibility Decision required Canada to consult with the parties to develop eligibility criteria for First Nations children under Jordan's Principle, which led to a consent order. If Canada considered the consultation inadequate, it could have sought broader participation earlier. There is no evidence that it did or that any First Nation community is objecting to the purported burden of identification for categories of First Nations children.

(e) Determining Complex Questions of Identity [table of contents]

[270] Finally, the applicant submits that the second category decides a complex question of identity that was not before the Tribunal and that Indigenous Peoples themselves do not agree on.

[271] In *Desautel*, the Supreme Court of Canada dealt with a subsection 35(1) Aboriginal rights claim of a non-citizen of Canada. The Court stated the following: "[w]hether a group is an Aboriginal people of Canada is a threshold question, in the sense that if a group is *not* an Aboriginal people of Canada, there is no need to proceed to the *Van der Peet* test... The threshold question is likely to arise only where there is some ground for doubt, such as where the group is located outside of Canada" (*Desautel*, at paragraph

20). The Court also found that no previous decision of the Supreme Court had interpreted the scope of the words “aboriginal peoples of Canada” in subsection 35(1) of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982, 1982, c. 11* (U.K.) [R.S.C., 1985, Appendix II, No. 44] (*Desautel*, at paragraph 21).

[272] Similar to the Supreme Court’s approach in *Desautel*, I also find that the legal issue of the definition of who is a First Nations child and how that determination is made is ultimately left for another day (*Desautel*, at paragraph 32). The Eligibility Decision was not determining the legal effect of who is a First Nations child. Rather, it determined certain parameters to assist the parties in deciding who is eligible for Jordan’s Principle and, consequently, compensation.

[273] I agree with Commission’s submissions that the Eligibility Decision clarified the benefit at issue as being able to apply for services and have those requests considered on a case-by-case basis. In other words, First Nations children living off reserve will now have the opportunity to *apply* for services pursuant to Jordan’s Principle. This does not guarantee that all applications will be fulfilled and services will be provided. The Eligibility Decision only instructs Canada to let First Nations children “through the door” for the purposes of eligibility. Determining who may *apply* for services does not determine a complex question of identity that has legal consequences beyond the scope of eligibility for Jordan’s Principle.

[274] Contrary to what the applicant submits, the Eligibility Decision clearly left determinations of identity and citizenship to First Nations communities. I agree with the COO that it was appropriate for the Tribunal to make a decision that would allow First Nations to retain control over identity, membership, and citizenship, as the principles in *Desautel* provide. The COO points to Annex A of 2020 CHRT 36 which does not dictate anything to a First Nation. Rather, that annex provides a funding mechanism for a First Nation that chooses to participate in the community recognition process. Furthermore, it leaves space for the First Nation to determine how it will do so.

[275] For all of these reasons, I disagree with the applicant that the Eligibility Decision is unreasonable because it determined complex questions of identity.

## (2) Eligibility Decision Conclusion [table of contents]

[276] Ultimately, the Eligibility Decision contains no reviewable error to permit the intervention of this Court. It is intelligible and rationale and the Tribunal worked within its jurisdiction to make the findings it did, taking into consideration the entire process that has developed since the Complaint was filed in 2007.

[277] The Eligibility Decision highlights the tension between nationhood, the *Indian Act*, and eligibility for program funding provided by the applicant. Frankly, the parties are talking to each other about different issues. The respondents properly highlight the colonial legislation’s adverse impact on Indigenous peoples historically and today. They also highlight that Indigenous people possess inherent Aboriginal and Treaty Rights including the right to self-determination. These rights include the right to govern their citizens, including children and families. It is a holistic approach.

[278] On the other hand, the applicant adopts a more limited and legalistic approach. It is fine to approach matters this way, but this approach, as a starting point, is fundamentally at odds with how Indigenous parties may approach matters. It is also not conducive to early resolution of issues arising with First Nations. The multitude of rulings and orders confirms this.

[279] With that being said, Canada is to be commended for moving beyond its initial definition on eligibility. The Tribunal’s remedial and dialogic approach can be credited for this improvement. Ultimately, however, the success rests upon true dialogue and discussion between Canada and the respondents. I encourage those discussions to continue for the benefit of future generations of First Nations children.

## D. Procedural Fairness [table of contents]

[280] I am not persuaded that the applicant was denied procedural fairness.

[281] As noted above, I have determined that the Tribunal did not change the nature of the Complaint in the remedial phase. The Tribunal, exercising extensive remedial jurisdiction under the quasi-constitutional CHRA, provided a detailed explanation of what had transpired previously and what would happen next in each ruling/decision (see e.g. 2016 CHRT 16, at paragraph 161). In so doing, it was relying on a dialogic approach. Such an approach was necessary considering the scope of the discrimination and the corresponding efforts to remedy or prevent future discrimination. Most importantly, the Tribunal was relying on established legal principles articulated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, [2008] 2 F.C.R. 393, at paragraph 37 and *Hughes 2010*, at paragraph 50 (Merit Decision, at paragraphs 468 and 483). I do not agree that the Tribunal did not provide the parties with notice of matters to be determined.

[282] I also find that the Tribunal did not err in finding that discrimination is ongoing. The Tribunal retained jurisdiction to deal specifically with this issue from the Merit Decision onward. For example, in 2017 CHRT 14, at paragraphs 80 and 133, the Tribunal made the finding that discrimination is ongoing based on Canada's narrow interpretation of Jordan's Principle eligibility. The Tribunal made a similar finding in 2018 CHRT 4, at paragraph 389. These rulings were not challenged.

[283] I disagree that the Tribunal ought to have included the issue of whether the discrimination had ceased and given Canada a chance to make submissions on this point. As the parties moved along with the reporting requirements, the Tribunal did note that it was encouraged by Canada's compliance with some of its orders and findings, including the provision of increased funding. However, funding alone was not going to remedy discrimination (2018 CHRT 4, at paragraphs 13, 105–107, 132–134, and 222).

[284] I am persuaded by the Caring Society's submission that the Tribunal's finding of harm is supported by the "robust evidentiary record", which I have referenced throughout this decision. As a result, it was reasonable for the Tribunal to find that discrimination is ongoing, particularly in light of the fact that Canada never challenged this finding in previous Orders.

[285] The applicant also submits that the Tribunal disregarded its right to procedural fairness by inviting the parties to make suggestions about "new categories" of victims for compensation. I find that the additional categories are not new, but are related to the issues presented by the *Indian Act*. The record shows that Canada had been relying on the *Indian Act* for its Jordan's Principle eligibility determinations for some time. The *Indian Act*'s concepts on "status" and "reserve" were squarely before the Tribunal and these terms necessarily affected the eligibility for Jordan's Principle in one way or another.

[286] With respect, the applicant never raised any objections with the Tribunal's approach. A party alleging a breach of procedural fairness has an obligation to raise it before the Tribunal at the earliest opportunity. The applicant, being a sophisticated litigant, should be aware of their obligation. For example, at paragraph 11 of the Compensation Decision, the Tribunal reiterated its earlier finding in 2018 CHRT 4, at paragraph 389, that First Nations children and families continue to suffer. The applicant did not challenge this finding.

[287] The applicant also submits that the Tribunal did not explain itself or provide reasons when it stated that any procedural unfairness to Canada is outweighed by the prejudice borne by First Nations children and their families who suffered and continue to suffer unfairness and discrimination. I disagree. From the Merit Decision onward there were findings made on the harm suffered by children and their families. The fact that the Tribunal did not directly state how that weighing occurred does not render the decision procedurally unfair. It can be inferred from the record and, specifically, the evidence related to the harms suffered by children as referenced in the Tribunal's numerous decisions and rulings.

[288] All parties received notice of issues that were under consideration. Where outstanding issues were before the Tribunal and further questions remained, it notified all parties in writing and provided them with an opportunity to provide written and/or oral submission. The evidentiary record considered by the Tribunal and paragraph 50(3)(e) of the CHRA empowers the Tribunal to decide procedural issues related to the inquiry. The Tribunal managed its remedial jurisdiction to ensure discrimination ceased and would not occur in the future.

[289] Since the Merit Decision, the issues of compensation and definitions related to Jordan's Principle were reserved by the Tribunal. I agree with the Caring Society and the AFN that Canada had every opportunity to seek a judicial review of that decision but chose not to. Nothing in the record suggests that the Tribunal limited the type or amount of evidence that the applicant or any of the parties could adduce. Accordingly, I find that the applicant was not treated unfairly.

[290] I also agree with the COO that the Tribunal appropriately considered the context, the rights, and interests of the parties when it crafted the decisions and its procedure. For example, in the Eligibility Decision, the Tribunal asked the parties to negotiate a mechanism that would implement the community eligibility decision on the ground. In 2020 CHRT 36 the Tribunal's order stemmed from the Tribunal's request that the parties negotiate an implementation plan for the Eligibility Decision.

[291] The Tribunal previously rejected the applicant's suggestion that more or any negotiation has to occur before a remedy can be awarded (2018 CHRT 4, at paragraphs 395–400).

[292] I also find that the Tribunal dealt fully and reasonably with the applicant's claim of surprise with respect to the Compensation Decision. The AFN submits that it and the Caring Society clearly demonstrated their intention from the date of their initial filing to pursue individual compensation. The AFN points to paragraph 21(3) of the statement of particulars submitted prior to the Merit Decision. The Tribunal also recognized this at paragraph 108 of the Compensation Decision.

[293] As set out above, the Tribunal provided advance notice of the questions it wished the parties to respond to prior to the Compensation Decision. If the applicant thought that the process was unfair, this would have been the opportune time to raise those concerns. It did not.

[294] At paragraph 490 of the Merit Decision, the Tribunal provided advance notice that it was seeking input from the parties on the outstanding question of remedies. In addition, the Tribunal dealt directly with the applicant's arguments about unfairness of the process (2018 CHRT 4, at paragraphs 376–389). The Tribunal reminded the applicant that there were three phases identified in the Merit Decision and that the ruling closed the immediate relief phase (2018 CHRT 4, at paragraphs 385–388). This ruling was not challenged by the applicant.

[295] In 2017 CHRT 14 the Tribunal also pointed out the process it employed to address the remedies ordered in the Merit Decision, which required additional information from the parties (at paragraph 32).

[296] For all of these reasons I find that the applicant was not denied procedural fairness. The Tribunal afforded all parties with a full picture of what was to be determined at each stage of the proceedings and sought submissions from the parties. There were no surprises.

## VII. Some Thoughts on Reconciliation [table of contents]

[297] While noting that these applications for judicial review did not involve constitutional issues or section 35 Aboriginal rights, the parties and the Tribunal have discussed the concept of reconciliation throughout these proceedings. Prior to concluding, I find it necessary to pause and reflect on this concept and consider but a few of the many lessons that have arisen during these proceedings.

[298] In *Desautel*, the Supreme Court stated the following on reconciliation and negotiation [at paragraphs 30 and 87]:



In this Court's recent jurisprudence, the special relationship between Aboriginal peoples and the Crown has been articulated in terms of the honour of the Crown. As was explained by McLachlin C.J. and Karakatsanis J. in *Manitoba Metis*, at para. 67:

The honour of the Crown [...] recognizes the impact of the “superimposition of European laws and customs” on pre-existing Aboriginal societies. Aboriginal peoples were here first, and they were never conquered; yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the “special relationship” that arises out of this colonial practice.

While the honour of the Crown looks back to this historic impact, it also looks forward to reconciliation between the Crown and Aboriginal peoples in an ongoing, “mutually respectful long-term relationship”.... The honour of the Crown requires that Aboriginal rights be determined and respected, and may require the Crown to consult and accommodate while the negotiation process continues.... It also requires that the Crown act diligently to fulfill its constitutional obligations to Aboriginal peoples. [Citations omitted.]

...

Negotiation has significant advantages for both the Crown and Aboriginal peoples as a way to obtain clarity about Aboriginal rights:

Negotiation ... has the potential of producing outcomes that are better suited to the parties' interests, while the range of remedies available to a court is narrower. ... The settlement of indigenous claims [has] an inescapable political dimension that is best handled through direct negotiation.

(S. Grammond, *Terms of Coexistence, Indigenous Peoples and Canadian Law* (2013), at p. 139)

Negotiation also provides certainty for both parties.... As the Court said in *Clyde River*... at para. 24, “[t]rue reconciliation is rarely, if ever, achieved in courtrooms”. [Citations omitted.] [Emphasis in Original.]

[299] In my view, the concept of reconciliation is, in essence, a continuation of the nation-building exercise of this young country in the sense that the foundational relationships between Indigenous people and the Crown continue to evolve. Reconciliation, as nation building, can also result in the re-establishment, on a proper foundation, of broken or damaged relationships between Indigenous people and Canada in the manner suggested by the Supreme Court in its numerous judgments.

[300] Negotiations are also seen as a way to realize the goal of reconciliation. It is, in my view, the preferred outcome for both Indigenous people and Canada. Negotiations, as part of the reconciliation process, should be encouraged whether or not the case involves constitutional issues or Aboriginal rights. When there is good will in the negotiation process, that good will must be encouraged and fostered before the passage of time makes an impact on those negotiations. As Pitikwahanapiwin (Chief Poundmaker), a nation-builder in his own right, so aptly said:

We all know the story about the man who sat by the trail too long, and then it grew over, and he could never find his way again. We can never forget what has happened, but we cannot go back. Nor can we just sit beside the trail.

[301] In my view, the procedural history of this case has demonstrated that there is, and has been, good will resulting in significant movements toward remedying this unprecedented discrimination. However, the good work of the parties is unfinished. The parties must decide whether they will continue to sit beside the trail or move forward in this spirit of reconciliation.

VIII. Conclusion [table of contents]

[302] I find that the applicant has not succeeded in establishing that the Compensation Decision is unreasonable. The Tribunal, utilizing the dialogic approach, reasonably exercised its discretion under the CHRA to handle a complex case of discrimination to ensure that all issues were sufficiently dealt with and that the issue of compensation was addressed in phases. The Tribunal ensured that the nexus of the Complaint, as discussed in the Merit Decision, was addressed throughout the remedial phases. Nothing changed. All of this was conducted in accordance with the broad authority the Tribunal has under the CHRA.

[303] I also find that the applicant has not succeeded in establishing that the Eligibility Decision is unreasonable. The Tribunal was aware of its jurisdiction when the Caring Society asked the Tribunal to create three new categories for Jordan's Principle. The Caring Society claimed that the third category would prevent further discrimination based on *Indian Act* status. The Tribunal reasonably noted the issues with Indian status within the scope of the proceedings. It concluded that only two of the proposed categories were tied to the scope of the Complaint and the proceedings. I find no error in this conclusion.

[304] Finally, the applicant has not succeeded in establishing that it was denied procedural fairness. The record indicates that the applicant was afforded numerous opportunities to challenge the various decisions but did not. The record also shows that the applicant, as well as each party before the Tribunal, was afforded an opportunity to make submissions on any issues that the Tribunal requested. All of this was in accordance with the broad authority the Tribunal has under the CHRA. No one was taken by surprise.

[305] The applicant has not sought costs in either of these two applications for judicial review and neither has CAP. All of the respondents, aside from the Commission and Amnesty, seek their costs. In light of this, the respondents, aside from the Commission and Amnesty, will file their respective written submissions on costs within 45 days of the Order below and the applicant will file its written reply within 90 days of the order below. The parties, of course, are encouraged to discuss this and to file a joint submission. In the event a joint submission is not filed, the matter of costs will be disposed of based on written submissions.

#### JUDGMENT in T-1559-20 and T-1621-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review concerning the Compensation Decision in T-1621-19 is dismissed.
  2. The application for judicial review concerning the Eligibility Decision in T-1559-20 is dismissed.
  3. The respondents, aside from the Commission and Amnesty, will provide their submissions on costs within 45 days of the date of this Order. The applicant will provide its submissions on costs within 90 days of this Order. The matter of costs will be dealt with in writing.
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TAB 5

## Canada (Attorney General) v. Grover, 1994 CanLII 18487 (FC)

Source: Federal Court

Date: 1994-07-04

File number: T-775-94; T-1945-93

Other citations:

80 FTR 256 — 24 CHRR 390 — 28 Admin LR (2d) 231 — [1994] FCJ No 1000 (QL)

### **Citation:**

**Canada (Attorney General) v. Grover, 1994 CanLII 18487 (FC), <<https://canlii.ca/t/g9vdx>>, retrieved on 2026-01-05**

### **Acknowledgements:**

**The addition of this document to the CanLII website was made possible by the Canadian Human Rights Reporter.**

### **Most recent unfavourable mention**

Canada (Attorney General) v. Grover (No. 1)  
T-775-94,T-1945-93  
1994-07-04

## **Federal Trial Division**

CHRR Doc. 96-039

### **Attorney General of Canada**

Applicant / Requéant

v. / c.

**Chander P. Grover and  
Canadian Human Rights Commission**

Respondents / Intimés

Date of Decision / Date de la décision:

July 4, 1994 / 4 juillet 1994

Before / Devant:

Federal Court Trial Division / Section de première instance de la Cour fédérale,  
Cullen J.

Court File Nos. / N du greffe:

T-1945-93 and / et T-775-94

Appeal from / Appel:

(1994), 1994 CanLII 189 (CHRT), 24 C.H.R.R. D/368 (Can.Trib.)

Appearances by / Ont comparu:

Alain Préfontaine, Counsel for the Applicant / Avocat du requérant

Peter Engelman, Counsel for the Commission / Avocat de la Commission

Cynthia Sams, Counsel for the Respondent C.P. Grover / Avocate de l'intimé C.P. Grover

**JURISDICTION — loss of jurisdiction for board/tribunal to make further decision on remedy — retained jurisdiction — APPEALS AND JUDICIAL REVIEW — BOARDS OF INQUIRY/TRIBUNALS — board/tribunal's hearing of complaint exceeds remedial authority — definition of decision or order — NATURAL JUSTICE — right to a fair hearing — HUMAN RIGHTS — nature and purpose of human rights legislation**

**Summary:** *This is an application by the National Research Council of Canada for an order to set aside the decision of a Canadian Human Rights Tribunal which reconvened to deal with the issue of remedy in the matter of a complaint by Dr. Chander P. Grover.*

*The Tribunal ordered the National Research Council to appoint Dr. Grover to a position commensurate with his scientific capabilities and a position that would provide redress for the interruption of his career progress caused by racial discrimination.*

*The National Research Council argues that the Tribunal had no jurisdiction to reconvene to deal with the issue of an appointment for Dr. Grover because, having rendered its original decision, it was functus officio, and could not deal with the case any further. The National Research Council also contends that the Tribunal erred in finding that an appointment that was offered to Dr. Grover did not fulfill the requirements of the remedy ordered by the Tribunal.*

*The Federal Court, Trial Division, finds that the integration of an employee who has been subjected to discrimination at the hands of his employer to a position which he or she would have occupied had the discrimination not taken place is a remedy which is inherently difficult to implement and one which may require some supervision. Consequently, the Tribunal must be given the ability to ensure that remedies are effectively implemented.*

*The Court finds that the Tribunal did not finally decide the appointment issue in its original decision, and it was appropriate to reconvene when the parties could not agree. The Tribunal was not functus officio.*

*The Federal Court, Trial Division, also rejects the attack on the Tribunal's decision on the merits. Specifically, it rejects the National Research Council's argument that the fact that it appointed Dr. Grover to a position in response to the Tribunal's ruling means that the Tribunal has no jurisdiction to deal with the appointment issue further. To accept that the appointment offered by the National Research Council on its face complies with the order without considering whether it is appropriate for Dr. Grover requires a very narrow reading of the Tribunal's decision and would divest it of remedial value.*

*For these reasons, the application is dismissed.*

**Cases Cited**

*Canada (Attorney General) v. Grover (No. 1)* (1992), 1992 CanLII 629 (CHRT), 18 C.H.R.R. D/1 (Can.Trib.):3, 13, 36

*Canada (Attorney General) v. Grover (No. 2)* (1994), 1994 CanLII 189 (CHRT), 24 C.H.R.R. D/368 (Can.Trib.):1, 9, 34

*Canada (Treasury Board) v. Robichaud*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84, 8 C.H.R.R. D/4326:30

*Canadian National Railway Co. v. Canada (Human Rights Comm.) and Action travail des femmes*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, 8 C.H.R.R. D/4210:30

*Chandler v. Alta. Assn. of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848:29

*Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369:42

*Murphy v. Teplitsky* (November 23, 1993), A-33-93 (F.C.A.):33, 38

*Rohm and Hass Canada Ltd. v. Canada (Anti-Dumping Tribunal)* (1978), 1978 CanLII 2028 (FCA), 22 N.R. 175 (F.C.A.):37

**Legislation Cited****Canada**

*Canadian Human Rights Act*, R.S.C. 1985, c. H-6

s. 2:22

s. 7:3

s. 50(2)(c):39

s. 53:27

s. 53(2):30

s. 53(2)(b):22, 30

*Federal Court Act*, R.S.C. 1985, c. F-7

s. 18:1

s. 18.1:1

**CULLEN J.**

[1] This case involves two applications for judicial review pursuant to ss. 18 and 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7. The applicants seek to quash two decisions of a Canadian Human Rights Tribunal (the "Tribunal") which arise out of an inquiry into a complaint filed with the Canadian Human Rights Commission by the respondent in this application, Chander P. Grover. By order of McGillis J., court files T-1945-93 (the "first application") and T-775-94 (the "second application") were

joined and heard together. The first application is to review and set aside the decision of the Tribunal rendered [orally] July 7, 1993. This application also seeks a declaration that the Tribunal is *functus officio* and is no longer seized with the complaint filed by Dr. Grover. The second application is to review and set aside the decision of the Tribunal rendered March 18, 1994 [reported 1994 CanLII 189 (CHRT), 24 C.H.R.R. D/368]. This application also seeks a declaration that the Tribunal is *functus officio* with respect to Dr. Grover's complaint.

## BACKGROUND

[2] A brief review of the facts surrounding the complaint heard by the Tribunal is necessary to set the context for the applications now brought before the Court by the Attorney General of Canada. Dr. Grover was born in India in 1942 and came to Canada in 1978. He has a B.Sc. in physics, chemistry and math and an M.Sc. in physics from the University of New Delhi. In addition, he has a post-doctorate degree in physics from the Indian Institute of Technology in Delhi. He has also attained a doctorate degree from the University of Bris in France. In 1981, Dr. Grover accepted a position with the National Research Council ("NRC") as an associate research professor in the field of optics. Dr. Grover's optics research has earned him an international reputation as a highly respected scientist.

[3] In September 1987, Dr. Grover filed a complaint with the Tribunal which alleged that from September 1986 to August 1987 his employer, the NRC, had engaged in discriminatory practices against him contrary to s. 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act") on the grounds of his race, colour and national origin. Dr. Grover claimed that the actions of two NRC directors denied him managerial and promotional opportunities as well as research responsibilities. A further amended complaint was filed in August 1989 alleging further incidents of discrimination. A second amended complaint was filed during the course of the inquiry. On August 21, 1992, after hearing twenty-six days of evidence and testimony, the Tribunal found that Dr. Grover's complaint of racial discrimination against the NRC was substantiated and a remedial order was issued [reported 1992 CanLII 629 (CHRT), 18 C.H.R.R. D/1]. The NRC was ordered to give Dr. Grover a written apology, to cease and desist its discriminatory practices, to pay damages for hurt feelings, to compensate Dr. Grover for denied salary progression and to appoint him to an appropriate position. The main issue now before the court arises from the implementation of the Tribunal's order that Dr. Grover be appointed to an appropriate position. At p. 86 [D/52, para. 170] of the Tribunal's reasons dated August 21, 1992, the following finding was made:

. . . Under the circumstances, we are of the opinion that, at a very minimum, the position of the section head or group leader be made available to Dr. Grover at the earliest possible opportunity. We are fully appreciative of the fact that the Respondent has a new promotion policy but the discrimination of Dr. Grover which interfered with his career opportunity commenced far earlier. If the

question of appointment to an appropriate position meets with resistance by the Respondent in its implementation, this Tribunal will retain jurisdiction to hear further evidence in this regard. [Emphasis added.]

[4] The relevant paragraph of the order for relief against the NRC (p. 93 [D/56, para. 175] of Tribunal's reasons) reads as follows:

d) The Complainant will be appointed, at the earliest possible opportunity to a position of section head or group leader. In the event that this Order with respect to promotion is resisted by the Respondent, the Tribunal shall retain jurisdiction to hear further evidence in this regard. [Emphasis added.]

Pursuant to this order, the NRC appointed Dr. Grover to the position of group head of the optical components research group in the Herzberg Institute of Astrophysics on September 10, 1992. Shortly after the appointment, Dr. Grover expressed dissatisfaction with the position. Other outstanding difficulties were the calculation of Dr. Grover's years of relevant experience ("YRE") and salary readjustment and the issue of costs. These issues were submitted to an arbitrator and have now been settled.

[5] As a result of Dr. Grover's concerns with the September 10, 1992, appointment, correspondence was exchanged between Mr. Bennett, counsel for Dr. Grover, and Mr. Saunders, counsel for the NRC. During this correspondence, Mr. Saunders continually maintained that the appointment complied with the order of the Tribunal and consequently, the Tribunal did not have the jurisdiction to reconsider the question of Dr. Grover's appointment to an appropriate position. On October 9, 1992, Mr. Bennett requested that the Tribunal reconvene to resolve the outstanding concerns of the complainant, namely, the appointment, the calculation of YRE and salary adjustment, and costs. All other aspects of the order had been complied with. At that time, and in subsequent correspondence, Mr. Saunders informed the Tribunal that the NRC took the position that the Tribunal retained the jurisdiction to deal only with the issue of YRE and wage loss from lack of promotion but that the Tribunal had no jurisdiction to reopen the issue of the appointment.

[6] On October 23, 1992, a telephone conference was convened to discuss the positions of the parties on Dr. Grover's motion to reopen the hearing. Mr. Saunders at that time reiterated that the position of the NRC with respect to the jurisdiction of the Tribunal remained unchanged. Dr. Grover's motion to reopen the hearing was scheduled to be heard on November 27, 1992. However, instead of proceeding to deal with this motion, the Tribunal indicated that they wished to meet privately with each party without counsel present in an attempt to resolve the outstanding conflicts. The Tribunal met separately with Dr. Grover and with Dr. Willis, a senior official from the NRC. After this discussion, counsel for the parties were asked to join the Tribunal in the meeting room. With counsel present, the private discussions



were summarized by the Tribunal and the parties were asked to return the following day. Further discussions were held but unfortunately these efforts to find a resolution to the appointment issue proved unsuccessful.

[7] Daniel Gervais, Director of the Legal Services Unit at the NRC, wrote to the Tribunal on February 2, 1993, and again indicated that the NRC maintained its position that the Tribunal lacked jurisdiction to deal with the appointment. Mr. Fleck, the Chairman of the Tribunal, in a letter dated February 10, 1993, set out the participation of both parties in the informal process undertaken with the assistance of the Tribunal to resolve the appointment issue. In light of the participation of the NRC in this process, Mr. Fleck expressed surprise that the NRC was maintaining the objection to jurisdiction on the basis of *functus officio*.

#### DECISIONS OF THE TRIBUNAL SUBJECT TO REVIEW

[8] The Tribunal issued a notice of resumption of hearing on March 29, 1993, and the hearing was officially reopened on July 6, 1993. At that time the NRC brought a preliminary motion challenging the jurisdiction of the Tribunal on the basis that it was *functus officio*. By their oral decision delivered on July 7, 1993, the Tribunal dismissed this motion and concluded that it retained jurisdiction to deal with the appointment issue. The Tribunal then proceeded to hear evidence regarding the appointment of Dr. Grover. The first application, file T-1945-93, seeks to quash this July 7, 1993, decision.

[9] File T-775-94 is an application to quash the decision of the Tribunal dated March 18, 1994. This was the final decision rendered by the Tribunal considering the implementation of the Tribunal's order for relief rendered August 21, 1992. The Tribunal gave written reasons for their earlier decision that they retained jurisdiction to deal with the issue of the appointment. At p. 6 [D/372–D/373, paras. 11 and 13–14] of the Tribunal's reasons the following comments were made regarding the issue of jurisdiction:

At the outset of the informal meeting on November 27th, the Chairman quite clearly pointed out to all counsel that the Tribunal was not prepared to participate in this process if any of the parties were going to challenge jurisdiction and raise the issue of *functus*. All counsel present, including Mr. Bennett for Dr. Grover, Mr. Saunders for NRC and Mr. Engelmann for C.H.R.C., assured the Tribunal that they were only interested in getting all of the issues resolved and completing the implementation of the order. Further meetings were held informally in an attempt to resolve the last outstanding issue, namely the appointment of Dr. Grover to an appropriate position. The Tribunal was impressed with the industry displayed by all parties, apparently expressing a common interest and goal to resolve the last and final issue. At no time during this process was it ever suggested by the Respondent [NRC], or indeed any of the parties, that if this informal process was not resolved to their liking that they would fall back onto a position the Tribunal was without jurisdiction to reconvene as they were *functus officio*.

It appears to this Tribunal that the conduct of the Respondent [NRC] if it is not estopped from now asserting this position should at the very least be considered as a question of bad faith on its part. Certainly its conduct is questionable in view of the following:

A. It never sought any formal remedy to question the jurisdiction of the Tribunal nor any aspect of its decision at any time;

B. At no time did it move through the Federal Court or any court of competent jurisdiction to stay or review the proceedings of this Tribunal following its participation in the process starting in November 1992. Indeed, it actively participated and sought the guidance from the Tribunal in the implementation of its order.

Is it now open for the Respondent in view of its conduct as described herein to raise the issue of *functus*? We think not.

[10] The Tribunal went on to fully consider the NRC's submissions on the issue of *functus officio* and undertook a thorough legal analysis regarding the question of jurisdiction. The Tribunal made the following conclusions at p. 15 [D/378–D/379, paras. 32–34] of its reasons:

The balance of provincial human rights legislature [*sic*] and the C.H.R.A. all provide for general remedial action to be taken but are silent with respect to the specifics of jurisdiction to either reconvene or maintain ongoing supervision. It is our finding, however, that the decision in *Robichaud* provides that human rights legislation by its nature is to be remedial as opposed to punitive. The general powers therefore under s. 53 require therefore in our opinion as Justice Sopinka calls for in the *Chandler* case the power of a Tribunal to "carry out its task." In other words, programmes and workplace job placements ordered through the general remedial section often by their necessity require not only implementation but ongoing supervision. We are of the opinion that it necessarily follows by implication that a Tribunal under these circumstances will be within its power to retain jurisdiction over the subject matter.

Important to our conclusions in this regard as it relates to having appropriate jurisdiction was the fact that this Tribunal was invited by the parties to reconvene in order to facilitate implementation and to hear further evidence in order to clarify the remedy as it relates to an appropriateness of position for Dr. Grover. We have not been called upon to change the decision or to implement a different remedy than that which we originally provided in our decision of August 21st, 1992 nor have we proposed to do so in this decision. It became readily apparent at the hearing of further evidence that NRC's terminology in designating management positions was and continues to be less than satisfactory in some areas of the organization. Often, the language appears confusing and misleading when interpreted in the context of the monetary authority designated for various positions.

This Tribunal is satisfied that upon review of the various principles and authorities outlined herein that its jurisdiction does extend to clarify the appropriateness of the position to which Dr. Grover has been and is to be appointed.

[11] In considering the question of Dr. Grover's September 10, 1992, appointment, the Tribunal concluded that the position was inappropriate. The Tribunal clarified what it meant by appropriate position as follows at p. 16 [D/379, para. 35] of their reasons:

The Tribunal is of the opinion that Dr. Grover has not been appointed to an appropriate position. An appropriate position in this instance is in our view characterized by three essential components:

1. The expectations, duties and responsibilities of the position are commensurate with Dr. Grover's scientific management and research capabilities.

2. The location of the designateribution on the salary scale and NRC guideline curve is in keeping with an appropriate career progression in terms of where Dr. Grover would be in 1994 had not the discrimination taken place.

3. That the NRC signing authority is consistent with the position title used.

The Tribunal again retained jurisdiction for the purpose of providing further clarification to facilitate the appointment of Dr. Grover to an appropriate position at the conclusion of the March 18, 1994, decision.

### **POSITION OF THE APPLICANT**

[12] The applicant advances three main lines of attack. First, the applicant submits that the Tribunal could not entertain Dr. Grover's motion for a rehearing because i[t] was *functus officio*. Secondly, in the alternative, if the Tribunal is not found to be *functus officio*, it is argued that the Chairman of the Tribunal breached a fundamental principle of natural justice at the July 6, 1992, hearing by acting as both trier of fact and witness in the same proceedings. It is argued that this breach vitiates the entire proceedings. Third, even if the Tribunal is found not to be *functus officio*, it is argued that the March 18, 1994, decision that Dr. Grover was appointed to an inappropriate position is void as it is based on an error of law and/or fact.

#### **(a) Was the Tribunal Functus Officio?**

[13] The applicant takes the position that the Tribunal, after hearing twenty-six days of evidence, spoke its final mind regarding the issue of an appropriate appointment for Dr. Grover, an issue which was central to the proceedings, and set out all the *indicia* of such a position in its August 21, 1992, decision at pp. 13–14 [D/8–D/9, para. 26]:

There is little doubt that Dr. Grover aspired to a position of management with the Division of Physics, and specifically that of a Section Head. The responsibilities of a section head within the Division of Physics would have called for added responsibility including the evaluation of the performance of staff, allocation of funds including travel funds, involvement with research planning and promotions. It should be noted that prior to Dr. Grover's return from NOI, he had been acting in the capacity of assistant director and acting scientific director, and in the mission statement of NOI was slated for a section head position along with other of the transferred members from the Division of Physics, namely Dr. Cowan and Dr. Powell. The initial promotion assessments from 1981 through to 1984, coupled with the evidence of Mr. Major and Dr. Cowan, clearly lead this tribunal Board to conclude that Dr. Grover was qualified to assume the position of Section Head and was quite capable of fulfilling the responsibilities relating to such position.

[14] The applicant argues that there is no express provision in the *Act* which allows the Tribunal to revisit its final decisions. It is submitted that the Tribunal changed its mind in the face of changes in the management structure of the NRC and issued a new order regarding the appointment of Dr. Grover on March 18, 1994. According to the applicant, the only options open to Dr. Grover would have been to seek enforcement of the August 21, 1992, order under s. 57 of the *Act* or alternatively, to

have filed a new complaint with the Commission. Accordingly, in the submission of the applicant, moving for a rehearing in the face of a final decision on the question of the appointment was not an option validly open to the complainant.

[15] The applicant suggests that after the August 21, 1992, order the Tribunal simply acted as a conciliator with the consent of the parties in order to resolve, on an informal basis, the outstanding issues between the parties. Counsel for the applicant relied on the conduct of the Tribunal between August 21, 1992, and July 6, 1993, particularly their participation in private settlement negotiations, as supporting the view that the Tribunal was *functus officio*. It was contended that only a conciliator could meet privately with parties and receive *ex parte* information and that such conduct is incompatible with the quasi-judicial functions of the Tribunal. The applicant also relies upon the proposition that settlement discussions are generally privileged from disclosure during the trial of an action. It is submitted that this proposition supports the view that the participation of the Tribunal in settlement negotiations rendered the Tribunal unable to return to a quasi-judicial capacity when they reopened the hearing to hear further evidence on July 6, 1993.

[16] The applicant contends that the question of whether the parties consented to the procedure undertaken by the Tribunal in its attempt to resolve the outstanding difficulties in an informal matter is entirely irrelevant to the issue of jurisdiction which is a question of law. In the alternative, if the consent is found to be relevant, the applicant points to the record, and particularly to the correspondence between counsel for the NRC and the Tribunal, which indicates that the NRC consistently maintained its objection to the Tribunal taking jurisdiction over the issue of the appointment. Therefore, a finding that the parties consented to its jurisdiction is a finding contrary to the material before the Tribunal. The applicant suggests that the Tribunal found as a fact that counsel for the NRC gave an undertaking not to dispute the jurisdiction of the Tribunal once they agreed to attempt to resolve the outstanding issues.

#### **(b) Denial of Natural Justice**

[17] In presenting oral argument to the Court, counsel for the applicant stated that, for the purpose of making the argument that the Tribunal breached a principle of natural justice, only the events subsequent to the reopening of the hearing on July 6, 1993, were to be relied upon by the applicant. During the proceedings before the Tribunal on July 6, 1993, the applicant contends that the Tribunal committed a flagrant breach of natural justice by becoming judge, jury, witness and party in the proceedings before them. At the opening of the inquiry, it is argued that the Chairman, Mr. Fleck, testified as to his version of the events which had occurred in the interim period between the two hearings and that the Tribunal made a finding of fact on the basis of this testimony that Mr. Saunders had given his undertaking not

to raise the question of *functus officio*. The portion of the transcript of the proceedings on July 6, 1993, which counsel for the applicant says contains the "testimony" of the Chairman, reads as follows at pp. 5211–16:

I thought, possibly, for the record, that I would outline where I believe we have arrived at as a result of our judgment in this case. I will give each counsel an opportunity to make an opening statement, or outline what they intend to deal with, if that is satisfactory to everybody.

The hearing today is a resumption of certain informal meetings that the Tribunal had with counsel for all parties and representatives of the parties following our judgment in this case, which gave to us jurisdiction to deal with certain questions that had been left for the parties to endeavour to implement. The balance of the matters that were left open dealt specifically with two paragraphs of our judgment.

The Chairman then cited the paragraphs of the judgment which dealt with the issue of the appointment and continued as follows:

Those are the two aspects of the judgment which, as of October 1992, had not been satisfactorily resolved.

As Chairman, I was contacted by counsel for the Complainant, the Respondent and for the Commission to ascertain if we could become involved, that is, the Tribunal, to facilitate the resolution of those remaining issues. I requested as Chairman, that all parties represented by counsel submit a brief of the issues, as defined. They did that. We agreed that we would meet informally to ascertain how we could best resolve the outstanding issues. We had a meeting in November, I believe the 27th, at the Human Rights Building, where we are seated today, and at that time it appeared that the question of costs was outstanding. That was a part of our judgment. We resolved the issue on that date, on the consent of all parties. The question of the years of relevant experience, the Y.R.E., and the appointment of an arbitrator to facilitate that calculation, which was a part of our judgment, was outstanding on that day. We again, on consent of all counsel, facilitated a resolution. I arranged to have an arbitrator available for the parties. I am uncertain at this date how that aspect of things has gone, but at least, the facilitating of an arbitrator to deal with that part of the judgment was arranged on consent of all parties and at their encouragement, which left one and the only remaining issue, as I ascertain it from our meetings: the question of an appropriate promotion and the placing of Dr. Grover within the work environment of the National Research Council. It is that issue that, after our November 27th meeting, remained outstanding and we again agreed with the consent of all counsel and their principals, to continue to meet to see if we could resolve that issue, informally, without the necessity of the expense of calling of witnesses and the involvement of further lengthy hearings. We endeavoured to meet informally to see if that issue could be resolved.

We encouraged the National Research Council and Dr. Grover to meet directly, which they did, without success. We encouraged various solutions to resolve this issue, on consent of all parties, and actively participated in it, and that without success.

The Tribunal advised all counsel that we were determined to ascertain if we could bring about a completion of that part of our judgment which remains outstanding, and it is for that purpose that we are convening today.

It has been suggested by counsel for the Respondent [NRC], and at various times—and I have endeavoured to address this issue—that the Tribunal is in a legal position of being *functus* and, therefore, without jurisdiction to deal with the issues. But I would remind the Respondent, as I have, in a lengthy letter dated February 10, 1993, that the entire sense and purpose of where we are at today resulted in the collaborative hearing, including all the parties, at the behest of the Tribunal, to see if we could endeavour to resolve this issue. If the Respondent—and I don't mean this as any

form of admonishment, warning or otherwise—but, if the Respondent wishes to take the position today, at these formal hearings, with a record being taken, that there is a position of this Board, as such, which may be described legally as *functus*, then so be it. We intend to proceed and we will deal with that issue if it arises.

Once we have completed our deliberations, we will give a decision that will, as far as this Tribunal is concerned, be what we consider the extent to which we can endeavour to resolve this matter. I don't know what further we could do. We have had some five or six meetings informally, again on consent of all parties, without a record being taken, to try to take the adversarial aspect out of the matter, to see if the hearings could be done informally so that we could resolve this as good-thinking human beings, with an effort to getting both parties on with life, in general; the Complainant back to work productively and the Respondent with their other concerns. We haven't been successful in doing that, obviously, or we wouldn't be here today, but that does not and will not deter us from endeavouring to come up and complete, formally, a resolution of that matter by this Tribunal.

[18] Counsel for the applicant also points to certain portions of the transcript which in his view demonstrate that the Tribunal, and particularly the Chairman, became upset when the issue of *functus* was raised and made several derogatory comments regarding the conduct of counsel for the NRC in objecting to the jurisdiction of the Tribunal to reopen the hearing. It is alleged that these comments gave rise to a reasonable apprehension of bias which eliminated any possibility for a fair hearing. In rendering its decision on the preliminary objection raised by the NRC on July 7, 1993, the Chairman made the following comments at pp. 5346 and 5355–56 of the transcript:

It appears that the conduct of the Respondent, if it is not estopped from now asserting this position, should, at the very least, be considered as a question of bad faith on its part.

As previously indicated herein, the Respondent elected to proceed within the framework of this Tribunal, as opposed to utilizing the judicial mechanisms of appeal or review. Surely, it is not open to any of the parties acting in good faith to now challenge the jurisdiction of this Tribunal, 11 months later, because they are not satisfied or have concerns about the consequences of the Tribunal's decision.

To allow any of the parties to proceed in this matter does, in our opinion, strike at the very heart of the integrity of the judicial process and all that one considers fairness in this use of judicial intervention in the resolution of disputes.

### **(c) March 18, 1994, Decision—Error of Law or Fact**

[19] The applicant also attacks the actual decision of the Tribunal that Dr. Grover was not appointed to an appropriate position. Counsel for the applicant points to three errors of law in this respect. First, it is contended that the Tribunal erred in considering facts and evidence which arose subsequent to the August 21, 1992, order in making its decision regarding the September 10, 1992, appointment. These subsequent facts are the appointment of two of Dr. Grover's colleagues to section head positions and the revision of the organizational structure of the NRC. Secondly, the applicant challenges the decision on the basis that it did not simply clarify the August 21, 1992, order but substantially altered it, and by so doing, the Tribunal exceeded their jurisdiction. Finally, the applicant submits that the Tribunal's

decision to again remain seized of the matter exceeded the power conferred upon the Tribunal by the *Act*. It is contended that the enforcement of orders of the Tribunal are entrusted to this Court and only the Commission has the power to investigate a complaint. Essentially, it is argued that the Tribunal does not have the power to remain seized of their jurisdiction once an order is rendered.

[20] As a final argument in the alternative, the applicant submits that even if the Tribunal was not *functus officio*, the decision on the motion to reopen is void for want of jurisdiction as the order was complied with and the condition precedent to the Tribunal retaining jurisdiction to revisit the issue, namely the resistance of the NRC to implement the order, had not been met. The applicant takes the position that the September 10, 1992, appointment complied fully with the order of the Tribunal. The applicant maintains that the position of group head at the Herzberg Institute of Astrophysics is equivalent to a group leader position and is in accordance with the order of the Tribunal rendered August 21, 1992.

#### **POSITION OF THE RESPONDENTS—CHRC AND CHANDER P. GROVER**

##### **(a) Functus Officio**

[21] In the view of both respondents, the Tribunal did not speak its final mind on August 21, 1992, with respect to the appointment of Dr. Grover because at that time it was unable to do so as a result of the substantial restructuring which was taking place at the NRC during the first hearing in 1991. The respondents take the view that the Tribunal set out minimal guidelines in the August 21, 1992, decision in order to help the parties work out between themselves the details of an appropriate position and retained jurisdiction in the event that the parties could not settle upon a mutually agreeable appointment. The findings of the Tribunal highlighted by counsel for the applicant which are submitted to contain all the criteria of an appropriate position, are, in the opinion of the respondents, simply findings with respect to the career progression Dr. Grover should have experienced in 1986 when the discriminatory practices began. In fashioning a remedy, the Tribunal was charged with the task of putting Dr. Grover in the position he would have occupied had the discriminatory practices not taken place. It is submitted that this calls for an appointment to a position appropriate for Dr. Grover in 1992 and that, at the conclusion of the first hearing, there was not enough information regarding the management structure of the NRC for the Tribunal to determine the details of the most appropriate position. Given this lack of information, it is argued that the second hearing was held solely for the purpose of supplementing the original order with further details of a position which would fully compensate Dr. Grover for the damage done to his career.

[22] The respondents urge the Court to consider both the purpose of the statute in s. 2 and the broad remedial power granted to the Tribunal in para. 53(2)(b) of the *Act* and the principle that human rights legislation is to be interpreted in a broad and

liberal fashion to ensure that the objectives of the legislation are fulfilled. It is submitted that it would be overly formalistic to strictly apply the principle of *functus officio* to prevent the Tribunal from reconvening for the purpose of clarifying their original order. It would be inconsistent with the purposes of the *Act* to put the onus on the complainant to seek enforcement of an ambiguous order in the Federal Court or to file a whole new complaint as suggested by the applicant. Rather, the Tribunal must have the power to clarify its own remedial orders in order to fulfil its mandate of making victims of discrimination whole.

[23] It is contended that the Tribunal did not base their decision regarding the question of *functus officio* on an undertaking given by counsel for the NRC not to dispute jurisdiction. Therefore, even if the Tribunal erred in finding that such an undertaking was given, their final decision was not based on this finding and the applicant submits that this is clear on the face of the written reasons of the Tribunal rendered March 18, 1994.

[24] As to the participation of the Tribunal in informal discussions with the parties in the interim period, counsel for the respondent Dr. Grover maintains that either the Tribunal was *functus officio* as of August 21, 1992, or it was not, and therefore, the events between August 21, 1992, and July 6, 1993, are of no relevance to this question. Further, it is submitted that, if the course of conduct undertaken by the Tribunal was a procedural irregularity, it is submitted that counsel for the NRC waived its right to now raise an objection by fully participating in the conciliation process without protest. Counsel for the respondent, Canadian Human Rights Commission, also points out that the Tribunal was careful to exclude any reference to the settlement discussions during the reconvened hearing.

**(b) Denial of Natural Justice**

[25] The respondents take issue with the applicant's perception that the Chairman was testifying from the bench at the beginning of the proceedings on July 7, 1993. Rather, it is submitted that the comments were made solely to set the context for the discussion regarding *functus officio*. As such, these comments did not give rise to the denial of a fair hearing. The respondents contend that even if the Chairman's comments regarding the alleged undertaking were inaccurate, this finding in no way forms the basis of the conclusion that the Tribunal was not *functus officio*. As to the allegedly derogatory comments made by the Chairman regarding the conduct of counsel in raising the *functus officio* question at the opening of the second hearing on July 6, 1992, the respondent argues that the Chairman was simply making findings on the facts. The respondents characterize the applicant's natural justice argument as one of bias and rely upon the proposition that a party waives a claim of bias where it has failed to make a timely objection at the initial stages of the proceedings.

**(c) March 18, 1994, Decision—Error of Law or Fact**



[26] The respondents both maintain that the reasons of the Tribunal should not be read as requiring the condition precedent that the NRC resist the order of reinstatement in order to revisit the issue of the appointment of Dr. Grover to an appropriate position. The evidence before the Tribunal was that they were aware that the NRC was undergoing significant management restructuring and reorganization. Therefore, it is argued that the reservation of jurisdiction must be read in this context of uncertainty. In the alternative, if it is found that the Tribunal did intend that the exercise of their jurisdiction to hear further evidence be subject to a condition precedent, the respondents maintain that this condition was met. They argue that the NRC resisted the implementation of the order by appointing Dr. Grover to an inappropriate position and that any other reading of the condition would require a microscopic reading of the Tribunal's reasons.

[27] In response to the applicant's submission that the Tribunal erred in considering facts which arose after the August 21, 1992, order, the respondents once again submit that the Human Rights Tribunal has a broad mandate under s. 53 of the *Act* to make the complainant whole and to properly fulfil this mandate, the Tribunal must have the power to consider evidence of events subsequent to its decision in order to ensure that the complainant is given an adequate remedy. Accordingly, for the same reasons, the respondents submit that the decision of the Tribunal on March 18, 1994, to again retain jurisdiction regarding the implementation of its remedial order must, for the same reasons, be seen as a valid exercise of the Tribunal's powers.

## ANALYSIS

### (a) Jurisdiction of the Tribunal—*Functus Officio*

[28] A preliminary issue to be decided is whether the Human Rights Tribunal has the power to retain jurisdiction at the conclusion of an inquiry to reconvene in order to hear further evidence as to difficulties in the implementation of the Tribunal's remedial order. There is no express provision in the *Act* which empowers a tribunal to revisit its decisions. The Federal Court has not yet considered whether a tribunal under the *Canadian Human Rights Act* possesses the power to supervise the implementation of its awards.

[29] In arguing the issue of *functus officio*, both parties rely upon the reasons of Sopinka J. in *Chandler v. Alta. Assoc. of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848. That decision clearly sets out the circumstances in which an administrative tribunal will be considered *functus officio* at p. 861:

Apart from the English practice which is based on a reluctance to amend or reopen formal judgements, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because

there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, *supra*.

Justice Sopinka, however, goes on to caution that the principle of *functus officio* should not be strictly applied to an administrative tribunal where injustice would result. He states at p. 862:

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours the finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic with respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling legislation that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.

[30] While there is no express provision in the *Act* which allows for reopening of an inquiry, s. 53(2) of the *Act* gives wide remedial powers to the Tribunal. The portion of the Tribunal's order at issue in this application was made pursuant to para. 53(2)(b) which reads as follows:

53(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, subject to subsection (4) and section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

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

The Supreme Court of Canada has mandated that human rights legislation should be liberally interpreted in a manner which accords full recognition and effect to the rights protected by such legislation: *Action travail des femmes v. Canadian National Railway*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114 at 1134 [8 C.H.R.R. D/4210]; *Robichaud v. The Queen*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at 89–90 [8 C.H.R.R. D/4326]. The words of La Forest J. in *Robichaud* are particularly helpful in underscoring the importance of the rights protected by the *Act*. He states at pp. 89–90 [D/4329, para. 33935]:

The purpose of the *Act* is set forth in s. 2 as being to extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices based on certain prohibited grounds of discrimination, including discrimination based on sex. As McIntyre J. speaking for this Court, recently explained in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, the *Act* must be interpreted so as to advance the broad policy considerations underlying it. That task should not be approached in a niggardly fashion but in a manner befitting the special nature of the legislation, which is described as "not quite constitutional";

see also *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145 per Lamer J., at pp. 157–58. By this expression, it is not suggested, of course, that the *Act* is somehow entrenched but rather that it incorporates certain basic goals of our society. More recently still, Dickson C.J. in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* (the *Action Travail des Femmes* case), 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, emphasized that the rights enunciated in the *Act* must be given full recognition and effect consistent with the dictates of the *Interpretation Act* that statutes must be given such fair, large and liberal interpretation as will best ensure the attainment of their objects.

[31] The aim of the *Act* is remedial and it is not intended to punish those responsible for the discriminatory treatment. Rather, the primary focus of the legislation is the eradication of discriminatory practices. In light of this, s. 53(2) should be interpreted in a manner which best facilitates the compensation of those subject to discrimination. The redress of discrimination, however, is not always fully achievable simply by the payment of monetary awards. This is reflected by the wide variety of remedial options open to a tribunal in s. 53(2), of which compensation for monetary losses is only one. The integration into the workplace of an employee who has been subjected to discrimination at the hands of his or her employer to a position which he or she would have occupied had the discriminatory practice not taken place is a remedy which is inherently difficult to implement and therefore, may require some supervision. The implementation of the remedy in this case is further complicated by the long-standing nature of the complaint, the ongoing changes in the management structure of the NRC and the highly complex work of Dr. Grover. Often it may be more desirable for the tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the reintegration into the workplace, rather than to have an unworkable order forced upon them by the tribunal.

[32] It is clear that the *Act* compels the award of effective remedies and therefore, in certain circumstances the tribunal must be given the ability to ensure that their remedial orders are effectively implemented. Therefore, the remedial powers in s. 53(2) should be interpreted as including the power to reserve jurisdiction on certain matters in order to ensure that the remedies ordered by the tribunal are forthcoming to complainants. The denial of such a power would be overly formalistic and would defeat the remedial purpose of the legislation. In the context of a rather complex remedial order, it makes sense for the tribunal to remain [sic] seized of jurisdiction with respect to remedial issues in order to facilitate the implementation of the remedy. This is consistent with the overall purpose of the legislation and with the flexible approach advocated by Sopinka J. in *Chandler, supra*. It would frustrate the mandate of the legislation to require the complainant to seek the enforcement of an unambiguous order in the Federal Court or to file a new complaint in order to obtain the full remedy awarded by the Tribunal.

[33] The Federal Court of Appeal has recently held in *Murphy v. Teplitsky*, F.C.A. No. A-33-93, order dated November 23, 1993, not reported, that an adjudicator under the *Canada Labour Code* has the power to retain jurisdiction regarding remedial issues. MacGuigan J.A., writing for the Court, held at p. 12 that the only test for applying the principle of *functus officio* is "whether the Adjudicator could be said to have finally determined the complaint before him." Having found that the *Act* contemplates the reopening of a decision, in my view, the test in *Murphy* is consistent with the criteria laid down in *Chandler, supra*, and is the proper test to determine whether the Tribunal was *functus* with respect to the issue of the appointment when it reopened the hearing on July 6, 1993.

[34] In my view, it is clear that the Tribunal did not finally dispose of the appointment issue as they explicitly anticipated that the NRC might resist the implementation of the order and specifically retained jurisdiction in this regard. The reasons of March 18, 1994, indicate that the Tribunal was aware at the time they issued the August 21, 1992, order that the NRC was undergoing organizational changes which could possibly impact on the appointment of Dr. Grover. The Tribunal states at p. 2 [D/370, para. 2]:

It is vital for an understanding of this matter to appreciate that the substantial portion of the first hearing related to the discriminatory treatment of the Complainant, particularly in the area of peer promotion to the upper management level of N.R.C. As set out on p. 86 of a decision of August 21st, 1992, this Tribunal was fully aware that the Respondent N.R.C. was undergoing a substantial restructuring including promotional policy. The Tribunal accordingly retained jurisdiction to hear further evidence to assist with the implementation in the event that difficulties arose with this aspect of the decision.

[35] Given that Dr. Grover is a highly qualified scientist engaged in highly technical research, the August 21, 1992, order regarding the appointment is conspicuously lacking in detail. This suggests that the Tribunal intended that the particulars of the position would be worked out by the parties who, in light of the organizational changes taking place at the NRC, would be best equipped to specify the exact position and responsibilities which would be commensurate with Dr. Grover's expertise.

[36] I am not persuaded that the Tribunal came to a final decision on August 21, 1992, and then changed its mind in the face of new circumstances when rendering its second decision on March 18, 1994. In the August 21, 1992, decision, the Tribunal found at p. 10 [D/7, para. 21] that in 1986 Dr. Grover was

an outstanding scientist with high peer recognition internationally [and a scientist] who was conducting on behalf of the NRC important work in several fields of optics.

Further, at pp. 13 and 14 [D/9, paras. 27–28], it was concluded that a position of group leader or section head in the Division of Physics would have been a reasonable career expectation for Dr. Grover in 1986. The Tribunal went on to find that Dr. Grover had been restricted in his research activities by the systematic denial

of budget and resources for his work and by his assignment to insignificant roles in projects which were under the control of other scientists. All of these findings provide the basis for the three essential components of an appropriate position which the Tribunal included in their decision dated March 18, 1994, which simply supplement and clarify the original order.

[37] Given that the Tribunal did not finally dispose of the matters in issue, the continued objections of the NRC to the jurisdiction of the Tribunal to deal with the appointment after the August 21, 1992, order also are of little consequence in coming to the conclusion that the Tribunal was not *functus officio*. It is not the consent of the parties which confers jurisdiction on the Tribunal. While the Tribunal comments on the actions of the NRC in dealing with their objections and states that all counsel involved agreed not to raise the issue of *functus* and may have erred in so doing, this is not the basis for their conclusion that they had validly retained jurisdiction. Erroneous findings of fact must be the basis for the impugned decision in order to be considered a sufficient basis to set aside the decision: *Rohm & Hass Canada Ltd. v. Anti-Dumping Tribunal* (1978), 1978 CanLII 2028 (FCA), 22 N.R. 175 (F.C.A.). An examination of the record reveals that the Tribunal thoroughly canvassed the law regarding the application of *functus officio* and concluded that the principle did not apply primarily on the basis of this legal analysis. The alleged undertaking by counsel for the NRC was only one factor in dealing with this issue.

[38] I do not see the participation of the Tribunal as a conciliator in the interim period between August 21, 1992, and July 6, 1993, as supporting the view that the Tribunal was *functus* upon rendering the August 21, 1992, order. The events during this period are of no relevance to the question of *functus officio* as once it is determined that the enabling legislation contemplates the power to retain jurisdiction, the only test to be applied is that articulated by MacGuigan J.A. in *Murphy v. Teplitsky*, *supra*, that being whether the Tribunal had spoken its final mind. However, the impact of the Tribunal's participation in private settlement negotiations upon their ability to return to a quasi-judicial capacity deserves consideration.

[39] The Tribunal met privately with both parties in an effort to bring a resolution to the outstanding appointment issue. While such a procedure would be highly unorthodox and would likely invalidate a judicial proceeding before this Court, it is inappropriate to apply the same standard to proceedings before the Tribunal under the *Act*. The nature of a Human Rights Tribunal is that of a quasi-judicial body charged with the difficult statutory task of resolving often complex and emotional disputes between parties in a manner which emphasizes the compensation of victims of discrimination. Such 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. That the Tribunal is subject to a less rigorous standard of procedure is illustrated by the less formal rules of evidence applicable to hearings before the Tribunal as mandated in para. 50(2)(c) of the *Act*.

[40] While the procedure chosen by the Tribunal is certainly unusual and could in some cases be susceptible to legitimate charges of bias, I am not satisfied that the Tribunal's efforts at conciliation in this case justify quashing the decision of the Tribunal. Each party met with the Tribunal and each party had every opportunity to refuse to proceed in this manner. However, no objection was voiced by either party at that time. After the NRC's preliminary objection to the jurisdiction of the Tribunal on July 7, 1993, was dismissed, the Tribunal heard five more days of evidence regarding the suitability of the September 10, 1992, appointment to Dr. Grover's area and level of expertise and the management structure of the NRC. Both parties called witnesses and were given every opportunity to present their positions. Therefore, looking at the matter practically, I am not persuaded that the fairness of the proceedings were unduly compromised by the participation of the Tribunal as a conciliator. Some flexibility must be granted to the Tribunal as they have a difficult statutory mandate to fulfil. They should not be held to the same strict procedural standards as a court of law where to do so would result in a grave injustice.

[41] Likewise, I am not persuaded that the Tribunal committed a breach of natural justice as contended by the applicant in offering an explanation of the events between August 21, 1992, and the reopening of the hearing on July 6, 1993. The applicant seems to take issue with the comments of the Chairman that an undertaking not to challenge the jurisdiction of the Tribunal was given by counsel for the NRC. He refers to these comments as testimony as to converted facts. As stated above, the alleged undertaking was only one minor factor in the Tribunal's conclusion that it was not *functus officio*. While the Tribunal may not have been pleased that questions regarding its jurisdiction were being raised, counsel for the NRC was given every opportunity to present its position on this issue. After hearing the parties, the Tribunal set out in great detail an analysis of the law regarding *functus* and, in my opinion, committed no error of law in concluding that the principle had no application. Therefore, any inaccuracy as to the undertaking is not a sufficient basis to quash the decision.

[42] As to the comments of the Chairman regarding the conduct of counsel for the NRC, it is understandable that, after having heard over twenty-eight days of evidence and making an order which had not been implemented, the Tribunal would be feeling some frustration at the failure of the parties to resolve the outstanding matters. The objection of the NRC to the Tribunal's jurisdiction was simply one further obstacle to the completion of their remedial mandate. Regard should be had to the test for bias set out by Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369. Would a reasonable and informed person viewing the matter practically and realistically conclude that there was a reasonable apprehension of bias on the part of the Tribunal? I cannot

conclude that the Chairman's comments were such to interfere with a full and fair examination of the legal question of *functus officio*. In my view, the comments did not result in the denial of the applicant's right to a fair hearing.

[43] The applicant also attacked the March 18, 1994, decision on its merits. Even if the Tribunal did not speak its final mind and validly retained jurisdiction, it was argued that this decision was made without jurisdiction as the NRC complied with the order by appointing Dr. Grover to an appropriate position on September 10, 1992. To accept that this appointment on its face complies with the order, without an examination of the quality of the position and its suitability to Dr. Grover, requires an overly narrow reading of the Tribunal's reasons and would divest the order of any meaningful remedial value. In my opinion, the appointment of Dr. Grover to an inappropriate position constitutes a resistance to the implementation of the remedial order and the Tribunal validly reconvened to hear further evidence. Given the problems encountered in the implementation of Dr. Grover's appointment, the Tribunal validly exercised its power in again reserving jurisdiction in the event that further clarification was required after March 18, 1994.

[44] For all the above reasons, the applications are dismissed.

TAB 6



# Closs v. Fulton Forwarders Incorporated and Stephen Fulton, 2012 CHRT 30 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2012-11-30

Other citation: 76 CHRR 246

## Citation:

**Closs v. Fulton Forwarders Incorporated and Stephen Fulton, 2012 CHRT 30 (CanLII),**  
**<<https://canlii.ca/t/fz6s5>>, retrieved on 2026-01-02**

**Most recent  
unfavourable  
mention**

## Between:

Stephen Closs

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Fulton Forwarders Incorporated and Stephen Fulton

Respondents

Decision

Member: Susheel Gupta

Date: November 30, 2012

Citation: 2013 CHRT 30

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**I. Complaint**

[1] On June 8, 2011, pursuant to subsection 49(1) of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 [the *Act*], the Canadian Human Rights Commission (the Commission) requested that the Chairperson of the Canadian Human Rights Tribunal (the Tribunal) institute an inquiry into the complaints of Stephen Closs (the Complainant) against Fulton Forwarders Inc. (FFI) and Stephen Fulton (Mr. Fulton). The Complainant claims FFI engaged in discriminatory practices, contrary to paragraphs 7(a) and 7(b) of the *Act*, on the grounds of disability and family status. The Complainant also claims that FFI and/or Mr. Fulton engaged in a discriminatory practice, contrary to paragraph 14(1)(c) of the *Act*, on the same grounds.

**II. Complainant's Evidence**

[2] As part of the inquiry into these complaints, a hearing was held on February 2, 2012 in Cambridge, Ontario. At the outset of the hearing, the parties presented the Tribunal with an Agreed Statement of Facts. Together with these agreed facts, the Complainant testified as to his version of the events that gave rise to these complaints as follows.

[3] The Complainant was employed as a truck driver by FFI. Located in Cambridge, Ontario, FFI is a trucking transport business that delivers goods within Ontario and also between Ontario and Quebec. In 2008, the Complainant worked under the supervision of Terence Fulton, President of FFI, as a replacement driver, filling in for drivers who were sick or on vacation. In February 2009, Stephen Fulton, the Operations Manager for FFI, hired the Complainant as a part-time driver. According to the Complainant, at the beginning of his part-time employment with FFI, he worked primarily day shifts. In addition to his day shifts, the Complainant was sometimes asked to work night shifts. Over time, the Complainant claims that the request to work night shifts grew to a point where he was working up to four night shifts a week, on top of his day work. During this time, the Complainant described his work load as "running hard" for FFI, working sixty to seventy hours a week, with little time to sleep between his shifts. From February 9, 2009 until his last shift with FFI on May 14, 2010, the Complainant was under the direct supervision of Stephen Fulton and reported to him directly.

[4] The Complainant advised FFI that he had a "disease" which impacted his eyesight. The Complainant testified that he told both Terence and Stephen Fulton, at the outset of his employment relationship with each of them, that he suffers from Jessner's, a form of lupus. According to the Complainant, his lupus affects his nervous system and causes him some fatigue. The Complainant added that some of the medication he takes to address his condition affects his eyesight. This requires him to get eye exams every six months. On occasion, the Complainant would have to miss work for medical appointments or because of the side effects of the medications he was prescribed. The Complainant testified that, at first, FFI was accommodating and understanding concerning any time off he needed to attend to his medical condition. As a result of his condition, the Complainant claims to have also requested that he be able to

bring his friend, Tim Caskenette, along with him on his runs in order to help him stay awake. The Complainant claims that FFI was aware that Tim Caskenette was riding with him for this reason. In fact, the Complainant stated that he has no complaint about FFI's accommodation in this regard.

[5] Under the heading "Closs's Medical Condition", at paragraph 12 of the Agreed Statement of Facts, it states that the Complainant advised Mr. Fulton that he could no longer drive at night and that FFI agreed to this request. During his testimony, the Complainant explained that he did not request that FFI no longer schedule him for night driving. Rather, as he felt he was getting "burnt out" by his day/night work schedule, he requested that he be allowed to go home and sleep between shifts or that his hours be scaled back. The Complainant claims to have even suggested to Mr. Fulton that he hire another driver to reduce his workload.

[6] In April 2009, the Complainant and his spouse found out they were pregnant. On or about April 13, 2009, the Complainant's spouse went to the hospital for an ultrasound. The ultrasound indicated there were complications with the pregnancy, and the Complainant's spouse set up an appointment with her personal physician for later in the day to discuss the nature of the complications. The Complainant was on duty at the time he found out about the complications with the pregnancy and the scheduled appointment. He phoned Mr. Fulton to advise him of the situation and his desire to be with his wife for the appointment. According to the Complainant's testimony, arrangements were made by Mr. Fulton to expedite the loading/unloading of his truck, which allowed him to finish his runs early, and leave work to attend the appointment.

[7] At the appointment, the Complainant and his wife learned that their pregnancy had been lost and that his wife would need to go to the hospital to receive treatment. As the Complainant was scheduled to work another shift that evening, he phoned Mr. Fulton to discuss the situation and requested the night off to go to the hospital with his wife. According to the Complainant, he was denied the night off and was threatened with termination should he not work his shift. The Complainant claims Mr. Fulton told him words to the effect of "You have a job to do – so do it". The Complainant decided he would stay at the hospital until the miscarriage occurred, and told Mr. Fulton that he would call him again at that point.

[8] At around 12:00am, on April 14, 2009, the Complainant and his spouse suffered the miscarriage. Shortly thereafter, the Complainant again phoned Mr. Fulton to discuss the situation and claims to have requested a few days off to grieve the loss of the pregnancy with his wife. Once he advised Mr. Fulton of the miscarriage, the Complainant claims that Mr. Fulton told him words to the effect of "The first thing that's good for you is getting your ass back in that truck and driving down the highway because you're going to get your mind off it". While the Complainant understood the comment to be related to Mr. Fulton's own experience with having suffered a miscarriage and his way of coping with it, the Complainant did not feel as though working would be best for him. Subsequently, the Complainant claims he was denied any time off and was threatened with termination should he not work. According to the Complainant, the words of Mr. Fulton were to the effect that "I'm going to have to fire you and get a real truck driver because you can't do your job right". Therefore, the Complainant went to work.

[9] In September 2009, the Complainant and his spouse once again learned they were pregnant, this time with twins. On or about December 17, 2009, the Complainant's spouse was hospitalized due to complications with this second pregnancy. The Complainant was on duty at the time he found out about his spouse's hospitalization. The Complainant phoned Mr. Fulton to advise him of the situation and his desire to be with his wife. According to the Complainant, he was denied permission to leave his shift to be with his wife at the hospital. The Complainant testified that Mr. Fulton told him words to the effect that "it's a miscarriage, she'll get over it, just do your job". During his shift, on or about Friday, December 18, 2009, the Complainant's spouse suffered a second miscarriage. Subsequently, the Complainant again claims to have requested some time off to grieve the loss of the pregnancy with his wife. The Complainant claims he was again advised by Mr. Fulton that if he did not come to work his employment would be terminated. Therefore, the Complainant worked his next shift on Monday, December 21, 2009.

[10] On or about Friday, April 9, 2010, the Complainant sustained a leg injury. The Complainant testified that he slipped on mud in FFI's yard while getting out of his truck. The Complainant testified that he attempted to reach Mr. Fulton on April 10 and 11 to discuss the injury, leaving him messages. On April 11, 2010, Mr. Fulton phoned the Complainant and they discussed the leg injury over the phone. During this conversation, the Complainant advised Mr. Fulton that he could not work because he was having difficulty walking and that he needed to consult with his doctor concerning the injury. Also during their conversation, the Complainant testified that Mr. Fulton asked that he not file a Workplace Safety and Insurance Board (WSIB) claim in respect of the injury, and assured the Complainant that FFI would compensate him during his time off. Subsequent to this conversation, the Complainant testified that he obtained a note from his doctor, which he gave to Mr. Fulton, indicating that he required a week off to allow his leg injury to heal.

[11] During his week off, the Complainant again consulted with his doctor regarding his injury and it was recommended that the Complainant take an additional week off from work to allow his injury to heal. Another note was prepared, dated April 20, 2010, indicating that the Complainant was to be off work from the 12 to the 26 of April. The Complainant phoned Mr. Fulton to indicate that he required another week off from work and could only return to work on April 26, 2010. In response, the Complainant testified that Mr. Fulton requested that he attend at FFI's yard on April 23, 2010 to clean out his truck to allow another driver to drive it during the Complainant's absence.

[12] On or about April 23, 2010, the Complainant went to FFI's yard to meet with Mr. Fulton and to clean out his truck. At that time, the Complainant provided Mr. Fulton with the doctor's note, dated April 20, 2010. The Complainant claims to have questioned Mr. Fulton as to why, given he was returning to work on the 26, he had to clean out his truck. The Complainant testified that Mr. Fulton advised him that a new driver was hired to cover his shift and that there was no longer work available for the Complainant. A Record of Employment (ROE), dated April 23, 2010, was issued to the Complainant under code D "illness or injury". Under "expected date of recall", the ROE indicates "unknown". According to the Complainant, at this point, the conversation became heated and during this exchange he claims that Mr. Fulton advised him to "ride out" employment insurance benefits in order to address his "disease".

[13] At this time, it was the Complainant's understanding that his employment with FFI was no longer available to him; however, he does recall Mr. Fulton offering him replacement duties should they become available. On this basis, and as he feared refusing a shift could jeopardize his claim for employment insurance benefits, the Complainant worked one more shift with FFI on May 14, 2010, replacing a driver who was sick. Subsequently, the Complainant testified that due to the fact that he had launched the present complaints, he was advised to no longer return to work for FFI because doing so could jeopardize his legal proceedings/complaints against FFI.

[14] Mr. Tim Caskenette also testified as part of the Complainant's evidence at the hearing of this matter. As indicated above, and confirmed by Mr. Caskenette, he accompanied the Complainant during truck drives to help him stay awake. Apart from not being able to recall the physical exchange of the medical note and the ROE on April 23, 2010, Mr. Caskenette's testimony was consistent with his witness statement, which he testified was prepared by him independently based on his own memory of the events in question in this complaint. Overall, Mr. Caskenette's evidence was supportive of the Complainant's version of the events giving rise to this complaint.

### **III. Has The Complainant Established a *Prima Facie* Case of Discrimination?**

[15] The complainant in proceedings before the Tribunal must establish a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent..." (*Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at para. 28 [O'Malley]). In this case, the Complainant has alleged a contravention of paragraphs 7(a), 7(b) and 14(1)(c) of the Act.

### **A. Complainant's allegations under paragraph 7(a) of the Act**

[16] With regard to his termination, the Complainant alleges that his knee injury and his ongoing treatment for lupus were factors in FFI's decision to terminate his employment. Given Mr. Fulton's comments regarding the Complainant's spouse, the Complainant also claims that his family status was a factor in the decision to terminate his employment. As a result, the Complainant submits that he was discriminated against on the basis of his disability and family status in his employment contrary to paragraph 7(a) of the *Act*.

[17] Paragraph 7(a) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. In complaints under paragraph 7(a), the complainant must establish a link between a prohibited ground of discrimination and the employer's decision to refuse to employ or continue to employ (see *Roopnarine v. Bank of Montreal*, 2010 CHRT 5 at para. 49). That said, discrimination does not need to be the only reason for the decision. It is sufficient that discrimination be one factor in the decision (see *Holden v. Canadian National Railway Co.*, 1990 CanLII 12529 (FCA), [1990] F.C.J. No. 419 (F.C.A.) (Q.L.); and, *Khiamal v. Canada (Canadian Human Rights Commission)*, 2009 FC 495 at para. 61).

[18] In this case, the Complainant suffered a knee injury, a physical impairment which resulted in a functional limitation on his ability to drive a truck. As such, I find the Complainant's knee injury was a physical disability under the *Act* (see the definition of "disability" at section 25 of the *Act*; and, *Desormeaux v. Ottawa (City)*, 2005 FCA 311 at para. 15 [*Desormeaux*]). Having received from the Complainant a doctor's note indicating that he could return to work on April 26, 2010, FFI presented the Complainant with an ROE, dated April 23, 2010, indicating code D "illness or injury". The ROE is an indication that the Complainant was no longer working with FFI as of April 23, 2010. Furthermore, FFI hired another driver to perform the Complainant's work and indicated to the Complainant that, although he could return to the workplace once his knee healed, only replacement duties (filling in for drivers who are sick or on vacation) would be made available to him. This is in contrast to the sixty to seventy hour work weeks the Complainant indicated he had been working on a regular basis. While the Complainant may not have been terminated, he was no longer offered continued employment in the same capacity as he had been prior to the injury. This is similar to the situation in *Tanzos v. AZ Bus Tours Inc.*, 2007 CHRT 33, aff'd 2009 FC 1134, where the Tribunal found that an employer's refusal to return an employee to full-time duties, and only offering her part-time duties following her doctor's recommendation that she no longer work in the evening, constituted a *prima facie* case of discrimination under paragraph 7(a) of the *Act*. Given the Complainant's evidence, I find that he has established a link between his knee injury and FFI's decision to issue the ROE and no longer continue to employ the Complainant in the same capacity as he had been employed before.

[19] While the issuance of the ROE arose from the Complainant's leg injury, the Complainant testified that other discriminatory factors may have factored into FFI's decision. The Complainant testified that, at the time of the issuance of the ROE on April 23, 2010, Mr. Fulton advised him to "ride out" employment insurance benefits in order to address his "disease". The Complainant indicated that he informed FFI at the outset of his employment, through both Terence and Stephen Fulton, that his "disease" was Jessner's, a form of lupus. According to the Complainant, at times his lupus limited his ability to drive a truck. To address those limitations, he requested some time off on occasion and that Mr. Caskenette ride with him. Given this evidence, I am satisfied that the Complainant's lupus is also a physical disability under the *Act* (see the definition of "disability" at section 25 of the *Act*; and, *Desormeaux* at para. 15). While FFI argued that the Complainant never provided medical documentation to it or to the Tribunal to establish that he has lupus, aside from making this statement, FFI did not challenge the Complainant's assertion that he suffers from lupus before this Tribunal. Nor was any reason advanced as to why the Complainant's assertion that he has lupus is not credible. Therefore, given the Complainant's testimony regarding Mr. Fulton's comments at the time of the issuance of the ROE, I also find there to be some evidence of a link between the Complainant's lupus and FFI's decision to no longer continue to employ him.

[20] Therefore, the Complainant has established a *prima facie* case of discrimination, on the ground of disability, both his leg injury and his lupus, under paragraph 7(a) of the *Act*.

[21] With regard to Mr. Fulton's alleged comments regarding the Complainant's spouse, the evidence presented by the Complainant indicated that the comments were made in the context of the Complainant's request for leave following each of the miscarriages. Sufficient evidence was not led to establish that those events and related comments somehow factored into FFI's decision to issue the ROE in April 2010. As a result, I fail to see a link between Mr. Fulton's alleged comments regarding the Complainant's spouse and FFI's actions in April 2010.

### **B. Complainant's allegations under paragraph 7(b) of the Act**

[22] The Complainant also claims to have been denied accommodation by FFI at the time of his wife's two miscarriages. As a result, the Complainant submits that he was discriminated against on the basis of family status contrary to paragraph 7(b) of the *Act*.

[23] Paragraph 7(b) of the *Act* provides that it is a discriminatory practice, directly or indirectly, to differentiate adversely in relation to an employee in the course of employment on a prohibited ground of discrimination. To "differentiate" is to create a distinction or to treat someone differently (see *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2009 FC 1009 at para. 44 [*Tahmourpour*]; varied on other grounds in *Tahmourpour v. Canada (Royal Canadian Mounted Police)*, 2010 FCA 192 [*Tahmourpour (FCA)*]; and, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at para. 254). However, not every distinction is discriminatory, as the *Act* qualifies the differential treatment with the term "adversely". According to the Federal Court, "adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile (see *Tahmourpour* at para. 44; see also *Tahmourpour (FCA)* at para. 12). Finally, the adverse differential treatment must be based on a prohibited ground of discrimination. In this case, the Complainant argues that he was adversely treated by FFI on the basis of his family status.

[24] In determining the scope of the protection against discrimination on the ground of family status, the Supreme Court of Canada has supported an approach that focuses on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66 at para. 46 [*B*]). In this regard, an approach to determining discrimination based on the harm suffered by the individual is reflected in the purpose of the *Act* at section 2:

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..

(Emphasis added)

In the employment context, the Tribunal has stated that section 2 of the *Act* is a clear recognition, within the context of "family status", of an individual's right and duty to strike a balance between work and family obligations, coupled with a clear duty on the part of an employer to facilitate and accommodate that balance (see *Brown v. Canada (Department of National Revenue)*, 1993 CanLII 683 (CHRT) at p. 20 [*Brown*]). On this basis, the Tribunal has recognized that the scope of "family status" can also include an individual's duties and obligations within the family (see *Brown*; *Hoyt v. Canadian National Railway*, 2006 CHRT 33 [*Hoyt*]; *Johnstone v. Canada Border Service Agency*, 2010 CHRT 20 [*Johnstone*]; and, *Seeley v. Canadian National Railway*, 2010 CHRT 23 [*Seeley*]).

[25] The British Columbia Court of Appeal has suggested that only a "serious interference" between work and family obligations will result in a *prima facie* case of family status discrimination in the employment context (see *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260). However, the Tribunal and the Federal Court have rejected this approach as

conflating the threshold issue of *prima facie* discrimination with the second-stage *bona fide* occupational requirement analysis; and, as creating a hierarchy of grounds of discrimination, where the ground of family status is singled out for a different and more onerous *prima facie* standard (see *Hoyt*; *Johnstone*; *Seeley*; and, *Johnstone v. Canada (Attorney General)*, 2007 FC 36).

[26] FFI argues that the requirements to establish a *prima facie* case of discrimination based on family status are as follows:

the evidence must demonstrate that family status includes the status of being a Parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer

(Johnstone at para. 55)

Based on these requirements, FFI argues that the Complainant does not qualify as being a parent; that there is no employer rule inhibiting the Complainant from participating equally and fully in his employment; and, that the request to extend the definition of family status to cover the circumstances of this case stretches the definition beyond that of any prior jurisprudence and beyond a reasonable interpretation.

[27] While the requirements outlined in *Johnstone* are instructive, they cannot automatically be applied in a rigid or arbitrary fashion in every case. Rather, the circumstances of each case must be considered to determine if the Complainant has established a *prima facie* case pursuant to the test established in *O'Malley*. I would add that the *Act* does not define the term “family status” as some provincial legislatures have chosen to do under their respective human rights schemes (see for example the definition of “family status” at subsection 10(1) of the *Human Rights Code* of Ontario; and, paragraph 44(1)(f) of the *Alberta Human Rights Act*). Therefore, Parliament has left it to the Tribunal to ascertain the meaning of the term “family status”. I have also not been referred to any jurisprudence that restricts the definition of “family status” under the *Act* to being a parent or being in a parent-child relationship. As was stated above, in determining the scope of the protection against discrimination on the ground of family status, the focus is on the harm suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected (see *B* at para. 46). =

[28] In the circumstances of this case, the Complainant testified as to the pain he felt for not being there to support his wife during and after the miscarriages. He also testified as to the grief he experienced as a result of the lost pregnancies and the continuing effect that those losses have had on him. With specific regard to the second miscarriage, the Complainant testified that it still hurts him today that he was not there to be with his wife during and after the miscarriages. He explained that the experience with the miscarriages has made him fearful of getting pregnant again and that he avoids interacting with other people who may be pregnant. He claims he has become depressed by not having time to mourn the loss of the pregnancies and that this in turn has affected his home life. The Complainant claims he is now seeking counseling to address these issues.

[29] In their closing submissions, the Respondents stated that the Complainant’s testimony clearly demonstrated an individual with deep feelings regarding the miscarriages suffered by his spouse. I agree, but I believe it is more appropriate, given these circumstances, to characterize the loss of the pregnancies as suffered by the Complainant and his spouse together, as a family. The relationship between spouses is protected by the ground of family status (see meaning of “family status” in *Schaap v. Canadian Armed Forces*, 1988 CanLII 125 (CHRT) at p. 27, rev’d on other grounds 1988 CanLII 8976 (FCA), [1989] 3 F.C. 172 (C.A.); and, in Justice Walter Surma Tarnopolsky & William F. Pentney, *Discrimination and the Law*, Vol. 2 (Toronto: Carswell, 2004) at p. 9-3).

[30] In the situation where his wife had complications related to her pregnancies and had to go to the hospital, the Complainant felt he had an obligation within his family to be there with her to provide comfort and support. When the pregnancies were lost, the Complainant also felt he had an obligation within his family to take time off to grieve the losses with his wife. The Complainant claims to have asked FFI for time off to address these family obligations, but was denied such leave.

[31] In denying his request for time off, the Complainant claims that FFI created a hurtful distinction between the Complainant's family obligations and work obligations. As described above, this distinction, which resulted in the Complainant not being able to attend to his family obligations, caused the Complainant some pain. According to the Complainant, there was no attempt to facilitate a balance between his family and work obligations. Rather, based on the Complainant's evidence, FFI was only concerned with ensuring that the Complainant got his job done, without consideration of his family obligations. On this basis, I am satisfied that the Complainant has established a *prima facie* case of discrimination, on the ground of family status, pursuant to paragraph 7(b) of the *Act*.

### **C. Complainant's allegations under paragraph 14(1)(c) of the Act**

[32] Paragraph 14(1)(c) of the *Act* provides that it is a discriminatory practice, in matters related to employment, to harass an individual on a prohibited ground of discrimination. Throughout his employment with FFI, the Complainant claims to have been harassed by Stephen Fulton, contrary to paragraph 14(1)(c) of the *Act*. Specifically, the Complainant claims that Mr. Fulton made continuous use of profane language in addressing and directing him; that the Respondent refused to accommodate his reasonable requests without consideration or explanation; and, that the Respondent routinely threatened to terminate his employment in the event "he chose to exercise his statutory rights" or when the Complainant raised concerns about compliance with hours of work regulation. The Complainant adds that the Respondent routinely dismissed the severity of the miscarriages or their aggregate impact on him. In this regard, in addition to the comments the Respondent made at the time of the miscarriages, the Complainant testified that the Respondent also made a comment to the effect that "maybe if you got rid of your wife, you could actually work harder and wouldn't have to worry about going home to spend time with your wife". In the context of discussing his lupus, the Complainant also claims that Mr. Fulton suggested that he ask his doctor about medicinal marijuana.

[33] Within the meaning of section 14 of the *Act*, harassment has been defined as unwelcomed conduct, directed at another person on the basis of a prohibited ground of discrimination. By its definition, harassment generally requires an element of persistence or repetition; however, the more serious the conduct and its consequences, the less repetition may be necessary. The severity of the impugned conduct is assessed from the perspective of the reasonable person in the circumstances (see *Janzen v. Platy enterprises ltd.*, 1989 CanLII 97 (SCC), [1989] 1 SCR 1252; and, *Canada (Human Rights Commission) v. Canada (Armed Forces)*, 1999 CanLII 7907 (FC), [1999] 3 FC 653).

[34] With regard to the allegations of the use of profane language and the threats related to statutory rights/hours of work, the Complainant did not establish that these acts were related to a prohibited ground of discrimination. I would add that the Complainant's allegations relating to his family obligations were addressed above under paragraph 7(b); and, aside from FFI's reasons for issuing the ROE, the Complainant testified that he did not have a complaint regarding FFI's actions with regard to his lupus.

[35] In discussing the comment made by Mr. Fulton with regard to medicinal marijuana, the Complainant testified that he was not sure whether the comment was an actual suggestion or was just a joke. Either way, the Complainant's testimony did not establish that the marijuana comments persisted beyond the one incident or that the severity of the one comment was such that it constituted harassment.



[36] I also find that there is insufficient evidence to establish harassment on the basis of the Complainant's allegation that Mr. Fulton routinely dismissed the severity of the miscarriages or their aggregate impact on him. The Complainant testified about the comments the Respondent made at the time of the miscarriages, however, there was little evidence regarding any persistency in these comments outside of when the Complainant made requests for time off. While the Complainant, in his testimony, claims that the Respondent made an additional comment to the effect that the Complainant should get rid of his wife, the Complainant did not elaborate as to when this comment was made, the context in which it was made, or whether this persisted beyond the one incident.

[37] Persistency aside, I also find that the severity of the comments does not meet the threshold to establish harassment. Mr. Fulton's alleged comments are focused on the Complainant fulfilling his employment obligations. While such a focus may have been insensitive to the Complainant's circumstances and family obligations, the Complainant did not indicate that the comments themselves seriously affected him. Rather, my understanding of the Complainant's testimony was that it was the denial of the time off itself that caused the Complainant pain in dealing with the miscarriages. I would add that the Complainant acknowledged that Mr. Fulton's comments regarding the miscarriages were influenced by his own experience with having suffered a miscarriage. Mr. Fulton's way of dealing with the grief was to get his mind off of it by working. While this strategy may not have been acceptable to the Complainant and the communication of such a perspective may have been done in an insensitive manner, I find this adds context to the comments made by Mr. Fulton and contributes to my finding that the severity of the comments does not meet the threshold for establishing harassment.

[38] Given the reasons above, I do not find the Complainant to have established a *prima facie* case under paragraph 14(1)(c) of the *Act*.

#### **IV. Respondent's Evidence**

[39] For the reasons detailed above, I have found that the Complainant has established a *prima facie* case of discrimination under paragraphs 7(a) and 7(b) of the *Act* on the grounds of disability and family status. Once a complainant has established a *prima facie* case of discrimination, the respondent must demonstrate that the *prima facie* discrimination did not occur as alleged or that the practice is justifiable under the *Act*.

[40] At the hearing of this matter, Stephen Fulton testified on behalf of FFI.

#### **A. Response to the Complainant's prima facie allegations under paragraph 7(a) of the Act**

[41] Mr. Fulton testified that the Complainant was informed, prior to injuring his knee, that another driver would share his duties with him. According to Mr. Fulton, the decision to hire another driver was in response to the Complainant's notification that he could no longer drive at night safely. According to Mr. Fulton, the Complainant was also advised in April 2010 of the loss of much of FFI's day work and the lack of work which could accommodate the no night driving requirement of the Complainant.

[42] According to Mr. Fulton's testimony, following his knee injury, the Complainant phoned Mr. Fulton to inform him that he had slipped in the yard. Mr. Fulton says that the Complainant initially informed him that it would be six months to heal the injury. Mr. Fulton claims he offered to submit a WSIB claim, however, the Complainant said not to worry as he would say he hurt himself at home. During their phone conversation, Mr. Fulton claims to have also discussed the option of claiming employment insurance benefits to cover the Complainant's absence from work.

[43] The genesis of the April 23, 2010 meeting at the yard was a request by the Complainant to remove his personal belongings from his truck, now being driven by another driver. When the Complainant arrived at the yard on April 23, 2010, Mr. Fulton claims he was limping and appeared to be in a lot of pain. While Mr. Fulton was provided with a note dated April 20, 2010 advising that the Complainant

was unable to work for the period of April 12 to April 26, 2010, he requested a further and better medical note beyond the brief note provided. According to Mr. Fulton, the Complainant refused to provide a further note citing the cost of having to do so.

[44] Overall, Mr. Fulton testified that his reasons for issuing the ROE were because the Complainant advised that his “disease” would no longer allow him to drive at night and that FFI’s daytime work was drying up. Mr. Fulton stated that he explained to the Complainant that “you got to deal with your disease” and that FFI does not have short-term disability leave benefits, whereas Employment Insurance can provide him with that type of benefit. In their closing submissions, at paragraph 31, FFI added:

Given the lack of work and Closs having failed to provide medical clearance for [a] return to work and his ongoing advice as to a host of medical related issues and the lack of disability leave benefits Fulton advised Closs he could obtain Employment Insurance and this would permit him time to deal [with] his medical appointments and his reported disease.

[45] FFI maintains that they did not terminate the Complainant. Rather, they note that an ROE is not a dismissal notice and that, following the issuance of the ROE, there was an offer of continued shifts in May 2010. Following his shift on May 14, 2010, the Complainant did not report for further shifts.

[46] While the Complainant may not have been terminated at the time of the issuance of the ROE, FFI did not dispute that from that point forward it was no longer continuing to employ the Complainant in the same capacity as he was before. Whereas the Complainant was hired as a part-time driver, and would sometimes work up to seventy hours in a week; following the issuance of the ROE, he was only offered work as a replacement driver when other drivers were sick or otherwise absent from work.

[47] It is curious that despite requesting further medical documentation regarding the Complainant’s leg injury, and the effects that the injury may have on the Complainant’s ability to drive a truck, FFI was still willing to have the Complainant drive a truck for them should it need a replacement driver. On this basis, without providing further medical documentation that his leg injury was healed, the Complainant was asked to work other shifts for FFI in May 2010. Therefore, I do not accept that the Complainant’s refusal to provide further medical documentation regarding his ability to return to work factored into FFI’s decision to issue the ROE. Nor do I accept that the ROE was issued to allow the Complainant to claim employment insurance benefits when FFI did not offer short-term disability benefits. This is not credible given that the ROE is dated April 23, 2010, and the Complainant was off work starting April 12, 2010; and, furthermore, the ROE is inconsistent with the Complainant having presented Mr. Fulton with a doctor’s note indicating he could return to work.

[48] While the circumstances giving rise to the issuance of the ROE were in relation to the Complainant’s request for time off following his leg injury, by Mr. Fulton’s own admission, FFI’s decision to issue the ROE was primarily motivated by the Complainant’s “disease” and its inability to accommodate the Complainant’s alleged request to no longer drive at night. This is reinforced by the Respondents’ closing submissions which indicate that “Given...his ongoing advice as to a host of medical related issues...Employment Insurance...would permit him time to deal [with] his medical appointments and his reported disease”. In his testimony, Mr. Fulton also admitted that he had some concern about potential abuse of time off by the Complainant, but did not pursue those concerns with the Complainant. From these statements, it appears as though FFI either did not believe that the Complainant’s request for time off in April 2010 was related to his leg injury or they were just unwilling to entertain any further requests for time off from the Complainant. This is reinforced by the fact that, despite getting a doctor’s note indicating he could return to work, FFI issued the ROE.

[49] Despite Mr. Fulton’s reasons for issuing the ROE, FFI argues that the Complainant never provided medical documentation to it or to the Tribunal to establish that he has lupus. As stated above, aside from making this statement, FFI did not challenge the Complainant’s assertion that he suffers from lupus before this Tribunal. I would add that, notwithstanding the lack of medical documentation, FFI

accepted that the Complainant could no longer drive at night and, that given this restriction and the loss of daytime work, it could not accommodate the Complainant. Even if it is true that the Complainant requested to no longer drive at night because of his medical condition, which the Complainant denies, once the accommodation request was made FFI had a duty to obtain all relevant information about the Complainant's disability and seriously consider how the Complainant could be accommodated (see *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), 91 OR (3d) 649 (Ont. Sup. Ct.) at para. 160; and, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at paras. 64-66 [*Meiorin*]). Given that FFI never requested medical documentation regarding the Complainant's lupus, I cannot accept that it seriously considered whether it could accommodate his alleged request to no longer drive at night. Nor was sufficient evidence led to establish that accommodating the Complainant's alleged request to no longer drive at night would have caused FFI undue hardship. In fact, FFI never led a defence under paragraph 15(1)(a) and subsection 15(2) of the *Act* in attempting to justify their actions.

[50] Given the above, I find FFI's decision to issue the ROE to be discriminatory. Instead of seriously considering whether it could accommodate the Complainant's request for time off following his leg injury, FFI replaced the Complainant with another driver because they either did not believe, or were unwilling to entertain, his request for time off. While I recognize Mr. Fulton's testimony that FFI is a small business and that the trucking industry may present some unique challenges in attempting to accommodate employees; however, those factors must be considered alongside "...the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin* at para. 62). As indicated above, the evidence in this case does not support FFI's decision to issue the ROE and no longer continue to employ the Complainant as a part-time driver.

[51] As a result, I find that FFI has not provided a satisfactory explanation or justification for their *prima facie* discriminatory conduct in refusing to continue to employ the Complainant on the basis of his disability, both his leg injury and his lupus, contrary to paragraph 7(a) of the *Act*.

### **B. Response to the Complainant's *prima facie* allegations under paragraph 7(b) of the Act**

[52] According to Mr. Fulton's testimony, when the Complainant notified him of his wife's hospitalization on April 13, 2009, it was the first he heard of the Complainant's pregnancy. At that time, the Complainant was on route with a delivery and arrangements were made to expedite the Complainant back to the home terminal. Following the Complainant's miscarriage, the Complainant and Mr. Fulton discussed the Complainant's return to work over the phone. In an attempt to be sensitive to the situation, Mr. Fulton testified about speaking with the Complainant about keeping busy, time healing and about his personal experiences with a miscarriage. Mr. Fulton denied any disregard for the situation or the feelings of the Complainant. According to Mr. Fulton, the Complainant did not request time off following the miscarriages, but decided he would continue working a reduced schedule, in order to continue receiving an income, at times when his wife was resting and other family members were available to assist her.

[53] The Complainant's Trip Sheets for April 14-17, 2009 were provided to the Tribunal as part of Mr. Fulton's testimony. The Trip Sheets, which are filled out by the driver of the truck, detail the trip information, including start and end date, pick-up and delivery location, and the mileage of the trip, for a given day. Mr. Fulton recalled that on April 14, 2009, the Complainant went to work early in the morning because he had been at the hospital with his wife the previous evening. According to Mr. Fulton, arrangements were made to have the Complainant perform one delivery and then return directly to FFI's yard. The Complainant then worked a shift on April 15, 2009, ending his shift the next day on April 16, 2009 in Bowmanville, Ontario. According to Mr. Fulton, the Complainant began his shift late on April 15, 2009 due to the fact that he was with his wife until other family members were available to be with her. On April 16, 2009, beginning in Bowmanville, the Complainant went to pick-up a load in Etobicoke. According to Mr. Fulton, as the Complainant's wife was not feeling well, arrangements were

made to expedite the loading of the Complainant's truck in Etobicoke to allow for a quick return to FFI's yard. Mr. Fulton adds that the Complainant did not work the evening of April 16, 2009. On April 17, 2009, it was Mr. Fulton's understanding that the Complainant worked while his wife was sleeping.

[54] According to Mr. Fulton, following the first miscarriage, the Complainant did not complain about his conduct or about having to work. Mr. Fulton recalls the Complainant expressing that he was having trouble getting over the loss of the pregnancy, but that he reassured the Complainant that time heals and to keep going.

[55] Regarding the second miscarriage, Mr. Fulton testified that it was not possible to relieve the Complainant of his duties on December 17-18, 2009. The Tribunal was provided with the Complainant's Daily Log for December 18, 2009 and his Trip Sheets for December 17-18, 2009. On December 17, 2009, the Complainant made a delivery to Belleville, Ontario, and then went overnight from Bellville to Scarborough, Ontario, to pick up another load on the morning of December 18, 2009. From Scarborough, he delivered the load in Toronto, and then returned to FFI's yard in Cambridge. According to Mr. Fulton, during this time, another driver was involved in an accident. When the Complainant informed him of his wife's hospitalization and his request to be with her, he also requested that the driver involved in the accident come to relieve him. Given the accident and the other driver having worked in excess of his hours for the day, Mr. Fulton did not think it was safe for the other driver to relieve the Complainant. Also, given that the Complainant was on his way home with a load anyways, Mr. Fulton did not think the Complainant would be home any sooner whether he was relieved of his duties or completed his deliveries. Mr. Fulton added that arrangements were again made to expedite the loading of the Complainant's truck in Toronto to allow him to return home more quickly.

[56] As December 18, 2009, was a Friday, the Complainant did not work on the weekend of December 19-20, 2009. Mr. Fulton recalls making contact with the Complainant over that weekend to discuss how he was doing and whether he was ready to return to work. According to Mr. Fulton, the Complainant was concerned about having money for Christmas. Therefore, Mr. Fulton offered him a shift for December 21, 2009. Mr. Fulton claims that the Complainant indicated to him that, as he had other family members available to be with his wife, he would work the shift on December 21, 2009. The Complainant's Daily Log and Trip Sheet for Monday, December 21, 2009 indicate that he worked from 5:30am until 7:00pm that day. The Complainant did not work an evening shift that night.

[57] Following the December 21 shift, Mr. Fulton does not recall any discussions with the Complainant regarding his return to work or any request for time off. The Complainant next worked on December 28, 2009.

[58] Overall, the FFI maintains that the Complainant was not treated in an adverse differential manner on the basis of his family status. FFI submits that it attempted to address the medical emergencies relating to the pregnancies and miscarriages by expediting a return to home base and providing work as requested by the Complainant. In this regard, the FFI claims that its actions were reasonable in response to the situation.

[59] Again, without advancing a defence under paragraph 15(1)(a) and subsection 15(2) of the *Act*, FFI claims that it accommodated the Complainant in the circumstances prior to and subsequent to the miscarriages. Prior to both miscarriages, in the situations where his wife had complications related to the pregnancies and had to go to the hospital, FFI made arrangements to expedite the Complainant's return to the yard so he could leave work early to be with his wife. However, the crux of the complaint is that the Complainant was denied permission to leave his shift until after he completed his deliveries. While arrangements were made by FFI, sufficient evidence was not led to establish that those arrangements met FFI's duty to accommodate. Subsection 15(2) of the *Act* states that:

For any practice...to be considered to be based on a bona fide occupational requirement...it must be established that accommodation of the needs of an individual...would pose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Generally, undue hardship is reached when an employer shows that it could not have done anything else reasonable or practical to avoid the negative impact on the individual (see *Meiorin*, at paras. 38, 64-65; and, *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 130). In this case, sufficient evidence was not led to establish that FFI considered any other accommodation measures beyond expediting the Complainant's return to the yard or that it would have caused FFI undue hardship to allow the Complainant to leave his shift prior to finishing his runs. While Mr. Fulton explained that it was not possible to allow the Complainant to leave his shift prior to the second miscarriage, again, sufficient evidence was not led that FFI considered other accommodation measures beyond those that the Complainant proposed (ie. that a particular driver come to relieve him) or what undue hardship FFI would have sustained if the Complainant did not complete his deliveries.

[60] Following the miscarriages, the Complainant also claims to have been denied time off. On the other hand, FFI says that the Complainant did not request time off, but, rather, wished to continue working a modified schedule, to keep earning an income, at times when his wife had other people with her to provide support. Given the contradictory evidence of the parties on these facts, this aspect of the complaint requires the Tribunal to make a credibility assessment. The Daily Log and Trip Sheets provided by FFI are not very helpful in this regard. While they establish that the Complainant was working on the days in question, which was not in dispute, they do not shed any additional light on Mr. Fulton's assertion that the Complainant did not request time off following the miscarriages.

[61] In weighing the totality of the evidence presented on this aspect of the complaint, I do not find FFI's version of the events to be credible. I find it more probable than not that the Complainant requested time off following the miscarriages. In particular, some inconsistencies with FFI's version of events were identified. Following the first miscarriage, Mr. Fulton admitted to having researched whether FFI had an obligation to provide leave, whether paid or unpaid, following a miscarriage. If the Complainant had not requested time off, whether paid or unpaid, and actually wished to continue working, why would Mr. Fulton have looked into FFI's obligations in this regard? Furthermore, regarding the second miscarriage, Mr. Fulton was asked "Do you not consider it reasonable for him [the Complainant] to ask you for time off?". In response, Mr. Fulton stated "I gave him time off [...] During Christmas he worked one day". In its closing submissions, at paragraph 22, FFI added:

It was not in dispute that Closs did not work between December 22, 2009 and December 29, 2009. Fulton confirmed that work continued in their trucking business over this period except statutory holidays and subject to workload demands in the usual course. It was the position of Closs that this period in some way did not count towards a leave without providing an explanation for this position.

While it maintains that the Complainant did not request time off, FFI here describes the period of December 22-29, 2009 as them providing him with leave. Finally, in response to the question "He [the Complainant] was a pain to you wasn't he?", Mr. Fulton responded "Not when he was working".

[62] This last comment is consistent with the Complainant's contention that, in the circumstances of his family's miscarriages and related requests for time off, FFI's primary concern was ensuring that he continued to work and completed his runs. The Complainant's testimony was straightforward and consistent with this allegation. Through his demeanor and answers, I had no reason to question the Complainant's capacity to remember the events surrounding the miscarriages or the credibility of his statement that he did in fact request time off following the miscarriages.

[63] Having accepted that it is more probable than not that the Complainant requested time off following the miscarriages, FFI had a duty to consider whether it could accommodate the Complainant's request. Among the possible accommodation measures available, Mr. Fulton testified that replacement drivers may have been available to cover the Complainant's shifts. However, that measure does not seem to have been explored. That is not to say that FFI had to provide the Complainant with leave, or that it did not have valid reasons to deny the leave; however, as mentioned above, those factors must be considered alongside "...the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship" (*Meiorin* at para. 62). While Mr. Fulton may have been of the view that the

Complainant should work through the grief of the miscarriages, based on his own personal experience with having suffered a miscarriage, that is not a strategy that the Complainant shared or that could necessarily be applied to the Complainant. In this regard, “[t]he importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made” (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at para. 22). In this case, considering that FFI denies that the Complainant requested time off, which I do not find credible, there is no evidence to suggest that FFI seriously considered the Complainant's needs in requesting time off following the miscarriages or that FFI seriously considered whether it could accommodate those needs.

[64] As a result, I find that FFI has not provided a satisfactory explanation or justification for its *prima facie* discriminatory conduct in relation to the Complainant's family status, contrary to paragraph 7(b) of the *Act*.

## **V. Conclusion**

[65] Given the evidence and reasoning above, I find the complaints under paragraphs 7(a) and 7(b) of the *Act* to be substantiated.

## **VI. Order**

[66] Pursuant to subsection 53(2) of the *Act*, if at the conclusion of the inquiry the Tribunal finds that the complaint is substantiated, the Tribunal can make an order against the person found to have engaged in the discriminatory practice. In this regard, the Complainant seeks an order with the following remedies: lost wages, interest on the lost wages; compensation for pain and suffering; compensation for having engaged in the discriminatory practice willfully or recklessly; and, such other remedy as Tribunal may determine is just.

[67] The aim in making an order under subsection 53(2) is not to punish the person found to have engaged in the discriminatory practice, but to eliminate - as much as possible - the discriminatory effects of the practice (see *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

### **A. Lost wages**

[68] The Complainant seeks lost wages for the period of April 9, 2010 to December 15, 2011. According to the Complainant, his projected annual earnings for the years 2010 and 2011 would have been \$63,000 per year or \$1,220 per week. Therefore, over a period of 83 weeks, he would have earned \$101,260. However, he mitigated those lost wages by earning \$25,729 through employment insurance and other employment. Therefore, the Complainant claims he is owed \$75,531 in lost wages.

[69] FFI disputes the lost wages claim. According to them, the calculation is not applicable because their drivers are paid by the kilometer. FFI adds that the Complainant's evidence regarding his efforts to mitigate is questionable. He initially stated that he was off work until his employment insurance benefits ran out. The Complainant then obtained employment and has had employment since in or about December 2010. Therefore, FFI argues that the Complainant appears able to obtain and maintain employment when he chooses to do so.

[70] The ROE dated April 23, 2010 issued by FFI to the Complainant indicates that the last day for which the Complainant was paid was April 9, 2010. The evidence indicates that the Complainant worked one more shift for FFI on May, 14, 2010. Subsequently, the Complainant received employment insurance benefits until, according to the Complainant, approximately the end of November 2010. The Tribunal was provided with the Complainant's T4E, Statement of Employment Insurance and Other Benefits, for the year 2010. This document indicates that the Complainant received \$12,755 in employment insurance benefits for 2010.

[71] The Complainant began employment with Challenger Motor Freight Inc. in December 2010. The Tribunal was provided with the Complainant's T4, Statement of Remuneration Paid, issued by Challenger for the year 2010, indicating he earned \$5,550.27. The document does not indicate a start or end date for the Complainant's employment with Challenger. According to the Complainant, as he was not receiving sufficient hours with Challenger - only 5-6 hours a day, two to three days a week - he quit Challenger, and on the same day went to work for Wag-mar Transport Inc. The Tribunal was provided with an ROE, issued by Wag-mar on May 18, 2011. This document indicates that the Complainant started work with Wag-mar on February 11, 2011 and his last day for which he was paid was May 15, 2011. The ROE also indicates that the reason for issuing the ROE is code M "dismissal". The ROE does not indicate the Complainant's income during his employment with Wag-mar, only his "total insurable earnings". No evidence was provided regarding the Complainant's employment situation following his dismissal from Wag-mar.

[72] Given that the Complainant was unemployed between April 2010 and December 2010 as a result of FFI's decision to issue the ROE, I accept that he suffered a wage loss for this period. While FFI questions the Complainant's efforts to mitigate his wage loss during this period, they did not advance sufficient evidence to support their claim. Furthermore, I accept the Complainant's testimony that in working for Challenger, his hours were significantly reduced from what he used to work with FFI. Despite partially mitigating his wage loss by working for Challenger, the Complaint continued to suffer a wage loss during this period.

[73] However, despite procuring employment with Wag-mar, on a more full-time basis than with Challenger, the Complainant claims he continued to suffer a wage loss until December 2011. Sufficient evidence was not provided by the Complainant to explain why he continued to suffer a wage loss once he began employment with Wag-mar or subsequently. Specifically, I note that the Complainant's calculation of his "projected annual earnings for the years 2010 and 2011" does not explain why his employment with Wag-mar ended and, as mentioned above, what the Complainant's employment situation was for the period between May to December 2011. Furthermore, while the Complainant claimed in his testimony that his legal action against FFI has made it difficult for him to find and maintain employment, sufficient evidence was not advanced to substantiate this claim.

[74] Given the evidence and reasoning above, and pursuant to paragraph 53(2)(c) of the *Act*, I order FFI to compensate the Complainant for his lost wages for the period of Monday, April 12, 2010 until February 10, 2011. This amounts to 43 weeks and four days of wages.

[75] In determining the amount to be awarded to the Complainant under this remedy, the calculation of the Complainant's wages shall follow the same method used by the parties previously, as indicated at paragraph 29 of the Agreed Statement of Facts, to calculate the amount of each week's worth of wages:

### **CLC Proceeding**

29. No adjudication on the merits occurred and there was no determination as to unjust dismissal. No human rights claims were raised nor adjudicated. A without prejudice settlement was reached wherein FFI paid Closs two weeks wages.

*(emphasis added)*

[76] To avoid double compensation, the wages the Complainant received for his shift on May 14, 2010 shall be deducted from the award. Furthermore, the amount of \$12,755 shall be deducted from the award to reflect the amount of employment insurance benefits the Complainant received during the relevant period. The amount of \$5,550.27 shall also be deducted from the award to reflect the Complainant's earnings from Challenger in 2010. Finally, the earnings the Complainant received from Challenger in 2011 shall also be deducted from the award.

[77] In accordance with subsection 53(4) of the *Act*, the Complainant also sought interest on any compensation for lost wages. As such, and pursuant to Rule 9(12) of the Tribunal's *Rules of Procedure*, I grant interest on the lost wages award, from April 23, 2010, the date on which the ROE was issued to the Complainant, until the date of the payment of the award. The interest shall be simple interest, calculated on a yearly basis, at the Bank Rate (monthly series) established by the Bank of Canada.

[78] I shall retain jurisdiction with regard to the lost wages award in the event any further clarification is required and until such time as the parties confirm that the terms of this aspect of the order have been implemented.

### **B. Compensation for pain and suffering**

[79] The Complainant seeks \$20,000 as compensation for the pain and suffering that he experienced as a result of the discriminatory practices. According to the Complainant, the way FFI treated him during the loss of the pregnancies and the resulting pain that it caused him warrants an award of compensation for pain and suffering. The Complainant also submits that he has suffered symptoms associated with mental distress and anxiety, which commenced after his employment with FFI and have progressively worsened since the termination of his employment. The Complainant claims he has been prescribed medication for the treatment of these symptoms.

[80] According to FFI, the amount claimed by the Complainant is excessive given that there is evidence that indicates that the Complainant suffered from a pre-existing condition and that there were external factors affecting his mental well being.

[81] Pursuant to paragraph 53(2)(e) of the *Act*, \$20,000 is the maximum amount of compensation that the Tribunal can award for pain and suffering. Therefore, the Tribunal only awards the maximum amount in the most egregious of circumstances: where the extent and duration of the complainant's suffering as a result of the discriminatory practice warrants the full amount.

[82] The Tribunal was provided with the Complainant's "Patient Medical History", a printout from Shoppers Drug Mart, indicating the Complainant's prescription history. Among other medications, the Complainant was prescribed trimipramine, which the Complainant described as an anti-depressant, and ratio-fluoxetine, which the Complainant stated he took to address panic attacks. These prescriptions were both serviced on January 27, 2009, prior to the Complainant having been hired by Mr. Fulton. The Complainant also testified to having experienced anxiety and panic attacks prior to his employment with FFI, as a result of having witnessed an automobile accident at a previous job. Therefore, I do not accept the Complainant's statement that his mental distress and anxiety only commenced after his employment with FFI. Nor was the Tribunal provided evidence to support the claim that these symptoms worsened following the issuance of the ROE.

[83] That said, I accept the Complainant's testimony that the issuance of the ROE caused him some emotional upset, which resulted in a heated exchange with Mr. Fulton and the filing of this complaint.

[84] With regard to the miscarriages, as mentioned previously and as stated by FFI, the Complainant's testimony clearly demonstrated an individual with deep feelings regarding the miscarriages suffered by his family. However, in awarding a remedy under paragraph 53(2)(e), the Tribunal is not trying to rectify the pain and suffering the Complainant experienced as a result of the miscarriages. Rather, it is attempting to redress the effects of the discriminatory practices. In denying the Complainant time off to address his family obligations, without seriously considering his needs, FFI exacerbated the grief



suffered by the Complainant as a result of the miscarriages. The Complainant testified that not being there to support his wife during the miscarriages and not being given time to grieve has had some long term effects on him, including depression. While the Complainant may have suffered from depression previously, again, I accept that the situation may have exacerbated his condition. Furthermore, the Complainant testified that he is now seeking counseling to address these issues, as his suffering is now affecting his relationship with his wife and others. That said, and without disregarding the effects of FFI's conduct, I believe the Complainant's evidence demonstrates that the bulk of his pain and suffering surrounding the miscarriages was as a result of losing the pregnancies themselves.

[85] Given the above, and pursuant to paragraph 53(2)(e) of the *Act*, I feel it is appropriate to order FFI to compensate the Complainant in the amount of \$5,000.00 for the pain and suffering he experienced as a result of the discriminatory practices.

**C. Compensation for having engaged in the discriminatory practice wilfully or recklessly**

The Complainant seeks \$20,000 as compensation for FFI having engaged in the discriminatory practice wilfully or recklessly. According to FFI, there is no evidence to support wilful or reckless conduct which would give rise to damages under this head.

[86] In order to be wilful or reckless, "...some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168, at para. 33). Under subsection 53(3) of the *Act*, \$20,000 is the maximum amount of compensation that the Tribunal can award for having engaged in the discriminatory practice wilfully or recklessly. Therefore, the award of the maximum amount should be reserved for the most severe or egregious cases.

[87] While I do not believe that the evidence demonstrates that FFI intentionally sought to discriminate against the Complainant, I do believe that FFI demonstrated a reckless disregard for the consequences of its behaviour. In the situation of the miscarriages, the Complainant made FFI aware of his needs and asked for accommodation, but FFI chose to focus on its own needs, without giving adequate consideration to the Complainant's family obligations. In the situation resulting in the issuance of the ROE, again, the Complainant made FFI aware of his needs and his request for accommodation. FFI's reasons for ignoring that request were dispassionate towards the Complainant's needs and, in replacing the Complainant with another driver, demonstrated a reckless disregard for the accommodation process.

[88] Given the above, and pursuant to subsection 53(4) of the *Act*, I feel it is appropriate to order FFI to compensate the Complainant in the amount of \$5,000.00 for having engaged in the discriminatory practices recklessly.

*Signed by*

Susheel Gupta

Acting Chairperson

OTTAWA, Ontario

November 30, 2012

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1693/4811 & T1694/4911

**Style of Cause:** Stephen Closs v. Fulton Forwarders Incorporated and Stephen Fulton

**Ruling/Decision of The Tribunal Dated:** November 30, 2012

**Appearances:**

Mr. Craig Lewis, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Carol VandenHoek, for the Respondent

TAB 7

# Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40 (CanLII), [2017] 1 SCR 1069

Source: Supreme Court of Canada  
 Date: 2017-07-26  
 File number: 36692  
 Other citations: 411 DLR (4th) 571 — [2017] SCJ No 40 (QL) — [2017] ACS no 40

## Citation:

**Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40 (CanLII), [2017] 1 SCR 1069, <<https://canlii.ca/t/h51gv>>, retrieved on 2026-01-02**

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## SUPREME COURT OF CANADA

**Citation:** Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40, [2017] 1 S.C.R. 1069

**Appeal  
heard:**  
November  
30, 2016

**Judgment  
rendered:**  
July 26,  
2017

**Docket:**  
36692

Between:

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization — Clyde River and Jerry Natanine

Appellants

and

Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-Nopec Geophysical Company ASA (TGS) and Attorney General of Canada

Respondents

- and -

Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario

## Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

**Reasons for Judgment:**

(paras. 1 to 53)

Karakatsanis  
and Brown  
JJ.  
(McLachlin  
C.J. and  
Abella,  
Moldaver,  
Wagner,  
Gascon,  
Côté and  
Rowe JJ.  
concurring)

*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069

Hamlet of Clyde River,

Nammautaq Hunters & Trappers

Organization — Clyde River and Jerry Natanine Appellants

v.

Petroleum Geo-Services Inc. (PGS),

Multi Klient Invest As (MKI),

TGS-NOPEC Geophysical Company ASA (TGS) and

Attorney General of Canada Respondents

and

Attorney General of Ontario,

Attorney General of Saskatchewan,

Nunavut Tunngavik Incorporated,

Makivik Corporation,

Nunavut Wildlife Management Board,

Inuvialuit Regional Corporation and

Chiefs of Ontario Interveners

**Indexed as: Clyde River (Hamlet) v. Petroleum Geo-Services Inc.**

2017 SCC 40

File No.: 36692.

2016: November 30; 2017: July 26.[1]<sup>3</sup>

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the federal court of appeal

*Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult — Whether Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).*

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

*Held:* The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial

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 3. The judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

### Cases Cited

**Applied:** *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **distinguished:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; **referred to:** *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

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*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, ss. 2.1, 3, 5(1)(a), 5(1)(b), 5(4), 5(5), 5.002 [ad. 2015, c. 4, s. 7], 5.2(2), 5.31, 5.32, 5.331 [*idem*, s. 13], 5.36.

*Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

*Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

*Constitution Act, 1982*, s. 35.

*National Energy Board Act*, R.S.C. 1985, c. N-7, s. 12(2), 16.3, 24.

*National Energy Board Act*, S.C. 1959, c. 46.

## **Treaties and Agreements**

*Nunavut Land Claims Agreement* (1993).

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Boivin JJ.A.), 2015 FCA 179, [2016] 3 F.C.R. 167, 474 N.R. 96, 94 C.E.L.R. (3d) 1, [2015] F.C.J. No. 991 (QL), 2015 CarswellNat 3750 (WL Can.), affirming a decision of the National Energy Board, No. 5554587, June 26, 2014. Appeal allowed.

*Nader R. Hasan, Justin Safayeni and Pam Hrick*, for the appellants.

*Sandy Carpenter and Ian Breneman*, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

*Mark R. Kindrachuk, Q.C., and Peter Southey*, for the respondent the Attorney General of Canada.

*Manizeh Fancy and Richard Ogden*, for the intervener the Attorney General of Ontario.

*Richard James Fyfe*, for the intervener the Attorney General of Saskatchewan.

*Dominique Nouvet, Marie Belleau and Sonya Morgan*, for the intervener Nunavut Tunngavik Incorporated.

Written submissions only by *David Schulze and Nicholas Dodd*, for the intervener the Makivik Corporation.

*Marie-France Major and Thomas Slade*, for the intervener the Nunavut Wildlife Management Board.



*Kate Darling, Lorraine Land, Matt McPherson and Krista Nerland*, for the intervener the Inuvialuit Regional Corporation.

*Maxime Faille, Jaimie Lickers and Guy Régimbald*, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

Karakatsanis and Brown JJ. —

## I. Introduction

[1] This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

[2] The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

[3] In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

[4] While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

## II. Background

### *A. Legislative Framework*

[5] The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

[6] The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

## B. The Seismic Testing Authorization

[7] In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

[8] The NEB launched an environmental assessment of the project.[2]<sup>4</sup>

[9] Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

[10] In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: “That’s a very difficult question to answer because we’re not the core experts” (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

... a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

[11] These are but two examples of multiple instances of the proponents’ failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

[12] Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

[13] In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[3]<sup>5</sup> before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory

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4. This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

5. At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the “Eastern Arctic Strategic Environmental Assessment” — for Baffin Bay and Davis Strait, meant to examine “all aspects of future oil and gas development.” Once complete, it would “inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait” (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

decisions affecting the Nunavut Settlement Area’s marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council’s view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

[14] In June 2014, the Minister responded to both letters, “disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment” (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

[15] In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents “made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised” and that “Aboriginal groups had an adequate opportunity to participate in the NEB’s [environmental assessment] process” (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of “Special Concern” by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

### C. The Judicial Review Proceedings

[16] Clyde River applied to the Federal Court of Appeal for judicial review of the NEB’s decision to grant the authorization. Dawson J.A. (Nadon and Boivin J.J.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister’s approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of COGOA (2015 FCA 179, [2016] 3 F.C.R. 167). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

[17] The Court of Appeal also concluded that the Crown’s duty to consult had been satisfied by the nature and scope of the NEB’s processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development activities. In the circumstances, a strategic environmental assessment report was not required.

### III. Analysis

[18] The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?
2. Can the Crown rely on the NEB’s process to fulfill the duty to consult?
3. What is the NEB’s role in considering Crown consultation before approval?
4. Was the consultation adequate in this case?

#### A. The Duty to Consult — General Principles

[19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

[20] The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

[21] This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

[22] In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

[23] Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

[24] Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstrance following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and

Aboriginal interests” (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

#### B. Can an NEB Approval Process Trigger the Duty to Consult?

[25] The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

[26] In this appeal, all parties agreed that the Crown’s duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*’s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment of the *NEB Act*[4]<sup>6</sup> (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB’s approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

[27] Contrary to the Federal Court of Appeal’s conclusions on this point, we agree that the NEB’s approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

[28] It bears reiterating that the duty to consult is owed by the Crown. In one sense, the “Crown” refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term “Crown” is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king’s peace but also against “his crown and dignity”: *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term “the Crown” is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on “the Crown.”

[29] By this understanding, the NEB is not, strictly speaking, “the Crown”. Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown’s ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency

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6. *National Energy Board Act*, S.C. 1959, c. 46.

exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

### C. Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?

[30] As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

[31] We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).[5]<sup>7</sup>

[32] *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

[33] The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

[34] In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

### D. What Is the NEB's Role in Considering Crown Consultation Before Approval?

[35] The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast,

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7. While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).

the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

[36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

[37] The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

[38] We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

[39] The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

[40] Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise

to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

[41] This leaves the question of what a regulatory agency must do where the adequacy of Crown consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are “a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation” (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 39).

[42] This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic “*Haida* analysis”, as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

#### E. Was the Consultation Adequate in This Case?

[43] The Crown acknowledges that deep consultation was required in this case, and we agree. As this Court explained in *Haida*, deep consultation is required “where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high” (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals “provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call ‘country food’” (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than . . . just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.

(*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

[44] The risks posed by the proposed testing to these treaty rights were also high. The NEB’s environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting



traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

[45] Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

[46] Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

[47] Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.[6]<sup>8</sup> While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

[48] The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

[49] While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

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8. The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above, Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

[50] The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

[51] These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

[52] The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

#### IV. Conclusion

[53] For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

*Appeal allowed with costs.*

Solicitors for the appellants: Stockwoods, Toronto.

Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener Nunavut Tunngavik Incorporated: Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener the Inuvialuit Regional Corporation: Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

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TAB 8

# CN v. Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114

Source: Supreme Court of Canada

Date: 1987-06-25

Other citations:

40 DLR (4th) 193 — 76 NR 161 — 5 ACWS (3d) 37 — 27 Admin LR 172 — 8 CHRR 4210 — [1987] CarswellNat 905 — JE 87-801 — [1987] SCJ No 42 (QL) — [1987] ACS no 42

## Citation:

**CN v. Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC), [1987] 1 SCR 1114, <<https://canlii.ca/t/1lpg8>>, retrieved on 2026-01-02**

**Most recent  
unfavourable  
mention**

**Supreme Court of Canada**

**CN v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114**

**Date: 1987-06-25**

**Action Travail des Femmes Appellant**

v.

**Canadian National Railway Company Respondent**

and

**Canadian Human Rights Commission Mis en cause**

and

**Attorney General of Canada Intervener**

and between

**Canadian Human Rights Commission Appellant**

v.

**Canadian National Railway Company Respondent**

and

**Action Travail des Femmes, Denis Lemieux, Nicole Duval-Hesler, Joan Wallace and the Attorney General of Canada Mis en cause**

INDEXED AS: CANADIAN NATIONAL RAILWAY CO. V. CANADA (CANADIAN HUMAN RIGHTS COMMISSION)

File Nos: 19499, 19500.

1986: November 5, 6; 1987: June 25.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ.

Chouinard J. took no part in the judgment.

#### ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Civil rights — Discrimination — Employment — Systemic discrimination against an identifiable group — Human Rights Tribunal imposing employment equity program on employer — Tribunal's order setting employment goal and fixing hiring quota — Whether the Tribunal had jurisdiction to make such order — Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 2, 15(1), 41(2)(a).

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Statutes — Interpretation — Human rights legislation — Legislation to be given a broad interpretation to fulfil its purposes — Canadian Human Rights Act, S.C. 1976-77, c. 33.

Action Travail des Femmes alleged that CN was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the *Canadian Human Rights Act* by denying employment opportunities to women in certain unskilled blue-collar positions. A Human Rights Tribunal constituted under s. 39 of the Act studied the complaint, found that the evidence indicated clearly that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue-collar jobs, and concluded that it was essential to impose upon CN a special employment program. In particular, paragraph 2 of the Special Temporary Measures Order required CN to increase to 13 per cent—the national average—the proportion of women working in non-traditional occupations, and until that goal was achieved, to hire at least one woman for every four non-traditional jobs filled in the future. CN's application to the Federal Court of Appeal under s. 28 of the *Federal Court Act* to review the Tribunal's decision was allowed and paragraph 2 of the Special Temporary Measures Order was set aside. The majority of the Court held that the Tribunal exceeded its jurisdiction under s. 41 (2)(a) of the *Canadian Human Rights Act* in making that part of the Order because the Tribunal's power under that section is limited to prescribing measures for the purpose of preventing in the future the recurrence of discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. This appeal is to determine whether the Tribunal has the power under s. 41(2)(a) to impose upon an employer an "employment equity program" to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women.

**Held:** The appeal is allowed and the cross-appeal dismissed.

The Order made by the Tribunal was within its jurisdiction under s. 41(2)(a) of the Act. The purpose of the Act, stated in s. 2, is not to punish wrongdoing but to prevent discrimination against identifiable protected groups and the Act must receive a fair, large and liberal interpretation to advance and fulfil its purpose. Under s. 41(2)(a), the Tribunal may order the "adoption of a special program ... referred to in subsection 15(1)", a

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section designed to meet the problem of systemic discrimination, "to prevent the same or a similar [discriminatory] practice occurring in the future". An employment equity program, such as the one in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears. In any employment equity program, there simply cannot be a radical dissociation of "remedy" and "prevention" for there is no prevention without some form of remedy. Although the dominant purpose of such programs is always to improve the situation of the

target group in the future, it is essential, in attempting to combat systemic discrimination, to look to the past patterns of discrimination and to destroy those patterns. In this case, it is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities. The employment equity program ordered by the Tribunal, including paragraph 2 of the Special Temporary Measures, was rationally designed to combat such systemic discrimination by preventing "the same or similar practice occurring in the future" and, therefore, fell within the scope of s.41(2)(a).

### Cases Cited

**Referred to:** *Bhinder v. Canadian National Railway Co.*, 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561, affg 1983 CanLII 5037 (FCA), [1983] 2 F.C. 531; *Insurance Corporation of British Columbia v. Heerspink*, 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145; *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536; *Canadian Odeon Theatres Ltd. v. Saskatchewan Human Rights Commission*, 1985 CanLII 183 (SK CA), [1985] 3 W.W.R. 717.

### Statutes and Regulations Cited

*Canadian Human Rights Act*, S.C. 1976-77, c. 33, ss. 2, 10, 15(1), 39, 41(2)(a), (b), (c), (d).

*Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.

*Interpretation Act*, R.S.C. 1970, c. 1-23, s. 11. *Ontario Human Rights Code*, R.S.O. 1980, c. 340.

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APPEAL from a judgment of the Federal Court of Appeal, 1985 CanLII 5531 (FCA), [1985] 1 F.C. 96, 20 D.L.R. (4th) 668, 61 N.R. 354, allowing CN's application under s. 28 of the *Federal Court Act* and setting aside part of the Human Rights Tribunal's Order. Appeal allowed and cross-appeal dismissed.

Hélène Lebel, Q.C., for Action Travail des Femmes.

Alphonse Giard, Q.C., Rolland Boudreau, Q.C., and Anne Bétournay, for the Canadian National Railway Co.

René Duval and Anne Trotier, for the Canadian Human Rights Commission.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This case raises the important question whether a Human Rights Tribunal appointed under s. 39 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (the Act), has the power under s. 41(2)(a) to impose upon an employer, in this case Canadian National Railway Co., a program tailored specifically to address the problem of "systemic discrimination" in the hiring and promotion of a disadvantaged group, in this case women. I am content to adopt the vocabulary of the *Report of the Commission on Equality in Employment* (1984), authored by Judge Rosalie

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Abella (the Abella Report) and to describe such programs as "employment equity programs".

Action Travail des Femmes, a public interest pressure group originally funded by the federal government but now incorporated and financed independently, alleged that Canadian National was guilty of discriminatory hiring and promotion practices contrary to s. 10 of the Act by denying employment opportunities to women in certain unskilled, blue-collar positions. Section 10 of the Act reads:

10. It is a discriminatory practice for an employer or an employee organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

#### The Facts

A Human Rights Tribunal was constituted in July 1981 to study the complaint lodged by Action Travail des Femmes. The complaint reads as follows:

A.T.F. has reasonable grounds to believe that CN in the St. Lawrence Region has established or pursued a policy or practice that deprives or tends to deprive a class of individuals of employment opportunities because they are female.

The complaint was not that of a single complainant or even of a series of individual complainants; it was a complaint of systemic discrimination practised against an identifiable group.

The Tribunal received testimony from 50 witnesses during 33 days of hearings and, in due course, rendered a decision of some 175 pages. The decision records in detail the evidence of Mr. Yvon

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Masse, Vice-President of the St. Lawrence Region of Canadian National. Mr. Masse spoke of a study, apparently prepared in 1974 at the request of the then President of CN, Mr. Robert Bandeen, entitled "Canadian National Action Programs— Women", and commonly referred to as the Boyle/ Kirkman Report. The Report identified three problems:

#### 1. Lack of Definitive Executive Management Commitment

Top management's interest on the issue of women has not been communicated effectively nor have direct actions demonstrated their concern. The majority of managers are understandably perplexed regarding the current and future role of women within CN. CN managers across the system await a definitive policy statement with specific action programs. Executive management must commit



themselves to begin to encourage their subordinates to change the environment to one which truly provides equal opportunity. They must convince both men and women that a special emphasis program is needed to utilize the talents of CN women. These actions must begin now in order to assure CN of a new, qualified management resource in the future.

## 2.Traditional beliefs by managers and women in the many negative myths and stereotypes about working women

Our interviews revealed a disturbing degree of negative attitudes resulting in obvious discriminatory behavior. For example, the majority of women seeking employment are channeled into secretarial positions, whereas, men are guided toward clerical positions which most often lead to promotions to higher level clerical jobs and/or middle management positions. In job bidding situations, women are frequently strongly discouraged from bidding on traditional men's job. Until the negative environment that these attitudes create is improved, equal opportunity for women will never occur.

## 3.Current personnel policies and procedures

These policies are limited and ineffective as they relate to the majority of women at CN.

The Report revealed that in the early 1970s women workers comprised one third of the total

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labour force in Canada, holding 14.3 per cent of managerial positions, 41.2 per cent of professional and technical positions, and 72 per cent of all clerical jobs nation-wide. In contrast to the national employment statistics, women constituted approximately 4 per cent of the total CN work force and held less than 0.5 per cent of the senior management jobs.

The attitudes of male personnel at CN towards women were reviewed extensively in the Report. Examples follow:

1. "Women are generally disruptive to the work-force."
2. "Women aren't tough enough to handle supervisory jobs. They fail miserably under pressure."
3. "The best jobs for women are coach cleaners—That's second nature to them."
4. "One big problem adding women to train crews would be policing the morals in the cabooses."
5. Work in the yards is too physically demanding. The weather is too harsh."
6. "Women cannot do the physical aspects of a CN conductor's job. There's too much handling of drunks, transients and undesirables."
7. "Women have no drive, no ambition, no initiative."
8. "A woman can't combine a career and family responsibilities."
9. "The 'old boy network' for promotions is very strong at CN. This naturally inhibits women's advancement."
10. "My department is all male—they don't want a woman snooping around."
11. "Railroading is a man's sport—there's no room for women."
12. "Unless I'm forced, I won't take a woman."

The Report also included a small number of comments from male CN employees which tended to  
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favour the participation of women in the CN work force:

1. "Women are a vast, untapped resource we have over looked until now."
2. "Women are the same as men—as long as they do the job, they should get hired, developed and promoted."
3. "We are guilty of unconscious discrimination against women by never identifying and developing their talents."

Women at CN were very conscious of the generally negative attitude of male supervisors, the Report revealed:

1. "We always hear—'You're taking a job from a man.' "
2. "We're at the mercy of the individual supervisor. If he's against women, we're sunk."
3. "When my Supervisor heard that he had to take two women, you should have heard the uproar he made in front of us."

The Boyle/Kirkman Report concluded with specific recommendations concerning the recruitment of women to CN:

CN needs to adopt a well-planned, aggressive program for the recruitment of women.

The following are some suggested actions which could be included in the recruitment program:

A. Establish numeric objectives by level for the recruitment of women.

B. Train all the personnel recruiters about how to interview women effectively.

C. Develop new avenues for locating women:

- (1) Advertise in women's periodicals
- (2) Work with women's search agencies
- (3) Specify women candidates wanted from all search agencies
- (4) Encourage women referrals from employees
- (5) Identify an individual within Personnel who could provide immediate follow-up on resumes

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and other leads regarding potential women candidates. Be prepared to act fast.

In July, 1978 a document entitled "Equal Opportunities Program" was sent to senior managers of the St. Lawrence Region of CN by Mr. Masse, enumerating three overarching objectives with respect to the participation of women in CN:

1. An increase in the total number of female employees at CN;
2. An increase in the number of female management employees;

3. An increase in the number of females in positions for which men only were traditionally hired.

The 1978 document contained a rather general program of action with five elements:

1. Hire female employees;
2. Increase receptiveness to female employees at CN;
3. Support the female employees at CN in their efforts to adapt and progress;
4. Project a public image of a company that is in favour of hiring female employees;
5. Periodically analyse the evolution of female manpower at CN.

It should be noted that these objectives were far less rigorous than those recommended in the CN-commissioned Boyle/Kirkman Report.

In January 1979, CN published a study entitled "Women in CN Status Report" which concluded that, systemically, progress had been slow, and in fact hardly merited being called "progress" at all. In spite of a decrease in the number of men in the CN work force, the number of women as a percentage of the work force had only increased by 1.61 per cent since 1974 when the Boyle/Kirkman Report was prepared. One section of the 1979 review carried this rubric: "Lingering Belief that Men Have First Claim to jobs".

By February 18, 1982, 155 complaints against CN had been lodged with the Human Rights Commission. In due course, the Commission set up

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the Human Rights Tribunal to consider the "class" complaint set out above.

Thirteen women testified before the Tribunal as to their experience as candidates or employees with CN. One of the witnesses, Ms. Carla Nemeroff, detailed some of the problems she faced as the only woman in her work place:

They told me they did not want me there. How did they behave? Well, they tried to confuse me. Instead of telling me things like two or three moves at a time, which is all you have to do, they would tell me about 15 moves in a row, like talking really quickly, using the numbers, like this "take a locomotive, put it there, go here, go there", you know, like really—so that I would get confused, or they would tell me to jump off the train at a switch, I would get off at the switch, and they would leave me at the switch, and they would not tell me what they were doing, they would leave me there, or they would just go off on break, and they would not tell me they were going on break. Sometimes they would leave me at a switch, or at an engine. They would say "go release the brakes on that engine and wait for my signal"; I would never hear the signal, they would go off and eat lunch and leave me there. They used to do that all the time.

According to the testimony, women were subjected to extremely unpleasant treatment by their male colleagues:

Another time, a few guys—we were on break sort of hanging around outside because it was warm out; a few guys jumped me and pretended they were going to rape me. I found that quite offensive.

Then, another time, I was bringing a train into the shop—you see, I was not a cleaner any more; I was signalling, and I was bringing a train into the shop. The boss yelled out something obscene to distract me from my work, and it was very dangerous.

By the end of 1981, there were only 57 women in "blue-collar" posts in the St. Lawrence Region of CN, being a mere 0.7 per cent of the blue-collar labour force in the region. There were 276 women occupying unskilled jobs in all the regions where CN operated, again amounting to only 0.7 per cent of the unskilled work force. By contrast, women represented, in 1981, 40.7 per cent of the total Canadian labour force. At the time, women constituted only 6.11 per cent of the total work force

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of CN. Among blue-collar workers in Canada, 13 per cent were women during the period January to May 1982, yet female applicants for blue-collar jobs at CN constituted only 5 per cent of the total applicant pool.

The markedly low rate of female participation in so-called "non-traditional" occupations at Canadian National, namely occupations in which women typically have been significantly under-represented considering their proportion in the work force as a whole, was not fortuitous. The evidence before the Tribunal established clearly that the recruitment, hiring and promotion policies at Canadian National prevented and discouraged women from working on blue-collar jobs. The Tribunal held, a finding not challenged in this Court, that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company. For example, the evidence indicated that Canadian National's recruitment program with respect to skilled crafts and trade workers was limited largely to sending representatives to technical schools where there were almost no women. When women presented themselves at the personnel office, the interviews had a decidedly "chilling effect" on female involvement in non-traditional employment; women were expressly encouraged to apply only for secretarial jobs. According to some of the testimony, women applying for employment were never told clearly the qualifications which they needed to fill the blue-collar job openings. Another hurdle placed in the way of some applicants, including those seeking employment as coach cleaners, was to require experience in soldering. Moreover, the personnel office did not itself do any hiring for blue-collar jobs. Instead, it forwarded names to the area foreman, and Canadian National had no means of controlling the decision of the foreman to hire or not to hire a woman. The

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evidence indicated that the foremen were typically unreceptive to female candidates.

## II

### The Earlier Judgments

#### 1. *The Human Rights Tribunal*

The Human Rights Tribunal concluded that it was essential to impose upon CN a special employment program if the proportion of women in blue-collar jobs at CN was to mirror even roughly the proportion of women in similar jobs across the country, namely 13 per cent. It should be stressed that this goal appears to be modest considering that the 13 per cent participation rate of women in blue-collar jobs across Canada at the time arguably constituted a significant under-representation of women in that segment of the labour market.

For greater clarity, the Tribunal stated that its objective was simply to increase to 13 per cent the female work force in non-traditional jobs at CN in the St. Lawrence Region. To that end, the Tribunal made the following order:

ORDER

FOR THE ABOVE REASONS this Tribunal, concluding that there are in the St Lawrence Region of CN certain hiring policies or practices that are discriminatory for the purpose of section 10 of the Canadian Human Rights Act, and that these practices are not based on bona fide occupational requirements for the purpose of section 14 of the said Act, makes the following order, according to the powers conferred upon it by section 41:

PERMANENT MEASURES FOR  
NEUTRALIZATION OF CURRENT POLICIES  
AND PRACTICES

1. CN shall immediately discontinue the use of the Bennett test for entry level positions other than apprentice positions, and, within one year of the time of this decision and for the same positions, shall discontinue all mechanical aptitude tests that have a negative impact on

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women and are not warranted by the aptitude requirements of the positions being applied for.

2. CN shall immediately discontinue all practices pursued by foremen or others in which female candidates undergo physical tests not required of male candidates, mainly the test which consists of lifting a brakeshoe with one arm.

3. CN shall immediately discontinue the requirement for welding experience for all entry level positions, with the exception of apprentice positions.

4. CN shall modify its system for the dissemination of information on positions available. More specifically, within the period of one year it shall take the most suitable measures to inform the general public of all positions available.

5. CN shall immediately change the reception practices in its employment office to give female candidates complete, specific and objective information on the real requirements of non-traditional positions.

6. CN shall immediately modify its system of interviewing candidates; in particular, it shall ensure that those responsible for conducting such interviews are given strict instructions to treat all candidates in the same way, regardless of their sex.

7. Should CN wish to continue to grant foremen the power to refuse to hire persons already accepted by the employment office, it shall immediately issue a specific directive to the effect that no one shall be rejected on the basis of sex.

8. CN shall continue to implement the measures already adopted in its directive on sexual harassment with a view to eliminating from the workplace all forms of sexual harassment and discrimination.

SPECIAL TEMPORARY MEASURES

1. Within the period of one year and until the percentage of women in non-traditional jobs at CN has reached 13, CN shall undertake an information and publicity campaign inviting women in particular to apply for non-traditional positions.

2. Whereas we feel that the process of change in CN's St Lawrence Region must be accelerated and preferential measures for women are required;

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—Whereas the employer must be given a certain measure of flexibility in view of the uncertainty surrounding the question of how many qualified female workers are available;

—Whereas ideally, in order to create as soon as possible a critical mass that would allow the system to continue to correct itself, we would be inclined to require over the coming years, until the objective of 13% is achieved, the hiring of women to fill at least one non-traditional position out of every three;

—Whereas for the sake of giving more latitude and flexibility to CN in the methods employed to achieve the desired objective, we feel that it would be more prudent to require a ratio lower than one in three for the hiring of women for non-traditional positions at CN;

ACCORDINGLY, Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future. This measure shall take effect only when CN employees who have been laid off but who are subject to recall have been recalled by CN, but not before one year has elapsed from the time of this decision, in order to give CN a reasonable length of time to adopt measures to comply with this order. When it is in effect, daily adherence to the one-in-four ratio will not be required, in order to give the employer more choice in the selection of candidates. However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

3. Within a period of two months of this decision, CN shall appoint a person responsible with full powers to ensure the application of the special temporary measures and to carry out any other duties assigned to him by CN to implement this decision.

#### SUBMISSION OF DATA

##### CN SHALL SUBMIT TO THE COMMISSION:

1. Within 20 days of the introduction of the above-mentioned special temporary measures, an initial inventory of the number of blue-collar workers in the CN's St Lawrence Region, by sex and by position.
2. Within 20 days of the end of each quarterly period after the above-mentioned special temporary measures have begun to be applied, and for the entire duration of

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the said measures, after forwarding a copy to ATF, a report containing:

- (a) a list indicating the name, sex, title and duties, date hired and employment sector of every person hired in the St Lawrence Region during the previous quarter;
  - (b) a detailed statement of the efforts made by CN to recruit female candidates for non-traditional positions during the previous quarter;
  - (c) a breakdown, by sex, of: the total number of persons who applied for non-traditional positions at CN during the previous quarter; and the total number of persons who completed, underwent or failed every test or written examination to fill a non-traditional position. This list shall include the score and rank of every person who passed the test or examination;
  - (d) the name, sex and changes in titles and duties, or changes in status of every employee hired for non-traditional positions after the special temporary measures come into force.
3. A statement giving the name, official title and date of appointment of the person in charge of applying the above-mentioned special temporary measures, within twenty days of his or her appointment.

It will be observed that the first part of the Order required CN to cease certain discriminatory hiring and employment practices and to alter others; the second part set a goal of 13 per cent female participation in the targeted job positions, and established a requirement to hire at least one woman to fill every four job openings until that goal was reached; and the third part required the filing of periodic reports with the Commission.

## 2. *The Federal Court of Appeal*

Canadian National made an application to the Federal Court of Appeal under s. 28 of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, to review and set aside the Decision of the Tribunal on the following grounds:

1. That the Tribunal appointed by the Canadian Human Rights Commission erred in law by basing its Decision on erroneous findings of fact, made without regard for the material before it. Such findings are contrary to, and unsupported by the evidence.

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2. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by imposing upon your Applicant a specific and detailed program containing mandatory quotas to redress alleged discriminatory practices, contrary to Section 41 of the Canadian Human Rights Act.

3. That the Tribunal appointed by the Canadian Human Rights Commission erred in law and exceeded its jurisdiction by ordering that your Applicant carry out said program without consultation with the Canadian Human Rights Commission as required by Section 41(2)(a) of the Canadian Human Rights Act.

In fact, both before the Federal Court of Appeal and before this Court, issue was joined primarily on the second ground of appeal, the jurisdiction of the Tribunal under s. 41(2)(a) of the *Canadian Human Rights Act* to make the impugned order.

Section 41(2) reads:

**41.** (1) ...

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

(a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future;

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

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

(d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facili-

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ties or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

Hugessen J. allowed the application and set aside part of the Tribunal's Order, 1985 CanLII 5531 (FCA), [1985] 1 F.C. 96. Insofar as the Tribunal's findings of discrimination were concerned, Hugessen J. was satisfied that no ground had been shown which would justify intervention by the Court under the provisions of s. 28 of the *Federal Court Act*. Likewise, he was not persuaded that the Tribunal committed any excess of jurisdiction in Parts 1 and 3 of the Order under review.

The only part of the Order which gave him concern was the "Special Temporary Measures" section contained in Part 2 and, in particular, paragraph 2 thereof, which imposed a hiring goal of 25 per cent on CN until such time as the goal of 13 per cent female involvement in the non-traditional work force had been achieved.

Justice Hugessen's judgment turned on his interpretation of the words "take measures ... to prevent" in the English text, and "*prendre des mesures destinées à prévenir*" in the French text of s. 41(2)(a). The crux of the judgment, it appears to me, is found in the following short paragraph which draws a sharp and determinative distinction between "prevention" and "cure" (at p. 102):

The sole permissible purpose for the order is prevention; it is not cure. The text requires that the order look to the avoidance of future evil. It does not allow restitution for past wrongs.

Hugessen J. quoted s. 15(1) of the Act, to which s. 41(2)(a) makes reference. It is the subsection which deals expressly with employment equity programs and it reads:

**15.** (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 or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical

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handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

Hugessen J. dealt with s. 15(1) by stating that the programs which s. 15(1) protects as non-discriminatory are voluntary in nature; by contrast, the measures which s. 41(2) (a) permits are imposed by order of the Tribunal. Section 41(2)(a) is limited to prevention in the future whereas s. 15(1) allows "the sins of the fathers to be visited upon the sons". He therefore held that when the Tribunal exercises its power under s. 41 to order the adoption of a program envisaged by s. 15, it can only order that kind of program which will meet the purposive requirements of s. 41. Hugessen J. was willing to concede that the fixing of a goal of 13 per cent women in non-traditional posts in CN in the St. Lawrence Region was a legitimate means of setting a measurable standard against which the achievement of the ultimate purpose of the order could be tested, but he emphasized that the purpose, as required by law, could only be the prevention of future acts of discrimination.

The judge went on to examine the requirement that until the goal was achieved, CN had to hire one woman for each four entries into its unskilled blue-collar labour force. He quoted *inter alia* the following passage from the decision of the Tribunal:

It will be difficult in the case of CN to remedy the marked disparity resulting from years of discriminatory practices. It is to be hoped that, with time, the imbalance will be reduced. However, it is our view that this will not be possible without the imposition of an affirmative action program.



He concluded (at p. 104):

There is nothing of prevention in this. The measure imposed is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices. That purpose is not one which is permitted by section 41.

Hugessen J. confessed to a "certain sense of frustration" in coming to the conclusion that the Tri-

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bunal had exceeded its powers in making the order, stating: "On a purely impressionistic basis, neither the goal of 13% nor the imposed hiring quota of 25% strike me as being *per se* unreasonable".

I have dealt at some length with the judgment of Hugessen J. because (i) it is the majority judgment of the Court and (ii) with great respect, I disagree with it. Pratte J., in a short judgment, sided with Hugessen J. in the view that the Tribunal's power was limited to prescribing measures for the purpose of preventing the recurrence of the discriminatory practices which had been found to exist and not to remedy the consequences of past discrimination. Pratte J. would have gone further than Hugessen J., however, and would also have set aside the second and third parts of the Order of the Tribunal. MacGuigan J. wrote a strong and cogent dissent to which I will make reference below, concluding that the Order of the Tribunal was within its jurisdiction under s. 41(2)(a). It is a view which I share.

The Attorney General of Canada did not file a factum or make any representations in the proceedings before our Court.

### III

#### Interpreting Human Rights Legislation

Let me emphasize at the outset that the Human Rights Tribunal's findings of fact that the hiring practices of Canadian National in the St. Lawrence Region constituted systemic discrimination are not at issue before this Court. Moreover, the argument that the Human Rights Tribunal lacked jurisdiction because the Commission failed first to consult with CN in breach of s. 41(2)(a) was not pursued with great vigour. In my view, the lack of emphasis upon that argument was wise for it holds no merit. The real controversy relates solely to the legality of the remedial order issued by the Human Rights Tribunal.

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I do not think the answer to the question posed in this appeal will be found by applying strict grammatical construction to the last twelve words of s. 41(2)(a). I say this for at least three reasons. First, such an approach renders meaningless the specific reference back to s. 15(1) contained in s. 41(2)(a). Section 15(1) of the Act is designed to save employment equity programs from attack on the ground of "reverse discrimination". If s. 41(2)(a) is read to limit the scope of such programs, no effective mandatory employment equity program could be undertaken in any circumstances, and the legislative protection offered to the principle of employment equity would be nullified. Second, in focussing solely upon the limited purposive aspect of s. 41(2)(a) itself, the dominant purpose of the *Canadian Human Rights Act* is ignored. Yet, we are not left in the dark as to the purpose of the Act as a whole. The drafters saw fit to include a specific statement of purpose in s. 2:

**2.** The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) *every* individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member 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 or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap ....

Third, the case-law of this Court, some of which post-dates the judgment of the Federal Court of Appeal in the present proceedings, has a direct bearing on the outcome of this appeal. The Court has spoken on the proper interpretive attitude towards human rights codes and acts.

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Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. See s. 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, as amended. As Elmer A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 has written:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposes of the Act would appear to be patently obvious, in light of the powerful language of s. 2. In order to promote the goal of equal opportunity for each individual to achieve "the life that he or she is able and wishes to have", the Act seeks to prevent all "discriminatory practices" based, *inter alia*, on sex. It is the practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination.

The last point is an important one and it deserves to be underscored. There is no indication that the purpose of the *Canadian Human Rights Act* is to assign or to punish moral blameworthiness. No doubt, some people who discriminate do so out of wilful ignorance or animus. Many of the first anti-discrimination statutes focussed solely upon the behaviour of such individuals, requiring proof of "intent" to discriminate before imposing any sanctions. See Walter S. Tarnopolsky, *Discrimination and the Law in Canada* (1982), at pp.

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109-122. There were two major difficulties with this approach. One semantic problem was a continuing confusion of the notions of "intent" and "malice". The word "intent" was deprived of its meaning in common parlance and was used as a surrogate for "malice". "Intent" was not the simple willing of a consequence, but rather the desiring of harm.

This imputed meaning was coherent in the context of a statute designed to punish moral blameworthiness. However, as the second problem with a fault-based approach was revealed—that moral blame was too limited a concept to deal effectively with the problem of discrimination—an attempt was made by legislatures and courts to cleanse the word "intent" of its moral component. The emphasis upon formal causality was restored and the intent required to prove discrimination became the intent to cause a discriminatory result. The judgment of the Federal Court of Appeal in *Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder*, 1983 CanLII 5037 (FCA), [1983] 2 F.C. 531, is an example of this approach (aff'd on different grounds in *Bhinder v. Canadian National Railway Co.*, 1985 CanLII 19 (SCC), [1985] 2 S.C.R. 561). The difficulty with this development was that "intent" had become so encrusted with the moral overtones of "malice" that it was often difficult to separate the two concepts. Moreover, the imputation of a requirement of "intent", even if unrelated to

moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen. The stated purpose of human rights legislation (in the case of the Canadian Act, to prevent "discriminatory practices") was not fully implemented.

The first comprehensive judicial statement of the correct attitude towards the interpretation of human rights legislation can be found in *Insurance Corporation of British Columbia v. Heerspink*,

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1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, at p. 158, where Lamer J. emphasized that a human rights code "is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law". This principle of interpretation was further articulated by McIntyre J., for a unanimous Court, in *Winnipeg School Division No. 1 v. Craton*, 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156:

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 nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.

The emphasis upon the "special nature" of human rights enactments was a strong indication of the Court's general attitude to the interpretation of such legislation.

In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, the Court set out explicitly the governing principles in the interpretation of human rights statutes. Again writing for a unanimous Court, McIntyre J. held, at pp. 546-47:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment ..., and give it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.

There can be no doubt that Canadian human rights legislation is now typically drafted to avoid reference to intention. As noted previously, the

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*Canadian Human Rights Act* is addressed to "discriminatory practices". The *Ontario Human Rights Code*, R.S.O. 1980, c. 340, seeks to uphold the "equal dignity" of all men and women by preventing discrimination. In *Simpsons-Sears*, at p. 547, this Court spoke clearly as to the purpose of the Ontario Code, holding that the reach was wider than intentional discrimination:

It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.

The emphasis upon discriminatory effects was also held by this Court to be central to the purposes of the *Canadian Human Rights Act*: *Bhinder*, at p. 586, *per* McIntyre J. (with whom all other members of the Court concurred on this point).

A necessary implication of the focus upon discriminatory effects was recognized by the Court in *Simpsons-Sears*. At page 551, McIntyre J. held that, in determining whether an individual or entity had practised discrimination under the relevant legislation, it was appropriate for the Court to consider "adverse effect discrimination", which may be described as the imposition of obligations, penalties or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an individual or group because of a special characteristic of that individual or group.

The rejection of a necessity to prove intent and the unequivocal adoption of the idea of "adverse effect discrimination" by the courts is the result of a commitment to the purposive interpretation of human rights legislation. An instructive example of the contemporary trend is found in the judgment of the Court of Appeal of Saskatchewan in *Canadian Odeon Theatres Ltd. v. Saskatchewan*

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*Human Rights Commission*, 1985 CanLII 183 (SK CA), [1985] 3 W.W.R. 717, where Vancise J.A. wrote at p. 735:

Generally human rights legislation has been given a broad interpretation to ensure that the stated objects and purposes are fulfilled. A narrow restrictive interpretation which would defeat the purpose of the legislation, that is, the elimination of discrimination, should be avoided.

As discussed above, the Supreme Court in the *Simpsons-Sears* and *Bhinder* decisions has already recognized that Canadian human rights legislation is directed not only at intentional discrimination, but at unintentional discrimination as well. In particular, the prohibition of discrimination in the *Canadian Human Rights Act* has been held to reach situations of "adverse effect discrimination": *Bhinder*. But unintentional discrimination may occur in another form, with potentially greater consequences in terms of the number of people who are disadvantaged. Section 15(1) of the Act and, by extension s. 41(2)(a), was designed to meet this second problem of "systemic discrimination".

#### IV

##### Systemic Discrimination and the Special Temporary Measures Order

A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis." (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report:

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ....

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It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

This is why it is important to look at the results of a system ....

In other words, systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" (see the Abella Report, pp. 9-10). To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged. The Tribunal sought to accomplish this objective through its "Special Temporary Measures" Order. Did it have the authority to do so?

Section 41(2) of the *Canadian Human Rights Act* lists the orders that a Tribunal may make if it determines that a person has engaged in a discriminatory practice. Among the potential orders is an order for "measures" to be taken under s. 41(2)(a) "including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future." The "program, plan or arrangement" referred to in s. 15(1) is any mechanism "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 or are based on or related to" *inter alia*, sex.

Because of his stated emphasis upon the "ordinary grammatical construction" of s. 41(2)(a),

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Hugessen J., for the majority in the Federal Court of Appeal, offered this reading of the paragraph (at p. 102):

Reduced to its essentials, this text permits the Tribunal to order the taking of measures aimed at preventing the future occurrence of a discriminatory practice on the part of a person found to have engaged in such a practice in the past.

He stressed that "[t]he sole permissible purpose for the order is prevention" and that the text "does not allow restitution for past wrongs." Therefore, the "program, plan or arrangement" authorized by reference to s. 15(1) would necessarily be limited by the language of s. 41(2) (a) to a mechanism designed "to prevent the same or a similar practice occurring in the future". Hugessen J. recognized the special difficulties involved in dealing with systemic discrimination (at p. 105):

... I recognize that by its very nature systemic discrimination may require creative and imaginative preventive measures. Such discrimination has its roots, not in any deliberate desire to exclude from favour, but in attitudes, prejudices, mind sets and habits which may have been acquired over generations. It may well be that hiring quotas are a proper way to achieve the desired result.

Hugessen J. simply did not believe, without some precise factual showing, that specific hiring goals could be related to prevention, and thereby fall within s. 41(2)(a). The Special Temporary Measures ordered by the Tribunal were struck down because the employment objectives imposed in the Order were expressed in terms which, in Justice Hugessen's view, indicated that the objective was remedial and not preventive.

To evaluate this argument it is important to remember exactly what was ordered by the Human Rights Tribunal. The impugned section of the Order was headed "Special Temporary Measures" and the heart of the employment equity program was contained in paragraph 2:

... Canadian National is ordered to hire at least one woman for every four non-traditional positions filled in the future .... When it is in effect, daily adherence to the one-in-four ratio will not be required in order to give the employer more choice in the selection of candidates.

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However, it must be complied with over each quarterly period until the desired objective of having 13% of non-traditional positions filled by women is achieved.

It should be underscored once again that the objective of 13 per cent female participation was not arbitrary, for it corresponded to the national average of women involved in the non-traditional occupations.

In his dissenting opinion in the Federal Court of Appeal, MacGuigan J. accepted, as I do, that s. 41(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. He noted the deep roots of discrimination against women at CN. It is an uncontradicted fact that the hiring and promotion policies of CN and the enormous problems faced by the tiny minority of women in the blue-collar work force amounted to a systematic denial of women's equal employment opportunities.

Justice MacGuigan's point is made abundantly clear when one considers the context in which the challenged order was issued. It bears repeating that the Tribunal had found that at the end of 1981 only 0.7 per cent of blue-collar jobs in the St. Lawrence Region of Canadian National were held by women. The Tribunal found furthermore that the small number of women in non-traditional jobs tended to perpetuate exclusion and, in effect, to cause additional discrimination. Moreover, Canadian National knew that its policies and practices, although perhaps not discriminatory in intent, were discriminatory in effect, yet had done nothing substantial to rectify the situation. When confronted with such a case of "systemic discrimination", 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,

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there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed there is no prevention without some form of remedy. The point was explained clearly by Professors Greschner and Norman in their Case Comment on the majority judgment of the Federal Court of Appeal in this case, found at (1985), 63 *Can. Bar Rev.* 805, at p. 812. They emphasize that an employment equity program

... tries to break the causal links between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such program will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.

This point demands repetition .... When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically, will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefitting from the program.

Unlike the remedies in s. 41(2) (b)-(d), 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.

To see more clearly why the Special Temporary Measures Order is prospective, it would be helpful

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to review briefly the theoretical underpinnings of employment equity programs. I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false. An employment equity program, such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

An employment equity program thus is designed to work in three ways. First, by countering the cumulative effects of systemic discrimination, such a program renders further discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.

Secondly, by placing members of the group that had previously been excluded into the heart of the work place and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job

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of "brakeman" or heavy cleaner or signaller at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Thirdly, an employment equity program helps to create what has been termed a "critical mass" of the previously excluded group in the work place. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is no longer the case that one or two women, for example, will be seen to "represent" all women. See Carol Agocs, "Affirmative Action, Canadian Style" (1986), 12 *Canadian Public Policy—Analyse de politiques* 148, at p. 149. Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring:

There is evidence that when sufficient minorities/women are employed in a given establishment, the informal processes of economic life, for example, the tendency to refer friends and relatives for employment, will help to produce a significant minority [or female] applicant flow.

(Alfred W. Blumrosen, "Quotas, Common Sense and Law in Labour Relations: Three Dimensions of Equal Opportunity", in Walter S. Tarnopolsky, ed., *Some Civil Liberties Issues of the Seventies* (1975), Toronto: Osgoode Hall Law School/York University, 5, at p. 15).

If increasing numbers of women apply for non-traditional jobs, the desire to work in blue-collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications for non-traditional jobs more seriously. In other words, once a "critical mass" of the previously excluded group has been created in the work force, there is a significant chance for the continuing self-correction of the system.

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When the theoretical roots of employment equity programs are exposed, it is readily apparent that, in attempting to combat systemic discrimination, it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. It is for this reason that the language of the Tribunal's Order for Special Temporary Measures may appear "remedial". In any case, as was stressed by MacGuigan J. in his dissent, the important question is not whether the Tribunal's order tracked the precise wording of s. 41(2)(a), but whether the actual measures ordered could be construed fairly to fall within the scope of the section. One should look to the substance of the order and not merely to its wording.

For the sake of convenience, I will summarize my conclusions as to the validity of the employment equity program ordered by the Tribunal. To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future. MacGuigan J. stressed in his dissent that "the prevention of systemic discrimination will reasonably be thought to require systemic remedies" (p. 120). Systemic remedies must be built upon the experience of the past so as to prevent discrimination in the future. Specific hiring goals, as Hugessen J. recognized, are a rational attempt to impose a systemic remedy on a systemic problem. The Special Temporary Measures Order of the Tribunal thus meets the requirements of s. 41(2)(a) of the *Canadian Human Rights Act*. It is a "special program, plan or arrangement" within the meaning of s. 15(1) and therefore can be ordered under s. 41(2)(a). The employment equity order is rationally designed to combat systemic discrimination in the Canadian National St. Law-

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rence Region by preventing "the same or a similar practice occurring in the future".

A secondary problem must now be addressed, the fact that the Order of the Tribunal was expressed in terms of an employment goal, rather than a hiring goal. This methodology might increase the belief that the Order was remedial and not, properly speaking, preventive. The Tribunal held, however, that the systemic discrimination at CN occurred not only in hiring but once women were on the job as well. The evidence revealed that there was a high level of publicly expressed male antipathy towards women which contributed to a high turnover rate amongst women in blue-collar jobs. As well, many male workers and supervisors saw any female worker in a non-traditional job as an upsetting phenomenon and as a "job thief". To the extent that promotion was dependent upon the evaluations of male supervisors, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off. For the employment equity program to be effective in creating the "critical mass" and in destroying stereotypes, the goals had to be expressed in terms of actual employment. Otherwise the reasonable objectives of the scheme would have been defeated. The dominant purpose remained to improve the employment situation for women at CN in the future.

## V

### The Cross-Appeal

Canadian National filed a cross-appeal by which it sought to set aside the entire decision and Order of the Tribunal for the reasons set out in the judgment of Pratte J. in the Federal Court of Appeal. In view of my disposition of the appeal, it is obviously unnecessary to discuss the merits of the cross-appeal.

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## VI

### Conclusion



I would allow the appeal with costs, reverse the decision of the Federal Court of Appeal and restore in its entirety the Order of the Human Rights Tribunal. The cross-appeal is therefore dismissed with costs.

*Appeal allowed with costs and cross-appeal dismissed with costs.*

Solicitors for Action Travail des Femmes: Rivest, Castiglio, Castiglio, LeBel & Schmidt, Montréal.

Solicitors for the Canadian National Railway Co.: Alphonse Giard and Rolland Boudreau, Montréal.

Solicitors for the Canadian Human Rights Commission: René Duval and Anne Trotier, Ottawa.

TAB 9

**Delgamuukw, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw (and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve Wet'suwet'en Houses as shown in Schedule 1)** *Appellants/ Respondents on the cross-appeal*

v.

**Her Majesty The Queen in Right of the Province of British Columbia** *Respondent/ Appellant on the cross-appeal*

and

**The Attorney General of Canada** *Respondent*

and

**The First Nations Summit, the Musqueam Nation et al. (as shown in Schedule 2), the Westbank First Nation, the B.C. Cattlemen's Association et al. (as shown in Schedule 3), Skeena Cellulose Inc., Alcan Aluminum Ltd.** *Interveners*

INDEXED AS: DELGAMUUKW v. BRITISH COLUMBIA

File No.: 23799.

1997: June 16, 17; 1997: December 11.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka\*, Cory, McLachlin and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law — Aboriginal rights — Aboriginal land title — Claim made for large tract — Content of aboriginal title — How aboriginal title protected by s. 35(1) of Constitution Act, 1982 — What required to*

\*Sopinka J. took no part in this judgment.

**Delgamuukw, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les membres des maisons Delgamuukw et Haaxw (et d'autres personnes en leur propre nom et au nom des membres de trente-huit maisons Gitksan et de douze maisons Wet'suwet'en, selon ce qui est indiqué à l'annexe 1)** *Appellants/ Intimés dans le pourvoi incident*

c.

**Sa Majesté la Reine du chef de la province de la Colombie-Britannique** *Intimée/ Appelante dans le pourvoi incident*

et

**Le procureur général du Canada** *Intimé*

et

**Le First Nations Summit, la Nation Musqueam et autres (selon ce qui est indiqué à l'annexe 2), la Première nation de Westbank, la B.C. Cattlemen's Association et autres (selon ce qui est indiqué à l'annexe 3), Skeena Cellulose Inc., Alcan Aluminium Ltée** *Intervenants*

RÉPERTORIÉ: DELGAMUUKW c. COLOMBIE-BRITANNIQUE

Nº du greffe: 23799.

1997: 16 et 17 juin; 1997: 11 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka\*, Cory, McLachlin et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Revendication d'un vaste territoire — Contenu du titre aborigène — Comment l'art. 35(1) de la Loi constitutionnelle de 1982 protège-*

\*Le juge Sopinka n'a pas pris part au jugement.

*prove aboriginal title — Whether claim to self-government made out — Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) — Constitution Act, 1982, s. 35(1) — Indian Act, R.S.C., 1985, c. I-5, s. 88.*

*Constitutional law — Aboriginal rights — Aboriginal land title — Evidence — Oral history and native law and tradition — Weight to be given evidence — Ability of Court to interfere with trial judge's factual findings.*

*Courts — Procedure — Land claims — Aboriginal title and self-government — Claim altered but no formal amendments to pleadings made — Whether pleadings precluded the Court from entertaining claims.*

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants. The most significant evidence of spiritual connection between the Houses and their territory

*t-il le titre aborigène? — Quels sont les éléments de preuve requis pour établir le titre aborigène? — Le bien-fondé de la revendication de l'autonomie gouvernementale a-t-il été établi? — La province pouvait-elle, après 1871, éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens (qui incorpore par renvoi les lois provinciales d'application générale)? — Loi constitutionnelle de 1982, art. 35(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 88.*

*Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Preuve — Récits oraux et règles de droit et traditions autochtones — Poids à donner aux éléments de preuve — Pouvoir d'intervention de la Cour quant aux conclusions de fait du juge de première instance.*

*Tribunaux — Procédure — Revendications territoriales — Titre aborigène et autonomie gouvernementale — Revendication modifiée mais sans modification formelle des actes de procédure — Les actes de procédure empêchent-ils la Cour d'entendre les revendications?*

Les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, revendiquent tant en leur propre nom qu'au nom de leurs «maisons» des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celui-ci. (Devant la Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants. Le signe le plus important du lien

was a feast hall where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.

The trial judge did not accept the appellants' evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made. On appeal, the original claim was altered in two different ways. First, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation. There were no formal amendments to the pleadings to this effect. The appeal was dismissed by a majority of the Court of Appeal.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*.

**Held:** The appeal should be allowed in part and the cross-appeal should be dismissed.

spirituel entre les différentes maisons et leur territoire est la salle des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes.

Le juge de première instance n'a pas accepté les récits oraux que les appelants présentaient comme éléments de preuve de leur attachement au territoire. Il a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générale de la province, il a rejeté la demande de dommages-intérêts et il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens. En appel, la revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Aucune modification en ce sens n'a été apportée formellement aux actes de procédure. L'appel a été rejeté par la Cour d'appel à la majorité.

Les principales questions dans le pourvoi sont les suivantes: (1) Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale? (2) Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance? (3) Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence? (4) Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale? (5) La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

**Arrêt:** Le pourvoi est accueilli en partie et le pourvoi incident est rejeté.

*Whether the Claims Were Properly Before the Court*

*Per* Lamer C.J. and Cory, McLachlin, and Major J.J.: The claims were properly before the Court. Although the pleadings were not formally amended, the trial judge did allow a *de facto* amendment to permit a claim for aboriginal rights other than ownership and jurisdiction. The respondents did not appeal this *de facto* amendment and the trial judge's decision on this point must accordingly stand.

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

A new trial is necessary. First, the defect in the pleadings prevented the Court from considering the merits of this appeal. The parties at a new trial would decide whether any amendment was necessary to make the pleadings conform with the other evidence. Then, too, appellate courts, absent a palpable and overriding error, should not substitute their own findings of fact even when the trial judge misapprehended the law which was applied to those facts. Appellate intervention is warranted, however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it.

*Per* La Forest and L'Heureux-Dubé J.J.: The amalgamation of the appellants' individual claims technically prevents a consideration of the merits. However, there is a more substantive problem with the pleadings. The appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out

*La Cour était-elle régulièrement saisie des revendications?*

Le juge en chef Lamer et les juges Cory, McLachlin et Major: La Cour était régulièrement saisie des revendications. Même si les actes de procédure n'ont pas été formellement modifiés, le juge de première instance a bel et bien accepté une modification *de facto* pour permettre la revendication de droits ancestraux autres que la propriété et la compétence. Les intimés n'ont pas interjeté appel contre cette modification *de facto* et la décision du juge de première instance sur ce point doit être maintenue.

Aucune modification n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Les revendications collectives n'étaient tout simplement pas en litige en première instance, et redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Il est nécessaire de tenir un nouveau procès. Premièrement, le vice dans les actes de procédure a empêché la Cour d'examiner le fond du pourvoi. Il reviendra aux parties à un nouveau procès de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve. En outre, sauf erreur manifeste et dominante, les cours d'appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance, même lorsque ce dernier a mal saisi le droit qu'il a appliqué aux faits en question. Par contre, une cour d'appel est justifiée d'intervenir dans le cas où le juge de première instance n'a pas tenu compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, lorsqu'il a appliqué les règles de preuve et a interprété la preuve qui lui était présentée.

Les juges La Forest et L'Heureux-Dubé: La fusion des revendications individuelles des appelants a empêché, sur le plan de la forme, la Cour d'examiner le fond de l'affaire. Cependant, les actes de procédure posent un problème encore plus substantiel. Même si les appelants ont sollicité un jugement déclarant l'existence d'un «titre aborigène», ils ont essentiellement tenté d'établir qu'ils exerçaient un contrôle complet sur le territoire en question. Il s'ensuit que ce que les appelants ont demandé à la Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu'ils se sont efforcés d'établir

to prove by way of the evidence were two different matters. A new trial should be ordered.

McLachlin J. was in substantial agreement.

*The Ability of the Court to Interfere with the Trial Judge's Factual Findings*

*Per* Lamer C.J. and Cory, McLachlin and Major J.J.: The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title. The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.

*The Content of Aboriginal Title, How It Is Protected by s. 35(1) of the Constitution Act, 1982, and the Requirements Necessary to Prove It*

*Per* Lamer C.J. and Cory, McLachlin and Major J.J.: Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land.

Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

par la preuve, étaient deux choses différentes. La tenue d'un nouveau procès doit être ordonnée.

Le juge McLachlin est largement en accord avec ces motifs.

*Le pouvoir de la Cour de modifier les conclusions de fait du juge de première instance*

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les conclusions de fait tirées en première instance ne pouvaient être maintenues en raison du fait que le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes établis dans *R. c. Van der Peet*. Ces récits ont été invoqués pour tenter d'établir l'occupation et l'utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

*Le contenu du titre aborigène, la façon dont il est protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et les exigences en matière de preuve de son existence*

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour différentes fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive. Ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres.

Le titre aborigène est un droit *sui generis*; il se distingue de ce fait des autres intérêts de propriété et est caractérisé par différentes dimensions. Le titre aborigène est inaliénable et ne peut être transféré, cédé ou vendu à personne d'autre que la Couronne. Les origines du titre aborigène constituent une autre dimension de celui-ci: sa reconnaissance par la *Proclamation royale de 1763* et le rapport entre la common law, qui reconnaît l'occupation comme preuve de la possession en droit, et les systèmes juridiques autochtones qui existaient avant l'affirmation de la souveraineté britannique. Finalement, le titre aborigène est détenu collectivement.

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. Land held by virtue of aboriginal title may not be alienated because the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value. Finally, the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). The constitutionalization of common law aboriginal rights, however, does not mean that those rights exhaust the content of s. 35(1). The existence of an aboriginal right at common law is sufficient, but not

Le droit exclusif d'utiliser les terres ne comprend pas simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit. La jurisprudence canadienne relative au titre aborigène définit le «droit d'occuper et de posséder» en termes généraux et, fait important, ne l'assortit pas d'une réserve le limitant aux utilisations liées à des coutumes, pratiques ou traditions. La nature du droit des Indiens sur les terres des réserves, qui a été déclaré être le même que leur droit sur les terres tribales, est très générale et intègre les besoins actuels des collectivités autochtones. Finalement, le titre aborigène comprend les droits miniers, et les terres détenues en vertu d'un titre aborigène devraient pouvoir être exploitées pour ces ressources, ce qui ne constitue certes pas une utilisation traditionnelle.

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite intrinsèque découle du fait que rien ne devrait empêcher ce rapport de continuer dans le futur. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Les terres détenues en vertu d'un titre aborigène sont inaliénables parce qu'elles ont en elles-mêmes une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur. Enfin, l'importance de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d'une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l'idée de cession renforce la conclusion que le titre aborigène est limité. Si les autochtones désirent utiliser leurs terres d'une manière que ne permet pas le titre, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Le titre aborigène a été reconnu en common law bien avant 1982 et est par conséquent protégé dans sa forme complète par le par. 35(1). Toutefois, la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu du par. 35(1). L'existence d'un droit ancestral



necessary, for the recognition and affirmation of that right by s. 35(1).

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities.

Aboriginal title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although broadly similar, are

reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

Les droits ancestraux reconnus et confirmés par le par. 35(1) s'étalent le long d'un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a le cas des droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question mais où l'occupation et l'utilisation du territoire sur lequel l'activité est pratiquée sont insuffisantes pour étayer la revendication du titre sur celui-ci. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu'un groupe autochtone puisse être incapable de démontrer l'existence d'un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s'adonner à une activité particulière. À l'autre extrémité du spectre, il y a le titre aborigène proprement dit, qui confère quelque chose de plus que le droit d'exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L'existence de droits spécifiques à un site peut être établie même si l'existence d'un titre ne peut pas l'être. Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d'établir le bien-fondé de leur revendication d'un titre, mais qu'ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits spécifiques à un site d'exercer des activités particulières.

Le titre aborigène est le droit au territoire lui-même. Sous réserve des limites inhérentes au titre aborigène, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent. Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, cette disposition doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part.

Bien que le critère applicable pour déterminer l'existence de droits ancestraux autorisant l'exercice d'activités particulières et le critère applicable pour détermi-

distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

Both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy. At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient

ner l'existence d'un titre aborigène comportent de grandes similitudes, ils se distinguent l'un de l'autre de deux façons: premièrement, dans le cadre du critère relatif au titre aborigène, l'exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l'exigence d'occupation; deuxièmement, alors que c'est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c'est le moment de l'affirmation par la Couronne de sa souveraineté sur le territoire.

Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu'il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. Lorsqu'il est question de titre aborigène, la période de l'affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d'un point de vue théorique, le titre aborigène découle de l'occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n'a acquis ce titre qu'à compter du moment où elle a affirmé sa souveraineté sur le territoire en question et il serait absurde de parler d'une charge grevant le titre sous-jacent avant que celui-ci ait existé. Le titre aborigène s'est cristallisé au moment de l'affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d'une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l'occupation ou de la possession suffit pour fonder un titre aborigène, et il n'est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l'arrivée des Européens ou qu'il était un élément distinctif de celle-ci. Finalement, la date de l'affirmation de la souveraineté a un caractère plus certain que celle du premier contact avec les Européens.

Tant la common law que le point de vue des autochtones à l'égard du territoire devraient être pris en compte dans la démonstration de l'occupation. En common law, l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en pas-

to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account. Given the occupancy requirement, it was not necessary to include as part of the test for aboriginal title whether a group demonstrated a connection with the piece of land as being of central significance to its distinctive culture. Ultimately, the question of physical occupation is one of fact to be determined at trial.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation. Since conclusive evidence of pre-sovereignty occupation may be difficult, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. An unbroken chain of continuity need not be established between present and prior occupation. The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be that the land not be used in ways which are inconsistent with continued use by future generations of aboriginals.

At sovereignty, occupation must have been exclusive. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land. The test must take into account the context of the aboriginal society at the time of sovereignty. The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved. The common law should develop to recognize aboriginal rights as they were rec-

sant par la délimitation et la culture de champs. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées. Compte tenu de l'exigence d'occupation, il n'est pas nécessaire d'inclure dans le critère relatif au titre aborigène la question de savoir si le groupe concerné a démontré que le lien qui le rattache au territoire visé est d'une importance fondamentale pour sa culture distinctive. En définitive, la preuve de l'occupation physique est une question de fait à trancher au procès.

Si l'occupation actuelle est invoquée comme preuve de l'occupation antérieure à l'affirmation de la souveraineté, il faut qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle. Étant donné qu'il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté, une collectivité autochtone peut produire, au soutien de la revendication d'un titre aborigène, des éléments de preuve de l'occupation actuelle comme preuve de l'occupation antérieure à l'affirmation de la souveraineté. Il n'est pas nécessaire de faire la preuve d'une continuité parfaite entre l'occupation actuelle et l'occupation antérieure. Le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être qu'il ne soit pas fait du territoire des utilisations incompatibles avec son usage continu par les générations autochtones futures.

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. Le critère doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Il est possible de concilier l'exigence d'occupation exclusive et l'existence possible d'un titre conjoint en reconnaissant qu'un titre conjoint peut découler d'une exclusivité partagée. De même, l'existence de droits ancestraux non exclusifs partagés ne constituant pas un titre, mais par ailleurs liés au territoire et permettant certaines utilisations, peut être établie, même si l'exclusivité ne peut être prouvée. La common law doit évoluer pour reconnaître les droits ancestraux qui étaient reconnus soit par

ognized by either *de facto* practice or by aboriginal systems of governance.

*Per La Forest and L'Heureux-Dubé JJ.:* “Aboriginal title” is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown and, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly. There is reluctance to define more precisely the right of aboriginal peoples to live on their lands as their forefathers had lived.

The approach to defining the aboriginal right of occupancy is highly contextual. A distinction must be made between (1) the recognition of a general right to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society’s habits and mode of life. As well, in defining the nature of “aboriginal title”, reference need not be made to statutory provisions and regulations dealing with reserve lands.

In defining the nature of “aboriginal title”, reference need not be made to statutory provisions and regulations dealing specifically with reserve lands. Though the interest of an Indian band in a reserve has been found to be derived from, and to be of the same nature as, the interest of an aboriginal society in its traditional tribal lands, it does not follow that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands.

The “key” factors for recognizing aboriginal rights under s. 35(1) are met in the present case. First, the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. When dealing with a claim of “aboriginal

une pratique *de facto*, soit par un régime de gestion autochtone.

*Les juges La Forest et L'Heureux-Dubé:* Le «titre aborigène» se fonde sur l’occupation et l’utilisation ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n’équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Il est personnel en ce sens qu’il est généralement inaliénable, sauf en faveur de la Couronne qui, dans ses opérations concernant un tel droit, est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. On hésite à définir avec plus de précision le droit des peuples autochtones de continuer à vivre sur leurs terres comme l’avaient fait leurs ancêtres.

Le point de vue adopté pour définir le droit d’occupation ancestral est éminemment contextuel. Il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d’un droit général d’occuper et de posséder des terres ancestrales; (2) la reconnaissance d’un droit distinct d’exercer une activité autochtone dans une région particulière. Ce dernier aspect a été défini comme étant l’utilisation traditionnelle — remontant avant l’arrivée des Européens — que fait une tribu indienne d’un territoire donné, à une fin particulière. À l’opposé, une revendication générale visant le droit d’occuper et de posséder de vastes étendues de territoire concerne le droit d’utiliser ces terres pour y exercer différentes activités liées aux habitudes et au mode de vie de la société autochtone concernée. En outre, en définissant la nature du «titre aborigène», il n’est pas nécessaire de se référer aux dispositions législatives et réglementaires concernant les terres des réserves.

En définissant la nature du «titre aborigène», il n’est pas nécessaire de se référer aux dispositions législatives et réglementaires visant spécifiquement les terres des réserves. Même s’il a été jugé que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, il ne s’ensuit aucunement que les dispositions législatives particulières régissant les terres des réserves s’appliquent automatiquement aux terres tribales traditionnelles.

Il est satisfait, dans le présent pourvoi, aux facteurs «clés» permettant de reconnaître des droits ancestraux en vertu du par. 35(1). Premièrement, la nature d’une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Le

title”, the court will focus on the occupation and use of the land as part of the aboriginal society’s traditional way of life.

Second, an aboriginal society must specify the area that has been continuously used and occupied by identifying general boundaries. Exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. It is possible that two or more aboriginal groups may have occupied the same territory and therefore a finding of joint occupancy would not be precluded.

Third, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty. However, the date of sovereignty may not be the only relevant time to consider. Continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area. Also, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, it is not necessary to establish an unbroken chain of continuity.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, the land is of central significance to them. Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas but also to the use of adjacent lands and even remote territories used to pursue a traditional mode of life. Occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. The *Royal Proclamation, 1763* supports this approach to occupancy.

McLachlin J. was in substantial agreement.

#### *Infringements of Aboriginal Title: The Test of Justification*

*Per* Lamer C.J. and Cory, McLachlin and Major J.J.: Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and pro-

tribunal qui examine la revendication d’un «titre aborigène» se demande principalement si l’occupation et l’utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée.

Deuxièmement, la société autochtone doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue en en indiquant les limites générales. L’exclusivité signifie que le groupe autochtone doit établir que le territoire qu’il revendique est, en fait, son territoire ancestral et non celui d’une autre société autochtone avec laquelle il n’a aucun lien. Comme il est possible que deux groupes autochtones ou plus aient occupé le même territoire, il est donc possible de conclure à l’existence d’une occupation conjointe.

Troisièmement, le droit de possession ancestral se fonde sur l’occupation et l’utilisation ininterrompues de terres tribales traditionnelles depuis l’affirmation par la Couronne de sa souveraineté. Cependant, il est possible que la date de l’affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Il peut encore y avoir continuité lorsque l’occupation actuelle d’une région est liée à l’occupation d’une autre région avant l’affirmation de la souveraineté. En outre, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l’occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, il n’est pas nécessaire de faire la preuve d’une continuité parfaite.

Quatrièmement, si des peuples autochtones continuent d’occuper et d’utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, ce territoire a une importance fondamentale pour eux. La notion d’occupation d’un territoire par des autochtones ne s’entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents, mais également de l’utilisation de terres adjacentes et même de territoires éloignés dans le cadre d’un mode de vie traditionnel. L’occupation constitue un aspect de la culture autochtone prise dans un sens large et s’intègre, par conséquent, à la notion de caractère distinctif. Cette approche relative à la nature de l’occupation est étayée par la *Proclamation royale de 1763*.

Le juge McLachlin est largement en accord avec ces motifs.

#### *Les atteintes au titre aborigène: le critère de justification*

*Le* juge en chef Lamer et les juges Cory, McLachlin et Major: Les droits ancestraux reconnus et confirmés par la Constitution ne sont pas absolus, et tant le gouver-

vincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.

*Per La Forest and L'Heureux-Dubé JJ.:* Rights that are recognized and affirmed are not absolute. Government regulation can therefore infringe upon aboriginal rights if it meets the test of justification under s. 35(1). The approach is highly contextual.

The general economic development of the interior of British Columbia, through agriculture, mining, forestry and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations, are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with

nement fédéral que les gouvernements provinciaux peuvent y porter atteinte si (1) l'atteinte au droit ancestral visé se rapporte à la poursuite d'un objectif législatif impérieux et réel; (2) l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. L'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet. Trois aspects du titre aborigène sont pertinents quant à la deuxième étape du critère. Premièrement, le droit d'utiliser et d'occuper de façon exclusive les terres visées est pertinent pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Deuxièmement, le droit de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones, indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation et, dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable qui montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification. Il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène.

*Les juges La Forest et L'Heureux-Dubé:* Les droits qui sont reconnus et confirmés ne sont pas absolus. Des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux si elles satisfont au critère de justification des atteintes aux droits visés au par. 35(1). La méthode adoptée est éminemment contextuelle.

Le développement économique général de l'intérieur de la Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification. Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples

the honour and good faith of the Crown. One aspect of accommodation of “aboriginal title” entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.

McLachlin J. was in substantial agreement.

### *Self-Government*

*Per The Court:* The errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out.

### *Extinguishment*

*Per Lamer C.J. and Cory, McLachlin and Major JJ.:* Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands.

A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard “of clear and plain intention” needed to extinguish aboriginal rights without being *ultra vires* the province. Second, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness”.

Provincial laws which would otherwise not apply to Indians *proprio vigore* are allowed to do so by s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application. This provision, however, does not “invigorate” provincial laws which are invalid because they are in relation to Indians and Indian lands.

autochtones. Cette prise en compte doit toujours être faite conformément à l’obligation de la Couronne d’agir honorablement et de bonne foi. L’un des aspects de cette prise en compte, dans un tel contexte, consiste à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation.

Le juge McLachlin est largement en accord avec ces motifs.

### *L’autonomie gouvernementale*

*La Cour:* En raison des erreurs de fait commises par le juge de première instance et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour la Cour de décider si le bien-fondé de la revendication de l’autonomie gouvernementale a été établi.

### *L’extinction*

*Le juge en chef Lamer et les juges Cory, McLachlin et Major:* Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* (le pouvoir du fédéral de légiférer sur les Indiens) emporte le pouvoir de légiférer relativement au titre aborigène et par implication, celui d’éteindre ce titre. Le droit de propriété de la province sur les terres détenues en vertu d’un titre aborigène (en vertu de l’art. 109) est distinct de la compétence exercée à l’égard de ces terres. Malgré le par. 91(24), les lois provinciales d’application générale s’appliquent *proprio vigore* (d’elles-mêmes) aux Indiens et aux terres indiennes.

Une loi provinciale d’application générale ne peut pas éteindre des droits ancestraux. Premièrement, par définition, une loi provinciale d’application générale ne peut pas, sans être *ultra vires*, respecter la norme de l’«intention claire et expresse» établie à l’égard de l’extinction des droits ancestraux. Deuxièmement, le par. 91(24) protège le fondement de la compétence du fédéral, même contre les lois provinciales d’application générale, par l’application du principe de l’exclusivité des compétences. Il a été dit que ce fondement se rapporte à des questions touchant à la «quiddité indienne», ou indianité, ou à l’«essentiel de l’indianité».

Des règles de droit provinciales qui autrement ne s’appliqueraient pas d’elles-mêmes aux Indiens peuvent le faire par l’effet de l’art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi les lois provinciales d’application générale. Cependant, cette disposition ne «revigore» pas des règles de droit provinciales qui sont invalides parce qu’elles se rapportent aux Indiens et aux terres indiennes.

*Per La Forest and L'Heureux-Dubé JJ.*: The province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

McLachlin J. was in substantial agreement.

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By Lamer C.J.

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By La Forest J.

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*Les juges La Forest et L'Heureux-Dubé*: La province n'avait pas le pouvoir d'éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l'effet de l'art. 88 de la *Loi sur les indiens*.

Le juge McLachlin est largement en accord avec ces motifs.

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APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), varying an order of McEachern C.J., [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), and dismissing British Columbia's cross-appeal as abandoned. Appeal allowed in part; cross-appeal dismissed.

*Stuart Rush, Q.C., Peter Grant, Michael Jackson, Louise Mandell and David Paterson*, for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs *et al.*

*Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur*, for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs *et al.*

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*Stuart Rush, c.r., Peter Grant, Michael Jackson, Louise Mandell et David Paterson*, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Gitksan et autres.

*Marvin R. V. Storrow, c.r., Joanne R. Lysyk et Joseph C. McArthur*, pour les appelants et intimés dans le pourvoi incident, les chefs héréditaires Wet'suwet'en et autres.

*Joseph J. Arvay, Q.C., Mark G. Underhill and Brenda Edwards*, for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia.

*Graham Garton, Q.C., Judith Bowers, Q.C., Murray T. Wolf and Geoffrey S. Lester*, for the respondent the Attorney General of Canada.

*Arthur Pape, Harry A. Slade, Peter Hogg and Jean Teillet*, for the intervener the First Nations Summit.

*Jack Woodward and Albert C. Peeling*, for the intervener the Westbank First Nation.

*Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur*, for the interveners the Musqueam Nation *et al.*

*J. Keith Lowes*, for the interveners the B.C. Cattlemen's Association *et al.*

*Charles F. Willms*, for the intervener Skeena Cellulose Inc.

*J. Edward Gouge, Q.C., and Jill M. Marks*, for the intervener Alcan Aluminum Ltd.

The judgment of Lamer C.J. and Cory and Major JJ. was delivered by

THE CHIEF JUSTICE —

## I. Introduction

<sup>1</sup>

This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*. Although that line of decisions, commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, proceeding through the *Van der Peet* trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723), and ending in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, have laid down the jurisprudential framework for s. 35(1), this appeal raises a set of

*Joseph J. Arvay, c.r., Mark G. Underhill et Brenda Edwards*, pour l'intimée et appelante dans le pourvoi incident, Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

*Graham Garton, c.r., Judith Bowers, c.r., Murray T. Wolf et Geoffrey S. Lester*, pour l'intimé le procureur général du Canada.

*Arthur Pape, Harry A. Slade, Peter Hogg et Jean Teillet*, pour l'intervenant le First Nations Summit.

*Jack Woodward et Albert C. Peeling*, pour l'intervenante la Première nation de Westbank.

*Marvin R. V. Storrow, c.r., Joanne R. Lysyk et Joseph C. McArthur*, pour les intervenants la Nation Musqueam et autres.

*J. Keith Lowes*, pour les intervenants la B.C. Cattlemen's Association et autres.

*Charles F. Willms*, pour l'intervenante Skeena Cellulose Inc.

*J. Edward Gouge, c.r., et Jill M. Marks*, pour l'intervenante Alcan Aluminium Ltée.

Version française du jugement du juge en chef Lamer et des juges Cory et Major rendu par

LE JUGE EN CHEF —

## I. Introduction

Le présent pourvoi est le plus récent d'une série d'affaires où notre Cour a été appelée à interpréter et à appliquer la garantie relative aux droits ancestraux existants prévue au par. 35(1) de la *Loi constitutionnelle de 1982*. Bien que cette série de décisions — qui a commencé par l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, s'est poursuivie par la trilogie *Van der Peet* (*R. c. Van der Peet*, [1996] 2 R.C.S. 507, *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672, et *R. c. Gladstone*, [1996] 2 R.C.S. 723), et s'est terminée par les arrêts *R. c. Pamajewon*, [1996] 2 R.C.S. 821, *R. c. Adams*, [1996] 3 R.C.S. 101, et *R. c. Côté*, [1996] 3 R.C.S. 139 — ait établi le cadre jurisprudentiel d'analyse du

interrelated and novel questions which revolve around a single issue — the nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title.

In *Adams*, and in the companion decision in *Côté*, I considered and rejected the proposition that claims to aboriginal rights must also be grounded in an underlying claim to aboriginal title. But I held, nevertheless, that aboriginal title was a distinct species of aboriginal right that was recognized and affirmed by s. 35(1). Since aboriginal title was not being claimed in those earlier appeals, it was unnecessary to say more. This appeal demands, however, that the Court now explore and elucidate the implications of the constitutionalization of aboriginal title. The first is the specific content of aboriginal title, a question which this Court has not yet definitively addressed, either at common law or under s. 35(1). The second is the related question of the test for the proof of title, which, whatever its content, is a right in land, and its relationship to the definition of the aboriginal rights recognized and affirmed by s. 35(1) in *Van der Peet* in terms of activities. The third is whether aboriginal title, as a right in land, mandates a modified approach to the test of justification first laid down in *Sparrow* and elaborated upon in *Gladstone*.

In addition to the relationship between aboriginal title and s. 35(1), this appeal also raises an important practical problem relevant to the proof of aboriginal title which is endemic to aboriginal rights litigation generally — the treatment of the oral histories of Canada's aboriginal peoples by the courts. In *Van der Peet*, I held that the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal

par. 35(1), le présent pourvoi soulève un ensemble de nouvelles questions interreliées, qui concernent une seule et même question — la nature et la portée de la protection constitutionnelle accordée par le par. 35(1) au titre aborigène reconnu en common law.

Dans *Adams*, ainsi que dans l'arrêt connexe *Côté*, j'ai examiné et rejeté l'argument voulant qu'une revendication visant des droits ancestraux doive aussi s'appuyer sur une revendication sous-jacente visant un titre aborigène. J'ai néanmoins conclu que le titre aborigène était une espèce distincte de droit ancestral reconnu et confirmé par le par. 35(1). Comme aucun titre aborigène n'était revendiqué dans ces pourvois antérieurs, il n'était pas nécessaire d'en dire davantage. Cependant, dans le cadre du présent pourvoi, la Cour doit examiner et élucider les conséquences de la constitutionnalisation du titre aborigène. La première conséquence a trait au contenu précis du titre aborigène, question à laquelle notre Cour n'a pas encore répondu de manière définitive, tant au regard de la common law que du par. 35(1). La deuxième est la question connexe du critère applicable pour faire la preuve du titre qui, quel que soit son contenu, est un droit foncier, et de sa relation avec la définition des droits ancestraux reconnus et confirmés par le par. 35(1) qui a été donnée dans *Van der Peet* en fonction de la notion d'activités. La troisième est la question de savoir si le titre aborigène, en tant que droit foncier, commande une approche modifiée à l'égard du critère de justification qui d'abord a été énoncé dans *Sparrow* puis précisé dans *Gladstone*.

En plus du rapport entre le titre aborigène et le par. 35(1), le présent pourvoi soulève aussi un problème pratique important en matière de preuve du titre aborigène, problème généralement commun à tout litige portant sur des droits ancestraux, soit le traitement réservé par les tribunaux aux récits oraux des peuples autochtones du Canada. Dans *Van der Peet*, j'ai conclu que les règles de la common law en matière de preuve devaient être adaptées pour tenir compte du caractère *sui generis* des droits ancestraux. Dans le présent pourvoi, notre

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rights. In this appeal, the Court must address what specific form those modifications must take.

Cour doit se demander quelle forme précise doivent prendre ces modifications.

4 Finally, given the existence of aboriginal title in British Columbia, this Court must address, on cross-appeal, the question of whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Moreover, if the province was without this jurisdiction, a further question arises — whether provincial laws of general application that would otherwise be inapplicable to Indians and Indian lands could nevertheless extinguish aboriginal rights through the operation of s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5.

Finalement, vu l'existence du titre aborigène en Colombie-Britannique, notre Cour doit examiner, dans un pourvoi incident, la question de savoir si, à compter de son entrée dans la Confédération en 1871 jusqu'à l'inscription du par. 35(1) dans la Constitution en 1982, la province de la Colombie-Britannique a eu le pouvoir d'éteindre, sur son territoire, les droits des peuples autochtones, y compris le titre aborigène. En outre, si la province n'avait pas ce pouvoir, se pose alors une autre question: est-ce que les lois provinciales d'application générale, qui seraient normalement inapplicables aux Indiens et à leurs terres, pourraient néanmoins éteindre les droits ancestraux sous l'effet de l'art. 88 de la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5.

## II. Facts

## II. Les faits

5 At the British Columbia Supreme Court, McEachern C.J. heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography.

En Cour suprême de la Colombie-Britannique, le juge en chef McEachern a présidé à 374 jours de déposition et d'argumentation. Une partie de la preuve n'était pas dans une forme familière aux tribunaux de common law et comportait notamment des récits oraux et des légendes. Un autre bloc considérable d'éléments de preuve était constitué de témoignages d'experts en généalogie, en linguistique, en archéologie, en anthropologie et en géographie.

6 The trial judge's decision (reported at [1991] 3 W.W.R. 97) is nearly 400 pages long, with another 100 pages of schedules. Although I am of the view that there must be a new trial, I nevertheless find it useful to summarize some of the relevant facts, so as to put the remainder of the judgment into context.

La décision du juge de première instance (publié à [1991] 3 W.W.R. 97) compte près de 400 pages, auxquelles s'ajoute une autre centaine de pages d'annexes. Même si je suis d'avis qu'il faut un nouveau procès, je crois néanmoins utile de résumer certains des faits pertinents, de manière à mettre en contexte le reste du jugement.

### A. The Claim at Trial

### A. La revendication au procès

7 This action was commenced by the appellants, who are all Gitksan or Wet'suwet'en hereditary chiefs, who, both individually and on behalf of their "Houses" claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into

La présente action a été engagée par les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, qui, tant en leur propre nom qu'au nom de leurs «maisons», revendiquent des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication,

133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) The province of British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

#### B. *The Gitksan and Wet'suwet'en Peoples*

##### (1) Demography

The Gitksan consist of approximately 4,000 to 5,000 persons, most of whom now live in the territory claimed, which is generally the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries. The Wet'suwet'en consist of approximately 1,500 to 2,000 persons, who also predominantly live in the territory claimed. This territory is mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries. It lies immediately east and south of the Gitksan.

Of course, the Gitksan and Wet'suwet'en are not the only people living in the claimed territory. As noted by both McEachern C.J. at trial (at p. 440) and Lambert J.A. on appeal (at p. 243), there are other aboriginals who live in the claimed territory, notably the Carrier-Sekani and Nishga peoples. Some of these people have unsettled land claims overlapping with the territory at issue here. Moreover, there are also numerous non-aboriginals living there. McEachern C.J. found that, at the time of the trial, the non-aboriginal population in the territory was over 30,000.

cation, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celui-ci. (Devant notre Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La province de la Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

#### B. *Les Gitksan et les Wet'suwet'en*

##### (1) La démographie

Les Gitksan sont un groupe d'environ 4 000 à 5 000 personnes, dont la plupart vivent maintenant dans le territoire revendiqué, c'est-à-dire de façon générale le bassin centre-nord des rivières Skeena, Nass et Babine et de leurs affluents. Les Wet'suwet'en, qui sont environ 1 500 à 2 000, habitent eux aussi de façon prédominante le territoire revendiqué. Leur territoire est situé principalement dans le bassin de la rivière Bulkley et, en partie, dans le système hydrographique formé par les rivières Fraser et Nechako et leurs affluents. Ce territoire se trouve immédiatement à l'est et au sud de celui des Gitksan.

Les Gitksan et les Wet'suwet'en ne sont évidemment pas les seules personnes vivant dans le territoire revendiqué. Comme l'ont souligné tant le juge en chef McEachern en première instance (à la p. 440) que le juge Lambert en appel (à la p. 243), d'autres autochtones vivent sur ce territoire, notamment les Carrier-Sekani et les Nishga. Certains d'entre eux ont des revendications territoriales pendantes qui chevauchent en partie le territoire en cause dans la présente affaire. En outre, de nombreux non-autochtones y vivent. Le juge en chef McEachern a conclu que, au moment du procès, la population non autochtone du territoire dépassait 30 000 personnes.

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(2) History

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There were numerous theories of the history of the Gitksan and Wet'suwet'en peoples before the trial judge. His conclusion from the evidence was that their ancestors migrated from Asia, probably through Alaska, and spread south and west into the areas which they found to be liveable. There was archeological evidence, which he accepted, that there was some form of human habitation in the territory and its surrounding areas from 3,500 to 6,000 years ago, and intense occupation of the Hagwilget Canyon site (near Hazelton), prior to about 4,000 to 3,500 years ago. This occupation was mainly in or near villages on the Skeena River, the Babine River or the Bulkley River, where salmon, the staple of their diet, was easily obtainable. The other parts of the territory surrounding and between their villages and rivers were used for hunting and gathering for both food and ceremonial purposes. The scope of this hunting and gathering area depended largely on the availability of the required materials in the areas around the villages. Prior to the commencement of the fur trade, there was no reason to travel far from the villages for anything other than their subsistence requirements.

(3) North American Exploration

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There was little European influence in western Canada until the arrival of Capt. Cook at Nootka on Vancouver Island in 1778, which led to the sea otter hunt in the north Pacific. This influence grew with the establishment of the first Hudson's Bay trading post west of the Rockies (although east of the territories claimed) by Simon Fraser in 1805-1806. Trapping for the commercial fur trade was not an aboriginal practice, but rather one influenced by European contact. The trial judge held that the time of direct contact between the Aboriginal Peoples in the claimed territory was approximately 1820, after the trader William Brown

(2) L'histoire

De nombreuses thèses ont été présentées au juge de première instance sur l'histoire des Gitksan et des Wet'suwet'en. De la preuve présentée, il a conclu que leurs ancêtres ont émigré d'Asie, probablement en passant par l'Alaska, et qu'ils se sont dispersés au sud et à l'ouest dans les régions qu'ils jugèrent habitables. Il a accepté des éléments de preuve archéologique indiquant que le territoire et ses alentours ont connu une certaine forme d'occupation humaine il y a de 3 500 à 6 000 ans et qu'il y a eu une occupation intense du site du canyon Hagwilget (près de Hazelton) il y a plus de 4 000 à 3 500 ans. Cette occupation s'est faite principalement dans des villages ou près de villages situés sur les rivières Skeena, Babine ou Bulkley, où le saumon, l'élément principal de leur régime alimentaire, était abondant. Les autres parties du territoire, autour des villages et des rivières ou entre ceux-ci, étaient utilisées pour la chasse et la cueillette tant à des fins alimentaires que rituelles. L'étendue de ce territoire de chasse et de cueillette était largement tributaire de la disponibilité des denrées requises autour des villages. Avant le début du commerce des fourrures, les personnes qui habitaient les villages n'avaient aucune raison de s'en éloigner si ce n'était pour assurer leur subsistance.

(3) L'exploration de l'Amérique du Nord

L'influence européenne ne s'est vraiment fait sentir dans l'Ouest du Canada qu'à l'arrivée du capitaine Cook à Nootka, sur l'île de Vancouver, en 1778, événement qui a entraîné la chasse à la loutre de mer dans le Pacifique Nord. Cette influence a crû par suite de l'établissement du premier poste de traite de la Baie d'Hudson à l'ouest des Rocheuses (quoiqu'à l'est des territoires revendiqués) par Simon Fraser en 1805 et 1806. Le trapage des fourrures à des fins commerciales n'était pas une pratique autochtone, mais plutôt une pratique qui a été induite par le contact avec les Européens. Le juge de première instance a statué que la date approximative du contact direct entre les peuples autochtones habitant le territoire revendiqué et les Européens était 1820, après l'arrivée

arrived and Hudson's Bay had merged with the North West Company.

#### (4) Present Social Organization

McEachern C.J. set out a description of the present social organization of the appellants. In his opinion, this was necessary because "one of the ingredients of aboriginal land claims is that they arise from long-term communal rather than personal use or possession of land" (at p. 147). The fundamental premise of both the Gitksan and the Wet'suwet'en peoples is that they are divided into clans and Houses. Every person born of a Gitksan or Wet'suwet'en woman is automatically a member of his or her mother's House and clan. There are four Gitksan and four Wet'suwet'en clans, which are subdivided into Houses. Each House has one or more Hereditary Chief as its titular head, selected by the elders of their House, as well as possibly the Head Chief of the other Houses of the clan. There is no head chief for the clans, but there is a ranking order of precedence within communities or villages, where one House or clan may be more prominent than others.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. The trial judge held that these are marked, in some cases, by physical and tangible indicators of their association with the territories. He cited as examples totem poles with the Houses' crests carved, or distinctive regalia. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants (see my discussion of the trial judge's view of this evidence, *infra*).

The most significant evidence of spiritual connection between the Houses and their territory is a

du commerçant William Brown et la fusion de la Baie d'Hudson et de la Compagnie du Nord-Ouest.

#### (4) L'organisation sociale actuelle

Le juge en chef McEachern a décrit l'organisation sociale actuelle des appelants. À son avis, il était nécessaire de le faire parce que [TRADUCTION] «l'un des éléments des revendications territoriales des autochtones est qu'elles reposent sur une longue utilisation ou possession collective — plutôt qu'individuelle — du territoire» (à la p. 147). La caractéristique fondamentale de l'organisation sociale des Gitksan et des Wet'suwet'en est qu'ils sont divisés en clans et en maisons. Toute personne dont la mère est Gitksan ou Wet'suwet'en est d'office membre de la maison et du clan de sa mère. Il y a quatre clans Gitksan et quatre clans Wet'suwet'en, clans qui sont subdivisés en maisons. Chaque maison compte un ou plusieurs chefs héréditaires qui agissent à titre de chef titulaire et sont choisis par les aînés de leur maison, et aussi, parfois, par le grand chef des autres maisons du clan. Le clan n'a pas de grand chef, mais il y a un ordre de préséance au sein des collectivités ou des villages où une maison ou un clan prédomine.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. Le juge de première instance a conclu que, dans certains cas, ces faits sont marqués par des indices physiques et tangibles de l'association des individus avec les territoires visés. Il a donné comme exemples les mâts totémiques sculptés aux emblèmes ou insignes distinctifs des maisons. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants (voir, plus loin, mon analyse de l'opinion du juge de première instance sur ces éléments de preuve).

Le signe le plus important du lien spirituel entre les différentes maisons et leur territoire est la salle

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feast hall. This is where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose, but is also used for making important decisions. The trial judge also noted the *Criminal Code* prohibition on aboriginal feast ceremonies, which existed until 1951.

des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes. Le juge de première instance a également souligné que, jusqu'en 1951, le *Code criminel* interdisait les cérémonies rituelles autochtones.

### III. Judgments Below

#### A. *Supreme Court of British Columbia*

##### (1) General Principles

15 The trial judge began his analysis by considering the significant cases in this area: *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.), *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *R. v. Sioui*, [1990] 1 S.C.R. 1025, and *Sparrow*, *supra*. On the basis of this jurisprudence, he set out four propositions of law. First, aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty. Second, aboriginal interests are communal, consisting of subsistence activities and are not proprietary. Third, at common law, aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon Confederation the province obtained title to all Crown land in the province subject to the "interests" of the Indians. Finally, unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may, in proper circumstances, be reconciled. Generally speaking, aboriginal rights may be regulated by the Crown only when such regulation operates to interfere with aboriginal rights pursuant to legitimate Crown objectives which can honourably be justified, without undue interference with such rights. Moreover, when regulating, government must be mindful of the appropriate level

### III. Les juridictions inférieures

#### A. *Cour suprême de la Colombie-Britannique*

##### (1) Principes généraux

Le juge de première instance a commencé son analyse par l'examen des décisions importantes dans le domaine: *St. Catharines Milling and Lumber Co. c. The Queen* (1887), 13 R.C.S. 577, *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (1<sup>re</sup> inst.), *Guerin c. La Reine*, [1984] 2 R.C.S. 335, *R. c. Sioui*, [1990] 1 R.C.S. 1025, et *Sparrow*, précité. Se fondant sur cette jurisprudence, il a énoncé quatre propositions de droit. Premièrement, les droits ancestraux découlent de l'occupation ou de l'utilisation, à des fins autochtones, d'un territoire précis pendant une période indéfinie ou très longue avant l'affirmation de la souveraineté. Deuxièmement, les droits ancestraux sont des droits collectifs, qui consistent en des activités de subsistance et non en des droits de propriété. Troisièmement, en common law, les droits ancestraux existent selon le bon plaisir de la Couronne et ils peuvent être éteints lorsque l'intention de la Couronne de le faire est claire et expresse. C'est la Couronne impériale qui détenait ce pouvoir au cours de la période coloniale. À la Confédération, la province a obtenu le titre relatif à toutes les terres publiques situées dans la province sous réserve de tout «intérêt» des Indiens. Finalement, les droits ancestraux non éteints ne sont pas absolus. Dans les circonstances appropriées, il est possible de concilier les actes de la Couronne et les droits ancestraux. De façon générale, les droits ancestraux peuvent être réglementés par l'État,

of priority which aboriginal rights have over competing, inconsistent activities.

With respect to the appellants' claims, McEachern C.J. divided his analysis into three parts: (1) jurisdiction over the territory; (2) ownership of the territory; and (in the alternative) (3) particular aboriginal rights over the territory. In the ownership claim, the appellants asserted they were "absolutely entitled to occupy and possess the individual territories" claimed (at p. 126). The claim to jurisdiction was understood by the trial judge as comprising jurisdiction over land and people in the territory, and amounted to aboriginal sovereignty, a right to "govern the territory free of provincial control in all matters where their aboriginal laws conflict with the general law" (at p. 128). Although the claim advanced at trial was advanced by individual chiefs on behalf of themselves or their House members, the trial judge held that since aboriginal rights are communal in nature, any judgment must be for the benefit of the Gitksan and Wet'suwet'en peoples generally.

## (2) Aboriginal Ownership

McEachern C.J. started from the proposition, for which he cited *St. Catharines Milling*, that aboriginal rights are not proprietary in nature, but rather "personal and usufructuary", and dependent upon the good will of the Sovereign. He was satisfied that at the date of British sovereignty, the appellants' ancestors were living in their villages on the great rivers, in a form of communal society. He was satisfied that they were occupying or possessing fishing sites and the adjacent lands, as their ancestors had done for the purpose of hunting and

mais seulement si cette réglementation ne porte pas atteinte de manière excessive à ces droits et qu'elle vise la poursuite par l'État d'objectifs légitimes qui peuvent être honorablement justifiés. En outre, lorsqu'il réglemente des activités, le gouvernement doit tenir compte du degré de priorité approprié qui doit être accordé à l'exercice de droits ancestraux sur l'exercice d'autres activités concurrentes et incompatibles.

Le juge en chef McEachern a divisé son analyse des revendications des appelants en trois parties: (1) la compétence sur le territoire; (2) la propriété du territoire; (3) (subsidiairement) les droits ancestraux particuliers visant le territoire. Dans leur revendication de la propriété, les appelants ont affirmé qu'ils avaient [TRADUCTION] «le droit absolu à la possession et à l'occupation des différents territoires» revendiqués (à la p. 126). Le juge de première instance a considéré que la revendication relative à la compétence visait la compétence sur le territoire et sur les personnes l'habitant, et qu'elle équivalait à la souveraineté autochtone, c'est-à-dire au droit de [TRADUCTION] «gouverner le territoire, libre de tout contrôle provincial sur les diverses questions où leurs règles de droit entrent en conflit avec le droit d'application générale» (à la p. 128). Bien que, en première instance, la revendication ait été présentée par chacun des chefs, en son propre nom et au nom des membres de sa maison, le juge de première instance a conclu que, vu la nature collective des droits ancestraux, tout jugement doit être prononcé au bénéfice des Gitksan et des Wet'suwet'en en général.

## (2) La propriété autochtone

Le juge en chef McEachern est parti de la proposition — au soutien de laquelle il a cité l'arrêt *St. Catharines Milling* — que les droits ancestraux ne sont pas, par nature, des droits de propriété, mais plutôt des droits «personnels et usufructuaires», tributaires du bon vouloir du souverain. Il était convaincu que, au moment de l'affirmation de la souveraineté par les Britanniques, les ancêtres des appelants vivaient dans leurs villages en bordure des grandes rivières, dans une forme de société communautaire. Il était convaincu qu'ils

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gathering that which they required for sustenance. However, he was not satisfied that they owned the territory in its entirety in any sense that would be recognized by the law.

occupaient et possédaient des sites de pêche et les terres adjacentes, comme leurs ancêtres l'avaient fait pour y chasser et y cueillir ce dont ils avaient besoin pour assurer leur subsistance. Cependant, il n'était pas convaincu qu'ils étaient propriétaires de l'ensemble du territoire, dans quelque sens qui serait reconnu par le droit.

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There were several specific claims of the plaintiffs as to their uses of the land before the assertion of sovereignty. He concluded that the appellants' ancestors lived within the territory, but predominantly at the village sites. He accepted, at p. 372, that they harvested the resources of the lands, but that there was only evidence of "commonsense subsistence practices . . . entirely compatible with bare occupation for the purposes of subsistence". He was not persuaded that there was any system of governance or uniform custom relating to land outside the villages. He refused to accept that the spiritual beliefs exercised within the territory were necessarily common to all the people or that they were universal practices. He was not persuaded that the present institutions of the plaintiffs' society were recognized by their ancestors. Rather, he found, at p. 373, that "they more likely acted as they did because of survival instincts". He stated that the maintenance and protection of the boundaries were unproven because of the numerous intrusions into the territory by other peoples. The oral histories, totem poles and crests were not sufficiently reliable or site specific to discharge the plaintiff's burden of proof. Although McEachern C.J. recognized the social importance of the feast system and the fact that it evolved from earlier practices, he did not accept its role in the management and allocation of lands, particularly after the fur trade. McEachern C.J. concluded, at p. 383, that "I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal

Les demandeurs ont fait valoir plusieurs revendications particulières visant des utilisations qu'ils faisaient du territoire avant l'affirmation de la souveraineté. Le juge de première instance a conclu que les ancêtres des appelants vivaient à l'intérieur du territoire, mais principalement dans le site des villages. Il a accepté, à la p. 372, qu'ils récoltaient les ressources du territoire, mais que la preuve étayait seulement l'existence de [TRADUCTION] «pratiques rationnelles de subsistance [. . .] tout à fait compatibles avec une simple occupation à des fins de subsistance». Il n'était pas convaincu qu'il existait quelque système de gestion ou de coutume uniforme visant les terres situées à l'extérieur des villages. Il a refusé de reconnaître que les croyances spirituelles respectées au sein du territoire étaient nécessairement communes à tous les autochtones et qu'elles constituaient des pratiques universelles. Il n'était pas convaincu que les institutions actuelles de la société des demandeurs étaient celles de leurs ancêtres. Il a plutôt conclu, à la p. 373, qu'[TRADUCTION] «il est plus vraisemblable qu'ils agissaient ainsi par instinct de survie». Il a affirmé que, compte tenu des nombreuses intrusions d'autres peuples dans le territoire, on n'avait pas fait la preuve du maintien et de la protection de frontières. Les récits oraux, les mâts totémiques et les emblèmes n'étaient pas des éléments suffisamment fiables ou spécifiques à un site pour permettre aux demandeurs de s'acquitter de la charge de la preuve qui leur incombait. Même si le juge en chef McEachern a reconnu l'importance sociale de la pratique des célébrations et son évolution depuis ses premières manifestations, il n'a pas accepté le rôle qu'on lui attribuait dans la gestion et l'attribution des terres, particulièrement après le début du commerce des fourrures. Le juge en chef McEachern a conclu ainsi, à la p. 383: [TRADUCTION] «je ne peux inférer de la preuve que les Indiens possédaient ou contrôlaient

use in a way that would justify a declaration equivalent to ownership”.

Although he was of the opinion that the status of the villages and their immediate surrounding area may be different from the territory as a whole, they were already predominantly reserve lands. Hence, the question of the Gitksan and Wet’suwet’en peoples’ rights to these particular lands did not need to be dealt with. Moreover, to the extent that there were hunting grounds not included on those lands, McEachern C.J. believed he had no jurisdiction to extend their boundaries.

### (3) Aboriginal Sovereignty

McEachern C.J. interpreted the appellants’ claim for “jurisdiction” as a claim to govern the territories in question. This would include the right to enforce existing aboriginal law, as well as make and enforce new laws, as required for the governance of the people and their land. Most notably, this would also include a right to supersede the laws of British Columbia if the two were in conflict. McEachern C.J. rejected the appellants’ claim for a right of self-government, relying on both the sovereignty of the Crown at common law, and what he considered to be the relative paucity of evidence regarding an established governance structure. First, he stated, at p. 386, that when British Columbia was united with Canada, “all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts”. Second, he characterized the Gitksan and Wet’suwet’en legal system, at p. 379, as a “most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves”. He continued, at pp. 379-80, stating:

une partie quelconque du territoire, à l’exception du site des villages, et qu’ils l’utilisaient d’une manière qui justifierait une déclaration équivalente au droit de propriété».

Même s’il était d’avis que les villages et leurs environs immédiats avait pu avoir un statut différent de celui du territoire pris dans son ensemble, ils étaient déjà constitués principalement de terres de réserve. Par conséquent, il n’était pas nécessaire d’examiner la question des droits des Gitksan et des Wet’suwet’en sur ces terres. De plus, s’il y avait des territoires de chasse qui n’étaient pas compris dans les limites de ces terres, le juge en chef McEachern était d’avis qu’il n’avait pas compétence pour élargir leurs limites.

### (3) La souveraineté autochtone

Le juge en chef McEachern a considéré la revendication des appelants relative à la «compétence» comme étant la revendication du pouvoir de gouverner les territoires en question, notamment le droit d’appliquer les règles de droit autochtones existantes ainsi que le droit d’en adopter de nouvelles et de les faire respecter, selon ce qui est requis pour la gouverne des individus et leur territoire. De façon plus particulière, cela emporterait le droit d’écarter l’application des lois de la Colombie-Britannique en cas de conflit. Le juge en chef a rejeté la revendication par les appelants du droit à l’autonomie gouvernementale, fondant sa décision à la fois sur la souveraineté de la Couronne en common law et sur la rareté relative, selon lui, de preuves de l’existence d’une structure gouvernementale établie. Il a d’abord affirmé, à la p. 386, que, lorsque la Colombie-Britannique a été unie au Canada, [TRADUCTION] «toutes les compétences législatives ont été réparties entre le Canada et la province, et il n’y avait aucune place pour quelque compétence ou souveraineté autochtone qui serait reconnue par le droit ou les tribunaux». Deuxièmement, il a qualifié le système juridique des Gitksan et des Wet’suwet’en, à la p. 379, d’[TRADUCTION] «ensemble de coutumes des plus incertaines et extrêmement souples qui, fréquemment, ne sont pas suivies par les Indiens eux-mêmes». Il a ajouté ceci, aux pp. 379 et 380:

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I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chief's territory, although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissible. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

As a result of the flexibility and uncertainty of the customs and rules, McEachern C.J. rejected the appellants' claim to jurisdiction or sovereignty over the territories.

#### (4) Aboriginal Rights

21 After rejecting the appellants' claim for ownership of and jurisdiction over the disputed territories, McEachern C.J. turned to the possibility that the appellants nevertheless have aboriginal rights exercisable therein. He set out, at p. 388, the four part test from *Baker Lake* for an aboriginal right:

1. That they (the plaintiffs) and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

McEachern C.J. noted that the requirement for an organized society had been satisfied, even though he did not believe the appellants' ancestors had institutions and governed themselves. However, he held that no specific level of sophistication ought to be required in satisfying this requirement. He then stated that there was evidence that the ancestors of the plaintiffs occupied specific locations in the territory (the villages) and they used surrounding lands. Although there was evidence that the Gitksan and Wet'suwet'en would not have been able to keep invaders or traders out of their terri-

[TRADUCTION] On m'a fait état de nombreux cas où des chefs en vue ne se sont pas conformés à ces règles, par exemple en faisant du piégeage ou en coupant du bois sur le territoire d'un autre chef, quoiqu'il semblait toujours y avoir une exception autochtone qui rendait licite presque toute dérogation aux règles autochtones. Selon moi, ces règles sont si souples et incertaines qu'elles ne peuvent être qualifiées de règles de droit.

En raison de la souplesse et de l'incertitude des coutumes et des règles, le juge en chef McEachern a rejeté la revendication de compétence ou de souveraineté sur les territoires visés qu'ont présentée les appelants.

#### (4) Les droits ancestraux

Après avoir rejeté la revendication des appelants relative à la propriété des territoires en cause et à la compétence sur ceux-ci, le juge en chef McEachern a ensuite examiné la possibilité que les appelants possèdent néanmoins des droits ancestraux pouvant y être exercés. Il a énoncé, à la p. 388, les quatre parties du critère établi dans *Baker Lake*, précité, pour la reconnaissance d'un droit ancestral:

- [TRADUCTION] 1. Il faut que (les demandeurs) et leurs ancêtres aient été membres d'une société organisée;
2. que cette société organisée ait occupé le territoire particulier à l'égard duquel ses membres revendiquent un titre aborigène;
  3. que cette occupation ait été à l'exclusion d'autres sociétés organisées;
  4. que l'occupation ait été un fait établi au moment de l'affirmation de la souveraineté par l'Angleterre.

Le juge en chef McEachern a souligné qu'on avait satisfait à l'exigence concernant l'existence d'une société organisée, même s'il ne croyait pas que les ancêtres des appelants avaient des institutions et se gouvernaient eux-mêmes. Cependant, il a statué qu'aucun degré particulier de raffinement ne devrait être requis pour satisfaire à cette exigence. Il a ensuite affirmé qu'il y avait des éléments de preuve indiquant que les ancêtres des demandeurs avaient occupé des lieux précis dans le territoire (les villages) et qu'ils avaient utilisé les terres environnantes. Même si la preuve indiquait que les

tory, no other organized societies had established themselves in the core areas on any permanent basis. Moreover, he noted at the outset of his reasons on this point that he was uncertain about the requirement for exclusivity.

The activities that were to be protected were only those carried on at the time of contact or European influence and that were still carried on at the time of sovereignty. This included “all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival” (at p. 391). This did not include trapping for the fur trade, or other land-based commercial enterprise. McEachern C.J. ultimately concluded, at p. 395 that “the plaintiffs have established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within [certain] portions of the territory”.

#### (5) Extinguishment and Fiduciary Duties

McEachern C.J. started with the proposition, at pp. 396-97, that the law “never recognized that the settlement of new lands depended upon the consent of the Indians”. All aboriginal rights existed at the pleasure of the Crown, and could be extinguished by unilateral act. He accepted the “clear and plain” intention test for extinguishment, but took the view that it need not be express or even mention aboriginal rights, if the intention can be identified by necessary implication. An example of such implied extinguishment might be a fee simple

Gitksan et les Wet’suwet’en n’auraient pas été capables d’interdire leur territoire aux envahisseurs ou aux commerçants, aucune autre société organisée ne s’était établie avec quelque permanence que ce soit dans les principaux emplacements. De plus, au début de la partie de ses motifs sur ce point, le juge a souligné qu’il était incertain en ce qui concerne cette exigence d’exclusivité.

Les activités qui devaient être protégées se limitaient à celles qui étaient exercées au moment du contact avec les Européens ou au moment où l’influence de ceux-ci s’est fait sentir et qui étaient encore exercées au moment de l’affirmation de la souveraineté. Ces activités comprenaient effectivement: [TRADUCTION] «toutes les pratiques de subsistance ainsi que les activités de récolte des produits des terres et des eaux du territoire que je vais définir, qu’ils suivaient et exerçaient — avant d’être exposés à la civilisation européenne (ou avant l’affirmation de la souveraineté) — à des fins de subsistance ou de survie» (à la p. 391). Ceci ne comprenait pas le trappage en vue du commerce des fourrures ou d’autres entreprises commerciales fondées sur l’exploitation du territoire. Le juge en chef McEachern a finalement conclu, à la p. 395, que [TRADUCTION] «les demandeurs ont établi qu’il était satisfait, à la date de l’affirmation de la souveraineté britannique, aux exigences relatives à la résidence continue dans leurs villages et à l’existence de droits ancestraux d’exploitation à des fins de subsistance non exclusifs sur [certaines] parties du territoire».

#### (5) L’extinction des droits et les obligations de fiduciaire

Le juge en chef McEachern a commencé en énonçant, aux pp. 396 et 397, la proposition suivante laquelle le droit [TRADUCTION] «n’a jamais reconnu que la colonisation de nouvelles terres était subordonnée au consentement des Indiens». L’existence de tous les droits ancestraux dépendait du bon plaisir de la Couronne et ces droits pouvaient être éteints par un acte unilatéral de cette dernière. Il a accepté l’application du critère de l’intention «claire et expresse» pour statuer sur la question de l’extinction, mais il s’est dit d’avis

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grant to a third party, or a grant of a lease, licence, permit or other tenure inconsistent with continuing aboriginal interest.

qu'il n'est pas nécessaire que l'intention ait été expresse ni même qu'on mentionne les droits ancestraux, si cette intention peut être dégagée par implication nécessaire. Un exemple d'une telle extinction implicite serait un acte de concession en fief simple au bénéfice d'un tiers ou l'octroi d'un bail, d'une licence, d'un permis ou de quelque autre forme de tenure incompatible avec le maintien d'un droit ancestral.

24 McEachern C.J. held that any aboriginal rights to the land had been extinguished. The extinguishment arose out of certain colonial enactments which demonstrated an intention to manage Crown lands in a way that was inconsistent with continuing aboriginal rights. He stated, at p. 411, that "the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests". Crown grantees who received land in colonial times were clearly intended to receive the land free from any aboriginal encumbrances. Moreover, this intention to extinguish did not only apply to lands that had actually been granted to third parties, but rather all Crown land in British Columbia. However, it should be noted that he was careful to distinguish between land and fishing rights. Since McEachern C.J. was of the view that all aboriginal title to the territories in question had been extinguished during colonial times, it was not necessary to consider whether the province had the power to extinguish aboriginal rights after Confederation.

Le juge en chef McEachern a conclu que tout droit ancestral au territoire avait été éteint. Cette extinction était le résultat de certains textes de loi coloniaux qui démontraient l'intention de gérer les terres publiques d'une façon incompatible avec le maintien des droits ancestraux. Il a déclaré, à la p. 411, que [TRADUCTION] «la Couronne, pleinement consciente de la situation locale, avait pleinement eu l'intention d'établir une colonie et d'accorder des titres et tenures qui ne soient grevés d'aucun droit ancestral». On entendait clairement que ceux qui se voyaient accorder des concessions par l'État à l'époque coloniale les reçoivent libres de toute charge dont seraient titulaires les autochtones. En outre, cette intention d'extinction s'appliquait non seulement aux terres qui, de fait, avaient été cédées à des tiers, mais également à toutes les terres publiques en Colombie-Britannique. Cependant, il convient de souligner que le juge a pris soin de distinguer entre les droits fonciers et les droits de pêche. Étant donné que le juge en chef McEachern était d'avis que tout titre aborigène sur les territoires en question avait été éteint pendant l'époque coloniale, il ne lui était pas nécessaire de se demander si la province avait le pouvoir d'éteindre des droits ancestraux après la Confédération.

25 Notwithstanding the complete extinguishment of all aboriginal rights in land, McEachern C.J. held, at p. 417, that the Crown was under a fiduciary obligation to continue to allow native persons to use vacant crown lands for lawful purposes until the land "is dedicated to another purpose". This is not an aboriginal "right", to which s. 35 can be applied, since any such "rights" over the land had been extinguished. However, he held that where the Crown extinguishes an aboriginal right, and

Nonobstant l'extinction complète de tous les droits ancestraux sur le territoire, le juge en chef McEachern a conclu, à la p. 417, que la Couronne avait l'obligation de fiduciaire de continuer de permettre aux autochtones d'utiliser, à des fins licites, les terres publiques inoccupées jusqu'à ce que le territoire en question [TRADUCTION] «soit affecté à une autre fin». Il ne s'agit pas d'un «droit» ancestral auquel l'art. 35 peut être appliqué, puisque tous ces «droits» au territoire ont été éteints. Tou-

makes a promise regarding use of Crown land at the same time, this creates the same fiduciary obligation as if the aboriginal people had surrendered the land to the Crown. In articulating guidelines for the application of the Crown's fiduciary obligation, McEachern C.J. made it clear that the Crown must be free to direct resource management in the province in the best interests of both the aboriginal and non-aboriginal persons in the province. However, Crown authorities should always keep the "aboriginal interests of the plaintiffs very much in mind" (at p. 423) in developing policies for the territory, and should ensure that aboriginal activities on the land are not unduly impaired.

#### (6) Damages

Since the plaintiffs failed to establish that existing ownership, jurisdiction, or aboriginal rights had been breached, the claim for damages for wrongful appropriation of their territory was dismissed by McEachern C.J.

#### (7) Lands Subject to Aboriginal Rights at Sovereignty

McEachern C.J. felt it necessary to delineate the boundaries of the lands that were subject to aboriginal rights at the time of sovereignty in case he was wrong that these rights had been extinguished. He considered the evidence regarding the external boundary of the territory, and the internal boundaries therein. He found numerous inconsistencies, and generally did not find it to be reliable. He rejected the boundaries as put forth by the appellants.

Nevertheless, since he had held that the Gitksan and Wet'suwet'en had aboriginal sustenance rights over part of the land, he had to delineate their

tefois, le juge en chef a statué que, dans les cas où la Couronne éteint un droit ancestral, et fait en même temps une promesse au sujet de l'utilisation de terres publiques, cela a pour effet de créer une obligation de fiduciaire au même titre que si les autochtones concernés avaient cédé le territoire à la Couronne. Dans la formulation de lignes directrices concernant l'application de l'obligation de fiduciaire de la Couronne, le juge en chef McEachern a clairement indiqué que celle-ci doit être libre de gérer les ressources de la province au mieux des intérêts tant des autochtones que des non-autochtones de la province. Cependant, les autorités étatiques devraient toujours avoir [TRA-DUCTION] «bien à l'esprit les droits ancestraux des demandeurs» (à la p. 423) lorsqu'elles élaborent des politiques relatives au territoire, en plus de veiller à ce que les activités exercées par les autochtones sur le territoire ne soient pas trop perturbées.

#### (6) Les dommages-intérêts

Comme les demandeurs n'ont pas réussi à établir la violation de droits existants — propriété, compétence ou droits ancestraux — le juge en chef McEachern a rejeté leur demande en dommages-intérêts fondée sur l'appropriation illicite de leur territoire.

#### (7) Les terres visées par des droits ancestraux au moment de l'affirmation de la souveraineté

Le juge en chef McEachern a estimé nécessaire de tracer les limites des terres qui étaient visées par des droits ancestraux au moment de l'affirmation de la souveraineté, au cas où il aurait tort de conclure à l'extinction de ces droits. Il a examiné la preuve déposée au sujet des limites externes et internes du territoire. Il y a constaté de nombreuses incohérences et, de façon générale, ne l'a pas jugée fiable. Il a rejeté les limites tracées par les appelants.

Néanmoins comme il avait statué que les Gitksan et les Wet'suwet'en possédaient des droits ancestraux les autorisant à exploiter à des fins de

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boundaries. He put forth three alternatives, and ultimately chose “Map 5” (at p. 400). This area recognized that the plaintiffs’ ancestors likely used more distant areas in the territory. However, McEachern C.J. was not persuaded of such use in either the northernmost or southernmost portions of the territory. The northern boundary was drawn through the centre of the Skeena River, with 20 miles on the north side of the river being added. The southern boundary was drawn following some of the internal boundaries, but excluding several of the southern Wet’suwet’en individual territories. He selected this alternative because it worked less injustice for the Wet’suwet’en who lived more spread out and less concentrated near the rivers. However, he cut off the north and south portions of the claimed territory because he did not have confidence in the presence of the Gitksan or Wet’suwet’en in the areas north or south of the boundaries he drew.

subsistance certaines parties du territoire, il se devait d’en tracer les limites. Après avoir exposé trois possibilités, il a finalement retenu la [TRADUCTION] «carte 5» (à la p. 400). Ce tracé reconnaissait que les ancêtres des demandeurs utilisaient vraisemblablement des régions plus éloignées dans le territoire. Toutefois, le juge en chef McEachern n’était pas convaincu qu’une telle utilisation avait été faite dans les parties situées à l’extrême nord et à l’extrême sud du territoire. Le tracé de la limite nord passait par le centre de la rivière Skeena, et ajoutait une aire de 20 milles du côté nord de la rivière. Le tracé de la limite sud suivait certaines limites internes, mais excluait plusieurs territoires Wet’suwet’en au sud. Le juge en chef McEachern a retenu cette solution parce qu’il en résultait une moins grande injustice pour les Wet’suwet’en, qui vivaient de façon plus dispersée et en moins grande concentration près des rivières. Il a cependant éliminé les parties nord et sud du territoire revendiqué parce qu’il n’était pas certain de la présence des Gitksan ou des Wet’suwet’en dans les parties situées au nord ou au sud des limites qu’il avait tracées.

#### (8) Other Matters

#### (8) Les autres questions

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McEachern C.J. concluded his reasons by rejecting the province’s argument that the plaintiffs’ aboriginal rights to some of the lands had been abandoned. He did not think courts should be quick to treat aboriginal lands as abandoned. He could not say with confidence which lands should be abandoned, and which should not, even though there was clearly declining aboriginal use of some of the lands. He also stressed that the onus of demonstrating abandonment rested with the province and that they had not discharged that onus. He also rejected the argument that the plaintiffs had waived their rights by accepting and using reserves and by conforming to the general law of the province. The honour of the Crown precluded the province from relying on this defence.

Le juge en chef McEachern a conclu ses motifs en rejetant l’argument avancé par la province que les droits ancestraux des demandeurs à l’égard de certaines terres avaient été abandonnés. Il était d’avis que les tribunaux ne devaient pas s’empres- ser de conclure à l’abandon de terres par les autochtones. Il ne pouvait pas dire avec certitude quelles terres devraient être considérées comme abandonnées, et lesquelles ne devraient pas l’être, même s’il y avait clairement un déclin dans l’utili- sation de certaines terres par les autochtones. Il a aussi souligné qu’il incombait à la province de prouver l’abandon et qu’elle ne s’était pas acquit- tée de cette charge. Il a aussi rejeté l’argument que les demandeurs avaient renoncé à leurs droits en acceptant et en utilisant les réserves, et en se con- formant aux lois générales de la province. L’obli- gation de la Couronne d’agir honorablement inter- disait à la province de s’appuyer sur ce moyen de défense.

(9) Final Order

In result, therefore, McEachern C.J. dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made.

B. *British Columbia Court of Appeal*(1) Judgment of Macfarlane J.A. (Taggart J.A. concurring)

Macfarlane J.A. set out the following propositions of law which he indicated were the starting points for analysing aboriginal rights in land, which he garnered from *Baker Lake*, *Calder*, *Guerin*, *Sparrow*, and *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C.). First, such rights arise from historic occupation and possession of the aboriginal peoples' tribal lands. Second, they arise by operation of law and do not depend on a grant from the Crown. Third, they are not absolute, but they are subject to regulation and extinguishment. Fourth, they are *sui generis* communal rights. Fifth, they cannot be alienated other than to the Crown. Finally, they are related to aboriginal activities which formed an integral part of traditional Indian life prior to sovereignty.

(a) *Ownership Rights*

Examining the appellants' ownership claim, Macfarlane J.A. agreed that an exclusive right to occupy land is required to support a claim akin to ownership. He noted that the use of the term "ownership" (which was used in the plaintiffs in their pleadings) was unfortunate, since *Guerin* specifically held that the aboriginal interest does not

(9) L'ordonnance finale

En définitive, le juge en chef McEachern a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générales de la province, il a rejeté la demande de dommages-intérêts et, enfin, il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens.

B. *Cour d'appel de la Colombie-Britannique*(1) La décision du juge Macfarlane (à laquelle le juge Taggart a souscrit)

Le juge Macfarlane a énoncé les propositions de droit suivantes qui, a-t-il indiqué, étaient les éléments de départ qu'il avait dégagés des arrêts *Baker Lake*, *Calder*, *Guerin*, *Sparrow* et *Mabo c. Queensland* (1992), 107 A.L.R. 1 (H.C.), en vue de l'analyse des droits fonciers ancestraux. Premièrement, ces droits découlent de la possession et de l'occupation historiques par les peuples autochtones de terres tribales. Deuxièmement, ils découlent de l'application de la common law et ne dépendent pas d'une concession de la Couronne. Troisièmement, ils ne sont pas absolus mais sujets à réglementation et à extinction. Quatrièmement, ce sont des droits collectifs *sui generis*. Cinquièmement, ils ne peuvent être aliénés qu'en faveur de la Couronne. Finalement, ils sont liés à des activités autochtones qui faisaient partie intégrante de la vie traditionnelle indienne avant l'affirmation de la souveraineté.

a) *Les droits de propriété*

Examinant la revendication par les appelants de la propriété du territoire, le juge Macfarlane a convenu qu'un droit d'occupation exclusif du territoire est requis pour étayer la revendication d'un droit analogue à la propriété. Il a souligné que l'utilisation du terme «propriété» (que les demandeurs ont utilisé dans leurs actes de procédure) était malheu-

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amount to beneficial ownership. In his view, the trial judge properly applied the law to the plaintiffs' claim of ownership. Similarly, he found no merit in the appellants' challenge to the trial judge's findings of fact on a number of points. Although some of the areas of the evidence were cause for concern, he concluded that the issues required an interpretation of the evidence as a whole and that it would be inappropriate for this court to intervene and substitute its opinions for that of the trial judge. Hence, he did not disturb the judge's conclusion with regard to ownership of the territory, nor his conclusion that any interest which the appellants have in the land is not proprietary.

reux, étant donné que l'arrêt *Guerin* avait précisément établi que le droit des autochtones n'équivait pas au droit de propriété à titre bénéficiaire. À son avis, le juge de première instance a bien appliqué le droit en ce qui concerne la revendication par les demandeurs de la propriété du territoire. De même, il n'a trouvé aucun fondement à la contestation par les appelants des conclusions de fait tirées par le juge de première instance sur un certain nombre de points. Même si certains éléments de preuve soulevaient des interrogations, il a conclu que les questions en litige nécessitaient une interprétation globale de la preuve et qu'il ne convenait pas que la cour intervienne et substitue ses opinions à celles du juge de première instance. En conséquence, il n'a pas modifié la conclusion de ce dernier quant à la propriété du territoire, ni sa conclusion que tout intérêt que possèdent les appelants dans le territoire n'est pas un droit de propriété.

(b) *Aboriginal Sustenance Rights*

b) *Le droit des autochtones d'assurer leur subsistance*

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Macfarlane J.A. canvassed the trial judge's findings regarding aboriginal sustenance rights. He noted that McEachern C.J.'s error in requiring a "time-depth" of a long time prior to contact in order to establish the rights did not affect his view of the territorial limits of the right. He agreed with the trial judge's application of the *Baker Lake* test. In particular, he viewed the significant question to be whether the practices were integral to aboriginal society or had only resulted from European influences. Macfarlane J.A. concluded that it would be inappropriate to intervene and substitute his view for that of the trial judge with respect to the weight of the evidence. Hence, if the appellants succeeded on the appeal with respect to extinguishment, they were entitled to sustenance rights in the area as identified by McEachern C.J. on Map 5.

Le juge Macfarlane a examiné les conclusions du juge de première instance quant au droit des autochtones d'assurer leur subsistance. Il a souligné que l'erreur que le juge en chef McEachern a commise en exigeant la preuve d'une [TRADUCTION] «durée» — savoir une longue période avant le contact avec les Européens — pour établir l'existence des droits n'avait pas d'effet sur son opinion quant aux limites territoriales du droit. Il était d'accord avec la façon dont le juge de première instance avait appliqué le critère énoncé dans *Baker Lake*. En particulier, il était d'avis que la question importante était de savoir si les pratiques faisaient partie intégrante de la vie sociale des autochtones ou si elles étaient seulement le résultat des influences européennes. Le juge Macfarlane a conclu qu'il ne convenait pas qu'il intervienne et substitue son point de vue à celui du juge de première instance quant au poids à accorder à la preuve. Par conséquent, si les appelants obtenaient gain de cause en appel sur la question de l'extinction, ils avaient le droit d'assurer leur subsistance dans le territoire délimité par le juge en chef McEachern sur la carte 5.

(c) *Jurisdiction*

Macfarlane J.A. essentially agreed with the trial judge with respect to his analysis of the jurisdiction, or sovereignty issue. He characterized the claim as the right to control and manage the use of lands and resources in the territory, as well as the right to govern the people within the territory, to the possible exclusion of laws of general application within the province. He stated that the Gitksan and Wet'suwet'en peoples do not need a court declaration to permit internal self-regulation, if they consent to be governed. However, the rights of self-government encompassing a power to make general laws governing the land, resources, and people in the territory are legislative powers which cannot be awarded by the courts. Such jurisdiction is inconsistent with the *Constitution Act, 1867* and its division of powers. When the Crown imposed English law on all the inhabitants of the colony and when British Columbia entered Confederation, the aboriginal people became subject to Canadian (and provincial) legislative authority. For this reason, the claim to jurisdiction failed.

(d) *Extinguishment*

Macfarlane J.A. began by noting that treaty-making is the most desirable way to resolve aboriginal land issues. However, he noted that prior to 1982, the rights of aboriginal people could be extinguished by the unilateral act of the sovereign, without the consent of the aboriginal people. Intention to extinguish must be clear and plain. Although express language is not strictly necessary, the honour of the Crown requires its intentions to be either express or manifested by unavoidable implication. Unavoidable implication should not be easily found — it occurs only where the interpretation of the instrument permits no other result. This, in turn, depends on the nature of the aboriginal interest and of the impugned grant.

c) *La compétence*

Le juge Macfarlane s'est dit essentiellement d'accord avec l'analyse du juge de première instance relativement à la question de la compétence ou souveraineté. Il a dit que l'on revendiquait le droit de contrôler et de gérer l'utilisation des terres et des ressources du territoire, ainsi que le droit de gouverner la population y habitant, d'une manière pouvant aller jusqu'à l'exclusion des lois d'application générale en vigueur dans la province. Il a affirmé que les Gitksan et les Wet'suwet'en n'ont pas besoin d'une déclaration de la cour autorisant l'autoréglementation interne, s'ils consentent à être gouvernés. Cependant, les droits relatifs à l'autonomie gouvernementale, y compris le pouvoir de faire des lois générales régissant les terres, les ressources et la population du territoire, sont des pouvoirs législatifs qui ne peuvent être accordés par les tribunaux. Une telle compétence est incompatible avec la *Loi constitutionnelle de 1867* et le partage des pouvoirs qu'elle établit. Lorsque la Couronne a imposé le droit anglais à tous les habitants de la colonie et lorsque la Colombie-Britannique est entrée dans la Confédération, les autochtones sont devenus assujettis aux pouvoirs législatifs du Canada (et de la province). Pour ce motif, la revendication relative à la compétence a été rejetée.

d) *L'extinction*

Le juge Macfarlane a d'abord indiqué que la conclusion de traités est la façon la plus souhaitable de résoudre les questions relatives aux terres autochtones. Cependant, il a souligné que, avant 1982, les droits des peuples autochtones pouvaient être éteints par acte unilatéral du souverain, sans leur consentement. L'intention d'éteindre un droit doit être claire et expresse. Bien qu'il ne soit pas strictement nécessaire que l'intention soit exprimée en termes exprès, l'honneur de la Couronne exige que ses intentions ressortent de façon expresse ou par implication inéluctable. Une implication inéluctable n'est pas facile à trouver — elle n'existe que lorsque l'interprétation de l'instrument ne permet aucun autre résultat. Ce résultat dépend pour sa part de la nature de l'intérêt autochtone en jeu et de la concession contestée.

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Macfarlane J.A. disagreed with the trial judge that the colonial instruments manifested the required clear and plain intention to extinguish all aboriginal interests in land. The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. It is not inevitable, upon a reading of the statutory scheme, that the aboriginal interest was to be disregarded. They did not foreclose the possibility of treaties or of co-existence of aboriginal and Crown interests. Similarly, even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Moreover, it is clear that, at common law, two or more interests in land less than fee simple can co-exist. However, since the record was not sufficiently specific to permit the detailed analysis of such issues, Macfarlane J.A. suggested that these issues be dealt with in negotiation. He concluded that extinguishment by a particular grant needed to be determined on a case by case basis.

Le juge Macfarlane n'était pas d'accord avec le juge de première instance que les instruments coloniaux manifestaient l'intention claire et expresse requise pour éteindre tous les droits fonciers des autochtones. Les instruments coloniaux en question visaient à faciliter la colonisation ordonnée de la province et à donner à la Couronne le pouvoir d'octroyer des concessions aux tiers. La lecture des textes législatifs n'amène pas inévitablement à conclure qu'il ne fallait pas tenir compte des droits des autochtones. Ces textes ne faisaient pas obstacle à la possibilité de conclure des traités ou à la coexistence des droits des autochtones et de ceux de la Couronne. De la même façon, même un acte de concession en fief simple à un tiers n'écarter pas nécessairement l'utilisation par les autochtones du territoire visé. Par exemple, le fait qu'une terre non cultivée et inoccupée soit détenue en fief simple n'exclut pas nécessairement l'exercice de droits de chasse. En outre, il est clair que, en common law, deux intérêts ou plus qui sont inférieurs au fief simple peuvent coexister. Cependant, comme le dossier n'était pas suffisamment précis pour permettre l'analyse détaillée de ces questions, le juge Macfarlane a suggéré qu'elles fassent l'objet de négociations. Il a conclu que la question de savoir si une concession donnée entraînait l'extinction de certains droits devait être tranchée au cas par cas.

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Macfarlane J.A. considered the constitutional power of the province to extinguish aboriginal rights after 1871, and in particular, whether valid provincial legislation could extinguish aboriginal rights in land by incidental effect. After 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" was given to the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. Valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, their status, or their core values (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309). However, the proposition that provincial laws could extinguish Indian title by incidental effect

Le juge Macfarlane a examiné le pouvoir constitutionnel de la province d'éteindre des droits ancestraux après 1871, et, en particulier, la question de savoir si une loi provinciale valide pouvait éteindre de façon incidente des droits fonciers ancestraux. Après 1871, la compétence exclusive de légiférer sur «les Indiens et les terres réservées aux Indiens» a été attribuée au gouvernement fédéral par le par. 91(24) de la *Loi constitutionnelle de 1867*. Une loi provinciale valide peut s'appliquer aux Indiens s'il s'agit d'une loi d'application générale et non d'une loi touchant leur quiddité indienne ou indianité, leur statut ou leurs valeurs fondamentales (*Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309). Cepen-

must be examined in light of federal authority relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial legislation were to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction, as such a law would “trench on the very core of the subject matter of s. 91(24)” (at p. 169). Hence, he concluded that provincial legislatures do not have the constitutional competence to extinguish common law aboriginal rights. Moreover, extinguishment by adverse dominion could only be accomplished by the federal government. Similarly, s. 88 of the *Indian Act* did not assist the province. Laws of general application which do not affect the “core of Indianness” apply by their own force. However, provincial laws which do affect that core rely on s. 88, which referentially incorporates them into federal law. For s. 88 of the *Indian Act* to give the province authority to extinguish aboriginal rights, it would have to show a clear and plain intention to do so. Since no such intention exists in s. 88 in particular or the *Indian Act* in general, it cannot authorize outright extinguishment. However, it may authorize provincial regulation of and interference with aboriginal rights. Of course, now the operation of such regulations are now subject to s. 35 of the *Constitution Act, 1982*.

(e) *Relief Allowed*

Macfarlane J.A. granted a declaration that the plaintiffs’ aboriginal rights were not all extinguished by the colonial instruments enacted prior to British Columbia’s entry into Confederation in

dant, la proposition suivant laquelle les lois provinciales pourraient éteindre un titre indien de manière incidente doit être examinée à la lumière de la compétence du fédéral sur les questions indiennes et en tenant compte du point de vue des autochtones. Les terres traditionnelles des Indiens font partie intégrante de leur mode de vie traditionnel et de la façon dont ils se définissent. Si une loi provinciale avait pour effet de dépouiller les autochtones du droit d’utiliser et d’occuper leurs terres traditionnelles, il s’agirait d’une intrusion inadmissible dans un champ de compétence fédéral, étant donné qu’une telle loi [TRADUCTION] «empiéterait sur l’essentiel de l’objet du par. 91(24)» (à la p. 169). Par conséquent, le juge Macfarlane a conclu que les législatures provinciales n’ont pas, en vertu de la Constitution, compétence pour éteindre les droits ancestraux reconnus par la common law. En outre, seul le gouvernement fédéral peut éteindre des droits par possession adversative. De même, l’art. 88 de la *Loi sur les Indiens* n’a été d’aucun secours pour la province. Les lois d’application générale qui ne touchent pas le «fondement même de la quiddité indienne» s’appliquent d’elles-mêmes. Au contraire, celles qui touchent à ce fondement s’appuient sur l’art. 88, qui les incorpore par renvoi au droit fédéral. Pour que l’art. 88 de la *Loi sur les Indiens* accorde à la province le pouvoir d’éteindre des droits ancestraux, il faudrait trouver dans son texte une intention claire et expresse à cet égard. Comme on ne trouve une telle intention ni dans l’art. 88 en particulier, ni dans la *Loi sur les Indiens* en général, cet article ne peut autoriser d’extinction pure et simple. Il peut cependant autoriser la réglementation par les provinces des droits ancestraux et des atteintes à ces droits. Évidemment, l’application d’une telle réglementation est maintenant assujettie à l’art. 35 de la *Loi constitutionnelle de 1982*.

e) *La réparation accordée*

Le juge Macfarlane a prononcé une déclaration portant que les droits ancestraux des demandeurs n’avaient pas tous été éteints par les instruments coloniaux édictés avant l’entrée de la Colombie-

1871. He also granted a declaration that the appellants have unextinguished, non-exclusive aboriginal rights, formerly protected at common law, and now protected under s. 35(1) of the *Constitution Act, 1982*. These rights are not ownership or property rights, and are located within the area indicated on Map 5. Their characteristics may vary depending on the particular context in which the rights are said to exist, and are dependent on the specific facts of each case.

Britannique dans la Confédération en 1871. Il a aussi prononcé une déclaration portant que les appelants possèdent des droits ancestraux non éteints et non exclusifs, auparavant protégés par la common law et qui le sont maintenant par le par. 35(1) de la *Loi constitutionnelle de 1982*. Ces droits, qui ne sont ni la propriété ni des droits de propriété, existent à l'intérieur du territoire délimité sur la carte 5. Leurs caractéristiques peuvent varier en fonction du contexte où ils sont invoqués, et ils dépendent des faits propres à chaque affaire.

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Macfarlane J.A. did not grant a declaration with respect to jurisdiction over land and resources or people within the territory, leaving this to negotiation. He also did not interfere with the decision of the trial judge that the claim for damages must be dismissed. He noted that the parties wished to negotiate the precise location, scope, content and consequences of the aboriginal rights which the trial judge has held may be exercised in that part of the territory, the approximate area of which is illustrated on Map 5. However, no order of the court was required to permit the parties to enter into such negotiations.

Le juge Macfarlane n'a pas prononcé de déclaration relativement à la compétence sur les terres, les ressources ou la population du territoire, laissant ces questions à la négociation. Il n'a pas modifié non plus la décision du juge de première instance rejetant la demande en dommages-intérêts. Il a souligné que les parties désiraient négocier l'emplacement, la portée, les conséquences et le contenu précis des droits ancestraux qui, de conclure le juge de première instance, peuvent être exercés dans cette partie du territoire dont les limites approximatives sont indiquées sur la carte 5. Cependant, aucune ordonnance de la cour n'était nécessaire pour permettre aux parties d'engager de telles négociations.

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Finally, Macfarlane J.A. stated that he would not give effect to the alternative declarations sought by the province relating to the alleged extinguishment of aboriginal rights by grants of fee simple and of lesser interests in the period from 1871-1982. The province did not have the power after 1871 to extinguish aboriginal rights. However, some provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s. 88 of the *Indian Act*. The effect of fee simple and lesser grants on the particular aboriginal rights would require a detailed and complete analysis, which neither the record nor the

Finalement, le juge Macfarlane a affirmé qu'il ne donnerait pas effet aux déclarations subsidiaires demandées par la province quant à sa prétention que des droits ancestraux avaient été éteints par suite de la concession, de 1871 à 1982, de fiefs simples et d'intérêts inférieurs au fief simple. La province n'avait plus, après 1871, le pouvoir d'éteindre des droits ancestraux. Cependant, certaines lois provinciales relatives aux terres et aux ressources et affectant les droits ancestraux peuvent produire leurs effets à titre de lois fédérales par application de l'art. 88 de la *Loi sur les Indiens*. L'effet de la concession de fiefs simples ou d'intérêts inférieurs sur les droits ancestraux en cause aurait nécessité une analyse approfondie que ni le dossier, ni les observations présentées ne permettraient d'effectuer. Le juge Macfarlane n'a

submissions permitted. He made no order for costs, adopting the reasons of the trial judge.

(2) Wallace J.A. (concurring)

(a) *Scope of Appellate Review*

Wallace J.A. considered the appropriate principles for appellate review of a trial judge's findings of fact. An appellate court should find error on the part of the trial judge with respect to those aspects of the finding of facts which involve questions of credibility or weight to be given the evidence of a witness only if it is established that the trial judge made some "palpable and overriding error" which affected his assessment of the material facts. Such an error exists in three situations: firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable. In reversing the trial judge for "palpable and overriding error" the Court of Appeal must designate the specific error and state why the nature of the error justifies reversing the trial judge's finding of fact. Wallace J.A. held that these principles applied to the trial judge's determination of the nature and territorial scope of the aboriginal activities, the question of jurisdiction and control over the territory, and the weight to be attributed to the evidence of the various witnesses.

(b) *General Principles*

Wallace J.A. stated that aboriginal rights of occupation and use originate in the Indians' historic occupation and use of their tribal lands, and is recognized by the common law. Unlike the trial judge, he recognized that these rights may resem-

rendu aucune ordonnance concernant les dépens, adoptant les motifs du juge de première instance.

(2) Le juge Wallace (opinion concordante)

a) *La portée de l'examen en appel*

Le juge Wallace s'est penché sur les principes à suivre dans le cadre de l'examen, en appel, des conclusions de fait du juge de première instance. Une cour d'appel ne devrait pas conclure que le juge de première instance a fait erreur sur les aspects des conclusions de fait qui se rattachent à la question de la crédibilité ou de la valeur probante d'un témoignage que s'il est établi que le juge de première instance a commis une [TRADUCTION] «erreur manifeste et dominante» ayant influé sur son appréciation des faits substantiels. Une telle erreur existe dans les trois cas suivants: premièrement, lorsqu'il peut être démontré qu'une conclusion de fait importante tirée par le juge de première instance ne s'appuie sur aucune preuve; deuxièmement, lorsque le juge de première instance a omis à tort de tenir compte d'éléments de preuve admissibles qui étaient pertinents et substantiels relativement à la question dont était saisi le tribunal; troisièmement, lorsque la conclusion de fait du juge de première instance ne peut être qualifiée de raisonnable. La cour d'appel qui infirme la décision du juge de première instance en raison d'une «erreur manifeste et dominante» doit indiquer de façon précise l'erreur qui a été commise et dire pourquoi la nature de cette erreur justifie l'infirmer de la conclusion de fait du juge de première instance. Le juge Wallace a statué que ces principes s'appliquaient à la détermination par le juge de première instance de la nature et de la portée territoriale des activités autochtones, à la question du contrôle du territoire et de la compétence sur celui-ci et au poids à accorder aux divers témoignages.

b) *Les principes généraux*

Le juge Wallace a affirmé que les droits ancestraux d'occupation et d'utilisation tirent leur origine de l'occupation et de l'utilisation historiques par les Indiens de leurs terres tribales, et que ces droits sont reconnus par la common law. Contrai-

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ble a proprietary title, not unlike those in western property law systems, or they may be restricted to certain uses of the land. He set out the requirements for establishing aboriginal rights, varying from the *Baker Lake* test used by the trial judge. In Wallace J.A.'s formulation of the test, the practices supporting the rights in question had to be integral to the claimants' distinctive and traditional society or culture. Moreover, he resolved the trial judge's concerns about the requirement of exclusivity as follows: if the plaintiffs claim exclusive occupation and use, the traditional occupation had to be to the exclusion of other organized societies.

(c) *Aboriginal Ownership*

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Wallace J.A. considered there to be reasonable support for the trial judge's conclusions regarding the nature and scope of the appellants' interest in the territory. The standard of occupation required to support the claim of ownership depended on the nature of the interest. The appellants' claim was to manage the lands and natural resources. This suggests exclusive control and possession of the territory, requiring the appellants to demonstrate exclusive possession. Since they could not do so, he concluded that the trial judge correctly dismissed their claim for ownership.

(d) *Aboriginal Rights of Occupation and Use of Traditional Lands*

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Even if the appellants' claim were characterized as a claim for aboriginal title, rather than ownership, Wallace J.A. agreed with the criteria applied by the trial judge: the occupation of specific territory, the exclusion of other organized societies, occupation at the time of British sovereignty and long-time aboriginal practices. Applying these principles to the trial judge's findings of fact, Wallace J.A. concluded that the appellants had not

rement au juge de première instance, il a reconnu que ces droits peuvent ressembler à un titre de propriété, qu'ils ne sont pas sans similitudes avec ceux reconnus dans les systèmes occidentaux de droit des biens et qu'ils peuvent se limiter à certaines utilisations du territoire. Il a énoncé les exigences à satisfaire pour démontrer l'existence de droits ancestraux, s'écarter du critère établi dans *Baker Lake* qu'avait utilisé le juge de première instance. Dans sa formulation du critère, le juge Wallace a indiqué que les pratiques sous-tendant les droits en question devaient faire partie intégrante de la société ou culture traditionnelle distinctive des demandeurs. Il a en outre dissipé de la façon suivante l'incertitude du juge de première instance quant à l'exigence d'exclusivité: si les demandeurs revendiquent une occupation et une utilisation exclusives, l'occupation traditionnelle doit avoir été à l'exclusion d'autres sociétés organisées.

c) *Droit de propriété ancestral*

Le juge Wallace a considéré que les conclusions du juge de première instance au sujet de la nature et de la portée de l'intérêt des appelants dans le territoire étaient raisonnablement étayées. La norme d'occupation exigée pour appuyer la revendication de la propriété dépendait de la nature de l'intérêt en cause. Les appelants revendiquaient la gestion des terres et des ressources naturelles. Cela suppose la possession et le contrôle exclusifs du territoire et exige que les appelants fassent la démonstration d'une possession exclusive. Comme ils n'y sont pas parvenus, il a conclu que le juge de première instance avait eu raison de rejeter leur revendication du droit de propriété.

d) *Droits ancestraux d'occupation et d'utilisation des terres traditionnelles*

Même si la revendication des appelants était qualifiée de revendication du titre aborigène, plutôt que de revendication du droit de propriété, le juge Wallace a souscrit aux critères appliqués par le juge de première instance: l'occupation d'un territoire précis, l'exclusion des autres sociétés organisées, l'occupation au moment de l'affirmation de la souveraineté des Britanniques et l'existence de pratiques autochtones de longue date. Appliquant

established a manifest or palpable error in concluding that the appellants' rights were non-exclusive, and confined to user rights. However, he was of the view that the court was not in a position to express an opinion on the specific territorial scope of these rights.

(e) *Aboriginal Jurisdiction or Self-Government*

Wallace J.A. agreed that the claim for "jurisdiction" was for an undefined form of government over land and people in the territory, which would be paramount as against provincial laws in the case of a conflict. Wallace J.A. held, at p. 225, that this claim was "incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846". Moreover, British Columbia's entry into Canada in 1871 exhaustively distributed legislative power between the province and the federal government. Section 35 of the *Constitution Act, 1982* could not revive and protect any sovereignty rights which the Gitksan and Wet'suwet'en may have had.

(f) *Extinction*

Wallace J.A. agreed with Macfarlane J.A. on this issue. He set out the test ("clear and plain intention") and decided that the rights of use and occupation discussed above had not been extinguished.

(g) *Miscellaneous*

Wallace J.A. agreed that the appellants' damages claim should be dismissed, without deciding whether damages might be payable for wrongful interference with the Gitksan's and Wet'suwet'en's non-exclusive aboriginal rights in the territory. He also considered the appellants' claim that the appeal be adjourned in part for two years, during

ces principes aux conclusions de fait du juge de première instance, le juge Wallace a statué que les appelants n'avaient pas établi que le juge avait commis une erreur manifeste ou dominante en concluant que les droits des appelants n'étaient pas exclusifs et qu'ils se limitaient à des droits d'utilisation. Toutefois, il était d'avis que la cour n'était pas en mesure d'exprimer une opinion quant à la portée territoriale précise de ces droits.

e) *Droit ancestral à la compétence ou l'autonomie gouvernementale*

Le juge Wallace a convenu que la revendication relative à la «compétence» visait une forme indéterminée de gouvernement sur les terres et la population du territoire, qui aurait prépondérance sur les lois provinciales en cas de conflit. Le juge Wallace a conclu, à la p. 225, que cette revendication était [TRADUCTION] «incompatible avec tous les principes touchant la souveraineté parlementaire dont était investi le parlement impérial en 1846». Qui plus est, à l'entrée de la Colombie-Britannique dans le Canada en 1871, le pouvoir législatif avait été réparti de manière exhaustive entre la province et le gouvernement fédéral. L'article 35 de la *Loi constitutionnelle de 1982* ne pouvait faire renaître et protéger quelque droit à la souveraineté qu'avaient pu avoir les Gitksan et les Wet'suwet'en.

f) *L'extinction*

Le juge Wallace a souscrit à la décision du juge Macfarlane sur cette question. Il a exposé le critère applicable (celui de l'«intention claire et expresse») et a décidé que les droits d'utilisation et d'occupation examinés précédemment n'avaient pas été éteints.

g) *Les autres questions*

Le juge Wallace a convenu que la demande en dommages-intérêts des appelants devait être rejetée, sans toutefois décider si des dommages-intérêts pourraient être payables pour atteinte fautive aux droits ancestraux non exclusifs des Gitksan et des Wet'suwet'en sur le territoire. Il a aussi examiné la demande des appelants que l'appel soit

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which time the parties would attempt to negotiate an agreement regarding the geographic parameters of the claimed territory. The court would retain jurisdiction to determine issues or refer them to the trial court if the parties failed to reach an agreement during the two-year period. However, he noted that the role of the Court of Appeal is not to tailor its judgment to facilitate negotiation. The Court of Appeal is restricted to declaring the legal status of rights claimed, on the basis of the trial record.

(3) Lambert J.A. (dissenting)

(a) *General Principles*

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Lambert J.A. considered at length the leading cases with regard to aboriginal rights in British Columbia. He set out a number of conclusions. He recognized that aboriginal title and aboriginal rights are *sui generis*, and not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts. He noted that aboriginal title is a form of aboriginal rights, and is therefore protected by s. 35. All rights arise from the practices, customs and traditions which form an integral part of the distinctive culture of the aboriginal people, and were part of the social fabric of aboriginal society at the time of the arrival of the first Europeans. This co-existed with the settlers' common law rights from the time of contact until sovereignty. After that time, aboriginal rights that continued as part of the social fabric of the aboriginal society were protected by both their own internal institutions and the common law.

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Lambert J.A. believed that aboriginal rights were not frozen at the time of contact. Rather, they must be permitted to maintain contemporary relevance in relation to the needs of the holders of the rights as those needs change along with the changes in overall society. The rights may be individual, or they may be collective, depending on

ajourné en partie pendant deux ans, période au cours de laquelle les parties tenteraient de négocier un accord sur les paramètres géographiques du territoire revendiqué. La cour conserverait compétence pour trancher les questions en litige ou les renvoyer au tribunal de première instance si les parties ne parvenaient pas à s'entendre pendant ces deux ans. Toutefois, il a souligné que le rôle de la Cour d'appel n'est pas de façonner sa décision afin de faciliter les négociations. La Cour d'appel n'a d'autre rôle que celui de statuer sur l'existence juridique des droits revendiqués au vu du dossier de première instance.

(3) Le juge Lambert (dissident)

a) *Les principes généraux*

Le juge Lambert a longuement examiné les arrêts clés en matière de droits ancestraux en Colombie-Britannique. Il a énoncé un certain nombre de conclusions. Il a reconnu que le titre aborigène et les droits ancestraux avaient un caractère *sui generis* et que ces notions n'étaient pas faciles à expliquer par l'analyse juridique occidentale ordinaire ou par les concepts de common law. Il a souligné que le titre aborigène est une forme de droit ancestral et qu'il est donc protégé par l'art. 35. Tous ces droits découlent des coutumes, pratiques et traditions qui font partie intégrante de la culture distinctive des autochtones visés et qui faisaient partie du tissu social de la société autochtone au moment de l'arrivée des premiers Européens. À partir du moment du contact avec les Européens jusqu'à l'affirmation de la souveraineté, ces droits ont coexisté avec ceux reconnus aux colons par la common law. Par la suite, les droits ancestraux qui ont continué de faire partie du tissu social de la société autochtone étaient protégés par leurs propres institutions internes et par la common law.

Le juge Lambert a estimé que les droits ancestraux n'ont pas été figés au moment du contact avec les Européens, mais qu'il faut plutôt permettre à ces droits de garder leur pertinence dans le monde actuel eu égard aux besoins de leurs titulaires, besoins qui changent à mesure qu'évolue l'ensemble de la société. Ces droits peuvent être

how they were and are treated by aboriginal people. Moreover, they do not come from aboriginal practice dating from time immemorial. Rather, they come, under the doctrine of continuity, from the practices, customs and traditions of the aboriginal people.

Aboriginal rights are neither abrogated by the fact that similar rights may be held by non-aboriginal people nor because the holders of the rights participate in the wage or cash economy. A right to occupy, possess, use and enjoy land to the exclusion of all others does not mean that it must be confined to the activities carried on in 1846, or that its exercise requires a renunciation of the contemporary world.

(b) *Extinguishment*

Lambert J.A. considered the test for extinguishment from *Calder*, and expressly rejected Judson J.'s views. He derived the authority to do so from the way in which extinguishment was dealt with in *Sparrow*. In considering implicit extinguishment, he stated that it will only be held to occur where no other conclusion is possible from the particular instrument or conduct. It could not take place through adverse dominion. In the case of an inconsistency between a Crown grant of land and aboriginal title, the title should not necessarily give way in the absence of a clear and plain intention to extinguish. In any case, no grants or other interests were granted in the territory prior to 1871, and after that date, the British Columbia legislature had no power to legislate to extinguish, by adverse dominion, or otherwise. Lambert J.A. recognized, at p. 312, that because of s. 91(24) of the *Constitution Act, 1867*, and the doctrine of interjurisdictional immunity, provincial legislation could not affect "Indians in their Indianness". This included aboriginal rights, since they are an integral part of aboriginal culture. This is not affected by s. 88 of the *Indian Act*.

soit individuels soit collectifs, selon la façon dont les autochtones les ont traités et les traitent. En outre, ils ne découlent pas de pratiques autochtones immémoriales. Ils viennent plutôt, selon la doctrine de la continuité, des coutumes, pratiques et traditions des autochtones.

Des droits ancestraux ne sont pas abrogés parce qu'il est possible que des droits similaires soient détenus par des non-autochtones, ni parce que leurs titulaires participent à l'économie salariale ou monétaire. Le droit d'occuper, de posséder, d'utiliser un territoire et d'en jouir à l'exclusion d'autrui ne signifie pas que ce droit doive se limiter aux activités pratiquées en 1846, ou que son exercice requière la renonciation au monde contemporain.

(b) *L'extinction*

Le juge Lambert a examiné le critère établi dans l'arrêt *Calder* à l'égard de l'extinction et il a expressément rejeté l'opinion du juge Judson. Pour ce faire, il s'est appuyé sur la manière dont cette question a été traitée dans *Sparrow*. Relativement à l'extinction implicite, il a affirmé qu'on ne conclura à l'existence d'une telle situation que dans les cas où il est impossible de tirer quelque autre conclusion de l'instrument ou de la conduite en cause. Il ne peut y avoir extinction par possession adversative. En cas d'incompatibilité entre une concession accordée par l'État et un titre aborigène, le titre ne devrait pas nécessairement disparaître en l'absence d'une intention claire et expresse de l'éteindre. De toute façon, ni concession ni quelque autre intérêt visant le territoire en cause n'ont été accordés avant 1871 et, après cette date, la législature de la Colombie-Britannique n'avait pas le pouvoir de légiférer à des fins d'extinction, par possession adversative ou autrement. Le juge Lambert a reconnu à la p. 312 que, en raison du par. 91(24) de la *Loi constitutionnelle de 1867* et de la doctrine de l'exclusivité des compétences, la législation provinciale ne pouvait affecter les [TRADUCTION] «Indiens dans leur indianité», y compris leurs droits ancestraux, étant donné que ces droits font partie intégrante de la culture autochtone. L'article 88 de la *Loi sur les Indiens* ne change rien à cette situation.

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Lambert J.A. applied the same principles to a consideration of whether the right to self-government had been extinguished. Neither the assertion of sovereignty nor the colonial enactments mentioned by the trial judge were sufficient to extinguish aboriginal rights in the claimed territory. He saw no incompatibility between statements that the Crown owned the land of the province and the notion that aboriginal title was a burden on the Crown's radical title. Moreover, there was no "inescapable inference" that the colonial enactments were intended to extinguish aboriginal interests. If this were the case, aboriginal peoples would instantly become trespassers on any lands not reserved for them as soon as the Crown took title. Finally, the evidence that the aboriginal peoples of northern British Columbia surrendered their title under Treaty No. 8 also suggested that they had title interests to surrender.

(c) *Findings at Trial*

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Lambert J.A. considered the factual findings made by the trial judge and made a number of general observations. First, if a finding of fact is necessary to the decision in the case, it should be given more deference than a fact which is merely made in the course of the decision or for some incidental reason. Second, findings of historical fact based on historical or anthropological evidence given by historians and anthropologists should be given only the kind of weight that other historians or anthropologists might have given them. These social scientists do not always agree, circumstances change, and new material is discovered and interpreted. Third, the appellants' oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard so long as it is enough to support an air of reality. Fourth, with the election of an NDP government in British Columbia in 1991, the province reconsidered its legal stance in this case. As such, it invited the court to confirm the existence of aboriginal rights of unspecified content over unspecified areas and to permit the parties to negotiate the precise content and the precise areas. In Lambert J.A.'s view, the

Le juge Lambert a appliqué les mêmes principes à la question de savoir si le droit à l'autonomie gouvernementale avait été éteint. Ni l'affirmation de la souveraineté ni les textes de loi coloniaux mentionnés par le juge de première instance n'ont suffi pour éteindre les droits ancestraux dans le territoire revendiqué. Il n'a vu aucune incompatibilité entre les affirmations selon lesquelles l'État est propriétaire des terres de la province et la notion que le titre aborigène constituait une charge grevant le titre absolu de l'État. En outre, il n'y avait aucune [TRADUCTION] «inférence inéluctable» que les textes de lois coloniaux visaient l'extinction des droits ancestraux. Si cela avait été le cas, les autochtones seraient automatiquement devenus des intrus sur toute terre qui ne leur était pas réservée dès que l'État en acquerrait le titre. Finalement, la preuve indiquant que les autochtones du nord de la Colombie-Britannique ont cédé leur titre aux termes du Traité n° 8 suggérerait également qu'ils avaient des droits de cette nature à céder.

c) *Les conclusions de fait en première instance*

Le juge Lambert a examiné les conclusions de fait tirées par le juge de première instance et a fait un certain nombre d'observations générales. Premièrement, si une conclusion de fait est nécessaire pour rendre décision dans une affaire, une plus grande retenue devrait être manifestée à son égard qu'à l'endroit de celles qui sont simplement tirées dans le cours de la décision ou pour quelque raison incidente. Deuxièmement, il ne devrait pas être accordé aux conclusions de fait d'ordre historique fondées sur les témoignages d'historiens et d'anthropologues une valeur probante plus grande que celle qu'ont pu leur accorder d'autres historiens ou anthropologues. Ces spécialistes des sciences sociales ne sont pas toujours d'accord, les circonstances changent et de nouveaux éléments sont découverts et interprétés. Troisièmement, le témoignage des appelants devrait, comme tout témoignage, être apprécié en regard de la valeur probante de la preuve contraire et non en regard d'une norme absolue, dans la mesure où il est suffisamment vraisemblable. Quatrièmement, à la suite de l'élection du gouvernement du parti néo-démocrate en Colombie-Britannique en 1991, la province a révisé sa position juridique dans cette

Crown, by adopting the position that it wished to negotiate the content and territorial scope of aboriginal rights, must be taken to have waived the argument that the findings of the trial judge must stand and that any aboriginal rights held by the Gitksan and Wet'suwet'en peoples must be confined to non-exclusive sustenance rights over the area covered by Map 5. In short, reliance on the findings of fact of the trial judge is entirely inconsistent with negotiation.

Nonetheless, Lambert J.A. was of the view that the findings of fact with respect to boundaries and with respect to the scope and content of aboriginal rights, including both rights in land and rights of self-government, cannot stand even in accordance with the usual principles governing the consideration of findings of fact, because they are flawed by errors of law.

With regard to the ownership claim, Lambert J.A. identified the following errors in the trial judge's reasons. In his view, the trial judge erred: (1) in not treating the ownership claim as a claim to aboriginal title and applied incorrect legal standards as a result; (2) in treating the claim to aboriginal title as a claim to a proprietary interest in land; (3) in applying a test of indefinite or long, long time use and occupation before the assertion of sovereignty; (4) in treating evidence of commercial interaction with the first Europeans as not being evidence of aboriginal practices; (5) in treating the rights to trap as being the exercise of rights other than aboriginal rights; (6) in rejecting evidence about commercial trapping and the evidence of Dr. Ray, a historical geographer who gave evidence at trial; (7) in rejecting possession, occupation, use, and enjoyment in a social sense as sufficient to establish aboriginal title; (8) in treating the test of possession and occupation as being whether

affaire. En conséquence, elle a invité la cour à confirmer l'existence de droits ancestraux de contenu indéterminé et visant des territoires non précisés, et à permettre aux parties de négocier ce contenu et ces territoires. Selon le juge Lambert, il faut considérer que, ayant décidé qu'il désirait négocier le contenu et la portée territoriale des droits ancestraux, l'État est réputé avoir renoncé à l'argument que les conclusions du juge de première instance doivent être maintenues et que tout droit ancestral dont sont titulaires les Gitksan et les Wet'suwet'en se limite à des droits d'exploitation à des fins de subsistance non exclusifs visant le territoire délimité par la carte 5. Bref, le fait de se fonder sur les conclusions de fait du juge de première instance est tout à fait incompatible avec la tenue de négociations.

Néanmoins, le juge Lambert était d'avis que les conclusions de fait relatives aux limites du territoire ainsi qu'à la portée et au contenu des droits ancestraux, y compris les droits fonciers et les droits relatifs à l'autonomie gouvernementale, ne sauraient être maintenues, même en regard des principes ordinaires régissant l'appréciation des conclusions de fait, étant donné qu'elles sont entachées d'erreurs de droit.

En ce qui concerne la revendication de la propriété, le juge Lambert a décelé les erreurs suivantes dans les motifs du juge de première instance. Selon lui, le juge de première instance a fait erreur (1) en ne traitant pas la revendication de la propriété comme la revendication du titre aborigène, et en appliquant, en conséquence, des normes juridiques incorrectes; (2) en traitant la revendication du titre aborigène comme la revendication d'un intérêt de propriété sur le territoire; (3) en appliquant le critère de l'utilisation et de l'occupation pendant une période indéfinie ou très longue avant l'affirmation de la souveraineté; (4) en considérant que la preuve relative aux échanges commerciaux avec les premiers Européens n'était pas une preuve des pratiques autochtones; (5) en considérant les droits de piégeage comme l'exercice de droits autres que des droits ancestraux; (6) en rejetant la preuve relative au piégeage commercial et le témoignage du professeur Ray, spécialiste

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there was a law which would have required a trespasser to depart; (9) in considering that aboriginal rights cannot be held jointly by more than one people; (10) in not concluding that aboriginal title could rest on occupation, possession, use, and enjoyment of land even though that occupation may have diminished in the period after contact; (11) in his treatment of blanket extinguishment of aboriginal title; and (12) in concluding that all aboriginal rights had been extinguished by the colonial instruments. These errors of law led to an incorrect conclusion on the part of the trial judge about the existence of aboriginal title. His findings of fact can be reconsidered on appellate review.

de la géographie historique qui a témoigné au procès; (7) en rejetant les notions de possession, d'occupation, d'utilisation et de jouissance prises dans leur sens social comme des éléments suffisants pour établir l'existence d'un titre aborigène; (8) en considérant que le critère de la possession et de l'occupation revenait à se demander s'il existait une règle de droit qui aurait forcé un intrus à quitter les lieux; (9) en considérant que des droits ancestraux ne peuvent être détenus conjointement par différents peuples; (10) en ne concluant pas que le titre aborigène pouvait reposer sur l'occupation, la possession, l'utilisation et la jouissance du territoire, même si cette occupation a pu diminuer dans la période qui a suivi le contact avec les Européens; (11) en examinant comme il l'a fait la question de l'extinction générale du titre aborigène; (12) en concluant que tous les droits ancestraux avaient été éteints par les instruments coloniaux. Ces erreurs de droit ont entraîné une conclusion erronée de la part du juge de première instance quant à l'existence du titre aborigène. Ses conclusions de fait peuvent être réexaminées en appel.

56 With regard to the jurisdiction claim, Lambert J.A. stated that the trial judge erred: (1) in treating the claim to jurisdiction as a claim to govern territory and assert sovereignty over the territory; (2) in trying to define the appellants' claim in terms of the answers given by one witness in cross-examination; (3) in concluding that the claim to jurisdiction must fail because the nature of aboriginal self-government and self-regulation was such that it does not produce a set of binding and enforceable laws; and (4) in considering that the existence of a legislative institution is an essential part of the existence of an aboriginal right to self-government. Because of these errors of law, the trial judge's conclusions were wrong.

En ce qui a trait à la revendication relative à la compétence, le juge Lambert a affirmé que le juge de première instance avait fait erreur (1) en considérant cette revendication comme la revendication par les demandeurs du droit de gouverner le territoire et d'affirmer leur souveraineté sur celui-ci; (2) en essayant de définir la revendication des appelants au moyen des réponses données par un témoin en contre-interrogatoire; (3) en concluant que la revendication relative à la compétence doit être rejetée parce que l'autonomie gouvernementale et l'autoréglementation autochtones étaient de nature telle qu'elles ne constituent pas un ensemble de règles de droit applicables et obligatoires; (4) en considérant que l'existence d'une institution législative est un élément essentiel de l'existence d'un droit ancestral à l'autonomie gouvernementale. En raison de ces erreurs de droit, les conclusions du juge de première instance étaient erronées.

57 With regard to the claim to aboriginal rights, Lambert J.A. was of the view that the trial judge erred: (1) in not treating the evidence of occupa-

Relativement à la revendication de droits ancestraux, le juge Lambert était d'avis que le juge de première instance avait fait erreur (1) en ne consi-

tion, possession, use, and enjoyment of the territory in an organized way by the appellants for their purposes, but particularly for sustenance, as being sufficient to establish aboriginal title to much of the land within the territory; (2) in separating commercial practices of aboriginal people from other practices and saying that commercial practices were not aboriginal practices; (3) in not considering the evidence of trading practices with neighbouring peoples; (4) in his treatment of the question of exclusivity both in relation to aboriginal title and sustenance rights; and (5) in considering participation in the wage or cash economy in relation to the existence (or non-existence) of aboriginal title. Again, given these errors of law, Lambert J.A. asserted that an appellate court had jurisdiction to intervene and set aside the trial judge's findings.

(d) *Substituted Findings*

In light of these errors, Lambert J.A. substituted his own findings of fact for those of the trial judge. In his view, the evidence established that in 1846, the Gitksan and Wet'suwet'en peoples occupied, possessed, used and enjoyed their traditional ancestral lands in accordance with their own practices, customs and traditions which were an integral part of their distinctive culture. Those ancestral lands extend throughout the claimed territory, well beyond the area indicated in Map 5. In areas where there were no conflicting claims to user rights, the appellants' rights should be characterized as aboriginal title. In areas of shared occupancy and use, the appellants' title would be shared-exclusive aboriginal title. In areas where the Gitksan and Wet'suwet'en peoples did not occupy, possess or use the land as an integral part of their culture, they would not have title, but may have aboriginal sustenance rights. These rights were not extinguished through any blanket extinguishment in the colonial period. Precise legislation related to a specific area may have extinguished some rights. However, no such legislation was before the court. The geographic scope of the

dérant pas que la preuve de l'occupation, de la possession, de l'utilisation et de la jouissance du territoire par les appelants, d'une façon organisée et pour leurs propres fins, mais particulièrement à des fins de subsistance, était suffisante pour établir le titre aborigène sur une grande partie des terres du territoire; (2) en séparant les pratiques commerciales des autochtones des autres pratiques, et en disant que les pratiques commerciales n'étaient pas des pratiques autochtones; (3) en ne tenant pas compte de la preuve de pratiques commerciales avec les peuples voisins; (4) en examinant comme il l'a fait la question de l'exclusivité tant en rapport avec le titre aborigène qu'avec les droits d'exploitation à des fins de subsistance; (5) en tenant compte de la participation à l'économie salariale ou monétaire pour statuer sur l'existence (ou l'inexistence) du titre aborigène. À nouveau, compte tenu de ces erreurs de droit, le juge Lambert a affirmé qu'une cour d'appel a compétence pour intervenir et infirmer les conclusions du juge de première instance.

d) *La substitution des conclusions*

À la lumière de ces erreurs, le juge Lambert a substitué ses propres conclusions de fait à celles du juge de première instance. Selon lui, la preuve établissait que, en 1846, les Gitksan et les Wet'suwet'en occupaient, possédaient et utilisaient leurs terres ancestrales traditionnelles et en avaient la jouissance conformément à leurs propres coutumes, pratiques et traditions qui faisaient partie intégrante de leur culture distinctive. Ces terres ancestrales s'étendent sur l'ensemble du territoire revendiqué, bien au-delà du territoire délimité sur la carte 5. Dans les secteurs où il n'y avait pas de revendications conflictuelles de droits d'utilisation, les droits des appelants devraient être qualifiés de titre aborigène. Dans les secteurs où il y a occupation et utilisation partagées, le titre des appelants serait un titre aborigène exclusif-partagé. Dans les secteurs où les Gitksan et les Wet'suwet'en n'ont pas occupé, possédé ou utilisé les terres en tant que partie intégrante de leur culture, ils n'auraient pas de titre, mais ils pourraient y avoir des droits ancestraux d'exploitation à des fins de subsistance. Aucune mesure d'extinction générale n'a éteint ces droits pendant la période coloniale. Il est possible



rights was a matter to be negotiated between the parties, and failing negotiation, needed to be determined by a new trial.

qu'un texte de loi donné, visant un secteur particulier, ait éteint certains droits, mais aucun texte de ce genre n'a été présenté à la cour. La portée géographique des droits était une question devant faire l'objet de négociations entre les parties ou, à défaut de négociations, être tranchée dans le cadre d'un nouveau procès.

59 Lambert J.A. also concluded that in 1846, the appellants' ancestors had rights of self-government and self-regulation, which rested on the practices, customs and traditions of those people which formed an integral part of their distinctive cultures. It is true that the rights may have been diminished by the assertion of British sovereignty, but those rights that continue are protected by s. 35 of the *Constitution Act, 1982*.

Le juge Lambert a aussi conclu que, en 1846, les ancêtres des appelants possédaient des droits à l'autonomie gouvernementale et à l'autoréglementation qui reposaient sur leurs coutumes, pratiques et traditions faisant partie intégrante de leur culture distinctive. Il est vrai que ces droits ont pu être diminués par l'affirmation de la souveraineté des Britanniques, mais ceux qui existent encore sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*.

60 Turning to aboriginal sustenance rights, Lambert J.A. stated that they are entirely encompassed within aboriginal title in those areas where Gitksan and Wet'suwet'en aboriginal title exists. They also may exist in areas outside of title lands. In areas where such rights were shared by a number of peoples, the appellants' rights may be limited to specific sustenance activities as opposed to exclusive or shared-exclusive use and occupation.

Abordant ensuite la question des droits ancestraux d'exploitation à des fins de subsistance, le juge Lambert a affirmé qu'ils sont entièrement compris dans le titre aborigène visant les terres à l'égard desquelles les Gitksan et les Wet'suwet'en possèdent un tel titre. Ils peuvent également exister à l'égard de secteurs non compris dans des terres visées par un titre. Sur les terres où ces droits étaient partagés par un certain nombre de peuples, il est possible que les droits des appelants se limitent à certaines activités précises de subsistance, par opposition à une utilisation et à une occupation exclusives ou exclusives-partagées.

#### (e) *Other Issues*

#### e) *Les autres questions*

61 With regard to the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1, Lambert J.A. expressed no views on its application or effect in the claimed territory and its inhabitants. With regard to infringement or denial of the appellants' rights in the claimed territory, Lambert J.A. concluded that the evidence in the case did not permit a proper consideration of the issues. Each infringement or denial would have to be examined in relation to the specific circumstances.

En ce qui concerne la *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1, le juge Lambert n'a exprimé aucune opinion quant à l'application ou à l'effet de ce texte sur le territoire revendiqué et sur ses habitants. Pour ce qui est de l'atteinte aux droits des appelants ou de la négation de ces droits, le juge Lambert a conclu que, en l'espèce, la preuve ne permettait pas de faire un examen adéquat de ces questions. Chaque atteinte ou négation devrait être examinée en fonction des circonstances particulières à chaque cas.

(f) *Disposition*

Lambert J.A. would have allowed the appeal, and made a number of declarations. First, he would declare that the Gitksan and Wet'suwet'en peoples had, at the time of the assertion of British sovereignty in 1846, aboriginal title to occupy, possess, use and enjoy all or some of the land within the claimed territory. The land covered by aboriginal title at that time extended far beyond village sites and the immediate areas surrounding. Second, he would declare that the Gitksan and Wet'suwet'en peoples may have had aboriginal sustenance rights, including hunting, fishing, gathering, and similar rights over any parts of the land within the claimed territory to which aboriginal title did not extend. He would also declare that the aboriginal title and the aboriginal sustenance rights described may have been exclusive to the Gitksan in certain areas and exclusive to the Wet'suwet'en in others, and in some they may have shared with each other, or other aboriginal peoples, or non-aboriginals.

Lambert J.A. would have also declared that the appellants' ancestors had, at the time of the assertion of British sovereignty in 1846, aboriginal rights of self-government and self-regulation relating to their own organized society, its members, its institutions and its sustenance rights. These rights were recognized by, incorporated into, and protected by the common law after 1846. They have not been extinguished by any form of blanket extinguishment. Hence, they exist in modern form, subject only to specific extinguishment of the specific title or specific sustenance right in a specific area. However, the right of aboriginal self-government did not include any rights that were inconsistent with British sovereignty, any rights that are repugnant to natural justice, equity and good conscience, and have not been modified to overcome that repugnancy, and any rights which are contrary to the part of the common law that applied to the

f) *Le dispositif*

Le juge Lambert aurait accueilli l'appel et prononcé certaines déclarations. Premièrement, il était d'avis de déclarer que les Wet'suwet'en et les Gitksan possédaient, à l'époque de l'affirmation de la souveraineté par les Britanniques en 1846, un titre aborigène fondant leur occupation, possession, utilisation et jouissance de tout ou partie des terres comprises dans le territoire revendiqué. Les terres visées par ce titre aborigène à l'époque s'étendaient bien au-delà du site des villages et de leurs environs. Deuxièmement, le juge Lambert aurait déclaré que les Gitksan et les Wet'suwet'en ont pu avoir des droits ancestraux d'exploitation à des fins de subsistance — y compris des droits de chasse, de pêche et de cueillette, ainsi que d'autres droits analogues — sur certaines parties du territoire revendiqué non visées par le titre aborigène. Il était aussi d'avis de déclarer que le titre aborigène et les droits ancestraux susmentionnés ont pu appartenir exclusivement aux Gitksan à certains endroits et exclusivement aux Wet'suwet'en à d'autres, et qu'à certains endroits les deux groupes ont pu les partager soit ensemble soit avec d'autres peuples autochtones ou avec des non-autochtones.

Le juge Lambert aurait aussi déclaré que les ancêtres des appelants possédaient, à l'époque de l'affirmation de la souveraineté par les Britanniques en 1846, des droits ancestraux à l'autonomie gouvernementale et à l'autoréglementation visant leur propre société organisée, ainsi que ses membres, ses institutions et ses droits d'exploitation à des fins de subsistance de cette société. Après 1846, ces droits ont été intégrés à la common law et protégés par celle-ci. Ils n'ont pas été éteints par quelque mesure d'extinction générale que ce soit. Par conséquent, ils existent sous une forme contemporaine, sous réserve seulement de l'extinction d'un titre particulier ou d'un droit d'exploitation à des fins de subsistance particulier visant un territoire précis. Cependant, le droit des autochtones à l'autonomie gouvernementale ne comportait ni droit inconciliable avec la souveraineté britannique, ni droit incompatible avec la justice naturelle, l'équité et la bonne conscience qui n'aurait pas été modifié pour éliminer cette incom-

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territory, the Gitksan and Wet'suwet'en peoples and their institutions.

patibilité, ni droit contraire à la partie de la common law qui s'appliquait au territoire, ainsi qu'aux Gitksan, aux Wet'suwet'en et à leurs institutions.

64 Lambert J.A. would also declare that these aboriginal title rights, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights may have been subject, after 1846 to specific extinguishment by the clear and plain extinguishing intention of the Sovereign Power, legislatively expressed by Parliament. Any specific extinguishment of specific rights might have been express or implicit, and, if implicit, it may have been brought about by the legislation itself (implied extinguishment) or by acts authorized by the legislation (extinguishment by adverse dominion), provided the intention to extinguish was contained within the legislative expression and was clear and plain. Instances of such specific extinguishment could not be decided on this appeal.

Le juge Lambert était aussi d'avis de déclarer que ces droits au titre aborigène, ainsi que ces droits ancestraux à l'autonomie gouvernementale, à l'autoréglementation et à l'exploitation à des fins de subsistance ont pu faire l'objet, après 1846, d'une extinction particulière par la manifestation de l'intention claire et expresse à cette fin du pouvoir du Souverain, exprimée législativement par le Parlement. Toute mesure d'extinction particulière de droits donnés aurait été expresse ou implicite et, dans ce dernier cas, aurait pu découler soit du texte de loi lui-même (extinction implicite) soit d'actes autorisés par ce texte (extinction par possession adversative), à la condition que cette intention d'extinction ait été présente dans la mesure législative et qu'elle ait été claire et expresse. Les cas d'extinction de ce genre ne pouvaient pas être tranchés dans le cadre de l'appel.

65 Lambert J.A. would declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, exercisable in relation to their aboriginal title, would include the specific rights claimed in this appeal by the plaintiffs in relation to aboriginal title. He would also declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.

Le juge Lambert aurait déclaré que seraient compris parmi les droits ancestraux actuels des Gitksan et des Wet'suwet'en à l'autonomie gouvernementale et à l'autoréglementation — droits pouvant être exercés relativement à leur titre aborigène — les droits précis revendiqués en appel par les demandeurs relativement à ce titre. Il était également d'avis de déclarer que ces droits à l'autonomie gouvernementale et à l'autoréglementation comprendraient aussi les droits à l'autonomie gouvernementale et à l'autoréglementation pouvant être exercés par l'entremise de leurs propres institutions pour préserver et renforcer leur identité sociale, politique, culturelle, linguistique et spirituelle.

66 Finally, Lambert J.A. would remit a number of questions back to trial. These include the question of the territorial boundaries for both title and sustenance rights; the degree of exclusivity or shared exclusivity which the appellants hold, on both the territories over which they have title and the territories over which they have sustenance rights; the scope and content of the sustenance rights; the scope and content of the rights to self-government and self-regulation; and all questions relating to

Finalement, le juge Lambert aurait renvoyé un certain nombre de questions au tribunal de première instance, dont celle des limites territoriales tant du titre aborigène que des droits d'exploitation à des fins de subsistance; le degré d'exclusivité ou d'exclusivité partagée dont sont titulaires les appelants, à la fois sur les territoires à l'égard desquels ils ont un titre et sur ceux où ils possèdent des droits d'exploitation à des fins de subsistance; la portée et le contenu de ces droits d'exploitation à

the plaintiffs' entitlement to damages and the quantum of damages. He would have also awarded the plaintiffs their costs, both in the Court of Appeal, and at trial.

(4) Hutcheon J.A. (dissenting in part)

(a) *Rights to Land*

Hutcheon J.A. agreed with the trial judge that the *Royal Proclamation, 1763* did not apply to the territory or its inhabitants. Nonetheless, the policy reflected in the *Proclamation* was, generally speaking, acceptance of aboriginal rights to land. Moreover, Hutcheon J.A. concluded on the basis of *Calder* and *Sparrow* that the colonial enactments did not extinguish the aboriginal rights in the claimed territory. He found it unnecessary to decide whether a grant in fee simple extinguishes aboriginal title or whether entitlement to compensation arises in such circumstances.

(b) *Nature of the Rights*

Hutcheon J.A. accepted that aboriginal rights to land existed prior to 1846 over the claimed territory. He found it sufficient to say, at p. 389, that aboriginal rights can "compete on an equal footing" with proprietary interests. Additionally, he noted that these rights are collective, inalienable except to the Crown, and extend to the traditional territory of the particular people.

(c) *Territory*

Hutcheon J.A. disagreed with the trial judge's conclusion that the appellants' ancestors occupied or controlled only the villages in the territory and the immediately surrounding areas. In Hutcheon J.A.'s view, the trial judge misapprehended the legal test for occupation and disregarded the independent evidence which showed that the territory occupied or controlled by the appellants extended far beyond the villages.

des fins de subsistance; la portée et le contenu des droits à l'autonomie gouvernementale et à l'autoréglementation; ainsi que toutes les questions relatives au droit des demandeurs à des dommages-intérêts et au montant de ceux-ci. Il était d'avis aussi d'accorder aux demandeurs leurs dépens, tant devant la Cour d'appel qu'en première instance.

(4) Le juge Hutcheon (dissident en partie)

a) *Les droits fonciers*

Le juge Hutcheon était d'accord avec le juge de première instance que la *Proclamation royale de 1763* ne s'appliquait pas au territoire ou à ses habitants. Néanmoins, la *Proclamation* reflétait, de façon générale, une politique d'acceptation des droits fonciers ancestraux. En outre, le juge Hutcheon a conclu, en se fondant sur les arrêts *Calder* et *Sparrow*, que les lois coloniales n'avaient pas éteint les droits ancestraux sur le territoire revendiqué. Il a jugé qu'il n'était pas nécessaire de décider si une concession en fief simple éteint le titre aborigène ou si le droit à une indemnité naît dans de telles circonstances.

b) *La nature des droits*

Le juge Hutcheon a accepté que des droits fonciers ancestraux existaient avant 1846 à l'égard du territoire revendiqué. Il a estimé suffisant de dire, à la p. 389, que les droits ancestraux peuvent [TRA-DUCTION] «concurrer sur un pied d'égalité» des droits de propriété. De plus, il a souligné que ces droits sont collectifs, qu'ils sont inaliénables sauf en faveur de l'État et qu'ils s'étendent au territoire traditionnel du peuple concerné.

c) *Le territoire*

Le juge Hutcheon a exprimé son désaccord avec la conclusion du juge de première instance que les ancêtres des appelants n'avaient occupé ou contrôlé que les villages se trouvant dans le territoire et leurs environs immédiats. Selon le juge Hutcheon, le juge de première instance a mal saisi le critère juridique relatif à l'occupation et il n'a pas tenu compte de la preuve indépendante qui démontrait que le territoire occupé ou contrôlé par les appelants s'étendait bien au-delà des villages.

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(d) *Self-Regulation*

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The traditions of the Gitksan and Wet'suwet'en peoples existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, and the right to occupy and control places of economic importance. The traditions also included the institution of the clans and the Houses in which membership descended through the mother and the feast system. They regulated marriage and relations with neighbouring societies. The right to practise these traditions was not lost, although the *Indian Act* and provincial laws have affected the appellants' right to self-regulation. Only negotiations will define with greater specificity the areas and terms under which the appellants and the federal and provincial governments will exercise jurisdiction in respect of the appellants, their institutions, and laws.

(e) *Disposition*

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Hutcheon J.A. would have allowed the appeal and have made a number of declarations. First, he would declare that all of the aboriginal rights of the appellants were not extinguished before 1871. Second, the appellants continue to have existing aboriginal rights to undefined portions of land within the claimed territory. Third, the appellants have rights of self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity. He would have remitted the outstanding matters to the Supreme Court of British Columbia, and stayed the proceedings for two years from the date of the judgment, or such shorter or longer period, in order for the parties to agree about the lands in respect of which the appellants have aboriginal rights, the scope of such rights on and to such lands, the scope of the right of self-regulation, and the appellants' entitlement to and quantum of

d) *L'autoréglementation*

Les traditions des Gitksan et des Wet'suwet'en existaient bien avant 1846 et elles ont continué d'exister par la suite. Elles comprenaient le droit de porter des noms et des titres, d'utiliser des masques et des symboles dans des rituels, d'utiliser des vêtements cérémoniels et d'occuper et de contrôler les lieux ayant une importance économique. Les traditions comprenaient aussi l'institution de clans et de maisons auxquels l'appartenance était régie par la filiation matrilineaire, et le système des célébrations. Ces traditions régissaient le mariage et les relations entre sociétés voisines. Le droit de pratiquer ces traditions n'a pas été perdu, bien que la *Loi sur les Indiens* et les lois provinciales aient affecté le droit des appelants à l'autoréglementation. Seules des négociations permettront de définir avec plus de précision les territoires où les appelants et les gouvernements fédéral et provinciaux exerceront leurs compétences sur les appelants, sur leurs institutions et sur leurs règles de droit, ainsi que les modalités d'exercices de ces compétences.

e) *Le dispositif*

Le juge Hutcheon était d'avis d'accueillir l'appel et de prononcer un certain nombre de déclarations. Premièrement, il aurait déclaré que tous les droits ancestraux des appelants n'ont pas été éteints avant 1871. Deuxièmement, les appelants continuent d'avoir des droits ancestraux existants sur des parties indéterminées du territoire revendiqué. Troisièmement, les appelants possèdent des droits à l'autoréglementation qu'ils peuvent exercer par l'entremise de leurs propres institutions pour préserver et renforcer leur identité sociale, politique, culturelle, linguistique et spirituelle. Il aurait renvoyé les questions non résolues à la Cour suprême de la Colombie-Britannique et suspendu les procédures pendant deux ans à compter de la date du jugement, ou pour une période plus courte ou plus longue, afin de permettre aux parties de s'entendre sur les terres à l'égard desquelles les appelants possèdent des droits ancestraux, sur la portée de tels droits à ces terres et sur celles-ci, sur la portée du droit à l'autoréglementation et sur le droit des appelants à des dommages-intérêts et sur

damages. Hutcheon J.A. would have awarded the appellants their costs throughout the proceedings.

#### IV. Issues

The following are the principal issues which must be addressed in this appeal. As will become apparent in my analysis, some of these issues in turn raise a number of sub-issues which I will address as well:

- A. Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?
- B. What is the ability of this Court to interfere with the factual findings made by the trial judge?
- C. What is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?
- D. Has a claim to self-government been made out by the appellants?
- E. Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?

#### V. Analysis

- A. *Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?*

In their pleadings, the appellants, 51 Chiefs representing most of the Houses of the Gitksan and Wet'suwet'en nations, originally advanced 51 individual claims on their own behalf and on behalf of their houses for "ownership" and "jurisdiction" over 133 distinct territories which together comprise 58,000 square kilometres of northwestern British Columbia. On appeal, that original claim was altered in two different ways. First, the claims for ownership and jurisdiction have been replaced with claims for aboriginal title and self-govern-

le montant de ceux-ci. Le juge Hutcheon aurait accordé aux appelants leurs dépens dans toutes les cours.

#### IV. Les questions en litige

Les principales questions qui doivent être tranchées dans le présent pourvoi sont énoncées ci-dessous. Comme il ressortira de mon analyse, certaines de ces questions soulèvent des sous-questions, que j'examinerai également:

- A. Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale?
- B. Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance?
- C. Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence?
- D. Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale?
- E. La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

#### V. L'analyse

- A. *Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale?*

Dans leurs actes de procédure, les appelants — 51 chefs représentant la plupart des maisons des nations Gitksan et Wet'suwet'en — ont initialement présenté, en leur propre nom et au nom de leurs maisons, 51 revendications individuelles sollicitant la «propriété» de 133 territoires distincts totalisant 58 000 kilomètres carrés dans la partie nord-ouest de la Colombie-Britannique, ainsi que la «compétence» sur ces territoires. En appel, cette revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives

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ment, respectively. Second, the individual claims by each house have been amalgamated into two communal claims, one advanced on behalf of each nation. However, there were no formal amendments to the pleadings to this effect, and the respondents accordingly argue that claims which are central to this appeal are not properly before the Court. Furthermore, the respondents argue that they have suffered prejudice as a result because they might have conducted the defence quite differently had they known the case to meet.

à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Toutefois, aucune modification en ce sens n'a été apportée formellement aux actes de procédure, et les intimés affirment par conséquent que la Cour n'est pas régulièrement saisie de revendications qui sont au centre du présent pourvoi. En outre, les intimés prétendent qu'ils ont en conséquence subi un préjudice, puisqu'ils auraient peut-être présenté leur défense d'une tout autre façon s'ils avaient su ce à quoi ils devaient répondre.

74 I reject the respondents' submission with respect to the substitution of aboriginal title and self-government for the original claims of ownership and jurisdiction. Although it is true that the pleadings were not formally amended, the trial judge, at p. 158, did allow a *de facto* amendment to permit "a claim for aboriginal rights other than ownership and jurisdiction". Had the respondents been concerned about the prejudice arising from this ruling, they could have appealed accordingly. However, they did not, and, as a result, the decision of the trial judge on this point must stand.

Je rejette l'argument des intimés en ce qui a trait à la substitution de la revendication du titre aborigène et de l'autonomie gouvernementale aux revendications initiales relatives à la propriété et à la compétence. Même s'il est vrai que les actes de procédure n'ont pas été formellement modifiés, le juge de première instance, à la p. 158, a bel et bien accepté une modification *de facto* pour permettre [TRADUCTION] «la revendication de droits ancestraux autres que la propriété et la compétence». Si les intimés avaient cru que cette décision pouvait leur porter préjudice, ils auraient pu en appeler. Cependant, ils ne l'ont pas fait et, par conséquent, la décision du juge de première instance sur ce point doit être maintenue.

75 Moreover, in my opinion, that ruling was correct because it was made against the background of considerable legal uncertainty surrounding the nature and content of aboriginal rights, under both the common law and s. 35(1). The content of common law aboriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of "ownership". As well, this case was pleaded prior to this Court's decision in *Sparrow*, *supra*, which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for

En outre, je suis d'avis que cette décision était exacte, parce qu'elle a été prise dans un contexte d'incertitude juridique considérable quant à la nature et au contenu des droits ancestraux, tant en vertu de la common law qu'en vertu du par. 35(1). Par exemple, notre Cour n'a pas encore statué de façon définitive sur le contenu du titre aborigène en common law, que certains ont décrit comme une forme de «propriété». Par ailleurs, la présente affaire a été plaidée avant que notre Cour rende l'arrêt *Sparrow*, précité, où elle se prononçait pour la première fois sur le type de droits qui sont visés au par. 35(1). Le droit a évolué rapidement depuis. Par conséquent, il était juste et convenable que le

an amendment to pleadings which were framed when the jurisprudence was in its infancy.

However, no such amendment was made with respect to the amalgamation of the individual claims brought by the 51 Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice. The appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

This defect in the pleadings prevents the Court from considering the merits of this appeal. However, given the importance of this case and the fact that much of the evidence of individual territorial holdings is extremely relevant to the collective claims now advanced by each of the appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge at p. 368, "[i]t will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence". Moreover, as I will now explain, there are other reasons why a new trial should be ordered.

juge de première instance permette la modification d'actes de procédure qui ont été rédigés lorsque la jurisprudence en était encore à ses balbutiements.

Cependant, aucune modification de la sorte n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les 51 maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Étant donné l'absence de modification des actes de procédure, je dois, avec réticence, conclure que les intimés ont subi un certain préjudice. Les appelants affirment que les intimés n'ont pas subi de préjudice puisque les revendications collectives et individuelles sont liées, dans la mesure où le territoire revendiqué par chaque nation est simplement la somme des revendications individuelles de chaque maison, les limites extrêmes des revendications collectives représentant donc les limites extérieures des territoires externes. Même si cet argument a un poids considérable, il ne répond pas au point fondamental que les revendications collectives n'étaient tout simplement pas en litige en première instance. Redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Ce vice dans les actes de procédure empêche notre Cour d'examiner le fond du présent pourvoi. Toutefois, vu l'importance de l'affaire et le fait qu'une grande partie de la preuve relative aux divers territoires possédés est extrêmement pertinente à l'égard des revendications collectives que présentent maintenant les appelants, la réparation convenable à l'égard du vice dont sont entachés les actes de procédure est la tenue d'un nouveau procès au cours duquel, comme l'a dit le juge de première instance, à la p. 368, [TRADUCTION] «[i]l reviendra aux parties de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve». En outre, comme je vais maintenant l'expliquer, il y a d'autres raisons pour lesquelles un nouveau procès doit être ordonné.

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B. *What is the ability of this Court to interfere with the factual findings made by the trial judge?*

(1) General Principles

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I recently reviewed the principles governing the appellate review of findings of fact in *Van der Peet*, *supra*. As a general rule, this Court has been extremely reluctant to interfere with the findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of witnesses. Unless there is a “palpable and overriding error”, appellate courts should not substitute their own findings of fact for those of the trial judge. The leading statement of this principle can be found in *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802, *per* Ritchie J., at p. 808:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

The same deference must be accorded to the trial judge’s assessment of the credibility of expert witnesses: see *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

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The policy reason underlying this rule is protection of “[t]he autonomy and integrity of the trial process” (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 278), which recognizes that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility. Moreover, *Van der Peet* clarified that deference was owed to findings of fact even when the trial judge misapprehended the law which was applied to those facts, a problem which can arise in quickly

B. *Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance?*

(1) Les principes généraux

Récemment, dans l’arrêt *Van der Peet*, précité, j’ai examiné les principes régissant la révision, en appel, des conclusions de fait. De façon générale, notre Cour s’est montrée extrêmement réticente à modifier des conclusions de fait tirées en première instance, particulièrement lorsque ces conclusions de fait sont fondées sur l’appréciation des témoignages et de la crédibilité des témoins. Sauf «erreur manifeste et dominante», les cours d’appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance. L’énoncé jurisprudentiel de ce principe qui fait autorité a été exposé par le juge Ritchie dans *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802, à la p. 808:

On ne doit pas considérer que ces arrêts signifient que les conclusions sur les faits tirées en première instance sont intangibles, mais plutôt qu’elles ne doivent pas être modifiées à moins qu’il ne soit établi que le juge du procès a commis une erreur manifeste et dominante qui a faussé son appréciation des faits. Bien que la Cour d’appel ait l’obligation de réexaminer la preuve afin de s’assurer qu’aucune erreur de ce genre n’a été commise, j’estime qu’il ne lui appartient pas de substituer son appréciation de la prépondérance des probabilités aux conclusions tirées par le juge qui a présidé le procès.

Il faut faire montre de la même retenue à l’égard de l’appréciation par le juge de première instance de la crédibilité des témoins experts: voir *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247.

La raison de principe qui sous-tend cette règle est la protection de «l’autonomie et [de] l’intégrité du procès» (*Schwartz c. Canada*, [1996] 1 R.C.S. 254, à la p. 278), qui reconnaît que le juge des faits — qui est en contact direct avec l’ensemble de la preuve — est le mieux placé pour tirer des conclusions de fait, particulièrement celles concernant la crédibilité. En outre, l’arrêt *Van der Peet* a précisé qu’il faut faire montre de retenue à l’égard des conclusions de fait, même lorsque le juge du procès a mal saisi le droit qu’il a appliqué aux faits en

evolving areas of law such as the jurisprudence surrounding s. 35(1).

I recently held, in *Van der Peet*, that these general principles apply to cases litigated under s. 35(1). On the other hand, while accepting the general principle of non-interference, this Court has also identified specific situations in which an appeal court can interfere with a finding of fact made at trial. For example, appellate intervention is warranted “where the courts below have misapprehended or overlooked material evidence”: see *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, at p. 493. In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it. As I said in *Van der Peet*, at para. 68:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. [Emphasis added.]

The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that

question, problème susceptible de survenir dans les domaines du droit qui évoluent rapidement comme celui de la jurisprudence relative au par. 35(1).

J’ai récemment statué, dans *Van der Peet*, que ces principes généraux s’appliquent aux affaires plaidées en vertu du par. 35(1). Par contre, tout en acceptant le principe général de non-intervention, la Cour a aussi indiqué des situations précises où une cour d’appel peut modifier une conclusion de fait tirée en première instance. Ainsi, une cour d’appel est justifiée d’intervenir «dans le cas où les premiers juges se sont mépris sur une preuve importante ou l’ont méconnue»: voir *Chartier c. Procureur général du Québec*, [1979] 2 R.C.S. 474, à la p. 493. Dans les affaires de détermination de droits ancestraux, l’intervention de la cour d’appel est également justifiée dans les cas où le tribunal de première instance n’a pas tenu compte des difficultés de preuve inhérentes à l’examen des revendications de droits ancestraux, premièrement, lorsqu’il a appliqué les règles de preuve et, deuxièmement, lorsqu’il a interprété la preuve qui lui était présentée. Comme je l’ai dit dans *Van der Peet*, au par. 68:

Pour déterminer si un demandeur autochtone a produit une preuve suffisante pour établir que ses activités sont un aspect d’une coutume, pratique ou tradition qui fait partie intégrante d’une culture autochtone distinctive, le tribunal doit appliquer les règles de preuve et interpréter la preuve existante en étant conscient de la nature particulière des revendications des autochtones et des difficultés que soulève la preuve d’un droit qui remonte à une époque où les coutumes, pratiques et traditions n’étaient pas consignées par écrit. Les tribunaux doivent se garder d’accorder un poids insuffisant à la preuve présentée par les demandeurs autochtones simplement parce que cette preuve ne respecte pas de façon précise les normes qui seraient appliquées dans une affaire de responsabilité civile délictuelle par exemple. [Je souligne.]

La justification de cette approche spéciale découle de la nature même des droits ancestraux. Dans *Van der Peet*, j’ai expliqué que ces droits visent à concilier l’occupation antérieure de l’Amérique du Nord par des sociétés autochtones distinctives avec l’affirmation de la souveraineté britannique sur le territoire du Canada. Ils visent à

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reconciliation by “their bridging of aboriginal and non-aboriginal cultures” (at para. 42). Accordingly, “a court must take into account the perspective of the aboriginal people claiming the right... while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each” (at paras. 49 and 50).

réaliser cette conciliation en établissant un «rapprochement entre les cultures autochtones et non autochtones» (au par. 42). Par conséquent, «le tribunal doit tenir compte du point de vue des autochtones qui revendiquent ce droit [...] [tout en tenant compte] de la common law» de sorte que «[l]a conciliation véritable accordée, également, de l'importance à chacun de ces éléments» (aux par. 49 et 50).

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In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” (at para. 49). Both the principles laid down in *Van der Peet* — first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against this background.

En d'autres termes, bien que la doctrine des droits ancestraux soit une doctrine de common law, les droits ancestraux sont véritablement des droits *sui generis* qui exigent, quant au traitement de la preuve, une approche unique, accordant le poids qu'il faut au point de vue des peuples autochtones. Toutefois, l'adaptation doit se faire d'une manière qui ne fasse pas entorse à «l'organisation juridique et constitutionnelle du Canada» (au par. 49). Les deux principes exposés dans *Van der Peet* — premièrement, le fait que les tribunaux de première instance doivent aborder les règles de preuve en tenant compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, et, deuxièmement, le fait que les tribunaux de première instance doivent interpréter cette preuve dans le même esprit — doivent être compris dans ce contexte.

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A concrete application of the first principle can be found in *Van der Peet* itself, where I addressed the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). However, given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) “conclusive evidence from pre-contact times about the practices, customs and

On peut trouver une application concrète du premier principe dans l'arrêt *Van der Peet* même, où je me suis penché sur les difficultés inhérentes à la démonstration de la continuité entre les activités autochtones actuelles et les coutumes, pratiques et traditions des sociétés autochtones qui existaient avant le contact avec les Européens. Comme je le réitère ci-dessous, l'exigence de continuité est un élément de la définition des droits ancestraux (quoique, comme je l'explique ci-après, dans le cas du titre, il s'agit de la continuité à partir de l'affirmation de la souveraineté, et non du contact avec les Européens). Toutefois, comme bon nombre de sociétés autochtones ne conservaient pas d'écrits à l'époque du contact avec les Européens, il leur serait excessivement difficile de produire (au par. 62), «relativement [à leurs] coutumes, pratiques et traditions [...], une preuve concluante, datant de l'époque antérieure au contact avec les

traditions of their community”. Accordingly, I held that (at para. 62):

The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. [Emphasis added.]

The same considerations apply when the time from which title is determined is sovereignty.

This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.

A useful and informative description of aboriginal oral history is provided by the *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), at p. 33:

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one — and not necessarily the most important — element of the

Européens». Par conséquent, j’ai statué ainsi (au par. 62):

La preuve sur laquelle s’appuient le demandeur et les tribunaux peut se rapporter aux coutumes, pratiques et traditions autochtones postérieures au contact avec les Européens. Il suffit que cette preuve tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d’avant le contact avec les Européens. [Je souligne.]

Les mêmes facteurs s’appliquent lorsque l’affirmation de la souveraineté est le moment servant à statuer sur l’existence d’un titre.

Le présent pourvoi exige que nous appliquions non seulement le premier principe établi dans *Van der Peet* mais aussi le second, et que nous adaptions les règles du droit de la preuve de manière à ce que les tribunaux accordent le poids qui convient au point de vue des autochtones sur leurs coutumes, pratiques et traditions, de même que sur les rapports qu’ils entretiennent avec le territoire. En pratique, cela exige que les tribunaux acceptent les récits oraux des sociétés autochtones, récits qui, pour bon nombre de nations autochtones, sont les seuls témoignages de leur passé. Étant donné que les droits ancestraux reconnus et confirmés par le par. 35(1) sont définis en regard des pratiques antérieures au contact avec les Européens ou, comme je vais l’expliquer ci-après, dans le cas d’un titre, en regard de l’occupation antérieure à l’affirmation de la souveraineté, ces récits jouent un rôle crucial dans les litiges portant sur les droits ancestraux.

On trouve des explications utiles et instructives quant aux récits oraux autochtones dans le *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 1 (*Un passé, un avenir*), à la p. 35:

La tradition autochtone, pour ce qui est de l’enregistrement des faits historiques, n’est ni linéaire ni fondée sur les mêmes notions d’évolution et de progrès sociaux [comme dans la tradition non autochtone]. D’habitude, elle n’est pas non plus centrée au même degré sur l’humain et part du principe que celui-ci n’est qu’un élément parmi d’autres — et pas nécessairement le plus impor-

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natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.

In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. . . .

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are “facts enmeshed in the stories of a lifetime”. They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

tant — de l’ordre naturel de l’univers. De plus, la tradition historique autochtone est une tradition orale, c’est-à-dire que les légendes, histoires et récits mythiques sont transmis de vive voix aux générations subséquentes. Elle vise moins à déterminer en quoi consiste la vérité objective, et suppose que le conteur de l’histoire est si directement concerné par l’événement en question que ce serait faire preuve d’arrogance que de vouloir classer celui-ci dans une catégorie précise et perpétuelle.

Dans la tradition autochtone, la transmission orale des récits poursuit un objectif qui dépasse le rôle de l’histoire écrite dans les sociétés occidentales. Cet objectif consiste peut-être à renseigner l’auditeur, à communiquer certains aspects de la culture, à socialiser la population en lui donnant une tradition culturelle, ou encore à valider l’autorité et le prestige que revendique telle ou telle famille . . .

Les récits oraux du passé reposent en grande partie sur des expériences subjectives. Ce ne sont pas de simples comptes rendus factuels, mais des «faits auxquels viennent se greffer les histoires de toute une vie». Il est également probable qu’ils soient associés à des lieux précis et qu’ils fassent allusion à des familles et à des collectivités précises. Tout cela donne l’impression d’une multitude d’histoires, dont chacune est influencée en partie par la façon dont un peuple se perçoit, se définit par rapport à l’environnement et exprime son unicité.

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Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for a culture” but also as an expression of “the values and mores of [that] culture”: Clay McLeod, “The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past” (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations.” The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial — the determina-

Devant un tribunal qui adopterait une approche traditionnelle à l’égard des règles de preuve, un grand nombre des caractéristiques des récits oraux joueraient contre l’admissibilité de ces récits et la valeur probante qui doit leur être accordée en tant que preuve d’événements passés. La plus fondamentale de ces caractéristiques est le rôle social général qu’ils jouent, non seulement [TRADUCTION] «en tant que moyen de conservation du savoir historique d’une culture» mais aussi comme expression «des valeurs et des mœurs de [cette] culture»: Clay McLeod, «The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past» (1992), 30 *Alta. L. Rev.* 1276, à la p. 1279. Le juge Dickson (plus tard Juge en chef) a reconnu ce fait lorsqu’il a affirmé, dans l’arrêt *Kruger c. La Reine*, [1978] 1 R.C.S. 104, à la p. 109, que «[l]es revendications de titres aborigènes reposent aussi sur

tion of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

l'histoire, les légendes, la politique et les obligations morales.» La difficulté que posent ces caractéristiques des récits oraux est qu'elles sont tangentielles à la finalité du processus de découverte des faits en première instance — savoir la découverte de la vérité historique. Une autre difficulté créée par les récits oraux est le fait qu'ils sont dans une large mesure constitués de déclarations extrajudiciaires, qui ont été transmises de façon ininterrompue jusqu'à nos jours, au fil des générations d'une nation autochtone. Ces déclarations extrajudiciaires sont admises pour leur véracité, et elles entrent donc en conflit avec la règle générale d'inadmissibilité du ouï-dire.

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies “did not keep written records”, the failure to do so would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge's findings of fact.

Malgré les problèmes que crée l'utilisation des récits oraux comme preuve de faits historiques, le droit de la preuve doit être adapté afin que ce type de preuve puisse être placé sur un pied d'égalité avec les différents types d'éléments de preuve historique familiers aux tribunaux, le plus souvent des documents historiques. Il s'agit d'une pratique appliquée de longue date dans l'interprétation des traités entre l'État et les peuples autochtones: *Sioui*, précité, à la p. 1068; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227 (C.A. Ont.), à la p. 232. Ainsi que l'a dit le juge en chef Dickson, comme la plupart des sociétés autochtones «ne tenaient aucun registre», le fait de ne pas suivre cette pratique «[imposerait un] fardeau de preuve impossible» aux peuples autochtones et «enlèverait [...] toute valeur» aux droits qu'ils ont (*Simon c. La Reine*, [1985] 2 R.C.S. 387, à la p. 408). Cette méthode doit être appliquée au cas par cas. Je vais appliquer cette approche dans mon analyse des conclusions de fait du juge de première instance.

On a final note, it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was “overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue” (*Schwartz*, *supra*, at p. 281).

En terminant, je tiens à souligner qu'il est important de comprendre que, même lorsque le juge de première instance a commis une erreur en tirant une conclusion de fait, il n'y a pas systématiquement intervention de la juridiction d'appel. L'erreur doit être suffisamment grave pour avoir constitué une erreur «dominant[e] et déterminant[e]» dans l'appréciation de la prépondérance des probabilités relativement à cette question de fait» (*Schwartz*, précité, à la p. 281).

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(2) Application of General Principles(a) *General Comments*

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The general principle of appellate non-interference applies with particular force in this appeal. The trial was lengthy and very complex. There were 318 days of testimony. There were a large number of witnesses, lay and expert. The volume of evidence is enormous. To quote the trial judge at pp. 116-17:

A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross-examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.

The result was a judgment of over 400 pages in length.

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It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of the appellants' objections fall into this category. Those objections are too numerous to list in their

(2) L'application des principes générauxa) *Observations générales*

Le principe général de la non-intervention des cours d'appel s'applique avec une force particulière dans le présent pourvoi. Le procès en première instance a été long et complexe. Il y a eu 318 jours de témoignages. Un grand nombre de témoins, tant experts que profanes, ont déposé. La quantité d'éléments de preuve est énorme. Comme l'a dit le juge de première instance aux pp. 116 et 117:

[TRADUCTION] Au total, 61 personnes ont témoigné au procès, bon nombre par l'entremise d'interprètes parce qu'ils s'exprimaient dans leur langue autochtone, le Gitksan ou le Wet'suwet'en; les sténographes officiels ont dû avoir recours à des «spécialistes de l'orthographe» pour de nombreux témoins; 15 autres témoins ont déposé dans le cadre d'une commission rogatoire; 53 affidavits territoriaux ont été déposés; 30 déposants ont été contre-interrogés à l'extérieur de la cour; la transcription des témoignages rendus au procès compte 23 503 pages; la transcription de l'argumentation 5 898 pages; les témoignages dans le cadre des commissions rogatoires 3 039 pages et la transcription des contre-interrogatoires sur les affidavits 2 553 pages (tous les témoignages et l'argumentation orale sont commodément conservés sur support papier et sur disquettes); ont été déposées au procès environ 9 200 pièces comptant, selon moi, bien au-delà de 50 000 pages; le document donnant les grandes lignes de l'argumentation des demandeurs comprend 3 250 pages, celui de la province 1 975 pages et celui du Canada plus de 1 000 pages; il y a 5 977 pages de transcription de l'argumentation, sur support papier et sur disquettes. Toutes les parties ont déposé des extraits des pièces auxquelles elles se sont référées au cours de leur argumentation. À elle seule, la province a déposé 28 énormes reliures contenant de tels documents. Au moins 15 reliures de la sorte contenant l'argumentation produite en réponse m'ont été remises au cours du procès.

Il en a résulté un jugement de plus de 400 pages.

Il n'est pas loisible aux appelants de contester les conclusions de fait du juge de première instance simplement parce qu'ils ne sont pas d'accord avec celles-ci. Je crains qu'un bon nombre des objections des appelants ne tombent dans cette

entirety. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

One objection that I would like to mention specifically, albeit in passing, is the trial judge's refusal to accept the testimony of two anthropologists who were brought in as expert witnesses by the appellants. This aspect of the trial judge's reasons was hotly contested by the appellants in their written submissions. However, I need only reiterate what I have stated above, that findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.

On the other hand, the appellants have alleged that the trial judge made a number of serious errors relating to the treatment of the oral histories of the appellants. Those oral histories were expressed in three different forms: (i) the *adaawk* of the Gitksan, and the *kungax* of the Wet'suwet'en; (ii) the personal recollections of members of the appellant nations, and (iii) the territorial affidavits filed by the heads of the individual houses within each nation. The trial judge ruled on both the admissibility of, and the weight to be given to, these various forms of oral history without the benefit of my reasons in *Van der Peet*, as will become evident in the discussion that follows.

(b) *Adaawk and Kungax*

The *adaawk* and *kungax* of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the

catégorie. Ces objections sont trop nombreuses pour en dresser la liste complète. Le gros de ces objections, au mieux, invoquent des erreurs de compréhension ou des oublis de la part du juge de première instance relativement à des éléments de preuve importants. Cependant, les intimés ont établi que, dans la plupart des cas, il y avait certains éléments de preuve contradictoires pour appuyer la conclusion du juge de première instance. En dernière analyse, il s'agissait d'une question de valeur probante de la preuve, et les appelants n'ont pas démontré que le juge de première instance avait commis d'erreur sur ce point.

Il y a une objection que j'aimerais mentionner de façon plus particulière, quoiqu'en passant. C'est celle qui a trait au refus du juge de première instance d'accepter le témoignage de deux anthropologues assignés comme témoins experts par les appelants. Cet aspect des motifs du juge de première instance a été vivement contesté par les appelants dans leurs observations écrites. Toutefois, il me suffit de réitérer ce que j'ai dit plus tôt, savoir qu'il appartient au juge de première instance de tirer les conclusions ayant trait à la crédibilité, y compris la crédibilité des témoins experts, et les cours d'appel doivent faire montre d'une retenue considérable à l'égard de ces conclusions.

Par contre, les appelants ont affirmé que le juge de première instance a commis de nombreuses erreurs graves dans le traitement des récits oraux des appelants. Ces récits ont été exprimés sous trois formes différentes: (i) l'*adaawk* des Gitksan et le *kungax* des Wet'suwet'en; (ii) les souvenirs personnels de membres des nations appelantes; (iii) les affidavits territoriaux déposés par les chefs de chacune des maisons de chaque nation. Le juge de première instance a rendu une décision sur leur admissibilité et le poids à leur accorder sans avoir pu bénéficier des motifs que j'ai rédigés dans l'arrêt *Van der Peet*, comme il ressortira de l'analyse qui suit.

b) *L'adaawk et le kungax*

L'*adaawk* de la nation Gitksan et le *kungax* de la nation Wet'suwet'en sont des récits oraux d'un genre spécial. Le juge de première instance les a

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trial judge, at p. 164, as a “sacred ‘official’ litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House”. The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are “repeated, performed and authenticated at important feasts” (at p. 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax. Although they serve largely the same role, the trial judge found that there are some differences in both the form and content of the adaawk and the kungax. For example, the latter is “in the nature of a song . . . which is intended to represent the special authority and responsibilities of a chief . . . .” However, these differences are not legally relevant for the purposes of the issue at hand.

décrits, à la p. 164, comme étant la [TRADUCTION] «litanie, l'énumération ou l'histoire “officielle” et sacrée, selon le cas, des règles de droit, des traditions et des faits historiques les plus importants d'une maison, ainsi que de son territoire traditionnel». Le contenu de ces récits oraux spéciaux est notamment exprimé physiquement dans les mâts totémiques, les emblèmes et les couvertures. L'importance de l'adaawk et du kungax est soulignée par le fait qu'ils sont [TRADUCTION] «répétés, représentés et authentifiés lors de célébrations importantes» (à la p. 164). Lors de ces célébrations, les dissidents ont l'occasion d'opposer leur désaccord à l'égard d'un détail et, de cette façon, d'aider à assurer l'authenticité de l'adaawk et du kungax. Bien que l'adaawk et le kungax jouent dans une large mesure le même rôle, le juge de première instance a constaté certaines différences de forme et de contenu. Par exemple, le kungax est [TRADUCTION] «de la nature d'un chant [. . .] qui vise à décrire l'autorité et les responsabilités spéciales du chef . . . .» Cependant, ces différences n'ont aucune pertinence juridique relativement à la question qui nous intéresse.

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It is apparent that the adaawk and kungax are of integral importance to the distinctive cultures of the appellant nations. At trial, they were relied on for two distinct purposes. First, the adaawk was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan's historical use and occupation of that territory. For the Wet'suwet'en, the kungax was offered as proof of the central significance of the claimed lands to their distinctive culture. As I shall explain later in these reasons, both use and occupation, and the central significance of the lands occupied, are relevant to proof of aboriginal title.

Il est manifeste que l'adaawk et le kungax ont une importance fondamentale pour les cultures distinctives des nations appelantes. En première instance, ils ont été invoqués pour deux fins distinctes. Premièrement, l'adaawk a été invoqué en tant qu'élément — et, partant, en tant que preuve de l'existence — d'un régime juridique de tenure foncière propre aux Gitksan, qui s'appliquait à l'ensemble du territoire revendiqué par cette nation appelante. En d'autres termes, l'adaawk a été présenté en tant que preuve de l'utilisation et de l'occupation historiques de ce territoire par les Gitksan. En ce qui concerne les Wet'suwet'en, le kungax a été invoqué comme preuve de l'importance fondamentale des terres revendiquées dans leur culture distinctive. Comme je vais l'expliquer plus loin dans les présents motifs, tant l'utilisation et l'occupation des terres visées que l'importance fondamentale de celles-ci sont pertinentes pour la preuve du titre aborigène.

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The admissibility of the adaawk and kungax was the subject of a general decision of the trial judge

Il a été statué sur l'admissibilité de l'adaawk et du kungax dans le cadre d'une décision générale

handed down during the course of the trial regarding the admissibility of all oral histories (incorrectly indexed as *Uukw v. R.*, [1987] 6 W.W.R. 155 (B.C.S.C.)). Although the trial judge recognized that the evidence at issue was a form of hearsay, he ruled it admissible on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights: see Michael N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence* (14th ed. 1990), at p. 736. He affirmed that earlier ruling in his trial judgment, correctly in my view, by stating, at p. 180, that the adaawk and kungax were admissible “out of necessity as exceptions to the hearsay rule” because there was no other way to prove the history of the Gitksan and Wet’suwet’en nations.

The trial judge, however, went on to give these oral histories no independent weight at all. He held, at p. 180, that they were only admissible as “direct evidence of facts in issue . . . in a few cases where they could constitute confirmatory proof of early presence in the territory”. His central concern that the adaawk and kungax could not serve “as evidence of detailed history, or land ownership, use or occupation”. I disagree with some of the reasons he relied on in support of this conclusion.

Although he had earlier recognized, when making his ruling on admissibility, that it was impossible to make an easy distinction between the mythological and “real” aspects of these oral histories, he discounted the adaawk and kungax because they were not “literally true”, confounded “what is fact and what is belief”, “included some material which might be classified as mythology”, and projected a “romantic view” of the history of the appellants. He also cast doubt on the authenticity of these special oral histories (at p. 181) because, *inter alia*, “the verifying group is so small that they cannot

rendue au cours du procès par le juge de première instance sur l’admissibilité des récits oraux (erronément répertoriée sous l’intitulé *Uukw c. R.*, [1987] 6 W.W.R. 155 (C.S.C.-B.)). Bien que le juge de première instance ait reconnu que la preuve en cause était une forme de ouï-dire, il a statué qu’elle était admissible en se fondant sur l’exception reconnue selon laquelle les déclarations de personnes décédées peuvent être versées en preuve par des témoins comme preuve de droits de nature publique ou générale; voir Michael N. Howard, Peter Crane et Daniel A. Hochberg, *Phipson on Evidence* (14<sup>e</sup> éd. 1990), à la p. 736. Dans son jugement au terme du procès, il a, avec raison selon moi, confirmé cette première décision en affirmant, à la p. 180, que l’adaawk et le kungax étaient admissibles [TRADUCTION] «par nécessité, comme exceptions à la règle du ouï-dire», parce qu’il n’y avait aucune autre façon de faire la preuve de l’histoire des nations Gitksan et Wet’suwet’en.

Cependant, par la suite, le juge de première instance n’a donné à ces récits aucune valeur probante indépendante. Il a statué, à la p. 180, qu’ils étaient admissibles seulement à titre de [TRADUCTION] «preuve directe des faits en litige [. . .] pour les quelques cas où ils pourraient constituer la confirmation d’une présence ancienne dans le territoire». Sa principale réserve était que l’adaawk et le kungax ne pouvaient pas servir «de preuve du détail de l’histoire ou encore de la propriété, de l’utilisation ou de l’occupation du territoire». Je suis en désaccord avec certains des motifs qu’il a invoqués au soutien de cette conclusion.

Même si, plus tôt, dans sa décision sur l’admissibilité, il avait reconnu qu’il était impossible de séparer facilement les aspects mythologiques des aspects [TRADUCTION] «réels» de ces récits oraux, il a écarté l’adaawk et le kungax parce qu’ils n’étaient pas «littéralement vrais», qu’ils mélangaient «les faits et les croyances», qu’ils «comportaient des éléments qui pourraient être qualifiés de mythologiques» et qu’ils évoquaient une «vision romanesque» de l’histoire des appelants. Il a aussi dit douter de l’authenticité de ces récits oraux spéciaux (à la p. 181) parce que, entre

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safely be regarded as expressing the reputation of even the Indian community, let alone the larger community whose opportunity to dispute territorial claims would be essential to weight". Finally, he questioned (at p. 181) the utility of the adaawk and kungax to demonstrate use and occupation because they were "seriously lacking in detail about the specific lands to which they are said to relate".

autres, [TRADUCTION] «le groupe témoin est si restreint qu'on ne peut, sans risque, considérer même qu'il exprime la commune renommée au sein de la communauté indienne, encore moins au sein de la communauté plus large, dont la possibilité de contester les revendications territoriales serait essentielle du point de vue de la valeur probante». Finalement, il a mis en doute (à la p. 181) l'utilité de l'adaawk et du kungax pour faire la preuve de l'utilisation et de l'occupation des terres visées, parce qu'ils «manquaient sérieusement de détails au sujet des terres mêmes auxquelles ils sont censés se rapporter».

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Although he framed his ruling on weight in terms of the specific oral histories before him, in my respectful opinion, the trial judge in reality based his decision on some general concerns with the use of oral histories as evidence in aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.

Bien qu'il ait structuré sa décision concernant la valeur probante en fonction des récits oraux particuliers qui lui avaient été présentés, le juge de première instance a, à mon avis, fondé plutôt sa décision sur certaines réserves générales concernant l'utilisation des récits oraux en preuve dans les affaires de droits ancestraux. En résumé, le juge du procès n'a accordé aucune valeur probante indépendante à ces récits oraux particuliers parce qu'ils ne transmettaient pas avec exactitude la vérité historique, parce que la connaissance de ces récits oraux était limitée aux communautés dont ils reconstituaient l'histoire et parce que ces récits oraux n'étaient pas suffisamment détaillés. Cependant, comme je l'ai mentionné précédemment, il s'agit là de caractéristiques qui sont, dans une mesure plus ou moins grande, propres à tous les récits oraux, et non seulement aux adaawk et aux kungax. L'implication du raisonnement du juge de première instance est qu'il ne devrait jamais être accordé de valeur probante indépendante aux récits oraux et que, dans les litiges sur les droits ancestraux, ces récits ne sont utiles qu'à titre d'éléments de preuve tendant à en confirmer d'autres. Je crains que, si ce raisonnement était suivi, la valeur des récits oraux des peuples autochtones serait constamment et systématiquement sous-estimée par le système juridique canadien, en contravention des instructions expresses à l'effet contraire qui ont été données dans l'arrêt *Van der Peet*, précité, et suivant lesquelles les tribunaux doivent interpréter la preuve présentée par les peuples autochtones en tenant compte des difficultés inhérentes à l'examen des revendications autochtones.

(c) *Recollections of Aboriginal Life*

The trial judge also erred when he discounted the “recollections of aboriginal life” offered by various members of the appellant nations. I take that term to be a reference to testimony about personal and family history that is not part of an *adaawk* or a *kungax*. That evidence consisted of the personal knowledge of the witnesses and declarations of witnesses’ ancestors as to land use. This history had been adduced by the appellants in order to establish the requisite degree of use and occupation to make out a claim to ownership and, for the same reason as the *adaawk* and *kungax*, is material to the proof of aboriginal title.

The trial judge limited the uses to which the evidence could be put. He reasoned, at p. 177, that this evidence, at most, established “without question, that the plaintiff’s immediate ancestors, for the past 100 years or so” had used land in the claimed territory for aboriginal purposes. However, the evidence was insufficiently precise to demonstrate that the more distant ancestors of the witnesses had engaged in specific enough land use “far enough back in time to permit the plaintiffs to succeed on issues such as internal boundaries”. In the language of *Van der Peet*, the trial judge effectively held that this evidence did not demonstrate the requisite continuity between present occupation and past occupation in order to ground a claim for aboriginal title.

In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively estab-

c) *Les souvenirs du mode de vie ancestral*

Le juge de première instance a aussi fait erreur en ne tenant pas compte des [TRADUCTION] «souvenirs du mode de vie ancestral» relatés par divers membres des nations appelantes. J’interprète cette expression comme une référence aux témoignages portant sur les antécédents personnels et familiaux qui ne font pas partie d’un *adaawk* ou d’un *kungax*. Cette preuve était constituée des connaissances personnelles des témoins et des déclarations de leurs ancêtres quant à l’utilisation du territoire. Ces récits ont été présentés en preuve par les appelants afin d’établir le degré d’occupation et d’utilisation requis pour fonder la revendication de propriété, et ils sont, pour le même motif que l’*adaawk* et le *kungax*, pertinents pour la preuve du titre aborigène.

Le juge de première instance a limité les utilisations qui pouvaient être faites de cette preuve. Il a raisonné, à la p. 177, que, au mieux, celle-ci établissait [TRADUCTION] «sans l’ombre d’un doute que, au cours des 100 dernières années environ, les ancêtres immédiats du demandeur» avaient utilisé à des fins autochtones des terres situées dans le territoire revendiqué. Cependant, la preuve n’était pas suffisamment précise pour démontrer que les ancêtres plus lointains des témoins avaient fait une utilisation suffisamment particulière des terres [TRADUCTION] «assez loin dans le temps pour permettre aux demandeurs d’avoir gain de cause sur des questions comme les limites internes». Pour reprendre les termes de l’arrêt *Van der Peet*, le juge de première instance a effectivement conclu que cette preuve ne démontrait pas la continuité requise entre l’occupation actuelle et l’occupation passée pour fonder la revendication d’un titre aborigène.

À mon avis, le juge de première instance attendait beaucoup trop des récits oraux des appelants, exprimés dans les souvenirs du mode de vie ancestral des membres des nations appelantes. Il attendait de ces témoignages qu’ils apportent la preuve définitive et précise d’activités autochtones sur le territoire en question avant le contact avec les Européens. Cependant, comme je l’ai dit dans *Van der Peet*, il s’agit là d’un fardeau de preuve dont il

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lish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do.

(d) *Territorial Affidavits*

102 Finally, the trial judge also erred in his treatment of the territorial affidavits filed by the appellant chiefs. Those affidavits were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses and, at trial, were introduced for the purposes of establishing each House's ownership of its specific territory. Before this Court, the appellants tried to amalgamate these individual claims into collective claims on behalf of each nation and the relevance of the affidavits changed accordingly. I have already held that it is not open to the appellants to alter fundamentally the nature of their claim in this way on appeal. Nevertheless, the treatment of the affidavits is important because they will be relevant at a new trial to the existence and nature of the land tenure system within each nation and, therefore, material to the proof of title.

103 The affidavits rely heavily on the declarations of deceased persons of use or ownership of the lands, which are a form of oral history. But those declarations are a kind of hearsay and the appellants therefore argued that the affidavits should be admitted through the reputation exception to the hearsay rule. Although he recognized, at p. 438, that the territorial affidavits were "the best evidence [the appellants] could adduce on this question of internal boundaries", the trial judge held

est presque impossible de s'acquitter. Par contre, même si (après le prononcé du présent arrêt) les récits oraux ne permettent pas d'établir de façon concluante l'occupation du territoire avant l'affirmation de la souveraineté, ils peuvent néanmoins être pertinents pour démontrer que les origines de l'occupation actuelle remontent avant l'affirmation de la souveraineté. C'est exactement ce que les appelants ont tenté de faire.

d) *Les affidavits territoriaux*

Finalement, le juge de première instance a aussi fait erreur dans la façon dont il a traité les affidavits territoriaux déposés par les chefs appelants. Ces affidavits étaient des déclarations concernant les terres de chaque maison Gitksan et Wet'suwet'en et, au procès, ils ont été déposés pour établir le droit de propriété de chaque maison sur son territoire spécifique. Devant notre Cour, les appelants ont tenté de fusionner ces revendications individuelles en revendications collectives présentées au nom de chaque nation, et la pertinence des affidavits a changé en conséquence. J'ai déjà statué qu'il n'est pas loisible aux appelants de modifier fondamentalement la nature de leur revendication comme ils l'ont fait en appel. Néanmoins, le traitement accordé aux affidavits est important parce que, dans le cadre d'un nouveau procès, ils seront pertinents pour statuer sur l'existence et la nature du régime de tenure foncière au sein de chaque nation et, par conséquent, importants pour la preuve du titre.

Les affidavits reposent en très grande partie sur des déclarations faites par des personnes décédées relativement à l'utilisation des terres ou à leurs propriétaires, une forme de récits oraux. Toutefois, ces déclarations constituent une sorte de ouï-dire, et les appelants ont par conséquent plaidé que les affidavits devraient être admis sur le fondement de l'exception à la règle du ouï-dire relative à la réputation ou à la commune renommée. Bien qu'il ait reconnu, à la p. 438, que les affidavits territoriaux étaient [TRADUCTION] «la meilleure preuve [que les appelants] pouvaient produire sur la question des limites internes», le juge de première instance a conclu que cette exception ne s'appliquait pas et il

that this exception did not apply and refused to admit the declarations contained in the affidavits.

I am concerned by the specific reasons the trial judge gave for refusing to apply the reputation exception. He questioned the degree to which the declarations amounted to a reputation because they were largely confined to the appellants' communities. The trial judge asserted that neighbouring aboriginal groups whose territorial claims conflicted with those of the appellants, as well as non-aboriginals who potentially possessed a legal interest in the claimed territory, were unaware of the content of the alleged reputation at all. Furthermore, the trial judge reasoned that since the subject-matter of the affidavits was disputed, its reliability was doubtful. Finally, the trial judge questioned, at p. 441, "the independence and objectivity" of the information contained in the affidavits, because the appellants and their ancestors (at p. 440) "have been actively discussing land claims for many years".

Although he regretted this finding, the trial judge felt bound to apply the rules of evidence because it did not appear to him (at p. 442) "that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case". The trial judge arrived at this conclusion, however, without the benefit of *Van der Peet*, where I held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.

Many of the reasons relied on by the trial judge for excluding the evidence contained in the territorial affidavits are problematic because they run against this fundamental principle. The requirement that a reputation be known in the general community, for example, ignores the fact that oral

a refusé d'admettre les déclarations contenues dans les affidavits.

Je suis préoccupé par les motifs particuliers invoqués par le juge de première instance pour refuser d'appliquer l'exception fondée sur la commune renommée. Il s'est demandé dans quelle mesure les déclarations exprimaient la commune renommée, étant donné qu'elles se confinaient largement aux communautés des appelants. Le juge de première instance a affirmé que les groupes autochtones voisins dont les revendications territoriales entraient en conflit avec celles des appelants, de même que les non-autochtones susceptibles d'avoir un intérêt juridique dans le territoire revendiqué, n'étaient absolument pas au courant du contenu du fait de commune renommée allégué. En outre, le juge de première instance a raisonné que, comme le contenu des affidavits était contesté, sa fiabilité était douteuse. Finalement, le juge de première instance a mis en doute, à la p. 441, [TRADUCTION] «l'indépendance et l'objectivité» de l'information contenue dans les affidavits, parce que les appelants et leurs ancêtres (à la p. 440) «discutent activement de revendications territoriales depuis de nombreuses années».

Bien qu'il ait dit regretter en arriver à cette conclusion, le juge de première instance s'est senti tenu d'appliquer les règles de preuve parce qu'il ne lui semblait pas (à la p. 442) [TRADUCTION] «que la Cour suprême du Canada ait décidé que les règles de preuve ordinaires ne s'appliquent pas dans ce genre d'affaires». Cependant, le juge de première instance a tiré cette conclusion avant le prononcé de l'arrêt *Van der Peet*, où j'ai statué que les règles de preuve ordinaires doivent être abordées et adaptées en tenant compte des difficultés de preuve inhérentes à l'examen des revendications autochtones.

Bon nombre des motifs invoqués par le juge de première instance pour écarter la preuve contenue dans les affidavits territoriaux sont problématiques parce qu'ils vont à l'encontre de ce principe fondamental. Par exemple, l'exigence qu'un fait de commune renommée soit connu dans la communauté

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histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular families and communities and may, as a result, be unknown outside of that community, even to other aboriginal nations. Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of aboriginal title in that province until relatively recently, largely as a direct result of the decision of this Court in *Calder, supra*. It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.

en général ne tient pas compte du fait que, comme l'a souligné la Commission royale sur les peuples autochtones, les récits oraux sont généralement associés à des lieux précis et font allusion à des familles et à des collectivités précises, et peuvent, par conséquent, ne pas être connus à l'extérieur de cette collectivité, même par d'autres nations autochtones. Écarter les affidavits territoriaux parce que les revendications auxquelles ils se rapportent sont contestées ne tient pas compte du fait que les revendications de droits ancestraux, et de titre aborigène en particulier, sont presque toujours contestées. De fait, si ces revendications ne soulevaient aucune controverse, il ne serait pas nécessaire de s'adresser aux tribunaux pour les faire trancher. Jeter le doute sur la fiabilité des affidavits territoriaux parce que les revendications territoriales ont été discutées activement pendant de nombreuses années ne tient pas compte non plus du contexte des revendications autochtones et ce, de deux façons. Premièrement, si ces revendications sont discutées depuis si longtemps, c'est en raison du refus constant de la Colombie-Britannique, jusqu'à une date relativement récente, de reconnaître l'existence du titre aborigène dans la province, refus qui était dans une large mesure une conséquence directe de l'arrêt *Calder*, précité, de notre Cour. Il serait pour le moins abusif d'utiliser le refus de la province de reconnaître les droits de ses habitants autochtones comme motif pour écarter la preuve qui pourrait établir l'existence de ces droits. Deuxièmement, ce motif d'exclusion place les revendicateurs autochtones — qui appartiennent à des sociétés préservant leur passé au moyen de récits oraux — devant un grave dilemme. Pour qu'un récit oral d'une communauté équivaille à une forme de commune renommée et soit admissible en cour, il doit se perpétuer dans les discussions des membres de cette communauté; ces discussions sont le fondement même de cette commune renommée. Toutefois, si ces récits font l'objet de trop de discussions, à une période trop rapprochée d'un litige, ils risquent d'être écartés parce qu'ils sont suspects, et ils peuvent ainsi être jugés inadmissibles. Cela pourrait avoir pour effet qu'une société possédant une telle tradition orale ne pourrait jamais faire la preuve d'une revendication historique en utilisant un récit oral en cour.

(e) *Conclusion*

The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome because oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

In the circumstances, the factual findings cannot stand. However, given the enormous complexity of the factual issues at hand, it would be impossible for the Court to do justice to the parties by sifting through the record itself and making new factual findings. A new trial is warranted, at which the evidence may be considered in light of the principles laid down in *Van der Peet* and elaborated upon here. In applying these principles, the new trial judge might well share some or all of the findings of fact of McEachern C.J.

C. *What is the content of aboriginal title, how is it protected by s. 35(1) of the Constitution Act, 1982, and what is required for its proof?*

(1) *Introduction*

The parties disagree over whether the appellants have established aboriginal title to the disputed area. However, since those factual issues require a new trial, we cannot resolve that dispute in this appeal. But factual issues aside, the parties also have a more fundamental disagreement over the content of aboriginal title itself, and its reception

e) *La conclusion*

Le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes que j'ai établis dans *Van der Peet*. Ces erreurs sont particulièrement troublantes, étant donné que les récits oraux étaient d'une importance cruciale pour la cause des appelants. Ils ont invoqué ces récits, pour tenter d'établir leur occupation et leur utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

Dans les circonstances, les conclusions de fait ne peuvent pas être confirmées. Cependant, vu la complexité énorme des questions de fait en jeu, il serait impossible à la Cour de rendre justice aux parties en passant le dossier au crible et en tirant de nouvelles conclusions de fait. Un nouveau procès s'impose, au cours duquel on pourra examiner la preuve à la lumière des principes qui ont été exposés dans *Van der Peet* et précisés en l'espèce. Dans l'application de ces principes, le juge qui présidera le nouveau procès pourrait bien partager l'ensemble ou certaines des conclusions de fait du juge en chef McEachern.

C. *Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et comment fait-on la preuve de son existence?*

(1) *Introduction*

Les parties ne s'entendent pas sur la question de savoir si les appelants ont démontré l'existence d'un titre aborigène sur la région contestée. Cependant, comme un nouveau procès est nécessaire pour trancher ces questions de fait, nous ne pouvons pas régler ce différend dans le cadre du présent pourvoi. Outre ce différend d'ordre factuel,

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into the Constitution by s. 35(1). In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.

les parties ont un désaccord plus fondamental à propos du contenu du titre aborigène lui-même, et de sa réception dans la Constitution par le par. 35(1). Afin d'éclairer le juge qui instruira le nouveau procès, je vais maintenant examiner cette question.

110 I set out these opposing positions by way of illustration and introduction because I believe that all of the parties have characterized the content of aboriginal title incorrectly. The appellants argue that aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose and which has been constitutionalized by s. 35(1). The respondents offer two alternative formulations: first, that aboriginal title is no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s. 35(1), and that the *Constitution Act, 1982*, merely constitutionalizes those individual rights, not the bundle itself, because the latter has no independent content; and second, that aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves, and that s. 35(1) constitutionalizes this notion of exclusivity.

Afin d'illustrer le problème, je vais, en guise d'introduction, exposer les thèses opposées des parties, car j'estime que toutes les parties ont décrit incorrectement le contenu du titre aborigène. Les appelants soutiennent que le titre aborigène équivaut à un fief simple inaliénable, qu'il confère aux peuples autochtones le droit d'utiliser les terres visées comme ils l'entendent et qu'il a été constitutionnalisé par le par. 35(1). Les intimés avancent deux définitions: premièrement, le titre aborigène n'est rien de plus qu'un faisceau de droits autorisant l'exercice d'activités qui sont elles-mêmes des droits ancestraux reconnus et confirmés par le par. 35(1), et la *Loi constitutionnelle de 1982* ne fait que constitutionnaliser ces droits individuels et non le faisceau lui-même, parce que celui-ci n'a aucun contenu indépendant; deuxièmement, le titre aborigène comprend, au plus, le droit exclusif d'utiliser et d'occuper des terres pour y exercer des activités qui sont elles-mêmes des droits ancestraux, et le par. 35(1) constitutionnalise cette notion d'exclusivité.

111 The content of aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in

En fait, le contenu du titre aborigène se situe quelque part entre ces deux thèses. Le titre aborigène est un droit foncier et, en tant que tel, il est quelque chose de plus que le droit d'exercer certaines activités précises, qui peuvent elles-mêmes être des droits ancestraux. Il confère plutôt le droit d'utiliser des terres pour y exercer différentes activités qui ne doivent pas nécessairement toutes être des aspects de coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones. Ces activités ne constituent pas le droit en soi; elles sont plutôt des parasites du titre sous-jacent. Toutefois, ces différents usages sont subordonnés à la restriction suivante: ils ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour le territoire visé et qui constitue le fondement de son

land, and is one way in which aboriginal title is distinct from a fee simple.

## (2) Aboriginal Title at Common Law

### (a) *General Features*

The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a "personal and usufructuary right" (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot

titre aborigène sur ce territoire. Cette limite intrinsèque, qui sera expliquée plus longuement ci-après, découle du fait que le titre aborigène est défini comme un droit foncier *sui generis*, et elle est un aspect qui différencie le titre aborigène du fief simple.

## (2) Le titre aborigène en common law

### a) *Caractéristiques générales*

Le point de départ de la jurisprudence canadienne sur le titre aborigène est la décision du Conseil privé dans l'affaire *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, dans laquelle le titre aborigène a été décrit comme étant un [TRADUCTION] «droit personnel, de la nature d'un usufruit» (à la p. 54). Par la suite, les tribunaux ont tenté de s'accommoder de cette définition, mais il ressort de leurs décisions que les termes choisis par le Conseil privé ne sont pas particulièrement utiles pour expliquer les différentes dimensions du titre aborigène. Le Conseil privé a cherché à rendre l'idée que le titre aborigène est un intérêt foncier *sui generis*. On a qualifié le titre aborigène de droit *sui generis* afin de le différencier des intérêts de propriété «ordinaires» comme le fief simple. Toutefois, comme je vais maintenant l'explicitier, on le qualifie également de droit *sui generis*, dans la mesure où il est impossible d'expliquer entièrement ses caractéristiques en fonction soit des règles du droit des biens en common law soit des règles relatives à la propriété prévues par les régimes juridiques autochtones. Tout comme d'autres droits ancestraux, le titre aborigène doit être défini en tenant compte à la fois de la common law et du point de vue des autochtones.

L'idée que le titre aborigène a un caractère *sui generis* est le principe unificateur qui sous-tend les différentes dimensions de ce titre. L'une de ces dimensions est l'inaliénabilité du titre aborigène. Les terres détenues en vertu d'un titre aborigène ne peuvent être transférées, vendues ou cédées à personne d'autre que la Couronne, et elles sont par conséquent inaliénables. Notre Cour s'est efforcée de préciser que c'est uniquement dans ce sens que le titre aborigène est un droit «personnel», et que cela ne veut pas dire qu'il ne s'agit pas d'un intérêt

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compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

de propriété, qui ne représente rien de plus qu'une autorisation d'utiliser et d'occuper les terres visées et qui ne peut pas concurrencer sur un pied d'égalité d'autres droits de propriété: *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, à la p. 677.

114 Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title — the relationship between common law and pre-existing systems of aboriginal law.

Une autre dimension du titre aborigène est son origine. On a d'abord cru que la source du titre aborigène au Canada était la *Proclamation royale de 1763*: voir *St. Catherine's Milling*. Cependant, il ne fait maintenant aucun doute que, même si le titre aborigène a été reconnu par la *Proclamation*, il découle de l'occupation antérieure du Canada par les peuples autochtones. Toutefois, cette occupation antérieure est pertinente à deux points de vue, qui illustrent tous deux le caractère *sui generis* du titre aborigène. Il y a d'abord le fait physique de l'occupation, qui découle du principe de common law selon lequel l'occupation prouve la possession en droit: voir Kent McNeil, *Common Law Aboriginal Title* (1989), à la p. 7. Ainsi, dans *Guerin*, précité, le juge Dickson a qualifié le titre aborigène, à la p. 376, de «droit, en *common law*, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales». Le titre aborigène a un caractère *sui generis* parce qu'il découle d'une possession antérieure à l'affirmation de la souveraineté britannique, tandis que les domaines ordinaires, comme le fief simple, ont pris naissance par la suite: voir Kent McNeil, «The Meaning of Aboriginal Title», dans Michael Asch, dir., *Aboriginal and Treaty Rights in Canada* (1997), 135, à la p. 144. Cette idée a été précisée dans *Roberts c. Canada*, [1989] 1 R.C.S. 322, où notre Cour a unanimement statué, à la p. 340, que le «titre aborigène existait avant la colonisation par les Britanniques et a continué d'exister après les revendications de souveraineté britanniques» (voir aussi *Guerin* à la p. 378). Ces affirmations indiquent que le titre aborigène a une autre origine — soit le rapport entre la common law et les régimes juridiques autochtones préexistants.

115 A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that

Une dimension supplémentaire du titre aborigène est le fait qu'il est détenu collectivement. Le titre aborigène ne peut pas être détenu par un autochtone en particulier; il est un droit foncier collectif, détenu par tous les membres d'une nation

land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) *The Content of Aboriginal Title*

Although cases involving aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the content of aboriginal title. In *St. Catherine's Milling*, the Privy Council, as I have mentioned, described the aboriginal title as a "personal and usufructuary right", but declined to explain what that meant because it was not "necessary to express any opinion upon the point" (at p. 55). Similarly, in *Calder, Guerin, and Paul*, the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, aboriginal title, respectively; the content of title was not at issue and was not directly addressed.

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. For the sake of clarity, I will discuss each of these propositions separately.

Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions

autochtone. Les décisions relatives aux terres visées sont également prises par cette collectivité. Il s'agit d'une autre caractéristique *sui generis* du titre aborigène, qui le différencie des intérêts de propriété ordinaires.

b) *Le contenu du titre aborigène*

Bien que notre Cour et le Conseil privé aient été saisis par le passé d'affaires relatives au titre aborigène, ni l'un ni l'autre ne se sont jamais prononcés d'une manière définitive sur le contenu du titre aborigène. Comme je l'ai indiqué, le Conseil privé, dans *St. Catherine's Milling*, a qualifié le titre aborigène de [TRADUCTION] «droit personnel, de la nature d'un usufruit», mais il a refusé d'expliquer ce que cela voulait dire, parce qu'il n'était pas «nécessaire d'exprimer une opinion sur ce point» (à la p. 55). De même, dans les arrêts *Calder, Guerin* et *Paul*, les questions litigieuses étaient respectivement l'extinction du titre aborigène, l'obligation de fiduciaire découlant de la cession de terres détenues en vertu d'un titre aborigène et les servitudes d'origine législative sur des terres ainsi détenues; le contenu du titre n'était pas en cause et n'a pas été abordé directement.

Même si les tribunaux n'ont pas été très explicites, je suis arrivé à la conclusion que le contenu du titre aborigène peut être résumé au moyen de deux énoncés: premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive; deuxièmement, ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres. Pour plus de clarté, je vais examiner chacun de ces énoncés séparément.

Le titre aborigène comprend le droit d'utiliser le territoire détenu en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions

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which are integral to distinctive aboriginal cultures

autochtones faisant partie intégrante d'une culture autochtone distinctive

118 The respondents argue that aboriginal title merely encompasses the right to engage in activities which are aspects of aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures of the aboriginal group claiming the right and, at most, adds the notion of exclusivity; i.e., the exclusive right to use the land for those purposes. However, the uses to which lands held pursuant to aboriginal title can be put are not restricted in this way. This conclusion emerges from three sources: (i) the Canadian jurisprudence on aboriginal title, (ii) the relationship between reserve lands and lands held pursuant to aboriginal title, and (iii) the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7. As well, although this is not legally determinative, it is supported by the critical literature. In particular, I have profited greatly from Professor McNeil's article, "The Meaning of Aboriginal Title", *supra*.

(i) Canadian Jurisprudence on Aboriginal Title

119 Despite the fact that the jurisprudence on aboriginal title is somewhat underdeveloped, it is clear that the uses to which lands held pursuant to aboriginal title can be put is not restricted to the practices, customs and traditions of aboriginal peoples integral to distinctive aboriginal cultures. In *Guerin*, for example, Dickson J. described aboriginal title as an "interest in land" which encompassed "a legal right to occupy and possess certain lands" (at p. 382). The "right to occupy and possess" is framed in broad terms and, significantly, is not qualified by reference to traditional and customary uses of those lands. Any doubt that the right to occupancy and possession encompasses a broad variety of uses of land was put to rest in *Paul*, where the Court went even further and stated that aboriginal title was "more than the right to enjoyment and occupancy" (at p. 678). Once again, there is no reference to aboriginal practices, customs and traditions as a qualifier on that right. Moreover, I take the reference to "more" as

Les intimés soutiennent que le titre aborigène comprend simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit, et que, tout au plus, le titre ajoute l'idée d'exclusivité, c'est-à-dire le droit exclusif d'utiliser à ces fins les terres visées. Cependant, les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne sont pas limitées de la sorte. Cette conclusion découle de trois sources: (i) la jurisprudence canadienne sur le titre aborigène; (ii) le rapport entre les terres de réserve et les terres détenues en vertu d'un titre aborigène; (iii) la *Loi sur le pétrole et le gaz des terres indiennes*, L.R.C. (1985), ch. I-7. En outre, même si ce fait n'est pas déterminant sur le plan juridique, cette conclusion est étayée par littérature doctrinale. En particulier, l'article du professeur McNeil intitulé «The Meaning of Aboriginal Title», *op. cit.*, m'a été très utile.

(i) La jurisprudence canadienne sur le titre aborigène

En dépit du fait que la jurisprudence sur le titre aborigène est en quelque sorte en cours d'élaboration, il est clair que les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne se limitent pas aux coutumes, pratiques et traditions d'un peuple autochtone et qui font partie intégrante de sa culture distinctive. Dans l'arrêt *Guerin*, précité, par exemple, le juge Dickson a qualifié le titre aborigène de «droit [. . .] sur [d]es terres» comprenant «le droit, en *common law*, d'occuper et de posséder certaines terres» (à la p. 382). Le «droit [. . .] d'occuper et de posséder» est exprimé en termes généraux et, fait important, n'est pas assorti d'une réserve le limitant aux utilisations traditionnelles et habituelles faites de ces terres. Tous les doutes qui pouvaient exister relativement à la question de savoir si le droit d'occuper et d'utiliser des terres vise un large éventail d'utilisations ont été dissipés dans l'arrêt *Paul*, précité, où notre Cour est allée encore plus loin et a déclaré que le titre aborigène était «quelque chose de plus

emphasis of the broad notion of use and possession.

## (ii) Reserve Land

Another source of support for the conclusion that the uses to which lands held under aboriginal title can be put are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures can be found in *Guerin*, where Dickson J. stated at p. 379 that the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. . . . [Emphasis added.]

The nature of the Indian interest in reserve land is very broad, and can be found in s. 18 of the *Indian Act*, which I reproduce in full:

**18.** (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed

qu'un droit de jouissance et d'occupation» (à la p. 678). Une fois de plus, il n'est fait aucune mention de coutumes, pratiques et traditions autochtones en tant que limites à ce droit. De plus, je considère que l'emploi de l'expression «quelque chose de plus» fait ressortir le caractère général de la notion d'utilisation et de possession.

## (ii) Les terres des réserves

L'arrêt *Guerin* est une autre source étayant la conclusion que les utilisations qui peuvent être faites des terres détenues en vertu d'un titre aborigène ne se limitent pas à celles fondées sur des coutumes, pratiques et traditions faisant partie intégrante de cultures distinctives autochtones. Dans cet arrêt, le juge Dickson a déclaré, à la p. 379, que les droits des autochtones sur les terres des réserves et leurs droits sur les terres détenues en vertu d'un titre aborigène sont régis par les mêmes principes juridiques:

À mon avis, il est sans importance que la présente espèce concerne le droit d'une bande indienne sur une réserve plutôt qu'un titre aborigène non reconnu sur des terres tribales traditionnelles. Le droit des Indiens sur les terres est le même dans les deux cas . . . [Je souligne.]

La nature du droit des Indiens sur les terres des réserves est très générale, et elle peut être dégagée de l'art. 18 de la *Loi sur les Indiens*, que je reproduis au complet:

**18.** (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable

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between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct. [Emphasis added.]

The principal provision is s. 18(1), which states that reserve lands are held “for the use and benefit” of the bands which occupy them; those uses and benefits, on the face of the *Indian Act*, do not appear to be restricted to practices, customs and traditions integral to distinctive aboriginal cultures. The breadth of those uses is reinforced by s. 18(2), which states that reserve lands may be used “for any other purpose for the general welfare of the band”. The general welfare of the band has not been defined in terms of aboriginal practices, customs and traditions, nor in terms of those activities which have their origin pre-contact; it is a concept, by definition, which incorporates a reference to the present-day needs of aboriginal communities. On the basis of *Guerin*, lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes.

(iii) *Indian Oil and Gas Act*

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The third source for the proposition that the content of aboriginal title is not restricted to practices, customs and traditions which are integral to distinctive aboriginal cultures is the *Indian Oil and Gas Act*. The overall purpose of the statute is to provide for the exploration of oil and gas on reserve lands through their surrender to the Crown. The statute presumes that the aboriginal interest in reserve land includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act* in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344. On the basis of *Guerin*, aboriginal title also encompass mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use

usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier. [Je souligne.]

La disposition principale est le par. 18(1), qui indique que les terres des réserves sont détenues «à l'usage et au profit» des bandes qui les occupent; à la lecture de la *Loi sur les Indiens*, il ne semble pas que les utilisations et les avantages se limitent aux coutumes, pratiques et traditions faisant partie intégrante des cultures autochtones distinctives. Cette pluralité d'utilisations est renforcée par le par. 18(2), qui prévoit que les terres des réserves peuvent être utilisées «pour tout autre objet concernant le bien-être général de la bande». Le bien-être général de la bande n'a pas été défini en fonction des coutumes, pratiques et traditions autochtones, ni en fonction des activités dont l'origine remonte avant le contact avec les Européens; il s'agit d'un concept qui, par définition, fait référence aux besoins actuels des collectivités autochtones. Sur le fondement de l'arrêt *Guerin*, les terres détenues en vertu d'un titre aborigène, tout comme les terres des réserves, peuvent servir à un grand nombre d'utilisations.

(iii) *La Loi sur le pétrole et le gaz des terres indiennes*

La troisième source sur laquelle s'appuie l'énoncé que le contenu du titre aborigène ne se limite pas aux coutumes, pratiques et traditions faisant partie intégrante des cultures autochtones distinctives est la *Loi sur le pétrole et le gaz des terres indiennes*. L'objet général de cette loi est de permettre l'exploitation pétrolière et gazière sur les terres des réserves par la cession de ces terres à la Couronne. Cette loi présume que le droit des autochtones sur les terres des réserves comprend les droits miniers, point que notre Cour a accepté à l'unanimité relativement à la *Loi sur les Indiens*, dans l'arrêt *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344. Sur le fondement de l'arrêt *Guerin*, le titre aborigène comprend également les droits miniers, et les terres détenues en vertu d'un titre aborigène devraient pouvoir être exploitées de la même façon, ce qui n'est certaine-

for those lands. This conclusion is reinforced by s. 6(2) of the Act, which provides:

6. . . .

(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

The areas referred to in s. 6(2), at the very least, must encompass lands held pursuant to aboriginal title, since those lands by definition have not been surrendered under land claims agreements. The presumption underlying s. 6(2) is that aboriginal title permits the development of oil and gas reserves.

Although this is not determinative, the conclusion that the content of aboriginal title is not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive aboriginal societies has wide support in the critical literature: Jocelyn Gagne, "The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim" (1982-83), 47 *Sask. L. Rev.* 309 at pp. 336-37; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 242; Kent McNeil, "The Meaning of Aboriginal Title", *supra*, at pp. 143-150; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982 Part II — Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207, at p. 221; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship*), at p. 561; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83), 8 *Queen's L.J.* 232, at pp. 268-9; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), at p. 34; Brian Slattery, "Understanding Aboriginal Rights", 66 *Can. Bar Rev.* 727, at pp. 746-48.

In conclusion, the content of aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinc-

ment pas une utilisation traditionnelle de ces terres. Cette conclusion est étayée par le par. 6(2) de la Loi, qui dispose:

6. . . .

(2) La présente loi n'a pas pour effet d'abroger les droits du peuple indien ou de l'empêcher de négocier l'obtention d'avantages pour le pétrole et le gaz dans les régions où les revendications de terres n'ont pas été réglées.

Les régions visées au par. 6(2) doivent à tout le moins comprendre les terres détenues en vertu d'un titre aborigène, étant donné que, par définition, ces terres n'ont pas été cédées dans le cadre d'accords sur des revendications territoriales. La présomption qui sous-tend le par. 6(2) est que le titre aborigène permet l'exploitation de réserves pétrolières et gazières.

Même si ce fait n'est pas déterminant, la conclusion que le contenu du titre aborigène ne se limite pas aux utilisations dont les origines remontent aux coutumes, pratiques et traditions faisant partie intégrante de sociétés autochtones distinctives jouit d'un vaste appui dans la doctrine: Jocelyn Gagne, «The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim» (1982-83), 47 *Sask. L. Rev.* 309, aux pp. 336 et 337; Kent McNeil, *Common Law Aboriginal Title*, *op. cit.*, à la p. 242; Kent McNeil, «The Meaning of Aboriginal Title», *op. cit.*, aux pp. 143 à 150; William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act*, 1982 Part II — Section 35: The Substantive Guarantee» (1988), 22 *U.B.C. L. Rev.* 207, à la p. 221; *Rapport de la Commission royale sur les peuples autochtones*, vol. 2 (*Une relation à redéfinir*), à la p. 624; Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights» (1982-83), 8 *Queen's L.J.* 232, aux pp. 268 et 269; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), à la p. 34; Brian Slattery, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, aux pp. 746 à 748.

En conclusion, le contenu du titre aborigène ne se limite pas aux utilisations qui sont des éléments d'une coutume, pratique ou tradition faisant partie

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tive culture of the aboriginal group claiming the right. However, nor does aboriginal title amount to a form of inalienable fee simple, as I will now explain.

(c) *Inherent Limit: Lands Held Pursuant to Aboriginal Title Cannot Be Used in a Manner that Is Irreconcilable with the Nature of the Attachment to the Land Which Forms the Basis of the Group's Claim to Aboriginal Title*

intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. Toutefois, comme je vais maintenant l'expliquer, le titre aborigène n'équivaut pas non plus à une forme de fief simple inaliénable.

c) *Limite intrinsèque: les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'a le groupe autochtone concerné pour le territoire et qui est à la base de sa revendication du titre aborigène*

125 The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land — it is a *sui generis* interest that is distinct from “normal” proprietary interests, most notably fee simple.

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite au contenu du titre aborigène est une manifestation du principe qui sous-tend les différentes dimensions de ce droit foncier spécial, il s'agit d'un droit *sui generis* qui est différent des intérêts de propriété «ordinaires», en particulier le fief simple.

126 I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

J'arrive à cette conclusion en me référant aux autres dimensions du titre aborigène qui ont également un caractère *sui generis*. Je vais examiner d'abord l'origine du titre aborigène. Comme je l'ai indiqué plus haut, le titre aborigène découle du fait que le Canada a d'abord été occupé par les peuples autochtones. Cette occupation antérieure est pertinente à deux égards: premièrement en raison du fait physique de l'occupation, et deuxièmement pour le motif que le titre aborigène tire en partie son origine des régimes juridiques autochtones préexistants. Toutefois, le droit relatif au titre aborigène ne cherche pas seulement à définir les droits historiques des peuples autochtones sur le territoire; il vise aussi à accorder, de nos jours, une protection juridique à cette occupation antérieure. La reconnaissance de l'importance de la continuité du rapport qu'une collectivité autochtone entretient avec ses terres au fil des ans ressort implicitement de la protection des modalités historiques de l'occupation.

I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.

Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

Je vais expliciter ce point plus loin, dans l'examen du critère applicable pour faire la preuve du titre aborigène. En l'espèce, la pertinence de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres réside dans le fait que ce rapport s'applique non seulement au passé mais aussi à l'avenir. Rien ne devrait empêcher ce rapport de continuer dans le futur. Il s'ensuit que les utilisations des terres qui menaceraient ce rapport futur sont, de par leur nature même, exclues du contenu du titre aborigène.

Par conséquent, les terres visées par un titre aborigène ne peuvent pas, selon moi, être utilisées à des fins incompatibles avec la nature de l'occupation de ces terres et avec le rapport que le groupe concerné entretient avec celles-ci, facteurs qui, ensemble, ont donné naissance au titre aborigène en premier lieu. Comme nous le verrons plus loin, l'un des éléments fondamentaux qui permettent de déterminer si un groupe autochtone donné possède un titre aborigène sur certaines terres est la question de l'occupation de celles-ci. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Il me semble que ces éléments du titre aborigène créent une limite intrinsèque aux utilisations qui peuvent être faites des terres visées par un tel titre. Par exemple, si on fait la preuve de l'occupation par référence à l'utilisation des terres comme territoire de chasse, alors le groupe qui a revendiqué avec succès le titre aborigène sur ces terres ne peut pas les utiliser d'une manière qui anéantisse leur valeur pour cette utilisation (p. ex. en les exploitant en tant que mine à ciel ouvert). De même, si un groupe affirme l'existence d'un lien spécial avec les terres visées en raison de leur importance culturelle ou rituelle, il ne peut pas les utiliser d'une manière qui anéantisse ce rapport (p. ex. en les exploitant d'une façon qui entraîne la destruction du lien, peut-être en les transformant en terrain de stationnement).

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It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy “to ensure that Indians are not dispossessed of their entitlements”: see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.

C’est également pour cette raison que les terres détenues en vertu d’un titre aborigène sont inaliénables. L’aliénation des terres en question éteindrait le droit des autochtones de les occuper et mettrait fin au rapport qu’ils entretiennent avec celles-ci. J’ai indiqué précédemment que l’inaliénabilité des terres indiennes découle, du moins en partie, du principe de common law selon lequel les personnes qui s’établissent dans une colonie doivent obtenir leur titre par voie de concession de la Couronne et que, par conséquent, elles ne peuvent pas l’acquérir en l’achetant à des autochtones. L’inaliénabilité découle également, une fois de plus en partie seulement, de la politique générale qui consiste à «veiller à ce que ceux-ci [les Indiens] ne soient pas dépouillés de leurs droits»: voir *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, à la p. 133. L’inaliénabilité des terres détenues en vertu d’un titre aborigène indique que ces terres sont quelque chose de plus qu’un simple bien fungible. Le rapport qu’entretient une collectivité autochtone avec les terres sur lesquelles elle possède un titre aborigène comporte un aspect important de nature non économique. Les terres en elles-mêmes ont une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur.

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I am cognizant that the *sui generis* nature of aboriginal title precludes the application of “traditional real property rules” to elucidate the content of that title (*St. Mary’s Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14). Nevertheless, a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” (E. H. Burn, *Cheshire and Burn’s Modern Law of Real Property* (14th ed. 1988), at p. 264) or “ruin the property” (Robert E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed. 1975), at p. 105). This description of the limits

Je suis conscient du fait que le caractère *sui generis* du titre aborigène ne permet pas d’appliquer les «règles traditionnelles du droit des biens» pour expliquer le contenu de ce titre (*Bande indienne de St. Mary’s c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657, au par. 14). Malgré tout, il est possible de faire une analogie utile entre la limite applicable au titre aborigène et le concept de dégradation en *equity* que l’on retrouve en common law. Selon ce concept, les personnes qui sont titulaires d’un domaine viager ne peuvent pas y commettre d’[TRADUCTION] «actes de destruction injustifiés ou excessifs» (E. H. Burn, *Cheshire and Burn’s Modern Law of Real Property* (14<sup>e</sup> éd. 1988), à la p. 264), ni [TRADUCTION] «ruiner le bien-fonds» (Robert E. Megarry et H. W. R. Wade, *The Law of Real Property* (4<sup>e</sup> éd. 1975), à la p. 105). Cette description des limites imposées par le concept de

imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

Finally, what I have just said regarding the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited in the way I have described. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

The foregoing amounts to a general limitation on the use of lands held by virtue of aboriginal title. It arises from the particular physical and cultural relationship that a group may have with the land and is defined by the source of aboriginal title over it. This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.

(d) *Aboriginal Title under s. 35(1) of the Constitution Act, 1982*

Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (emphasis added). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalized those rights which aborigi-

dégradation en *equity* illustre bien le genre de limites auxquelles je pense en l’espèce.

Enfin, les remarques que je viens de faire au sujet de l’importance de la continuité du rapport qu’entretient une collectivité autochtone avec ses terres, et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d’une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l’idée de cession renforce la conclusion que le titre aborigène est limité de la manière que j’ai décrite. Si les autochtones désirent utiliser leurs terres d’une manière que ne permet pas le titre aborigène, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Ce qui précède équivaut à une limitation générale de l’utilisation des terres détenues en vertu d’un titre aborigène. Cette limite découle du rapport physique et culturel particulier qu’un groupe peut entretenir avec les terres, et elle est définie par la source du titre aborigène sur ces terres. Il ne s’agit pas, je dois le souligner, d’une limite qui restreint l’utilisation des terres aux activités qui y ont traditionnellement été exercées. Cela reviendrait, sur le plan juridique, à placer dans un carcan juridique les autochtones qui ont un droit légitime sur les terres. L’approche que je viens d’exposer permet un éventail complet d’utilisations des terres, sous réserve seulement d’une limite dominante, définie par la nature spéciale du titre aborigène sur les terres en question.

d) *Le titre aborigène visé au par. 35(1) de la Loi constitutionnelle de 1982*

Le titre aborigène en common law est protégé, dans sa forme complète, par le par. 35(1). Cette conclusion découle des termes exprès du par. 35(1) lui-même, dont le texte complet est ainsi rédigé: «[l]es droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés» (je souligne). Il ressort de la simple lecture du par. 35(1) que cette disposition n’a pas créé de droits ancestraux, mais qu’elle a plutôt constitutionnalisé ceux qui étaient «existants» en 1982. Cette disposition a, à tout le moins,

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nal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder, supra*), s. 35(1) has constitutionalized it in its full form.

constitutionnalisés les droits que les peuples autochtones possédaient en common law, étant donné que ces droits existaient au moment de l'entrée en vigueur du par. 35(1). Comme le titre aborigène était un droit issu de la common law et dont l'existence a été reconnue bien avant 1982 (p. ex. dans *Calder, précité*), le par. 35(1) l'a constitutionnalisé dans sa forme complète.

134 I expressed this understanding of the relationship between common law aboriginal rights, including aboriginal title, and the aboriginal rights protected by s. 35(1) in *Van der Peet*. While explaining the purposes behind s. 35(1), I stated that "it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law" (at para. 28). Through the enactment of s. 35(1), "a pre-existing legal doctrine was elevated to constitutional status" (at para. 29), or in other words, s. 35(1) had achieved "the constitutionalization of those rights" (at para. 29).

J'ai exprimé cette conception du rapport qui existe entre les droits ancestraux reconnus en common law, y compris le titre aborigène, et les droits ancestraux protégés par le par. 35(1) dans l'arrêt *Van der Peet*. Pour expliquer l'objet du par. 35(1), j'ai dit qu'il ne faut pas oublier que le par. 35(1) n'a pas créé la doctrine juridique des droits ancestraux. En effet, ces droits existaient déjà et ils étaient reconnus en common law» (au par. 28). Par suite de l'édiction du par. 35(1), «une doctrine juridique préexistante s'est vue conférer un statut constitutionnel» (au par. 29); en d'autres termes, le par. 35(1) a réalisé «la constitutionnalisation de [ces droits]» (au par. 29).

135 Finally, this view of the effect of s. 35(1) on common law aboriginal title is supported by numerous commentators: Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382, at pp. 447-48; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255, at pp. 256-57; James O'Reilly, "La Loi constitutionnelle de 1982, droit des autochtones" (1984), 25 *C. de D.* 125, at p. 137; William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee", *supra*, at pp. 220-21; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 329; Douglas Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada", in Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 707, at pp. 731-32; Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *supra*, at p. 254; Brian Slattery, *Ancestral Lands*,

En dernier lieu, de nombreux commentateurs souscrivent à cette façon de voir l'effet du par. 35(1) sur le titre aborigène reconnu en common law: Patrick Macklem, «First Nations Self-Government and the Borders of the Canadian Legal Imagination» (1991), 36 *R.D. McGill* 382, aux pp. 447 et 448; Kent McNeil, «The Constitutional Rights of the Aboriginal Peoples of Canada» (1982), 4 *Sup. Ct. L. Rev.* 255, aux pp. 256 et 257; James O'Reilly, «La Loi constitutionnelle de 1982, droit des autochtones» (1984), 25 *C. de D.* 125, à la p. 137; William Pentney, «The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II — Section 35: The Substantive Guarantee», *loc. cit.*, aux pp. 220 et 221; Douglas Sanders, «The Rights of the Aboriginal Peoples of Canada» (1983), 61 *R. du B. can.* 314, à la p. 329; Douglas Sanders, «Les droits préexistants: les peuples autochtones du Canada», dans Gerald-A. Beaudoin et Ed Ratushny, dir., *Charte canadienne des droits et libertés* (2<sup>e</sup> éd. 1989), 779, aux pp. 809 à 811; Brian Slattery, «The Constitutional Guarantee of Aboriginal and Treaty Rights», *loc.*

*Alien Laws: Judicial Perspectives on Aboriginal Title*, *supra*, at p. 45.

I hasten to add that the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1). As I said in *Côté*, *supra*, at para. 52:

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.

I relied on this proposition in *Côté* to defeat the argument that the possible absence of aboriginal rights under French colonial law was a bar to the existence of aboriginal rights under s. 35(1) within the historic boundaries of New France. But it also follows that the existence of a particular aboriginal right at common law is not a *sine qua non* for the proof of an aboriginal right that is recognized and affirmed by s. 35(1). Indeed, none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).

The acknowledgement that s. 35(1) has accorded constitutional status to common law aboriginal title raises a further question — the relationship of aboriginal title to the “aboriginal rights” protected by s. 35(1). I addressed that question in *Adams*, *supra*, where the Court had been presented with two radically different conceptions of this relationship. The first conceived of aboriginal rights as being “inherently based in aboriginal title to the land” (at para. 25), or as fragments of a broader claim to aboriginal title. By implication, aboriginal rights must rest either in a claim to title or the unextinguished remnants of title. Taken to

*cit.*, à la p. 254; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, *op. cit.*, à la p. 45.

Je m’empresse d’ajouter que la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu de cette disposition. Comme je l’ai dit dans *Côté*, précité, au par. 52:

Le noble objet visé par le par. 35(1), savoir la préservation des caractéristiques déterminantes qui font partie intégrante des sociétés autochtones distinctives, ne saurait être réalisé s’il ne protégeait que les caractéristiques déterminantes dont le sort a bien voulu qu’elles soient reconnues légalement par les colonisateurs européens.

Dans *Côté*, je me suis fondé sur cette affirmation pour réfuter l’argument selon lequel l’absence possible de droits ancestraux dans le droit colonial français faisait obstacle à l’existence de droits ancestraux au sens du par. 35(1) à l’intérieur des frontières historiques de la Nouvelle-France. Toutefois, il s’ensuit également que l’existence d’un droit ancestral particulier reconnu en common law n’est pas un préalable essentiel pour prouver l’existence d’un droit ancestral reconnu et confirmé par le par. 35(1). De fait, aucune des décisions qui ont été rendues par notre Cour relativement au par. 35(1) et dans lesquelles l’existence d’un droit ancestral a été démontrée n’a invoqué l’existence de ce droit en common law. L’existence d’un droit ancestral reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

La reconnaissance du fait que le par. 35(1) a constitutionnalisé le titre aborigène reconnu en common law soulève une autre question, celle du rapport qui existe entre le titre aborigène et les «droits ancestraux» protégés par le par. 35(1). J’ai examiné cette question dans l’arrêt *Adams*, précité, où deux conceptions diamétralement opposées de ce rapport avaient été soumises à notre Cour. La première présentait les droits ancestraux comme des droits qui «se rattachent intrinsèquement au titre aborigène sur le territoire visé» (au par. 25), ou comme des fragments d’une revendication plus large visant le titre aborigène. Par implication, les

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its logical extreme, this suggests that aboriginal title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position for another — that aboriginal title is “simply one manifestation of a broader-based conception of aboriginal rights” (at para. 25). Thus, although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land “was of a central significance to their distinctive culture” (at para. 26).

droits ancestraux doivent reposer soit sur la revendication d’un titre, soit sur les restes non éteints d’un titre. Poussé à son extrême, ce raisonnement suggère que le titre aborigène est simplement la somme d’un ensemble de droits ancestraux individuels, et qu’il n’a donc aucun contenu indépendant. J’ai toutefois rejeté cette conception et retenu l’autre, savoir que le titre aborigène n’est «que la manifestation d’une conception plus large des droits ancestraux» (au par. 25). Par conséquent, bien que le titre aborigène soit un type de droit ancestral reconnu et confirmé par le par. 35(1), il est distinct des autres droits ancestraux parce qu’il naît lorsque le rapport entre un territoire et un groupe «avait, pour sa culture distinctive, une importance fondamentale» (au par. 26).

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The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation and use of the land” where the activity is taking place is not “sufficient to support a claim of title to the land” (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. I put the point this way in *Adams*, at para. 30:

Il ressort de l’arrêt *Adams* que les droits ancestraux qui sont reconnus et confirmés par le par. 35(1) s’étalent le long d’un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a les droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question. Toutefois, le fait que le territoire sur lequel l’activité est pratiquée a été «occupé et utilisé» ne suffit pas «pour étayer la revendication du titre sur celui-ci» (au par. 26 (souligné dans l’original)). Néanmoins, ces activités bénéficient de la protection de la Constitution. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu’un groupe autochtone puisse être incapable de démontrer l’existence d’un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s’adonner à une activité particulière. J’ai présenté la chose de la façon suivante dans l’arrêt *Adams* (au par. 30):

Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to,

En effet, même si un droit ancestral s’attache à une parcelle de terrain dont le titre n’appartient pas au peuple autochtone concerné, ce droit peut fort bien être spécifique à un site et, en conséquence, ne pouvoir être exercé que sur cette parcelle de terrain spécifique. Par exemple, si un peuple autochtone établit que la chasse sur une parcelle de terrain spécifique faisait partie intégrante de sa culture distinctive à l’époque, le droit de chasse ancestral — même s’il existe indépendamment

the right to hunt on the specific tract of land. [Emphasis added.]

At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances” (at para. 27). The fact that aboriginal peoples were non-sedentary, however (at para. 27)

does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.

#### (e) *Proof of Aboriginal Title*

##### (i) Introduction

In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to

du titre sur cette parcelle de terrain — est néanmoins défini comme étant le droit de chasser sur cette parcelle spécifique, et il se limite à cela. [Je souligne.]

À l’autre extrémité du spectre, il y a le titre aborigène proprement dit. Ainsi qu’il ressort clairement de l’arrêt *Adams*, le titre aborigène confère quelque chose de plus que le droit d’exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L’existence de droits spécifiques à un site peut être établie même si l’existence d’un titre ne peut pas l’être. Ce que le titre aborigène confère c’est le droit au territoire lui-même.

Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d’établir le bien-fondé de leur revendication d’un titre, mais qu’ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits — spécifiques à un site — d’exercer des activités particulières. Comme je l’ai expliqué dans *Adams*, cela peut se produire dans le cas de peuples nomades qui changeaient «l’emplacement de leurs établissements [...] en fonction des saisons et des circonstances» (au par. 27). Toutefois, le fait que des peuples autochtones n’étaient pas sédentaires (au par. 27)

ne change rien au fait que les peuples nomades ont survécu en exploitant le territoire avant le contact avec les Européens, et que bon nombre des coutumes, pratiques et traditions observées par ces peuples nomades sur le territoire en question faisaient partie intégrante de leur culture distinctive.

#### e) *La preuve de l’existence d’un titre aborigène*

##### (i) Introduction

En plus de différer des autres droits ancestraux quant au degré de rattachement avec le territoire, le titre aborigène se distingue de ceux-ci d’une autre façon. Jusqu’à maintenant, la Cour a défini les droits ancestraux par rapport à des activités. Comme je l’ai dit dans *Van der Peet* (au par. 46):

[P]our constituer un droit ancestral, une activité doit être un élément d’une coutume, pratique ou tradition faisant

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the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]

Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

141 This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly. I anticipated this possibility in *Van der Peet* itself, where I stated that (at para. 74):

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. [Emphasis added; "and" emphasized in original.]

Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s. 35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s. 35(1) — prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.

partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit en question. [Je souligne.]

Or le titre aborigène est le droit au territoire lui-même. Sous réserve des limites que j'ai exposées précédemment, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent.

Cette différence entre les droits ancestraux autorisant l'exercice d'activités particulières et le titre aborigène exige l'adaptation, en conséquence, du critère que j'ai exposé dans *Van der Peet*. J'ai prévu cette possibilité dans cet arrêt, où j'ai déclaré (au par. 74):

Les droits ancestraux découlent non seulement de l'occupation antérieure du territoire, mais aussi de l'organisation sociale antérieure et des cultures distinctives des peuples autochtones habitant ce territoire. Pour déterminer si le bien-fondé de la revendication d'un droit ancestral a été établi, les tribunaux doivent considérer et les rapports qu'entretient le demandeur autochtone avec le territoire et les coutumes, pratiques et traditions de la société à laquelle il appartient et de la culture distinctive de cette société. Ils ne doivent pas se concentrer sur les rapports qu'entretiennent les peuples autochtones avec le territoire au point de négliger les autres facteurs pertinents pour l'identification et la définition des droits ancestraux. [Je souligne; «et» souligné dans l'original.]

Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, il ressort clairement de cet énoncé que le par. 35(1) doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part. Jusqu'à ce jour, la jurisprudence relative au par. 35(1) a surtout insisté sur le deuxième aspect. Cette situation est dans une large mesure attribuable aux genres d'affaires qui ont été soumises à notre Cour dans le contexte du par. 35(1), savoir des poursuites intentées relativement à des infractions réglementaires qui, de par leur nature même, interdisent divers types d'activités.

The adaptation of the test laid down in *Van der Peet* to suit claims to title must be understood as the recognition of the first aspect of that prior presence. However, as will now become apparent, the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are first, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy, and second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

(ii) The Test for the Proof of Aboriginal Title

In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The land must have been occupied prior to sovereignty

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of aboriginal rights to engage in specific activities. In *Van der Peet*, I held, at para. 60 that “[t]he time period that

L’adaptation du critère établi dans l’arrêt *Van der Peet* en vue de son application aux revendications de titre doit également être considérée comme la reconnaissance du premier aspect de cette présence antérieure. Toutefois, comme il deviendra maintenant évident, le critère applicable pour déterminer l’existence de droits ancestraux autorisant l’exercice d’activités particulières et le critère applicable pour déterminer l’existence d’un titre aborigène comportent de grandes similitudes. Par ailleurs, voici quelles sont les principales distinctions: premièrement, dans le cadre du critère relatif au titre aborigène, l’exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l’exigence d’occupation; deuxièmement, alors que c’est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c’est le moment de l’affirmation par la Couronne de sa souveraineté sur le territoire.

(ii) Le critère applicable pour prouver l’existence d’un titre aborigène

Pour établir le bien-fondé de la revendication d’un titre aborigène, le groupe autochtone qui revendique ce titre doit satisfaire aux exigences suivantes: (i) il doit avoir occupé le territoire avant l’affirmation de la souveraineté; (ii) si l’occupation actuelle est invoquée comme preuve de l’occupation avant l’affirmation de la souveraineté, il doit exister une continuité entre l’occupation actuelle et l’occupation antérieure à l’affirmation de la souveraineté; (iii) au moment de l’affirmation de la souveraineté, cette occupation doit avoir été exclusive.

Le territoire doit avoir été occupé avant l’affirmation de la souveraineté

Pour établir le bien-fondé de la revendication d’un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu’il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. La période pertinente pour établir l’existence du titre est donc différente de celle qui s’applique pour établir l’existence de droits ancestraux autorisant l’exercice d’activités précises. Dans *Van der Peet*, j’ai

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a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact . . .” This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

statué, au par. 60, que «[l]a période que doit prendre en considération le tribunal pour décider si le droit revendiqué satisfait au critère de la partie intégrante de la culture distinctive de la collectivité autochtone qui revendique le droit en cause est la période qui a précédé le contact . . .» Cela découle du fait que pour définir les attributs fondamentaux et distinctifs des sociétés autochtones préexistantes, il faut se reporter à une époque antérieure à l’arrivée des Européens. Les pratiques, coutumes et traditions qui ont pris naissance uniquement sous l’effet des influences européennes ne satisfont pas à la norme établie pour la reconnaissance des droits ancestraux.

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On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown’s underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. I note that this is the approach has support in the academic literature: Brian Slattery, “Understanding Aboriginal Rights”, *supra*, at p. 742; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 196. For these reasons, I conclude that aboriginals must establish occupation of the land

Par contre, lorsqu’il est question de titre aborigène, la période de l’affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d’un point de vue théorique, le titre aborigène découle de l’occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n’a acquis ce titre qu’à compter du moment où elle a affirmé sa souveraineté sur le territoire en question. Étant donné qu’il serait absurde de parler d’une charge grevant le titre sous-jacent avant que celui-ci ait existé, le titre aborigène s’est cristallisé au moment de l’affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d’une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l’occupation ou de la possession suffit pour fonder un titre aborigène, et il n’est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l’arrivée des Européens ou qu’il était un élément distinctif de celle-ci. Finalement, il semble, d’un point de vue pratique, que la date de l’affirmation de la souveraineté ait un caractère plus certain que celle du premier contact avec les Européens. Il est souvent très difficile de déterminer à quel moment précis chaque groupe autoch-

from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. McEachern C.J. found, at pp. 233-34, and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846. This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.

There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.

This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law

tone est pour la première fois entré en contact avec la culture européenne. Je note que cette approche trouve appui dans la doctrine: Brian Slattery, «Understanding Aboriginal Rights», *loc. cit.*, à la p. 742; Kent McNeil, *Common Law Aboriginal Title*, *op. cit.*, à la p. 196. Pour ces motifs, je conclus que les autochtones doivent prouver l'occupation du territoire à partir de l'affirmation de la souveraineté pour fonder la revendication d'un titre aborigène. Le juge en chef McEachern a conclu, aux pp. 233 et 234, que la date de l'affirmation de la souveraineté britannique sur la Colombie-Britannique avait été établie de façon concluante par le traité Oregon de 1846, conclusion que les parties n'ont pas contestée en appel. Cela ne veut pas dire que des circonstances ultérieures à l'affirmation de la souveraineté ne seront jamais pertinentes pour ce qui est du titre ou de l'indemnité. De telles circonstances pourraient l'être, par exemple dans le cas de bandes autochtones qui auraient été dépossédées de terres traditionnelles après l'affirmation de la souveraineté.

Il y avait un consensus entre les parties au présent pourvoi sur le fait que la preuve de l'occupation historique du territoire visé est requise pour établir le bien-fondé de la revendication d'un titre aborigène sur celui-ci. Toutefois, les parties ne se sont pas entendues sur la façon de prouver cette occupation. Les intimés soutiennent que, en ce qui concerne l'établissement de l'existence d'un titre aborigène, l'occupation s'entend nécessairement de l'occupation physique du territoire en question. À l'opposé, la nation Gitksan appelante prétend qu'il est possible, du moins en partie, d'établir l'existence d'un titre aborigène en se référant aux règles de droit autochtones.

Ce débat sur la preuve de l'occupation témoigne de l'existence de deux conceptions divergentes de l'origine du titre aborigène. Essentiellement, les intimés soutiennent que le titre aborigène découle de la réalité physique qu'ont rencontrée les Européens au moment de l'affirmation de la souveraineté, tandis que la nation Gitksan adopte en fait le point de vue que le titre aborigène découle des modes de possession foncière prévus par les règles de droit autochtones et qu'il devrait refléter ces

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and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In *Baker Lake*, *supra*, Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their “physical presence on the land they occupied” (at p. 561) and the existence “among [that group of] . . . a recognition of the claimed rights. . . by the regime that prevailed before” (at p. 559).

modes de possession. Toutefois, comme je l’ai expliqué précédemment, l’origine du titre aborigène semble reposer tant sur la common law que sur le point de vue des autochtones à l’égard du territoire, point de vue qui tient compte notamment de leurs régimes juridiques. Il s’ensuit que ces deux éléments devraient être pris en compte dans la démonstration de l’occupation. De fait, il existe un précédent à cet égard. Dans l’affaire *Baker Lake*, précitée, le juge Mahoney a statué que, pour établir l’existence d’un titre aborigène, les requérants devaient prouver leur «présence physique [. . .] sur la terre qu’ils occupaient» (à la p. 561) et l’existence «chez [ce groupe] [d’]une perception des droits réclamés [. . .] [qui] recevai[t] effet au cours du régime qui prévalait antérieurement» (à la p. 559).

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This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law” and that “[t]rue reconciliation will, equally, place weight on each”. I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

L’arrêt *Van der Peet* commande également cette approche relative à la preuve de l’occupation en common law dans le contexte du par. 35(1). Dans cette décision, comme je l’ai dit précédemment, j’ai statué, au par. 50 que, pour concilier l’occupation antérieure de l’Amérique du Nord par les peuples autochtones avec l’affirmation de la souveraineté de la Couronne, il fallait tenir compte à la fois du «point de vue des autochtones et de la common law», et j’ai également conclu que «[l]a conciliation véritable accorde, également, de l’importance à chacun de ces éléments». En outre, j’ai déclaré que le point de vue des autochtones sur l’occupation des terres peut être dégagé en partie, mais pas exclusivement, de leurs règles de droit traditionnelles parce que ces règles étaient des éléments des coutumes, pratiques et traditions des peuples autochtones: au par. 41. Il s’ensuit que si, au moment de l’affirmation de la souveraineté, une société autochtone avait des règles de droit concernant le territoire, ces règles seraient pertinentes pour prouver l’occupation des terres visées par la revendication d’un titre aborigène. Les règles de droit pertinentes pourraient notamment inclure un régime de tenure foncière ou des règles régissant l’utilisation des terres.

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However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly

Toutefois, le point de vue des autochtones doit être pris en considération en même temps que la common law. Le professeur McNeil a soutenu,

argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, *supra*, at p. 73; also see *Cheshire and Burn's Modern Law of Real Property*, *supra*, at p. 28; and Megarry and Wade, *The Law of Real Property*, *supra*, at p. 1006. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

In *Van der Peet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture" (at para. 55). The latter stood apart because they "made the culture of the society distinctive . . . it was one of the things that truly made the society what it was" (at para. 55, emphasis in original). The same requirement operates in the determination of the proof of aboriginal title. As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land . . . was of a central significance to their distinctive culture" (at para. 26).

Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actu-

d'une façon convaincante, qu'en common law l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres visées: *Common Law Aboriginal Title*, *op. cit.*, à la p. 73; voir aussi *Cheshire and Burn's Modern Law of Real Property*, *op. cit.*, à la p. 28; et Megarry et Wade, *The Law of Real Property*, *op. cit.*, à la p. 1006. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en passant par la délimitation et la culture de champs: voir McNeil, *Common Law Aboriginal Title*, aux pp. 201 et 202. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, [TRADUCTION] «il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées»: Brian Slattery, «Understanding Aboriginal Rights», à la p. 758.

Dans *Van der Peet*, j'ai établi une distinction entre les coutumes, pratiques et traditions des peuples autochtones qui étaient «un aspect» de la société autochtone qui revendique le titre ou qui «y était[ent] exercée[s]», et celles qui étaient «un élément fondamental et important de la culture distinctive de cette société» (au par. 55). Ces dernières coutumes, pratiques et traditions se démarquaient parce qu'elles «rendaient la culture de la société distinctive [ . . . ] c'était l'une des choses qui véritablement faisait de la société ce qu'elle était» (au par. 55, souligné dans l'original). La même exigence s'applique pour prouver l'existence d'un titre aborigène. Comme je l'ai dit dans *Adams*, le bien-fondé de la revendication d'un titre est établi lorsqu'un groupe peut démontrer «que le rapport qu'il entretient avec le territoire [ . . . ] avait, pour sa culture distinctive, une importance fondamentale» (au par. 26).

Bien que cela demeure un aspect fondamental du critère de détermination de l'existence des droits ancestraux, compte tenu de l'exigence d'occupation prévue par le critère applicable pour sta-

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ally serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

tuer sur l'existence d'un titre aborigène, je ne peux imaginer de situation où cette exigence servirait en fait à limiter ou à empêcher la revendication de titre. L'exigence existe à l'égard des droits qui ne constituent pas des titres parce que, dans de tels cas, il est nécessaire de distinguer entre les pratiques qui étaient des éléments fondamentaux de la culture des demandeurs et celles qui étaient d'avantage accessoires. Toutefois, dans le cas d'un titre, il semble clair que tout territoire qui a été occupé antérieurement à l'affirmation de la souveraineté et avec lequel les parties ont depuis maintenu un rapport substantiel est suffisamment important pour avoir une importance fondamentale pour la culture des demandeurs. Par conséquent, je ne crois pas qu'il soit nécessaire d'inclure explicitement cet élément dans le critère relatif au titre aborigène.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation

Si l'occupation actuelle est invoquée comme preuve de l'occupation avant l'affirmation de la souveraineté, il doit y avoir continuité entre l'occupation actuelle et l'occupation antérieure à l'affirmation de la souveraineté

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In *Van der Peet*, I explained that it is the pre-contact practices, customs and traditions of aboriginal peoples which are recognized and affirmed as aboriginal rights by s. 35(1). But I also acknowledged it would be “next to impossible” (at para. 62) for an aboriginal group to provide conclusive evidence of its pre-contact practices, customs and traditions. What would suffice instead was evidence of post-contact practices, which was “directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact” (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there is a difference in the time for determination of title. Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the deter-

Dans *Van der Peet*, j'ai expliqué que ce sont les coutumes, pratiques et traditions des peuples autochtones qui existaient avant le contact avec les Européens qui sont reconnues et confirmées comme des droits ancestraux par le par. 35(1). Cependant, j'ai également reconnu qu'il serait «pratiquement impossible» (au par. 62) pour un groupe autochtone de produire une preuve concluante de ses coutumes, pratiques et traditions datant de l'époque antérieure au contact avec les Européens. Il suffirait plutôt de produire une preuve des pratiques postérieures au contact avec les Européens qui «tende à démontrer lesquels des aspects de la collectivité et de la société autochtones datent d'avant le contact avec les Européens» (au par. 62). La preuve de l'occupation dans le cadre de la revendication d'un titre aborigène pose le même problème et appelle la même solution. Il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté. Au lieu de cela, une collectivité autochtone peut produire, au soutien de la revendication d'un titre abo-

mination of aboriginal title is at the time before sovereignty.

rigène, des éléments de preuve de l'occupation actuelle comme preuve d'une occupation antérieure à l'affirmation de la souveraineté. Il faut en outre qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle, parce que la période pertinente pour la détermination de l'existence d'un titre aborigène est celle qui a précédé l'affirmation de la souveraineté.

Needless to say, there is no need to establish "an unbroken chain of continuity" (*Van der Peet*, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect" aboriginal rights to land (*Côté, supra*, at para. 53). In *Mabo, supra*, the High Court of Australia set down the requirement that there must be "substantial maintenance of the connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.

Il va sans dire qu'il n'est pas nécessaire de faire la preuve d'une «continuité parfaite» (*Van der Peet*, au par. 65) entre l'occupation actuelle et l'occupation antérieure au contact avec les Européens. Il est possible que l'occupation et l'utilisation des terres aient été interrompues pendant une certaine période, à cause peut-être de la réticence des colonisateurs européens à reconnaître le titre aborigène. Exiger la continuité d'une manière trop stricte pourrait «saper l'objet même du par. 35(1) en perpétuant l'injustice historique dont les peuples autochtones ont été victimes aux mains des colonisateurs, qui n'ont pas respecté» les droits fonciers des autochtones (*Côté, précité*, au par. 53). Dans l'arrêt *Mabo*, précité, la Haute Cour d'Australie a établi l'exigence selon laquelle il doit y avoir «un maintien substantiel du lien» entre le peuple et le territoire. Je suis d'avis que ce critère s'applique également au Canada pour statuer sur l'existence d'un titre.

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I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.

Il me faut également souligner qu'il est fort possible que la nature précise de l'occupation ait changé entre l'époque de l'affirmation de la souveraineté et aujourd'hui. Je veux qu'il soit clair que le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être les limites intrinsèques aux utilisations qui peuvent être faites du territoire visé par un titre aborigène, c.-à-d. des utilisations incompatibles avec son usage continu par les générations autochtones futures.

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At sovereignty, occupation must have been exclusive

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté

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Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

Enfin, il faut que l'occupation ait été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, que j'ai défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. L'exclusivité, en tant qu'aspect du titre aborigène, appartient à la collectivité autochtone qui possède la capacité d'exclure autrui des terres détenues en vertu de ce titre. La preuve du titre doit, à cet égard, refléter le contenu du droit. S'il était possible de prouver l'existence du titre sans démontrer l'existence d'une occupation exclusive, on parviendrait à un résultat absurde, car il serait alors possible à plus d'une nation autochtone de posséder le titre aborigène à l'égard d'un même territoire, et toutes ces nations pourraient alors tenter de faire valoir le droit d'utiliser et d'occuper de façon exclusive ce territoire.

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As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, *Common Law Aboriginal Title*, *supra*, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to

Comme pour la preuve de l'occupation, la preuve de l'exclusivité doit tenir compte tant de la common law que du point de vue des autochtones, et accorder une importance égale aux deux. En common law, l'accent est mis sur la réalité factuelle de l'occupation, telle qu'elle était constatée par les Européens. Cependant, comme le concept de possession en common law doit tenir compte des réalités de la société autochtone, il doit en être de même pour le concept d'exclusivité. L'exclusivité est un principe de common law qui est dérivé de la notion de propriété en fief simple et qui doit être intégré avec précaution au concept de titre aborigène. Par conséquent, le critère requis pour établir l'occupation exclusive doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Par exemple, il est important de souligner qu'il est possible de prouver l'exclusivité de l'occupation même si d'autres groupes autochtones étaient présents ou se rendaient souvent sur les terres revendiquées. Dans de tels cas, l'exclusivité serait établie par la preuve de [TRADUCTION] «l'intention et de la capacité de garder le contrôle exclusif [du territoire visé]» (McNeil, *Common Law Aboriginal Title*, *op.*

enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group’s exclusive control” (at p. 204).

A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more aboriginal nations. The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared

*cit.*, à la p. 204). Par conséquent, une intrusion isolée ne ferait pas obstacle à une conclusion générale d’exclusivité si le groupe autochtone concerné avait l’intention de faire respecter son occupation exclusive et avait tenté de le faire. Qui plus est, comme l’indique le professeur McNeil, la présence d’autres groupes autochtones pourrait en fait renforcer une conclusion d’exclusivité. Par exemple, [TRADUCTION] «[l]orsque d’autres personnes demandaient l’accès au territoire et étaient autorisées à s’y rendre, le fait même qu’une permission était demandée et accordée constituerait une preuve supplémentaire du contrôle exclusif exercé sur le territoire par le groupe» (à la p. 204).

La prise en considération du point de vue des autochtones peut également amener à conclure qu’une intrusion par d’autres groupes autochtones ne fait pas obstacle à l’occupation exclusive du territoire visé par le groupe autochtone qui en revendique le titre, et que la présence autorisée de ces autres groupes peut renforcer cette occupation exclusive. À titre d’exemple, le groupe autochtone qui revendique le titre aborigène peut avoir, en matière d’intrusion, des règles de droit qui sont des preuves de l’occupation exclusive, de sorte que la présence d’intrus n’est pas considérée comme une preuve à l’encontre de l’exclusivité. De plus, l’existence de règles de droit autochtones en vertu desquelles d’autres groupes autochtones peuvent être autorisés à utiliser les terres ou même à y résider temporairement étayeraient la conclusion d’occupation exclusive. De fait, si cette permission a fait l’objet de traités entre les nations autochtones concernées, ces traités feraient également partie du point de vue des autochtones.

Dans leurs observations, les appelants ont insisté sur le fait que l’obligation de prouver l’occupation exclusive pourrait empêcher de conclure à l’existence d’un titre conjoint partagé par deux ou plusieurs nations autochtones. La possibilité de l’existence d’un titre conjoint a été reconnue par les tribunaux américains: *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). Je suis d’avis qu’il est possible de concilier l’exigence d’occupation exclusive et l’existence possible d’un titre conjoint en reconnaissant qu’un titre conjoint

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exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands.

peut découler d'une exclusivité partagée. Le sens de la notion d'exclusivité partagée est bien connue en common law. La possession exclusive est le droit d'exclure autrui. La possession exclusive partagée donne le droit d'exclure autrui, à l'exception des personnes avec qui la possession est partagée. Manifestement, il est possible que deux nations autochtones aient vécu sur un territoire particulier, et que chacune ait reconnu les droits de l'autre sur ce territoire, mais pas ceux de personne d'autre. Comme aucun titre conjoint n'a été revendiqué en l'espèce, je laisse à une autre occasion l'examen de toutes les difficultés et implications de la notion de titre conjoint, de même que les limites que le titre d'une autre bande pourrait imposer sur la façon dont une bande donnée utilise les terres sur lesquelles elle a un titre.

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I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights. Hence, in addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights. In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance. It also allows sufficient

Je dois aussi rappeler que si des autochtones peuvent montrer qu'ils ont occupé un territoire particulier, mais que cette occupation n'était pas exclusive, il sera toujours possible d'établir l'existence de droits ancestraux ne constituant pas un titre. Il est vraisemblable que ces droits seront intimement liés au territoire, et qu'ils pourraient permettre de nombreuses utilisations. Cependant, contrairement au titre, ils ne constituent pas un droit au territoire lui-même, mais plutôt, comme je l'ai suggéré, il s'agit de droits permettant de faire certaines choses liées à ce territoire. Si, par exemple, il était établi que les terres situées à proximité de celles visées par la revendication d'un titre étaient utilisées pour la chasse par certaines bandes, ces terres partagées ne seraient pas l'objet d'un titre aborigène, car l'élément essentiel d'exclusivité serait absent. Cependant, toutes les bandes qui les ont utilisées pourraient avoir sur ces terres des droits ancestraux spécifiques à un site. Ce fait ne confère à personne le droit aux terres elles-mêmes, mais il pourrait avoir pour effet d'accorder des droits de chasse à toutes les bandes qui chassaient sur ces terres. Par conséquent, en plus d'un titre partagé, il sera possible d'avoir des droits partagés non exclusifs et spécifiques à certains sites. À mon avis, cette situation est conforme au principe général voulant que la common law doive évoluer pour reconnaître les droits ancestraux (et au besoin les titres aborigènes) qui étaient reconnus soit par une

flexibility to deal with this highly complex and rapidly evolving area of the law.

(f) *Infringements of Aboriginal Title: the Test of Justification*

(i) Introduction

The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

(ii) General Principles

The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. I explained in *Gladstone* that compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights by s. 35(1), which are (at para. 72):

... the recognition of the prior occupation of North America by aboriginal peoples or ... the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

I noted that the latter purpose will often "be most relevant" (at para. 72) at the stage of justification. I think it important to repeat why (at para. 73) that is so:

Because ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact

pratique *de facto*, soit par un régime de gestion autochtone. Cette approche accorde également toute la souplesse nécessaire à l'examen de ce domaine très complexe du droit qui évolue rapidement.

f) *Les atteintes au titre aborigène: le critère de justification*

(i) Introduction

Les droits ancestraux reconnus et confirmés par le par. 35(1), y compris le titre aborigène, ne sont pas absolus. Tant le gouvernement fédéral (p. ex. *Sparrow*) que les gouvernements provinciaux (p. ex. *Côté*) peuvent porter atteinte à ces droits. Toutefois, le par. 35(1) exige que ces atteintes satisfassent au critère de justification. Dans la présente section, je vais examiner la jurisprudence naissante de la Cour sur la justification et expliquer comment ce critère s'appliquera dans le contexte des atteintes au titre aborigène.

(ii) Principes généraux

Le critère de justification comporte deux volets que je vais examiner à tour de rôle. Premièrement, l'atteinte au droit ancestral visé doit se rapporter à la poursuite d'un objectif législatif impérieux et réel. Dans *Gladstone*, j'ai expliqué qu'un objectif impérieux et réel était un objectif visant l'un ou l'autre des objets qui sous-tendent la reconnaissance et la confirmation des droits ancestraux par le par. 35(1). Ces objets sont les suivants (au par. 72):

... soit la reconnaissance de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones soit [...] la conciliation de cette occupation avec l'affirmation par Sa Majesté de sa souveraineté sur ce territoire.

J'ai souligné que le deuxième objet sera souvent «plus pertinent» (au par. 72) à l'étape de la justification. J'estime important de répéter pourquoi il en est ainsi (au par. 73):

[C]omme les sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie et sur laquelle s'exerce la souveraineté de Sa Majesté, il existe des circonstances où, dans la poursuite d'objectifs importants ayant un caractère impérieux et réel pour

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that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. [Emphasis added; “equally” emphasized in original.]

The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include “the pursuit of economic and regional fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

l'ensemble de la communauté (compte tenu du fait que les sociétés autochtones font partie de celle-ci), certaines restrictions de ces droits sont justifiables. Les droits ancestraux sont un élément nécessaire de la conciliation de l'existence des sociétés autochtones avec la communauté politique plus large à laquelle ces dernières appartiennent. Les limites imposées à ces droits sont également un élément nécessaire de cette conciliation, si les objectifs qu'elles visent sont suffisamment importants pour la communauté dans son ensemble. [Je souligne; «également» souligné dans l'original.]

La conservation des ressources halieutiques, qui a été acceptée comme un objectif impérieux et réel dans *Sparrow*, est un objectif qui vise la poursuite de ces deux objets parce que, d'une part, il reconnaît que la pêche fait partie intégrante de nombreuses cultures autochtones et, d'autre part, parce qu'il tend également à concilier l'existence des sociétés autochtones avec la communauté plus large en veillant à ce qu'il y ait assez de poissons pour tous. Cependant, sont également des objectifs légitimes du gouvernement «la poursuite de l'équité sur les plans économique et régional» et «la reconnaissance du fait que, historiquement, des groupes non autochtones comptent sur ces ressources et participent à leur exploitation» (par. 75). À l'opposé, des mesures édictées pour des raisons relativement peu importantes, telles des activités de pêche sportive ne comportant aucun élément économique important (*Adams, précité*), ne satisferaient pas à ce volet du critère de justification.

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The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given

Le deuxième volet du critère de justification commande une appréciation de la question de savoir si l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. Il est devenu clair que les exigences de l'obligation de fiduciaire sont fonction du «contexte juridique et factuel» de chaque appel (*Gladstone, précité*, au par. 56). Dans les arrêts *Sparrow* et *Gladstone*, par exemple, la Cour a interprété et appliqué l'obligation de fiduciaire en fonction de l'idée de priorité. Selon la théorie qui sous-tend ce principe, les rapports de fiduciaire qui existent entre la Couronne et les peuples autochtones commandent que les intérêts des autochtones aient préséance. Toutefois, l'obligation de fiduciaire n'exige pas qu'on accorde toujours la priorité aux droits ancestraux. Comme il a

priority. As was said in *Sparrow*, *supra*, at pp. 1114-15:

The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

*Sparrow* did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the aboriginal right at issue.

In addition to variation in the form which the fiduciary duty takes, there will also be variation in degree of scrutiny required by the fiduciary duty of the infringing measure or action. The degree of scrutiny is a function of the nature of the aboriginal right at issue. The distinction between *Sparrow* and *Gladstone*, for example, turned on whether the right amounted to the exclusive use of a resource, which in turn was a function of whether the right had an internal limit. In *Sparrow*, the right was internally limited, because it was a right to fish for food, ceremonial and social purposes, and as a result would only amount to an exclusive right to use the fishery in exceptional circumstances. Accordingly, the requirement of priority was applied strictly to mean that (at p. 1116) “any allocation of priorities after valid conservation

été dit dans *Sparrow*, précité, aux pp. 1114 et 1115:

La nature de la protection constitutionnelle qu’offre le par. 35(1) dans ce contexte commande l’existence d’un lien entre la question de la justification et l’établissement de priorités dans le domaine de la pêche. [Je souligne.]

D’autres contextes permettent, et peuvent même exiger, que l’obligation de fiduciaire soit formulée autrement (à la p. 1119):

Il y a, dans l’analyse de la justification, d’autres questions à aborder, selon les circonstances de l’enquête. Il s’agit notamment des questions de savoir si, en tentant d’obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d’expropriation et si le groupe d’autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre.

Dans *Sparrow*, la Cour n’a pas expliqué dans quels cas les différentes formulations de l’obligation de fiduciaire devraient être utilisées. Plus loin, j’indique que le choix de la formulation dépendra en grande partie de la nature du droit ancestral en cause.

Outre la variation de l’obligation de fiduciaire du point de vue de la forme, il y a aussi variation du degré d’examen — requis par cette obligation — de la mesure ou de l’acte qui porte atteinte au droit. Le degré d’examen est fonction de la nature du droit ancestral en cause. La distinction entre les arrêts *Sparrow* et *Gladstone*, par exemple, dépendait de la question de savoir si le droit en cause correspondait à l’utilisation exclusive d’une ressource, question qui dépendait à son tour de la réponse à la question de savoir si le droit était assorti d’une limite intrinsèque. Dans *Sparrow*, le droit en cause était assujéti à une telle limite parce qu’il s’agissait du droit de pêcher à des fins alimentaires, sociales et rituelles, droit qui, de ce fait, ne constituerait un droit exclusif à l’utilisation de la ressource que dans des circonstances exceptionnelles. Par conséquent, l’obligation d’accorder la priorité a été appliquée strictement, de sorte que (à la p. 1116), «dans l’établissement des priorités suite à la mise en œuvre de mesures de conserva-

measures have been implemented must give top priority to Indian food fishing”.

tion valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance”.

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In *Gladstone*, by contrast, the right to sell fish commercially was only limited by supply and demand. Had the test for justification been applied in a strict form in *Gladstone*, the aboriginal right would have amounted to an exclusive right to exploit the fishery on a commercial basis. This was not the intention of *Sparrow*, and I accordingly modified the test for justification, by altering the idea of priority in the following way (at para. 62):

Dans *Gladstone*, par contre, le droit de vendre commercialement du poisson était uniquement limité par l’offre et la demande. Si le critère de justification avait été appliqué strictement dans cet arrêt, le droit ancestral aurait correspondu au droit exclusif d’exploiter la ressource sur une base commerciale. L’arrêt *Sparrow* ne visait pas ce résultat, et j’ai modifié le critère de justification en conséquence, en modifiant l’idée de priorité de la manière suivante (au par. 62):

... the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

... cette doctrine [relative à l’ordre de priorité] commande que l’État démontre que, dans la répartition de la ressource, il a tenu compte de l’existence des droits ancestraux et réparti la ressource d’une manière qui respecte le fait que les titulaires de ces droits ont, en matière d’exploitation de la pêche, priorité sur les autres usagers. Il s’agit d’un droit à la fois substantiel et procédural. À l’étape de la justification, l’État doit démontrer que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l’intérêt prioritaire des titulaires des droits ancestraux à l’égard de cette pêche.

After *Gladstone*, in the context of commercial activity, the priority of aboriginal rights is constitutionally satisfied if the government had taken those rights into account and has allocated a resource “in a manner respectful” (at para. 62) of that priority. A court must be satisfied that “the government has taken into account the existence and importance of [aboriginal] rights” (at para. 63) which it determines by asking the following questions (at para. 64):

Depuis *Gladstone*, en matière d’activités commerciales, la priorité des droits ancestraux est respectée sur le plan constitutionnel si le gouvernement a tenu compte de l’existence de ces droits et a réparti la ressource «d’une manière qui respecte» (au par. 62) cette priorité. Le tribunal doit être convaincu que «l’État a tenu compte de l’existence et de l’importance [des droits ancestraux]» (au par. 63), fait qu’il détermine en se posant les questions suivantes (au par. 64):

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are ... questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government’s objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food versus commercial rights, for example), how important the fishery is to the economic and

Les questions pertinentes pour déterminer si l’État a donné la priorité aux titulaires de droits ancestraux sont [des] questions [...] telles que celle de savoir si l’État a facilité l’exercice du droit ancestral de participer à la pêche (en réduisant les droits payables pour les permis, par exemple), si les objectifs que poursuit l’État en établissant un régime de réglementation donné reflètent la nécessité de tenir compte du droit de priorité des titulaires de droits ancestraux, la mesure dans laquelle la participation à la pêche par les titulaires de droits ancestraux correspond au pourcentage que représente leur population par rapport à la population totale, la manière dont l’État a concilié les différents droits ancestraux visant une pêche donnée (par exemple le droit de pêcher

material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

### (iii) Justification and Aboriginal Title

The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

The manner in which the fiduciary duty operates with respect to the second stage of the justification test — both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take — will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the

à des fins alimentaires par opposition à celui de pêcher à des fins commerciales), l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers.

### (iii) Justification et titre aborigène

Les principes généraux régissant la justification, qui ont été exposés dans *Sparrow* et précisés dans *Gladstone*, s'appliquent à l'égard des atteintes au titre aborigène. Depuis *Gladstone*, l'éventail d'objectifs législatifs qui peuvent justifier une atteinte au titre aborigène est assez large. La plupart de ces objectifs peuvent être rattachés à la conciliation de l'occupation antérieure de l'Amérique du Nord par les peuples autochtones avec l'affirmation de la souveraineté de la Couronne, ce qui nécessite la reconnaissance du fait que les «sociétés autochtones distinctives existent au sein d'une communauté sociale, politique et économique plus large, communauté dont elles font partie» (au par. 73). À mon avis, l'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet et qui, en principe, peuvent justifier une atteinte à un titre aborigène. Toutefois, la question de savoir si une mesure ou un acte donné du gouvernement peut être expliqué par référence à l'un de ces objectifs est, en dernière analyse, une question de fait qui devra être examinée au cas par cas.

La façon dont l'obligation de fiduciaire s'applique relativement à la deuxième étape du critère de justification — du point de vue tant de la norme d'examen que de la forme particulière que prendra l'obligation de fiduciaire — est fonction de la nature du titre aborigène. Trois aspects du titre aborigène sont pertinents en l'espèce. Premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres visées; deuxièmement, le titre aborigène comprend le droit

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ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones; troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable.

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The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.

La nature exclusive du titre aborigène est pertinente pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Par exemple, si l'obligation de fiduciaire de la Couronne exige de donner préséance au titre aborigène, alors c'est l'approche modifiée concernant l'ordre de priorité que j'ai exposée dans *Gladstone* qui devrait être appliquée. Il faut que le gouvernement démontre «que les modalités de répartition de la ressource ainsi que la répartition elle-même reflètent l'intérêt prioritaire» (au par. 62) des détenteurs du titre aborigène sur les terres visées. Par analogie avec l'arrêt *Gladstone*, cela pourrait vouloir dire, par exemple, que les gouvernements prennent en compte la participation des peuples autochtones à la mise en valeur des ressources de la Colombie-Britannique, que la concession de fiefs simples pour l'agriculture ainsi que de baux et permis à des fins d'exploitation forestière ou minière tiennent compte de l'occupation antérieure des terres visées par un titre aborigène, que les obstacles économiques à l'utilisation par les autochtones de leurs terres (p. ex. le paiement de droits pour l'obtention de permis) soient sensiblement réduits. Cette liste n'est pas complète et n'est donnée qu'à titre indicatif. Il s'agit d'une question qui pourrait obliger à soupeser les divers intérêts concernés par les ressources en cause. Il ne fait aucun doute qu'il sera difficile de déterminer la valeur exacte de l'intérêt des autochtones dans le territoire et des concessions, baux ou permis accordés en vue de l'exploitation de celui-ci. Il va de soi que ces difficiles questions d'ordre économique ne peuvent être tranchées en l'espèce.

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Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for

En outre, les autres aspects du titre aborigène tendent à indiquer que l'obligation de fiduciaire peut se manifester autrement que par l'idée de priorité. Ce point devient clair quand on compare le titre aborigène et le droit ancestral de pêcher à

food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches

des fins alimentaires qui était visé dans *Sparrow*. Premièrement, le titre aborigène comprend le droit de choisir les utilisations qui peuvent être faites d'une parcelle de territoire. À l'opposé, le droit ancestral de pêcher à des fins alimentaires ne comporte pas le même élément discrétionnaire. Cet aspect du titre aborigène indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation. La question de savoir si un groupe autochtone a été consulté est pertinente pour décider si l'atteinte au titre aborigène est justifiée, au même titre que le fait pour la Couronne de ne pas consulter un groupe autochtone au sujet des conditions auxquelles des terres d'une réserve sont cédées à bail peut constituer un manquement à l'obligation de fiduciaire de celle-ci en common law: *Guerin*. La nature et l'étendue de l'obligation de consultation dépendront des circonstances. Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones.

Deuxièmement, contrairement au droit ancestral de pêcher à des fins alimentaires, le titre aborigène a inévitablement une dimension économique, particulièrement quand on tient compte des utilisations qui peuvent être faites aujourd'hui des terres détenues en vertu d'un titre aborigène. La dimension économique du titre aborigène montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification, possibilité

of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

D. *Has a claim to self-government been made out by the appellants?*

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In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment *Pamajewon*. There, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very

évoquée dans l'arrêt *Sparrow* et que j'ai répétée dans *Gladstone*. De fait, l'indemnisation des manquements à l'obligation de fiduciaire est un aspect bien établi du domaine des droits ancestraux: *Guerin*. Conformément à l'obligation de la Couronne d'agir de bonne foi et honorablement, il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène. Le montant de l'indemnité payable variera en fonction de la nature du titre aborigène touché, de la nature et de la gravité de l'atteinte et de la mesure dans laquelle les intérêts des autochtones ont été pris en compte. Comme la question des dommages-intérêts a été dissociée de l'action principale, aucune observation ne nous a été présentée relativement aux principes juridiques appropriés qui seraient pertinents pour déterminer l'indemnité qui devrait être versée pour les atteintes au titre aborigène. Dans les circonstances, il est préférable que nous attendions une autre occasion pour examiner ces questions complexes.

D. *Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale?*

Devant les juridictions inférieures, on s'est longuement attardé à la question de savoir si le par. 35(1) peut protéger le droit à l'autonomie gouvernementale et, dans l'affirmative, quels sont les contours de ce droit. En raison des erreurs de fait commises par le juge de première instance, et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour notre Cour de décider si le bien-fondé de la revendication de l'autonomie gouvernementale a été établi. De plus, il ne s'agit pas d'un cas qui se prête à la formulation par la Cour des principes juridiques devant guider l'instruction d'autres affaires. Les parties semblent avoir reconnu ce point, peut-être implicitement, en accordant beaucoup moins d'importance en appel aux arguments relatifs à l'autonomie gouvernementale. L'arrêt *Pamajewon* de notre Cour est une raison pour laquelle une moins grande importance a été attachée au droit à l'autonomie gouvernementale en appel. Dans cet arrêt, j'ai conclu que les droits relatifs à l'autonomie gouvernementale, s'ils existent, ne peuvent pas être exprimés en termes excessivement généraux. Au moment du procès,

broad terms, and therefore in a manner not cognizable under s. 35(1).

The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.

E. *Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the Indian Act?*

(1) Introduction

For aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision. In a federal system such as Canada's, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so. In the context of this appeal, that general question becomes three specific ones. First, there is the question whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the

les appelants n'avaient évidemment pas pris connaissance de mon jugement dans cet arrêt rendu ultérieurement. Il n'est donc pas étonnant, comme l'admet explicitement l'avocat des Wet'suwet'en, que les appelants aient plaidé le droit à l'autonomie gouvernementale en termes très généraux et, par conséquent, d'une manière incompatible avec le par. 35(1).

Le caractère général de la revendication présentée au procès a également fait en sorte que les parties n'ont pas abordé bon nombre des difficiles questions conceptuelles que soulève la reconnaissance de l'autonomie gouvernementale des autochtones. Le *Rapport de la Commission royale sur les peuples autochtones*, qui consacre 304 pages à cette question, donne une bonne idée de sa complexité. Ce rapport présente divers modèles d'autonomie gouvernementale, tous différents les uns des autres, notamment en ce qui concerne le territoire, la citoyenneté, la compétence et l'organisation gouvernementale interne. On nous a présenté peu d'observations propres à nous aider à résoudre ces questions fondamentales et difficiles. Sans l'aide des parties, il serait imprudent pour la Cour de s'avancer sur ce terrain. Dans ces circonstances, la question de l'autonomie gouvernementale sera tranchée au procès.

E. *La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens?*

(1) Introduction

Pour qu'un droit ancestral soit reconnu et confirmé par le par. 35(1), il devait exister en 1982. Cette disposition ne fait pas revivre des droits qui avaient été éteints par le souverain avant cette date. Dans un régime fédéral comme celui qui existe au Canada, la nécessité de déterminer si des droits ancestraux ont été éteints oblige à se demander lequel des niveaux de gouvernement a compétence pour le faire. Dans le contexte du présent pourvoi, cette question générale se subdivise en trois questions particulières. Premièrement, il y a la question de savoir si la province de la Colombie-Britannique, depuis son entrée dans la fédération

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jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Second, if the province was without such jurisdiction, another question arises — whether provincial laws which were not in pith and substance aimed at the extinguishment of aboriginal rights could have done so nevertheless if they were laws of general application. The third and final question is whether a provincial law, which could otherwise not extinguish aboriginal rights, be given that effect through referential incorporation by s. 88 of the *Indian Act*.

## (2) Primary Jurisdiction

<sup>173</sup> Since 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.

### “Lands reserved for the Indians”

<sup>174</sup> I consider the second part of this provision first, which confers jurisdiction to the federal government over “Lands reserved for the Indians”. The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title. The province’s principal submission is that “Lands reserved for the Indians” are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in *St. Catherine’s Milling*. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over “Indian Reserves”. Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s. 91(24) in this way,

en 1871 jusqu’à la constitutionnalisation du par. 35(1) en 1982, avait compétence pour éteindre, dans la province, les droits des peuples autochtones, y compris le titre aborigène. Deuxièmement, si elle n’avait pas compétence pour le faire, il faut alors se demander si les lois provinciales qui ne visaient pas, de par leur essence même, à éteindre des droits ancestraux ont quand même pu le faire si elles étaient des lois d’application générale. La troisième et dernière question consiste à décider si une loi provinciale qui ne pourrait par ailleurs pas éteindre des droits ancestraux pourrait se voir reconnaître cet effet par incorporation par renvoi en application de l’art. 88 de la *Loi sur les Indiens*.

## (2) Compétence principale

Depuis 1871, le pouvoir exclusif de légiférer sur «les Indiens et les terres réservées aux Indiens» appartient au gouvernement fédéral en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*. Ce chef de compétence comprend, selon moi, le pouvoir exclusif d’éteindre les droits ancestraux, y compris le titre aborigène.

### «Les terres réservées aux Indiens»

Je vais d’abord examiner la deuxième partie de cette disposition, c’est-à-dire celle qui attribue au gouvernement fédéral compétence sur les «terres réservées aux Indiens». Le débat entre les parties a porté sur la question de savoir si cette partie du par. 91(24) confère le pouvoir de légiférer relativement au titre aborigène. Le principal argument invoqué par la province est que les «terres réservées aux Indiens» sont des terres qui ont été expressément mises de côté ou désignées pour être occupées par les Indiens, par exemple les réserves. Je dois toutefois rejeter cet argument parce qu’il va à l’encontre du jugement rendu par le Conseil privé dans l’affaire *St. Catherine’s Milling*. L’une des questions en litige dans ce pourvoi concernait le pouvoir du gouvernement fédéral d’accepter la cession de terres détenues en vertu d’un titre aborigène. On prétendait que le gouvernement fédéral avait tout au plus compétence sur les «réserves

specific language to this effect would have been used. He accordingly held that (at p. 59):

... the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.

Lord Watson's reference to "all lands" encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title.

The province responds by pointing to the fact that underlying title to lands held pursuant to aboriginal title vested with the provincial Crown pursuant to s. 109 of the *Constitution Act, 1867*. In its submission, this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title, and so by negative implication excludes aboriginal title from the scope of s. 91(24). The difficulty with the province's submission is that it fails to take account of the language of s. 109, which states in part that:

**109.** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands. Thus, although on surrender of aboriginal title the province would

indiennes». S'exprimant au nom du Conseil privé, Lord Watson a rejeté cet argument, déclarant que si le législateur avait voulu limiter le par. 91(24) de cette façon, il l'aurait dit en termes exprès. Lord Watson a donc statué ainsi (à la p. 59):

[TRADUCTION] . . . les mots employés dans les faits sont, d'après leur sens naturel, suffisants pour englober toutes les terres qui sont réservées, à quelque condition que ce soit, pour être occupées par les Indiens.

L'expression «toutes les terres» utilisée par lord Watson englobe non seulement les terres des réserves, mais aussi celles détenues en vertu d'un titre aborigène. En d'autres termes, le par. 91(24) accorde le pouvoir de légiférer relativement au titre aborigène. Il s'ensuit, par implication, qu'il accorde également le pouvoir d'éteindre ce titre.

La province a répondu en faisant remarquer que le titre sous-jacent sur les terres détenues en vertu d'un titre aborigène a été attribué à la Couronne provinciale par l'art. 109 de la *Loi constitutionnelle de 1867*. Selon la province, ce droit de propriété emportait le droit d'accorder des fiefs simples éteignant par implication le titre aborigène, et il a donc pour conséquence d'exclure le titre aborigène de la portée du par. 91(24). Le problème que pose cet argument de la province est qu'il ne tient pas compte du texte de l'art. 109, qui dit en partie ce qui suit:

**109.** Les terres, mines, minéraux et redevances appartenant aux différentes provinces du Canada [. . .] lors de l'Union [. . .] appartiendront aux différentes provinces [. . .] sous réserve des fiducies existantes et de tout intérêt autre que celui de la province à cet égard.

Même si cette disposition accorde aux couronnes provinciales le titre sous-jacent, elle limite ce droit de propriété provincial en le subordonnant à «tout intérêt autre que celui de la province à cet égard». Dans l'arrêt *St. Catherine's Milling*, le Conseil privé a statué que le titre aborigène constituait un tel intérêt et a rejeté l'argument selon lequel le droit de propriété des provinces avait pour effet de limiter la compétence du gouvernement fédéral. Concrètement, cet arrêt a donc eu pour effet de dissocier le droit de propriété relatif aux terres détenues en vertu d'un titre aborigène de la compé-

take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment — although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.

tence exercée à l'égard de ces terres. Par conséquent, même si la province obtient un titre absolu en cas de cession d'un titre aborigène, le pouvoir d'accepter les cessions appartient au gouvernement fédéral. La même affirmation peut être faite au sujet de l'extinction: même si la province obtient un titre absolu sur les terres visées au moment de l'extinction d'un titre aborigène, le pouvoir d'éteindre ce titre appartient au gouvernement fédéral.

176 I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result — the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.

Je termine par deux remarques. Premièrement, même si ce point n'avait pas été tranché, je serais parvenu à la même conclusion. Les juges de la juridiction inférieure ont souligné que le fait de dissocier la compétence du gouvernement fédéral à l'égard des Indiens et sa compétence à l'égard des terres indiennes produirait un résultat très regrettable: en effet, comme le gouvernement fédéral est investi par la Constitution de la responsabilité principale de garantir le bien-être des peuples autochtones du Canada, il se verrait dans l'impossibilité de protéger l'un des droits les plus fondamentaux des autochtones — savoir leur droit à leurs terres. Deuxièmement, même si les observations des parties et mon analyse étaient axés sur la question de la compétence à l'égard du titre aborigène, je suis d'avis que le même raisonnement s'applique à la compétence à l'égard de tout droit ancestral se rapportant à des terres. Comme je l'ai expliqué précédemment, l'arrêt *Adams* a clairement établi que des droits ancestraux peuvent être rattachés à un territoire sans constituer un titre. Cependant, ces divers rapports avec un territoire peuvent être tout aussi fondamentaux pour les peuples autochtones et, pour la même raison il doit être investi de la compétence à l'égard du titre aborigène, le gouvernement fédéral doit être investi du pouvoir de légiférer sur les autres droits ancestraux se rapportant au territoire.

#### “Indians”

#### «Les Indiens»

177 The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under

Notre Cour ne s'est pas prononcée définitivement sur l'étendue de la compétence du gouvernement fédéral à l'égard des Indiens. Elle n'a pas eu besoin de le faire parce que la validité des dispositions fédérales concernant les Indiens, dans le contexte du partage des pouvoirs, n'a jamais été en

s. 91(24) have implicated the question of jurisdiction over Indians from the other direction — whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)’s reference to “Lands reserved for the Indians”. But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over “Indians”. Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

### (3) Provincial Laws of General Application

The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction: see *R. v. Sutherland*, [1980] 2 S.C.R. 451. However, it

cause. Les affaires qui ont été soumises à la Cour relativement au par. 91(24) ont plutôt soulevé la question de la compétence à l’égard des Indiens du point de vue opposé: c’est-à-dire en posant la question de savoir si des lois provinciales qui, à première vue, s’appliquent aux Indiens, empiètent sur la compétence du gouvernement fédéral, et si ces lois sont inapplicables aux Indiens dans la mesure de cet empiètement. Comme je l’explique plus loin, la Cour a statué que, par le principe de l’exclusivité des compétences, le par. 91(24) protège l’«essentiel» de la quiddité indienne, ou indianité, contre les empiètements provinciaux.

Il s’ensuit, à tout le moins, que l’essentiel de l’indianité relève de la compétence du fédéral sur les Indiens. Pour des raisons que je vais exposer, l’essentiel de l’indianité englobe les droits ancestraux, y compris les droits reconnus et confirmés par le par. 35(1). Les lois censées éteindre ces droits portent donc atteinte à l’essentiel de l’indianité qui est au cœur du par. 91(24), et elles outrepassent la compétence législative des provinces. L’essentiel de l’indianité englobe toute la gamme des droits ancestraux protégés par le par. 35(1). Ces droits comprennent les droits se rapportant à un territoire; cette partie de l’essentiel de l’indianité découle de la référence aux «terres réservées aux Indiens» au par. 91(24). Cependant, ces droits comprennent également les coutumes, pratiques et traditions qui ne se rattachent pas à un territoire; cette partie de l’essentiel de l’indianité découle de la compétence du fédéral à l’égard des «Indiens». Il est interdit aux gouvernements provinciaux de faire des lois portant sur ces deux types de droits ancestraux.

### (3) Lois provinciales d’application générale

Le fait que le gouvernement fédéral soit investi, en vertu du par. 91(24), de la compétence exclusive à l’égard des Indiens et des terres réservées aux Indiens a pour effet d’empêcher l’édiction de lois provinciales sur ces questions. Par conséquent, les lois provinciales qui visent à imposer un traitement spécial aux Indiens sont inconstitutionnelles parce qu’elles se rapportent aux Indiens et empiètent donc sur la compétence du fédéral: voir *R. c. Sutherland*, [1980] 2 R.C.S. 451. Toutefois, il

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is a well-established principle that (*Four B Manufacturing Ltd.*, *supra*, at p. 1048):

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (*Four B*) and motor vehicle laws (*R. v. Francis*, [1988] 1 S.C.R. 1025), which purport to apply to all persons in the province, also apply to Indians living on reserves.

existe un principe bien établi selon lequel (*Four B Manufacturing Ltd.*, précité, à la p. 1048):

L'attribution au Parlement de la compétence législative exclusive de faire des lois relatives à certaines catégories de personnes ne signifie pas que la totalité des droits et obligations de ces personnes relève de la compétence fédérale principale à l'exclusion des lois provinciales d'application générale.

En d'autres termes, malgré le par. 91(24), les lois provinciales d'application générale s'appliquent *proprio vigore* (d'elles-mêmes) aux Indiens et aux terres indiennes. Ainsi, notre Cour a statué que les lois provinciales sur les relations de travail (*Four B*) et les lois sur les véhicules à moteur (*R. c. Francis*, [1988] 1 R.C.S. 1025), qui sont censées s'appliquer à toutes les personnes dans la province, s'appliquent également aux Indiens qui vivent dans des réserves.

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What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect, for two reasons. First, a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow*, *supra*, at p. 1099, as one of "clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been "necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown "use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone*, *supra*, at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal

Il faut toutefois répondre à la question de savoir si ce même principe autorise l'extinction de droits ancestraux par des lois provinciales d'application générale. Je suis arrivé à la conclusion qu'une loi provinciale d'application générale ne peut pas avoir cet effet, et ce pour deux raisons. Premièrement, par définition, une loi provinciale d'application générale ne peut pas, sans être *ultra vires*, respecter la norme qui a été établie par notre Cour à l'égard de l'extinction des droits ancestraux. Cette norme, qui a été énoncée dans *Sparrow*, précité, à la p. 1099, est celle de l'intention «claire et expresse». Dans cet arrêt, la Cour a établi une distinction entre les règles de droit qui éteignent des droits ancestraux et celles qui se bornent à les réglementer. Quoique des règles de droit appartenant à cette deuxième catégorie aient pu être «nécessairement incompatibles» avec l'exercice continu de droits ancestraux, elles ne pouvaient pas éteindre ces droits. Même si l'obligation de manifester une intention claire et expresse n'exige peut-être pas que le gouvernement «utilise des mots faisant explicitement état de l'extinction de droits ancestraux» (*Gladstone*, précité, au par. 34), la norme est néanmoins très élevée. Le problème que je vois est que les seules règles de droit capables d'exprimer une intention suffisamment claire et expresse d'éteindre des droits ancestraux seraient des règles de droit ayant trait aux Indiens et aux

rights, because the intention to do so would take the law outside provincial jurisdiction.

Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indian-ness” (*Dick*, *supra*, at pp. 326 and 315; also see *Four B*, *supra*, at p. 1047 and *Francis*, *supra*, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were “at the centre of what they do and what they are” (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

#### (4) Section 88 of the Indian Act

Provincial laws which would otherwise not apply to Indians *proprio vigore*, however, are allowed to do so by s. 88 of the *Indian Act*, which incorporates by reference provincial laws of gen-

terres indiennes. En conséquence, une règle de droit provinciale ne pourrait jamais éteindre d'elle-même des droits ancestraux, puisque l'existence de cette intention aurait pour effet d'exclure cette règle de la compétence de la province.

Deuxièmement, comme je l'ai mentionné plus tôt, le par. 91(24) protège l'essentiel de la compétence du fédéral, même contre les lois provinciales d'application générale, par l'application du principe de l'exclusivité des compétences. Il a été dit que ces éléments essentiels se rapportent à des questions touchant à la «quiddité indienne» ou au «fondement même de la quiddité indienne» (*Dick*, précité, aux pp. 326 et 315; voir aussi *Four B*, précité, à la p. 1047 et *Francis*, précité, aux pp. 1028 et 1029). On a défini l'essentiel de l'indianité qui est au cœur du par. 91(24) en disant ce qu'il est et en disant ce qu'il n'est pas. Dans des exemples de cette dernière situation, on a statué que l'essentiel de l'indianité ne comprenait pas les relations de travail (*Four B*) ni la conduite de véhicules à moteur (*Francis*). Le seul exemple concret d'indianité a été donné dans l'arrêt *Dick*. S'exprimant au nom de la Cour, le juge Beetz a tenu pour acquis, sans toutefois se prononcer sur la question, qu'une loi provinciale en matière de chasse ne s'appliquait pas d'elle-même aux membres d'une bande indienne lorsqu'ils chassent parce que ces activités étaient «au cœur même de leur existence et de leur être» (à la p. 320). Dans *Van der Peet*, toutefois, j'ai décrit et défini les droits ancestraux reconnus et confirmés par le par. 35(1) d'une manière analogue, c'est-à-dire comme des droits protégeant l'occupation des terres et les activités qui font partie intégrante de la culture distinctive autochtone du groupe qui revendique le droit. Il s'ensuit que les droits ancestraux font partie de l'essentiel de l'indianité qui est au cœur du par. 91(24). Par conséquent, avant 1982, ces droits ne pouvaient pas être éteints par des lois provinciales d'application générale.

#### (4) L'article 88 de la Loi sur les Indiens

Cependant, des règles de droit provinciales qui autrement ne s'appliqueraient pas d'elles-mêmes aux Indiens peuvent le faire par l'effet de l'art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi

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eral application: *Dick*, *supra*, at pp. 326-27; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 297; *Francis*, *supra*, at pp. 1030-31. However, it is important to note, in Professor Hogg's words, that s. 88 does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands (*Constitutional Law of Canada* (3rd ed. 1992), at p. 676; also see *Dick*, *supra*, at p. 322). What this means is that s. 88 extends the effect of provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the Indianness at the core of s. 91(24). For example, a provincial law which regulated hunting may very well touch on this core. Although such a law would not apply to aboriginal people *proprio vigore*, it would still apply through s. 88 of the *Indian Act*, being a law of general application. Such laws are enacted to conserve game and for the safety of all.

les lois provinciales d'application générale: *Dick*, précité, aux pp. 326 et 327; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285, à la p. 297; *Francis*, précité, aux pp. 1030 et 1031. Toutefois, il est important de souligner, dans les mots du professeur Hogg, que l'art. 88 ne [TRADUCTION] «revigore» pas des règles de droit provinciales qui sont invalides parce qu'elles se rapportent aux Indiens et aux terres indiennes (*Constitutional Law of Canada* (3<sup>e</sup> éd. 1992), à la p. 676; voir aussi *Dick*, précité, à la p. 322). Ce que cela veut dire, c'est que l'art. 88 étend l'effet des lois provinciales d'application générale qui ne sauraient autrement s'appliquer aux Indiens et aux terres indiennes parce qu'elles touchent à la quiddité indienne qui est au cœur du par. 91(24). Par exemple, une règle de droit provinciale réglementant la chasse peut très bien affecter ce fondement. Même si une telle loi ne s'appliquait pas d'elle-même aux peuples autochtones, elle le ferait néanmoins sous l'effet de l'art. 88 de la *Loi sur les Indiens*, en tant que loi d'application générale. De telles lois sont adoptées pour la conservation du gibier et pour assurer la sécurité de tous.

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The respondent B.C. Crown argues that since such laws are *intra vires* the province, and applicable to aboriginal persons, s. 88 could allow provincial laws to extinguish aboriginal rights. I reject this submission, for the simple reason that s. 88 does not evince the requisite clear and plain intent to extinguish aboriginal rights. The provision states in full:

**88.** Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights. Indeed, the explicit reference to treaty rights in s. 88 suggests that the provision

La province intimée prétend que, comme les provinces ont le pouvoir d'adopter de telles lois et que celles-ci sont applicables aux autochtones, l'art. 88 pourrait autoriser l'extinction de droits ancestraux par des règles de droit provinciales. Je rejette cet argument pour la simple raison que l'intention claire et expresse requise pour l'extinction de droits ancestraux ne ressort pas de l'art. 88. Cette disposition est rédigée ainsi:

**88.** Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime.

Selon moi, il n'y a rien dans le texte de cette disposition qui suggère même l'intention d'éteindre des droits ancestraux. De fait, l'allusion explicite aux droits issus de traités à l'art. 88 indique que cette

was clearly not intended to undermine aboriginal rights.

#### VI. Conclusion and Disposition

For the reasons I have given above, I would allow the appeal in part, and dismiss the cross-appeal. Reluctantly, I would also order a new trial.

I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) — "the reconciliation of the pre-existence

disposition n'est manifestement pas censée porter atteinte aux droits ancestraux.

#### VI. Conclusion et dispositif

Pour les motifs que je viens d'exposer, je suis d'avis d'accueillir le pourvoi en partie et de rejeter le pourvoi incident. À regret, j'ordonnerais également la tenue d'un nouveau procès.

Je vais conclure par deux observations. En premier lieu, de nombreuses nations autochtones dont les revendications territoriales chevauchent celles des appelants ne sont pas intervenues dans le présent pourvoi et ne paraissent pas l'avoir fait en première instance. Cette situation est malheureuse parce que les décisions relatives au titre aborigène des Gitksan et des Wet'suwet'en auront indubitablement un effet sur les revendications de ces autres nations autochtones, particulièrement en raison du fait que le titre aborigène comprend le droit exclusif d'utiliser et d'occuper des terres, c'est-à-dire de le faire à l'exclusion des non-autochtones et des membres d'autres nations autochtones. Par conséquent, peut-être serait-il souhaitable que ces autres nations autochtones interviennent dans une nouvelle instance.

En second lieu, la présente affaire a été longue et coûteuse, non seulement sur le plan financier mais aussi sur le plan humain. En ordonnant la tenue d'un nouveau procès, je n'encourage pas nécessairement les parties à introduire une instance et à régler leur différend devant les tribunaux. Comme il a été dit dans *Sparrow*, à la p. 1105, le par. 35(1) «procure [...] un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises». Devraient également participer à ces négociations les autres nations autochtones qui ont un intérêt dans le territoire revendiqué. En outre, la Couronne a l'obligation morale, sinon légale, d'entamer et de mener ces négociations de bonne foi. En fin de compte, c'est au moyen de règlements négociés — toutes les parties négociant de bonne foi et faisant les compromis qui s'imposent — processus renforcé par les arrêts de notre Cour, que nous pourrions réaliser ce que, dans *Van der Peet*, précité, au par. 31, j'ai déclaré être l'objet fondamental du par. 35(1),

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of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

The reasons of *La Forest* and *L’Heureux-Dubé JJ.* were delivered by

187 LA FOREST J. — I have read the reasons of the Chief Justice, and while I agree with his conclusion, I disagree with various aspects of his reasons and in particular, with the methodology he uses to prove that aboriginal peoples have a general right of occupation of certain lands (often referred to as “aboriginal title”).

188 I begin by considering why a new trial is necessary in this case. It is true, as the Chief Justice points out, that the amalgamation of the appellants’ individual claims represents a defect in the pleadings and, technically speaking, this prevents us from considering the merits of the case. However, in my view, there is a more substantive problem with the pleadings in this case. Before this Court, the appellants sought a declaration of “aboriginal title” but attempted, in essence, to prove that they had complete control over the territory in question. The appellants effectively argued on appeal, as they did at trial, that by virtue of their social and land tenure systems — consisting of Chief authority, Houses, feasts, crests, and totem poles — they acquired an absolute interest in the claimed territory, including ownership of and jurisdiction over the land. The problem with this approach is that it requires proof of governance and control as opposed to proof of general occupation of the affected land. Only the latter is the *sine qua non* of “aboriginal title”. It follows that what the appellants sought by way of declaration from this Court and what they set out to prove by way of the evidence were two different matters. In light of this substantive defect in the pleadings, a new trial

c’est-à-dire «concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté». Il faut se rendre à l’évidence, nous sommes tous ici pour y rester.

Version française des motifs des juges *La Forest* et *L’Heureux-Dubé* rendus par

LE JUGE LA FOREST — J’ai lu les motifs du Juge en chef et, bien que je souscrive à sa conclusion, je suis en désaccord avec divers aspects de ses motifs et en particulier avec la méthode dont il se sert pour établir que les peuples autochtones ont un droit général d’occupation de certaines terres (souvent appelé «titre aborigène»).

Je vais d’abord examiner les raisons pour lesquelles la tenue d’un nouveau procès est nécessaire en l’espèce. Il est vrai, comme le souligne le Juge en chef, que la fusion des revendications individuelles des appelants constitue un vice affectant les actes de procédure et que, sur le plan de la forme, cela nous empêche d’examiner le fond de l’affaire. Cependant, à mon avis, les actes de procédure en l’espèce posent un problème encore plus substantiel. En effet, même si, devant notre Cour, les appelants ont sollicité un jugement déclarant l’existence d’un «titre aborigène», ils ont essentiellement tenté d’établir qu’ils exerçaient un contrôle complet sur le territoire en question. En appel, les appelants ont effectivement prétendu, comme ils l’avaient fait en première instance, qu’en vertu de leur régime de tenure foncière et de leur organisation sociale — constituée de l’autorité des chefs, de maisons, de célébrations, d’armoiries et de mâts totémiques — ils ont acquis un intérêt absolu sur le territoire revendiqué, y compris la propriété des terres visées et la compétence sur celles-ci. Le problème que pose cette approche est qu’elle exige qu’on prouve la gestion et le contrôle des terres visées, plutôt que l’occupation générale de celles-ci. Or, seule la preuve du deuxième fait est la condition *sine qua non* de l’existence du «titre aborigène». Il s’ensuit que ce que les appelants ont demandé à notre Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu’ils se sont efforcés d’établir par la preuve, étaient deux choses différentes. Étant donné ce vice substantiel entachant les actes de procédure, la tenue d’un

should be ordered to permit a reassessment of the matter on the basis of these reasons.

In my view, the foundation of “aboriginal title” was succinctly described by Judson J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, where, at p. 328, he stated: “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . .” Relying in part on Judson J.’s remarks, Dickson J. (as he then was) wrote in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382, that aboriginal peoples have a “legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”. As well, in *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, this Court stated, at p. 678: “The inescapable conclusion from the Court’s analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although . . . it is difficult to describe what more in traditional property law terminology”. More recently, Judson J.’s views were reiterated in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There Lamer C.J. wrote for the majority, at para. 30, that the doctrine of aboriginal rights (one aspect of which is “aboriginal title”) arises from “one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (emphasis in original).

It follows from these cases that the aboriginal right of possession is derived from the historic occupation and use of ancestral lands by aboriginal peoples. Put another way, “aboriginal title” is based on the continued occupation and use of the

nouveau procès doit être ordonnée pour permettre le réexamen de la question, sur le fondement des présents motifs.

À mon avis, le fondement du «titre aborigène» a été décrit de façon succincte par le juge Judson, dans *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313, où il a dit, à la p. 328: «mais il reste que lorsque les colons sont arrivés, les Indiens étaient déjà là, ils étaient organisés en sociétés et occupaient les terres comme leurs ancêtres l’avaient fait depuis des siècles. C’est ce que signifie le titre indien . . . .» S’appuyant en partie sur les commentaires du juge Judson, le juge Dickson (plus tard juge en chef) a écrit, dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, à la p. 382, que les peuples autochtones ont le «droit, en *common law*, d’occuper et de posséder certaines terres dont le titre de propriété est finalement détenu par Sa Majesté». En outre, dans *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, notre Cour a dit ceci, à la p. 678: «La conclusion inéluctable qui se dégage jusqu’à maintenant de l’analyse que la Cour a faite du titre indien est que les Indiens ont un véritable droit *sui generis* sur leurs terres. Il s’agit de quelque chose de plus qu’un droit de jouissance et d’occupation bien [ . . . ] [qu’]il soit difficile de décrire ce en quoi consiste ce quelque chose de plus au moyen de la terminologie traditionnelle du droit des biens». Plus récemment, les vues du juge Judson ont été réitérées dans *R. c. Van der Peet*, [1996] 2 R.C.S. 507. Dans cet arrêt, le juge en chef Lamer a écrit, au nom des juges majoritaires, au par. 30, que la doctrine des droits ancestraux (dont un aspect est le «titre aborigène») découle d’«un fait bien simple: quand les Européens sont arrivés en Amérique du Nord, les peuples autochtones s’y trouvaient déjà, ils vivaient en collectivités sur ce territoire et participaient à des cultures distinctives, comme ils l’avaient fait pendant des siècles» (souligné dans l’original).

Il ressort de ces arrêts que le droit de possession ancestral d’un peuple autochtone découle de l’occupation et de l’utilisation historiques par celui-ci de ses terres ancestrales. Autrement dit, le «titre aborigène» se fonde sur l’occupation et l’utilisa-

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land as part of the aboriginal peoples' traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. The best description of "aboriginal title", as set out above, is a broad and general one derived from Judson J.'s pronouncements in *Calder*, *supra*. Adopting the same approach, Dickson J. wrote in *Guerin*, *supra*, that the aboriginal right of occupancy is further characterized by two principal features. First, this *sui generis* interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly. Dickson J. went on to conclude, at p. 382, that "[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading". I share his views and am therefore reluctant to define more precisely the "right [of aboriginal peoples] to continue to live on their lands as their forefathers had lived"; see *Calder*, at p. 328.

tion ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Comme il a été expliqué plus tôt, la meilleure façon de décrire le «titre aborigène» consiste à le décrire en termes larges et généraux, à partir des déclarations du juge Judson dans *Calder*, précité. Adoptant la même approche, le juge Dickson a écrit, dans *Guerin*, précité, que le droit d'occupation ancestral comportait en outre deux caractéristiques principales. Premièrement, ce droit *sui generis* est personnel en ce sens qu'il est généralement inaliénable, sauf en faveur de la Couronne. Deuxièmement, dans ses opérations concernant ce droit, la Couronne est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. Le juge Dickson poursuit en concluant, à la p. 382, que «[t]oute description du titre indien qui va plus loin que ces deux éléments est superflue et risque d'induire en erreur». Je partage les vues exprimées par le juge Dickson et je suis en conséquence réticent à définir avec plus de précision le «droit [des peuples autochtones] de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres»; *Calder*, à la p. 328.

191 The approach I adopt, in defining the aboriginal right of occupancy, is also a highly contextual one. More specifically, I find it necessary to make a distinction between: (1) the recognition of a general right to occupy and possess ancestral lands; and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. I defined the latter in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 97, as "the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose". The issue in *Côté*, as in *Van der Peet*, was whether the use of a particular fishing spot was really an aspect of the aboriginal peoples' way of life in pre-contact times; see also in the *Van der Peet* trilogy *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672. In all those cases, the fishing rights asserted by the aboriginal claimants were not associated with a

Le point de vue que j'adopte pour définir le droit d'occupation ancestral est, de plus, éminemment contextuel. Plus précisément, j'estime qu'il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d'un droit général d'occuper et de posséder des terres ancestrales; (2) la reconnaissance d'un droit distinct d'exercer une activité autochtone dans une région particulière. J'ai défini ce dernier aspect dans *R. c. Côté*, [1996] 3 R.C.S. 139, au par. 97, comme étant «l'utilisation traditionnelle — remontant avant l'arrivée des Européens — que fait une tribu indienne d'un territoire donné, à une fin particulière». La question qui était en litige dans *Côté*, tout comme dans *Van der Peet*, était de savoir si l'utilisation d'un site de pêche particulier constituait véritablement un aspect du mode de vie des peuples autochtones avant le contact avec les Européens; voir également les autres arrêts de la

more general occupancy of the affected land. By contrast, the present case deals with a general claim to occupy and possess vast tracts of territory (58,000 square kilometres). This type of generalized land claim is not merely a bundle of discrete aboriginal rights to engage in specific activities. Rather, it is, as the Chief Justice states, at para. 111, the “right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies”. These land-based activities are, of course, related to the aboriginal society’s habits and mode of life.

trilogie *Van der Peet*, soit *R. c. Gladstone*, [1996] 2 R.C.S. 723, et *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672. Dans toutes ces affaires, les droits de pêche revendiqués par les autochtones n’étaient pas liés à une occupation plus générale des terres visées. À l’opposé, le présent cas concerne une revendication générale visant le droit d’occuper et de posséder de vastes étendues de territoire (58 000 kilomètres carrés). Ce type de revendication territoriale générale n’est pas qu’un simple faisceau de droits ancestraux distincts autorisant l’exercice d’activités particulières. Il s’agit plutôt, comme le dit le Juge en chef, au par. 111, du «droit d’utiliser des terres pour y exercer différentes activités qui ne doivent pas nécessairement toutes être des aspects de coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones». Il va de soi que ces activités — qui se rattachent au territoire — sont liées aux habitudes et au mode de vie de la société autochtone.

I note, as well, that in defining the nature of “aboriginal title”, one should generally not be concerned with statutory provisions and regulations dealing with reserve lands. In *Guerin*, *supra*, this Court held that the interest of an Indian band in a reserve is derived from, and is of the same nature as, the interest of an aboriginal society in its traditional tribal lands. Accordingly, the Court treated the aboriginal interest in reserve lands as one of occupation and possession while recognizing that the underlying title to those lands was in the Crown. It was not decided in *Guerin*, *supra*, and it by no means follows, that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands. For this reason, I am unable to assume that specific “reserve” provisions of the *Indian Act*, R.S.C., 1985, c. I-5, and the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7, apply to huge tracts of land which are subject to an aboriginal right of occupancy.

En outre, je souligne qu’en définissant la nature du «titre aborigène» il faut généralement faire abstraction des dispositions législatives et réglementaires concernant les terres des réserves. Dans *Guerin*, précité, notre Cour a statué que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, et qu’il est de la même nature que celui-ci. Par conséquent, notre Cour a considéré que le droit des autochtones sur les terres des réserves était un droit d’occupation et de possession, tout en reconnaissant que le titre de propriété sous-jacent de ces terres appartenait à la Couronne. Il n’a pas été décidé, dans *Guerin*, précité, et il ne s’ensuit pas que les dispositions législatives particulières régissant les terres des réserves s’appliquent automatiquement aux terres tribales traditionnelles. Pour cette raison, je ne peux pas présumer que les dispositions particulières concernant les «réserves» prévues par la *Loi sur les Indiens*, L.R.C. (1985), ch. I-5, et par la *Loi sur le pétrole et le gaz des terres indiennes*, L.R.C. (1985), ch. I-7, s’appliquent à d’énormes étendues de territoire faisant l’objet d’un droit d’occupation ancestral.



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I turn next to this Court's decision in *Van der Peet*, *supra*, where the Chief Justice identified a number of factors essential to the recognition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. As I have already indicated, the *Van der Peet* trilogy dealt with activity-based discrete rights and, more specifically, with fishing activities that were carried out in the face of statutory prohibitions. By contrast, the present case deals with a generalized claim over vast tracts of territory, a claim which is itself the foundation for particular rights and activities. Moreover, I agree with the appellants that this generalized claim should not be defined as merely a compendium of aboriginal rights, each of which must meet the test set out in *Van der Peet*. Nonetheless, I am of the view that the "key" factors identified in *Van der Peet*, namely precision, specificity, continuity, and centrality are still met by my approach in the present case.

Je vais maintenant examiner l'arrêt de notre Cour *Van der Peet*, précité, dans lequel le Juge en chef a fait état d'un certain nombre de facteurs essentiels à la reconnaissance des droits ancestraux visés au par. 35(1) de la *Loi constitutionnelle de 1982*. Comme je l'ai déjà indiqué, la trilogie *Van der Peet* concernait des droits distincts liés à certaines activités et, plus précisément, des activités de pêche exercées en dépit d'interdictions prévues par la loi. À l'opposé, le présent cas porte sur une revendication générale visant de vastes étendues de territoire, revendication qui constitue elle-même le fondement de droits et d'activités de nature particulière. En outre, je suis d'accord avec les appelants que cette revendication générale ne doit pas être définie comme un simple ensemble de droits ancestraux, dont chacun doit satisfaire au critère énoncé dans *Van der Peet*. Néanmoins, je suis d'avis que l'approche que je retiens en l'espèce satisfait quand même aux facteurs «clés» mentionnés dans *Van der Peet*, savoir la précision, la spécificité, la continuité et le caractère fondamental.

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First, it is clear that the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. As already mentioned, when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. These uses, although limited to the aboriginal society's traditional way of life, may be exercised in a contemporary manner; see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1099.

Premièrement, il est clair que la nature d'une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Comme il a été mentionné plus tôt, le tribunal qui examine la revendication d'un «titre aborigène» se demande principalement si l'occupation et l'utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée. En pratique, cela veut dire qu'il doit se demander de quelle manière les membres de la société utilisaient les terres visées pour vivre, c'est-à-dire pour y établir des villages, pour y travailler, pour se rendre à leur travail, pour y chasser, pour se rendre à leurs territoires de chasse, pour y pêcher, pour se rendre à leurs sites de pêche, pour y accomplir des cérémonies religieuses et pour d'autres fins. Ces utilisations, quoiqu'elles se limitent au mode de vie traditionnel de la société autochtone, peuvent être exercées de manière contemporaine; voir *R. c. Sparrow*, [1990] 1 R.C.S. 1075, à la p. 1099.

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Second, it is self-evident that an aboriginal society asserting the right to live on its ancestral lands

Deuxièmement, il est évident que la société autochtone qui revendique le droit de vivre sur ses

must specify the area which has been continuously used and occupied. That is, the general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.

Some would also argue that specificity requires exclusive occupation and use of the land by the aboriginal group in question. The way I see it, exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. On the other hand, I recognize the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two aboriginal groups in the same territory.

Third, as indicated above, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands. The Chief Justice concludes that the relevant time period for the establishment of “aboriginal title” is the time at which the Crown asserted sovereignty over the affected land. I agree that in the context of generalized land claims, it is more appropriate, from a practical and theoretical standpoint, to consider the time of sovereignty as opposed to the time of first contact between an aboriginal society and Europeans. However, I am also of the view that the date

terres ancestrales doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue. En d’autres mots, les limites générales du territoire occupé doivent être indiquées. Cependant, je conviens que, lorsqu’il est question de vastes étendues de territoire, il peut se révéler impossible de déterminer les limites géographiques avec une précision scientifique. Néanmoins, cela ne doit pas faire obstacle à la reconnaissance d’un droit général d’occupation des terres visées. En effet, le tracé de limites territoriales précises peut être établi dans le cadre de négociations subséquentes entre les revendicateurs autochtones et le gouvernement.

Certains pourraient également prétendre que la notion de spécificité exige l’occupation et l’utilisation exclusives des terres visées par le groupe autochtone concerné. À mon avis, l’exclusivité signifie que le groupe autochtone doit établir que le territoire qu’il revendique est, en fait, son territoire ancestral et non celui d’une autre société autochtone avec laquelle il n’a aucun lien. Par ailleurs, je reconnais que deux groupes autochtones ou plus peuvent avoir occupé le même territoire et l’avoir utilisé en commun dans le cadre de leur mode de vie traditionnel. Dans les cas où deux groupes ou plus auraient convenu de tels arrangements, je n’écarterais pas la possibilité de conclure à l’existence d’une occupation conjointe. Toutefois, il est possible que le résultat soit différent dans les cas où un groupe autochtone dominant aurait simplement permis à d’autres groupes d’utiliser le territoire en cause ou lorsque deux groupes autochtones ont établi et maintenu entre eux des limites précises au sein du même territoire.

Troisièmement, comme il a été indiqué précédemment, le droit de possession ancestral se fonde sur l’occupation et l’utilisation ininterrompues de terres tribales traditionnelles. Le Juge en chef conclut que le moment pertinent pour établir l’existence du «titre aborigène» est celui de l’affirmation par la Couronne de sa souveraineté sur le territoire visé. Je suis d’accord avec le fait que, dans le contexte de revendications territoriales générales, il convient d’avantage, aussi bien d’un point de vue pratique que théorique, de tenir compte du moment de l’affirmation de la souveraineté plutôt que du

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of sovereignty may not be the only relevant moment to consider. For instance, there may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of “aboriginal title” in that area merely because the relocation occurred post-sovereignty. In other words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.

moment du premier contact entre la société autochtone et des Européens. Cependant, je suis également d’avis qu’il est possible que la date de l’affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Par exemple, il est possible que des peuples autochtones se soient établis dans une partie de la province, mais que, après l’affirmation de la souveraineté, ils aient tous migré vers une autre région, où ils se trouvent toujours depuis cette date. Il se peut que cette migration ait été provoquée par des causes naturelles telle l’inondation des villages ou par des affrontements avec des colons européens. Dans de telles circonstances, je n’écarterais pas l’existence d’un «titre aborigène» sur cette région pour la seule raison que la migration s’est produite après l’affirmation de la souveraineté. Autrement dit, il peut encore y avoir continuité lorsque l’occupation actuelle d’une région est liée à l’occupation d’une autre région avant l’affirmation de la souveraineté.

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Also, on the view I take of continuity, I agree with the Chief Justice that it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of “title”. I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established;

En outre, compte tenu du point de vue que j’adopte à l’égard de la continuité, je suis d’accord avec le Juge en chef qu’il n’est pas nécessaire que les tribunaux disposent d’éléments de preuve concluants d’une occupation antérieure à l’affirmation de la souveraineté. En effet, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l’occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, je conviens qu’il n’est pas nécessaire de faire la preuve d’une continuité parfaite et que le fait que l’occupation ou l’utilisation ait été marquée par des interruptions n’empêche pas de conclure à l’existence d’un «titre». Cependant, j’irais encore plus loin et suggérerais que la présence de deux groupes autochtones ou plus dans un territoire donné peut aussi avoir une incidence sur la continuité de l’utilisation. Par exemple, il est possible qu’un groupe autochtone ait cédé la possession de territoire à des occupants ultérieurs ou encore qu’il ait fusionné ce territoire avec celui d’une autre société autochtone. De même, l’occupation du territoire par une société autochtone peut être liée à l’occupation d’une autre société par voie de conquête ou d’échange. Dans de telles circonstances, la continuité de l’utilisation et de l’occupation du territoire

see Brian Slattey, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 759.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, it necessarily follows that the land is of central significance to them. As already suggested, aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy. Viewed in this light, occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. To use the language of *Van der Peet*, proof of occupancy is proof of centrality.

I would also add that my approach regarding the nature of aboriginal occupancy is supported by the terms of the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1. Although the *Proclamation* is not the sole source of “aboriginal title” in this country, it bears witness to the British policy towards aboriginal peoples which was based on respect for their right to occupy their ancestral lands; see *Sparrow*, *supra*, at p. 1103. Specifically, the *Proclamation* provides:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

In clear terms vast tracts of territory (including large portions of the area now comprising Ontario,

visé depuis la période pertinente peut très bien être établie; voir Brian Slattey, «Understanding Aboriginal Rights» (1987), 66 *R. du B. can.* 727, à la p. 759.

Quatrièmement, si des peuples autochtones continuent d’occuper et d’utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, il s’ensuit nécessairement que ce territoire a une importance fondamentale pour eux. Comme il a été suggéré plus tôt, la notion d’occupation d’un territoire par des autochtones ne s’entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents. Est également visée par cette notion l’utilisation de terres adjacentes et même de territoires éloignés dans le cadre d’un mode de vie traditionnel. Vue sous cet angle, l’occupation constitue un aspect de la culture autochtone prise dans un sens large et s’intègre, par conséquent, à la notion de caractère distinctif. Pour reprendre le vocabulaire employé dans *Van der Peet*, la preuve de l’occupation est la preuve du caractère fondamental.

J’ajouterais également que l’approche que j’adopte relativement à la nature de l’occupation du territoire par des autochtones est étayée par le libellé de la *Proclamation royale de 1763*, L.R.C. (1985), app. II, n° 1. Bien que la *Proclamation* ne soit pas l’unique source du «titre aborigène» au pays, elle témoigne de la politique britannique envers les peuples autochtones, laquelle était fondée sur le respect de leur droit d’occuper leurs terres ancestrales; voir *Sparrow*, précité, à la p. 1103. Plus précisément, la *Proclamation* prévoit ce qui suit:

Nous déclarons de plus que c’est Notre plaisir royal ainsi que Notre volonté de réserver pour le présent, sous Notre souveraineté, Notre protection et Notre autorité, pour l’usage desdits sauvages, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compagnie de la baie d’Hudson, ainsi que toutes les terres et tous les territoires situés à l’ouest des sources des rivières qui de l’ouest et du nord-ouest vont se jeter dans la mer.

En termes clairs, de vastes étendues de territoire (y compris de larges portions du territoire qui

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Quebec, and the prairie provinces) were reserved for aboriginal peoples. These huge tracts of land were by no means limited to villages or permanent settlements but were reserved more generally as “Hunting Grounds” and “for the use of the said Indians”. Aboriginal peoples had the right to possess the lands reserved for them and “not be molested or disturbed in the Possession” of such territory. In essence, the rights set out in the *Proclamation* — which were applied in principle to aboriginal peoples across the country — underlie the view I have taken of aboriginal occupancy; see *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. S.C., App. Div.), at p. 787, and *R. v. Sikyey* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), *aff’d Sikyey v. The Queen*, [1964] S.C.R. 642.

comprend aujourd’hui l’Ontario, le Québec et les provinces des Prairies) ont été réservées pour l’usage des peuples autochtones. Ces vastes étendues de territoire n’étaient aucunement limitées aux villages ou aux établissements permanents, mais elles étaient plutôt réservées, de façon plus générale, comme «territoires de chasse» «pour l’usage desdits sauvages». Les peuples autochtones avaient le droit à la «possession entière et paisible» de ces territoires. Essentiellement, les droits énoncés dans la *Proclamation* — qui ont été appliqués en principe aux peuples autochtones dans l’ensemble du pays — sous-tendent le point de vue que j’ai adopté en ce qui concerne l’occupation du territoire par des autochtones; voir *R. c. Wesley*, [1932] 4 D.L.R. 774 (C.S. Alb., Div. app.), à la p. 787, et *R. c. Sikyey* (1964), 43 D.L.R. (2d) 150 (C.A.T.N.-O.), *conf. par Sikyey c. The Queen*, [1964] R.C.S. 642.

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The analysis thus far has focussed on the nature of the aboriginal right to occupy and possess certain lands — a right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. Nonetheless, as Dickson C.J. and I wrote in *Sparrow*, *supra*, at p. 1109: “Rights that are recognized and affirmed are not absolute”. Thus, government regulation can infringe upon aboriginal rights if it meets the test of justification under s. 35(1). It is important to emphasize as well that the approach adopted under s. 35(1) is a highly contextual one. This is also clear from the reasons I wrote jointly with Dickson C.J. in *Sparrow*, at p. 1111:

Jusqu’à présent, l’analyse a porté principalement sur la nature du droit ancestral d’occuper et de posséder certaines terres — droit reconnu et confirmé au par. 35(1) de la *Loi constitutionnelle de 1982*. Néanmoins, comme le juge en chef Dickson et moi-même l’avons écrit dans *Sparrow*, précité, à la p. 1109: «Les droits qui sont reconnus et confirmés ne sont pas absolus». Par conséquent, des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux s’ils satisfont au critère de justification des atteintes aux droits visés au par. 35(1). Il est également important de souligner que la méthode adoptée à l’égard du par. 35(1) est éminemment contextuelle. Cela ressort d’ailleurs clairement des motifs que j’ai écrits conjointement avec le juge en chef Dickson dans l’arrêt *Sparrow*, à la p. 1111:

We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Nous tenons à souligner relativement au par. 35(1) l’importance du contexte et d’un examen cas par cas. Étant donné la généralité du texte de la disposition constitutionnelle en cause et compte tenu surtout des complexités que présentent l’histoire, la société et les droits des autochtones, les limites d’une norme justificative doivent être fixées dans le contexte factuel particulier de chaque cas.

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In the context of the present case, I agree with the Chief Justice that the general economic development of the interior of British Columbia,

Dans le contexte de la présente affaire, je suis d’accord avec le Juge en chef que le développement économique général de l’intérieur de la

through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis.

Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow, supra*, at p. 1119. Indeed, the treatment of "aboriginal title" as a compensable right can be traced back to the *Royal Proclamation, 1763*. The relevant portions of the *Proclamation* are as follows:

... such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [aboriginal peoples] or any of them, as their Hunting Grounds. . . .

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name. . . . [Emphasis added.]

Clearly, the *Proclamation* contemplated that aboriginal peoples would be compensated for the

Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement, sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification.

Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples autochtones. Cette prise en compte doit toujours être faite conformément à l'obligation de la Couronne d'agir honorablement et de bonne foi. En outre, dans l'examen d'une revendication générale visant de vastes étendues de territoire, cette prise en compte ne consiste pas simplement à s'enquérir si des permis ont été délivrés de manière équitable dans un secteur d'activité donné ou si des mesures de conservation ont été régulièrement mises en œuvre à l'égard d'une ressource particulière. En effet, la question de la prise en compte du «titre aborigène» a une portée beaucoup plus large. L'un des aspects de cette prise en compte, dans un tel contexte, consiste certainement à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation. Plus précisément, en cas d'expropriation, il faut se demander si une juste indemnité est prévue pour les peuples autochtones; voir *Sparrow*, précité, à la p. 1119. De fait, l'idée que le «titre aborigène» est un droit donnant ouverture à indemnisation remonte à la *Proclamation royale de 1763*. Voici les passages pertinents de la *Proclamation*:

... des parties de Nos possessions et territoires qui ont été ni concédées ni achetées et ont été réservées pour ces tribus [les peuples autochtones] ou quelques-unes d'entre elles comme territoires de chasse . . .

Nous déclarons de l'avis de Notre Conseil privé, qu'il est strictement défendu à qui que ce soit d'acheter aux sauvages des terres qui leur sont réservées [. . .] cependant si quelques-uns des sauvages, un jour ou l'autre, devenaient enclins à se départir desdites terres, elles ne pourront être achetées que pour Nous, en Notre nom . . . [Je souligne.]

De toute évidence, la *Proclamation* prévoyait que les peuples autochtones seraient indemnisés pour

surrender of their lands; see also Slattery, “Understanding Aboriginal Rights”, *supra*, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.

la cession de leurs terres; voir également l’ouvrage de Slattery, «Understanding Aboriginal Rights», *loc. cit.*, aux pp. 751 et 752. Néanmoins, il convient de souligner que, dans le présent contexte, la juste indemnité ne peut être assimilée à la valeur d’un fief simple. L’indemnité doit plutôt être considérée en fonction du droit en cause et être propre à sauvegarder l’honneur de la Couronne. Ainsi, de façon générale, l’indemnité peut être plus importante lorsque l’expropriation touche un village et ses environs par opposition à une région peu fréquentée. J’ajoute qu’il faut tenir compte de l’interdépendance des utilisations traditionnelles faites du territoire visé.

204 In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

En résumé, on s’attend à ce que le gouvernement, dans le cadre du développement de vastes étendues de territoire, prenne en compte le bien-être économique de tous les Canadiens. Les peuples autochtones ne doivent cependant pas être oubliés dans cette prise en compte. Le droit que leur reconnaît la loi d’occuper et de posséder certaines terres, droit qui est confirmé par le par. 35(1) de la *Loi constitutionnelle de 1982*, commande que l’on fasse montre envers eux d’équité fondamentale, d’une manière qui soit compatible avec l’obligation de la Couronne d’agir honorablement et de bonne foi.

205 With regard to the issue of self-government, I conclude, as does the Chief Justice, that there was insufficient evidence before this Court to make any determination regarding this aspect of the appellants’ claim.

En ce qui concerne la question de l’autonomie gouvernementale, je conclus, à l’instar du Juge en chef, que notre Cour ne dispose pas de suffisamment d’éléments de preuve pour statuer sur cet aspect de la demande des appelants.

206 As for the issue raised on the cross-appeal, I agree with the Chief Justice’s conclusion. The respondent province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

Quant à la question soulevée dans le pourvoi incident, je souscris à la conclusion du Juge en chef à cet égard. La province intimée n’avait pas le pouvoir d’éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l’effet de l’art. 88 de la *Loi sur les Indiens*.

207 On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:

Enfin, je tiens à souligner que la meilleure approche dans ce genre d’affaires est un processus de négociation et de réconciliation qui prenne dûment en compte les intérêts complexes et opposés en jeu. Cette observation a été faite par le juge Lambert de la Cour d’appel, [1993] 5 W.W.R. 97, aux pp. 379 et 380:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. [Emphasis added.]

(See also *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2 (*Restructuring the Relationship*), Part 2, at pp. 561-62.)

Accordingly, I would allow the appeal in part and order a new trial on the basis of the principles set out in these reasons. I would also dismiss the cross-appeal.

The following are the reasons delivered by

MCLACHLIN J. — I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest.

\* \* \*

## SCHEDULE 1

### Appellants

DELGAMUUKW, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw

GISDAY WA, also known as Alfred Joseph, suing on his own behalf and on behalf of all the members of the House of Gisday Wa

NII KYAP, also known as Gerald Gunanoot, suing on his own behalf and on behalf of all the members of the House of Nii Kyap

[TRADUCTION] En fin de compte, il faudra donc tenir compte des droits reconnus par la loi aux Indiens au sein de l'ensemble de la société, au moyen de compromis politiques et de mesures d'adaptation qui seront fondés, au départ, sur la négociation d'accords, et qui devront, en dernière analyse, être conformes à la volonté souveraine de la collectivité toute entière. Les droits reconnus par la loi aux Gitksan et aux Wet'suwet'en, sur lesquels la présente action porte exclusivement et qui ne laissent de place à aucune autre approche que l'application de la loi elle-même, de même que les droits reconnus par la loi à tous les peuples autochtones de la Colombie-Britannique, ne constituent qu'un seul des facteurs qui détermineront, en définitive, quelle genre de collectivité nous aurons dans les années à venir, non seulement en Colombie-Britannique, mais partout au Canada. [Je souligne.]

(Voir également le *Rapport de la Commission royale sur les peuples autochtones* (1996), vol. 2 (*Une relation à redéfinir*), partie 2, aux pp. 561 et 562.)

En conséquence, je suis d'avis d'accueillir le pourvoi en partie et d'ordonner la tenue d'un nouveau procès sur le fondement des principes énoncés dans les présents motifs. Je suis également d'avis de rejeter le pourvoi incident.

Version française des motifs rendus par

LE JUGE MCLACHLIN — Je souscris aux motifs du Juge en chef. J'ajoute que je suis en outre largement en accord avec les commentaires du juge La Forest.

\* \* \*

## ANNEXE 1

### Appelants

DELGAMUUKW, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les autres membres des maisons Delgamuukw et Haaxw

GISDAY WA, connu également sous le nom d'Alfred Joseph, en son propre nom et au nom de tous les autres membres de la maison Gisday Wa

NII KYAP, connu également sous le nom de Gerald Gunanoot, en son propre nom et au nom de tous les autres membres de la maison Nii Kyap



LELT, also known as Lloyd Ryan, suing on his own behalf and on behalf of all the members of the Houses of Lelt and Haak'w

ANTGULILBIX, also known as Mary Johnson, suing on her own behalf and on behalf of all the members of the House of Antgulilbix

TENIMGYET, also known as Arthur Matthews, Jr., suing on his own behalf and on behalf of all the members of the House of Tenimgyet

GOOHLAHT, also known as Lucy Namox, suing on her own behalf and on behalf of all the members of the Houses of Goohlaht and Samooh

KLIYEM LAX HAA, also known as Eva Sampson, suing on her own behalf and on behalf of all the members of the Houses of Kliiyem Lax Haa and Wii'mugulsxw

GWIS GYEN, also known as Stanley Williams, suing on his own behalf and on behalf of all the members of the House of Gwis Gyen

KWEESE, also known as Florence Hall, suing on her own behalf and on behalf of all the members of the House of Kweese

DJOGASLEE, also known as Walter Wilson, suing on his own behalf and on behalf of all the members of the House of Djogaslee

GWAGL'LO, also known as Ernest Hyzims, suing on his own behalf and on behalf of all the members of the Houses of Gwagl'lo and Duubisxw

GYOLUGYET, also known as Mary McKenzie, suing on her own behalf and on behalf of all the members of the House of Gyolugyet

GYETM GALDOO, also known as Sylvester Green, suing on his own behalf and on behalf of all the members of the Houses of Gyetm Galdoo and Wii'Goob'l

HAAK ASXW, also known as Larry Wright, suing on his own behalf and on behalf of all the members of the House of Haak Asxw

LELT, connu également sous le nom de Lloyd Ryan, en son propre nom et au nom de tous les autres membres des maisons Lelt et Haak'w

ANTGULILBIX, connue également sous le nom de Mary Johnson, en son propre nom et au nom de tous les autres membres de la maison Antgulilbix

TENIMGYET, connu également sous le nom d'Arthur Matthews, fils, en son propre nom et au nom de tous les autres membres de la maison Tenimgyet

GOOHLAHT, connue également sous le nom de Lucy Namox, en son propre nom et au nom de tous les autres membres des maisons Goohlaht et Samooh

KLIYEM LAX HAA, connue également sous le nom d'Eva Sampson, en son propre nom et au nom de tous les autres membres des maisons Kliiyem Lax Haa et Wii'mugulsxw

GWIS GYEN, connu également sous le nom de Stanley Williams, en son propre nom et au nom de tous les autres membres de la maison Gwis Gyen

KWEESE, connue également sous le nom de Florence Hall, en son propre nom et au nom de tous les autres membres de la maison Kweese

DJOGASLEE, connu également sous le nom de Walter Wilson, en son propre nom et au nom de tous les autres membres de la maison Djogaslee

GWAGL'LO, connu également sous le nom d'Ernest Hyzims, en son propre nom et au nom de tous les autres membres des maisons Gwagl'lo et Duubisxw

GYOLUGYET, connue également sous le nom de Mary McKenzie, en son propre nom et au nom de tous les autres membres de la maison Gyolugyet

GYETM GALDOO, connu également sous le nom de Sylvester Green, en son propre nom et au nom de tous les autres membres des maisons Gyetm Galdoo et Wii'Goob'l

HAAK ASXW, connu également sous le nom de Larry Wright, en son propre nom et au nom de tous les autres membres de la maison Haak Asxw

GEEL, also known as Walter Harris, suing on his own behalf and on behalf of all the members of the House of Geel

HAALUS, also known as Billy Morrison, suing on his own behalf and on behalf of all the members of the House of Haalus

WII HLENGWAX, also known as Herbert Burke, suing on his own behalf and on behalf of all the members of the House of Wii Hlengwax

LUUTKUDZIIWUS, also known as Ben McKenzie, Sr., suing on his own behalf and on behalf of all the members of the House of Luutkudziiwus

MA'UUS, also known as Jeffrey Harris, Jr., suing on his own behalf and on behalf of all the members of the House of Ma'uus

MILUU LAK, also known as Alice Jeffery, suing on her own behalf and on behalf of all the members of the Houses of Miluu Lak and Haiwas

NIKA TEEN, also known as James Woods, suing on his own behalf and on behalf of all the members of the House of Nika Teen

SKIIK'M LAX HA, also known as John Wilson, suing on his own behalf and on behalf of all the members of the House of Skiik'm Lax Ha

WII MINOSIK, also known as Robert Stevens, suing on his own behalf and on behalf of all the members of the House of Wii Minosik

GWININ NITXW, also known as Solomon Jack, suing on his own behalf and on behalf of all the members of the House of Gwinin Nitxw

GWOIMT, also known as Kathleen Wale, suing on her own behalf and on behalf of all the members of the Houses of Gwoimt and Tsabux

LUUS, also known as Jeffrey Harris, suing on his own behalf and on behalf of all the members of the House of Luus

GEEL, connu également sous le nom de Walter Harris, en son propre nom et au nom de tous les autres membres de la maison Geel

HAALUS, connu également sous le nom de Billy Morrison, en son propre nom et au nom de tous les autres membres de la maison Haalus

WII HLENGWAX, connu également sous le nom d'Herbert Burke, en son propre nom et au nom de tous les autres membres de la maison Wii Hlengwax

LUUTKUDZIIWUS, connu également sous le nom de Ben McKenzie, père, en son propre nom et au nom de tous les autres membres de la maison Luutkudziiwus

MA'UUS, connu également sous le nom de Jeffrey Harris, fils, en son propre nom et au nom de tous les autres membres de la maison Ma'uus

MILUU LAK, connue également sous le nom d'Alice Jeffery, en son propre nom et au nom de tous les autres membres des maisons Miluu Lak et Haiwas

NIKA TEEN, connu également sous le nom de James Woods, en son propre nom et au nom de tous les autres membres de la maison Nika Teen

SKIIK'M LAX HA, connu également sous le nom de John Wilson, en son propre nom et au nom de tous les autres membres de la maison Skiik'm Lax Ha

WII MINOSIK, connu également sous le nom de Robert Stevens, en son propre nom et au nom de tous les autres membres de la maison Wii Minosik

GWININ NITXW, connu également sous le nom de Solomon Jack, en son propre nom et au nom de tous les autres membres de la maison Gwinin Nitxw

GWOIMT, connue également sous le nom de Kathleen Wale, en son propre nom et au nom de tous les autres membres des maisons Gwoimt et Tsabux

LUUS, connu également sous le nom de Jeffrey Harris, en son propre nom et au nom de tous les autres membres de la maison Luus

NIIST, also known as David Blackwater, suing on his own behalf and on behalf of all the members of the Houses of Niist and Baskyelaxha

SPOOKW, also known as Steven Robinson, suing on his own behalf and on behalf of all the members of the Houses of Spookw and Yagosip

WII GAAK, also known as Neil Sterritt, Sr., suing on his own behalf and on behalf of all the members of the House of Wii Gaak

DAWAMUXW, also known as Charlie Clifford, suing on his own behalf and on behalf of all the members of the House of Dawamuxw

GITLUDAH, also known as Peter Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Gitludahl and Wiigyet

GUXSAN, also known as Herbert Wesley, suing on his own behalf and on behalf of all the members of the House of Guksan

HANAMUXW, also known as Joan Ryan, suing on her own behalf and on behalf of all the members of the House of Hanamuxw

YAL, also known as George Turner, suing on his own behalf and on behalf of all the members of the House of Yal

GWIIYEEHL, also known as Chris Skulsh, suing on his own behalf and on behalf of all the members of the House of Gwiiyeehl

SAKXUM HIGOOKX, also known as Vernon Smith, suing on his own behalf and on behalf of all the members of the House of Sakxum Higookx

MA DEEK, also known as James Brown, suing on his own behalf and on behalf of all the members of the House of Ma Deek

WOOS, also known as Roy Morris, suing on his own behalf and on behalf of all the members of the House of Woos

NIIST, connu également sous le nom de David Blackwater, en son propre nom et au nom de tous les autres membres des maisons Niist et Baskyelaxha

SPOOKW, connu également sous le nom de Steven Robinson, en son propre nom et au nom de tous les autres membres des maisons Spookw et Yagosip

WII GAAK, connu également sous le nom de Neil Sterritt, fils, en son propre nom et au nom de tous les autres membres de la maison Wii Gaak

DAWAMUXW, connu également sous le nom de Charlie Clifford, en son propre nom et au nom de tous les autres membres de la maison Dawamuxw

GITLUDAH, connu également sous le nom de Peter Muldoe, en son propre nom et au nom de tous les autres membres des maisons Gitludahl et Wiigyet

GUXSAN, connu également sous le nom d'Herbert Wesley, en son propre nom et au nom de tous les autres membres de la maison Guksan

HANAMUXW, connue également sous le nom de Joan Ryan, en son propre nom et au nom de tous les autres membres de la maison Hanamuxw

YAL, connu également sous le nom de George Turner, en son propre nom et au nom de tous les autres membres de la maison Yal

GWIIYEEHL, connu également sous le nom de Chris Skulsh, en son propre nom et au nom de tous les autres membres de la maison Gwiiyeehl

SAKXUM HIGOOKX, connu également sous le nom de Vernon Smith, en son propre nom et au nom de tous les autres membres de la maison Sakxum Higookx

MA DEEK, connu également sous le nom de James Brown, en son propre nom et au nom de tous les autres membres de la maison Ma Deek

WOOS, connu également sous le nom de Roy Morris, en son propre nom et au nom de tous les autres membres de la maison Woos

KNEDEBEAS, also known as Sarah Layton, suing on her own behalf and on behalf of all the members of the House of Knebebas

SMOGELGEM, also known as Leonard George, suing on his own behalf and on behalf of all the members of the House of Smogelgem

KLO UM KHUN, also known as Patrick Pierre, suing on his own behalf and on behalf of all the members of the House of Klo Um Khun

HAG WIL NEGH, also known as Ron Mitchell, suing on his own behalf and on behalf of all the members of the House of Hag Wil Negh

WAH TAH KEG'HT, also known as Henry Alfred, suing on his own behalf and on behalf of all the members of the House of Wah Tah Keg'ht

WAH TAH KWETS, also known as John Namox, suing on his own behalf and on behalf of all the members of the House of Wah Tah Kwets

WOOSIMLAXHA, also known as Victor Mowatt, suing on his own behalf and on behalf of all the members of the House of Gutginuxw

XSGOGIMLAXHA, also known as Vernon Milton, suing on his own behalf and on behalf of all the members of the House of Xsgogimlaxha

WIIGYET, also known as Roy Wesley, suing on his own behalf and on behalf of all the members of the House of Wiigyet

WII ELAAST, also known as Jim Angus, Jr., suing on his own behalf and on behalf of all the members of the Houses of Wii Elaast and Amagyet

GAXSBGABAXS, also known as Gertie Watson, suing on her own behalf and on behalf of all the members of the House of Gaxsbgabaxs

WIGETIMSCHOL, also known as Dan Michell, suing on his own behalf and on behalf of all the members of the House of Namox

KNEDEBEAS, connue également sous le nom de Sarah Layton, en son propre nom et au nom de tous les autres membres de la maison Knebebas

SMOGELGEM, connu également sous le nom de Leonard George, en son propre nom et au nom de tous les autres membres de la maison Smogelgem

KLO UM KHUN, connu également sous le nom de Patrick Pierre, en son propre nom et au nom de tous les autres membres de la maison Klo Um Khun

HAG WIL NEGH, connu également sous le nom de Ron Mitchell, en son propre nom et au nom de tous les autres membres de la maison Hag Wil Negh

WAH TAH KEG'HT, connu également sous le nom d'Henry Alfred, en son propre nom et au nom de tous les autres membres de la maison Wah Tah Keg'ht

WAH TAH KWETS, connu également sous le nom de John Namox, en son propre nom et au nom de tous les autres membres de la maison Wah Tah Kwets

WOOSIMLAXHA, connu également sous le nom de Victor Mowatt, en son propre nom et au nom de tous les autres membres de la maison Gutginuxw

XSGOGIMLAXHA, connu également sous le nom de Vernon Milton, en son propre nom et au nom de tous les autres membres de la maison Xsgogimlaxha

WIIGYET, connu également sous le nom de Roy Wesley, en son propre nom et au nom de tous les autres membres de la maison Wiigyet

WII ELAAST, connu également sous le nom de Jim Angus, fils, en son propre nom et au nom de tous les autres membres des maisons Wii Elaast et Amagyet

GAXSBGABAXS, connue également sous le nom de Gertie Watson, en son propre nom et au nom de tous les autres membres de la maison Gaxsbgabaxs

WIGETIMSCHOL, connu également sous le nom de Dan Michell, en son propre nom et au nom de tous les autres membres de la maison Namox

**SCHEDULE 2****Those Intervening with the Musqueam Nation**

Delbert Guerin  
 Gail Y. Sparrow  
 Jim Kew  
 Larry Grant  
 Leona M. Sparrow  
 Mary Charles  
 Myrtle McKay  
 Nolan Charles  
 Susan A. Point  
 Chief George Guerin

**SCHEDULE 3****Those Intervening with the B.C. Cattlemen's Association**

B.C. Chamber of Commerce  
 B.C. Wildlife Federation  
 Business Council of British Columbia  
 Council of Tourist Associations  
 Fisheries Council of British Columbia  
 Guideoutfitters Association of British Columbia  
 Mining Association of British Columbia  
 Pacific Fishermen's Defence Alliance

*Appeal allowed in part; cross-appeal dismissed.*

*Solicitors for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs et al.: Rush, Crane, Guenther & Adams, Vancouver.*

*Solicitors for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs et al.: Blake, Cassels & Graydon, Vancouver.*

**ANNEXE 2****Intervenant avec la Nation Musqueam**

Delbert Guerin  
 Gail Y. Sparrow  
 Jim Kew  
 Larry Grant  
 Leona M. Sparrow  
 Mary Charles  
 Myrtle McKay  
 Nolan Charles  
 Susan A. Point  
 Chef George Guerin

**ANNEXE 3****Intervenant avec la B.C. Cattlemen's Association**

B.C. Chamber of Commerce  
 B.C. Wildlife Federation  
 Business Council of British Columbia  
 Council of Tourist Associations  
 Fisheries Council of British Columbia  
 Guideoutfitters Association of British Columbia  
 Mining Association of British Columbia  
 Pacific Fishermen's Defence Alliance

*Pourvoi accueilli en partie; pourvoi incident rejeté.*

*Procureurs des appelants et intimés dans le pourvoi incident, les chefs héréditaires Gitksan et autres: Rush, Crane, Guenther & Adams, Vancouver.*

*Procureurs des appelants et intimés dans le pourvoi incident, les chefs héréditaires Wet'suwet'en et autres: Blake, Cassels & Graydon, Vancouver.*

*Solicitors for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia: Arvay, Finlay, Victoria.*

*Procureurs de l'intimée et appelante dans le pourvoi incident, Sa Majesté la Reine du chef de la Province de la Colombie-Britannique: Arvay, Finlay, Victoria.*

*Solicitor for the respondent the Attorney General of Canada: The Attorney General of Canada, Ottawa.*

*Procureur de l'intimé le procureur général du Canada: Le procureur général du Canada, Ottawa.*

*Solicitors for the intervener the First Nations Summit: Ratcliff & Company, North Vancouver.*

*Procureurs de l'intervenant le First Nations Summit: Ratcliff & Company, North Vancouver.*

*Solicitors for the intervener the Westbank First Nation: Woodward and Company, Victoria.*

*Procureurs de l'intervenante la Première nation de Westbank: Woodward and Company, Victoria.*

*Solicitors for the interveners the Musqueam Nation et al.: Blake, Cassels & Graydon, Vancouver.*

*Procureurs des intervenants la Nation Musqueam et autres: Blake, Cassels & Graydon, Vancouver.*

*Solicitor for the interveners the B.C. Cattlemen's Association, et al.: J. Keith Lowes, Vancouver.*

*Procureur des intervenants la B.C. Cattlemen's Association et autres: J. Keith Lowes, Vancouver.*

*Solicitors for the intervener Skeena Cellulose Inc.: Russell & DuMoulin, Vancouver.*

*Procureurs de l'intervenante Skeena Cellulose Inc.: Russell & DuMoulin, Vancouver.*

*Solicitors for the intervener Alcan Aluminum Ltd.: Lawson, Lundell, Lawson & McIntosh, Vancouver.*

*Procureurs de l'intervenante Alcan Aluminium Ltée: Lawson, Lundell, Lawson & McIntosh, Vancouver.*

TAB 10

# Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3

Source: Supreme Court of Canada

Date: 2003-11-06

File number: 28807

Other citations:

232 DLR (4th) 577 — 312 NR 1 — 218 NSR (2d) 311 — 687 APR 311 — 112 CRR (2d) 202 — 45 CPC (5th) 1 — [2003] CarswellNS 375 — JE 2003-2076 — [2003] SCJ No 63 (QL) — [2003] ACS no 63

**Citation:**

**Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 SCR 3, <<https://canlii.ca/t/4nx4>>, retrieved on 2026-01-02**

**Most recent  
unfavourable  
mention**

**R. v. Warren, 2024 ONSC 2785 (CanLII)**

**[...] Mr. Warren’s case is distinguishable from Doucet-Boudreau v. Nova Scotia (Minister of Education) , 2003 SCC 62 (CanLII) , [2003] 3 S.C.R. 3, as s. 12 of the Charter does not contain the same “affirmative promise” as the provision of minority language education in s. 23. [...]**

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62

**Glenda Doucet-Boudreau, Alice Boudreau, Jocelyn Bourbeau,**

**Bernadette Cormier-Marchand, Yolande Levert and Cyrille Leblanc,**

**in their name and in the name of all Nova Scotia parents who are**

**entitled to the right, under Section 23 of the *Canadian Charter of***

***Rights and Freedoms*, to have their children educated in the language**

**of the minority, namely the French language, in publicly funded**

**French-language school facilities, and Fédération des parents**

**acadiens de la Nouvelle-Écosse Inc. *Appellants***

**v.**

**Attorney General of Nova Scotia *Respondent***

**and**

**Attorney General of Canada, Attorney General of Ontario, Attorney**

**General of New Brunswick, Attorney General of Newfoundland**

**and Labrador, Commissioner of Official Languages for Canada,**

**Fédération nationale des conseillères et conseillers scolaires**



**francophones, Fédération des associations de juristes d'expression**

**française de Common Law Inc. (FAJEFCL) and Conseil scolaire**

**acadien provincial (CSAP) Interveners**

**Indexed as: Doucet-Boudreau v. Nova Scotia (Minister of Education)**

**Neutral citation: 2003 SCC 62.**

File No.: 28807.

2002: October 4; 2003: November 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for nova scotia

*Constitutional law — Charter of Rights — Enforcement — Remedy available for realization of minority language education rights — Trial judge ordering province to make best efforts to provide homogeneous French-language facilities and programs by particular dates — Order further requiring parties to appear before same judge periodically to report on status of those efforts — Whether trial judge had authority to retain jurisdiction to hear reports from Province on the status of those efforts as part of his remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Whether reporting order was “appropriate and just in the circumstances” — Canadian Charter of Rights and Freedoms, ss. 23, 24(1).*

*Appeals — Mootness — Appropriate and just remedy — Minority language education rights — Appeal raising important question about jurisdiction of superior courts to order what may be an effective remedy in some classes of cases — Moot appeal should be heard to provide guidance in similar cases.*

The appellants are Francophone parents living in five school districts in Nova Scotia. They applied for an order directing the Province and the Conseil scolaire acadien provincial to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level. The trial judge noted that the government did not deny the existence or content of the parents' rights under s. 23 of the *Canadian Charter of Rights and Freedoms* but rather failed to prioritize those rights and delayed fulfilling its obligations, despite clear reports showing that assimilation was “reaching critical levels”. He found a s. 23 violation and ordered the Province and the Conseil to use their “best efforts” to provide school facilities and programs by particular dates. He retained jurisdiction to hear reports on the status of the efforts. The Province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The majority of the Court of Appeal allowed the appeal and struck down the impugned portion of the order. On the basis of the common law principle of *functus officio*, the majority held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. They also held that, while courts have broad ranging powers under s. 24(1) of the *Charter* to fashion remedies, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies.

*Held* (Major, Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed and the trial judge's order restored.

*Per* McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ.: This appeal involves the nature of remedies available under s. 24(1) of the *Charter* for the realization of the minority language education rights protected by s. 23. A purposive approach to remedies in a *Charter* context requires that

both the purpose of the right being protected and the purpose of the remedies provision be promoted. To do so, courts must issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms.

Section 23 of the *Charter* is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing. While the rights are granted to individuals, they apply only if the “numbers warrant”. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23. The affirmative promise contained in s. 23 and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.

Under s. 24(1) of the *Charter*, a superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, it must exercise a discretion based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies which usurp the role of the other branches of governance. The boundaries of the courts’ proper role will vary according to the right at issue and the context of each case.

The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. While it would be unwise at this point to attempt to define the expression “appropriate and just”, there are some broad considerations that judges should bear in mind in evaluating the appropriateness and justice of a potential remedy. An appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. Since s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may thus in some cases require the introduction of novel remedies. Lastly, the remedial power in s. 24(1) cannot be strictly limited by statutes or rules of the common law. However, insofar as the statutory provisions or common law rules express principles that are relevant to determining what is “appropriate and just in the circumstances”, they may be helpful to a court choosing a remedy under s. 24(1).

Here, the remedy ordered by the trial judge was appropriate and just in the circumstances. He exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education. The order is a creative blending of remedies and processes already known to the courts in order to give life to the rights in s. 23. Given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. The remedy took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. The remedy vindicated the rights of the parents while leaving the detailed choices of means largely to the executive. The reporting order was judicial in the sense that it called on the functions and powers known to courts. The range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts. Further, although the common law doctrine of *functus officio* cannot strictly pre-empt the remedial discretion in s. 24(1), an examination of the *functus* question indicates that the trial judge issued an order that is appropriately

judicial. The retention of jurisdiction did not include any power to alter the disposition of the case and did nothing to undermine the provision of a stable basis for launching an appeal. Finally, in the context, the reporting order was not unfair to the government. While, in retrospect, it would certainly have been advisable for the trial judge to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. It was not vaguely worded so as to render it invalid.

*Per Major, Binnie, LeBel and Deschamps JJ. (dissenting):* While superior courts' powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice and by constitutional boundaries. Such remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels: (1) by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle; (2) by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine.

Here, the drafting of the reporting order was anything but clear. The order gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. The uncertainty engendered by the order amounted to a breach of procedural fairness. For this reason alone, the order can be found to be inappropriate under s. 24(1) and therefore void. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized. As a general rule, courts should avoid interfering in the management of public administration. Once they have rendered judgment, they should resist the temptation to directly oversee or supervise the administration of their orders and operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. In this case, the trial judge assumed jurisdiction over a sphere traditionally outside the province of the judiciary, and also acted beyond the jurisdiction with which he was legitimately charged as a trial judge, thereby breaching the constitutional principle of separation of powers and the *functus officio* doctrine. His remedy undermined the proper role of the judiciary within our constitutional order and unnecessarily upset the balance between the three branches of government. Since no part of the Constitution can conflict with another, the trial judge's order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. The intrusiveness of the trial judge's order was in no way necessary to secure the appellants' s. 23 *Charter* interests. In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy and, more importantly, to that which they are guaranteed by s. 23 — namely, the timely provision of minority language instruction facilities. If, as suggested by the appellants, the reporting hearings were an incentive for the government to comply with the best efforts order, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. Moreover, at the level of constitutional principles, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive. While a trial judge's decisions with respect to remedies are owed deference, this must be tempered when, as here, fundamental legal principles are threatened. Proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (2001), 203 D.L.R. (4th) 128, 194 N.S.R. (2d) 323, 85 C.R.R. (2d) 189, [2001] N.S.J. No. 240 (QL), 2001 NSCA 104, setting aside a decision of the Nova Scotia Supreme Court (2000), 2000 CanLII 50591 (NS SC), 185 N.S.R. (2d) 246, 575 A.P.R. 246, [2000] N.S.J. No. 191 (QL). Appeal allowed, Major, Binnie, LeBel and Deschamps JJ. dissenting.

Joel E. Fichaud, Q.C., and Melanie S. Comstock, for the appellants.

Alexander M. Cameron, for the respondent.

Bernard Laprade and Christopher Rupar, for the intervener the Attorney General of Canada.

Janet E. Minor and Vanessa Yolles, for the intervener the Attorney General of Ontario.

Gabriel Bourgeois, Q.C., for the intervener the Attorney General of New Brunswick.

Written submissions only by Deborah Paquette, for the intervener the Attorney General of Newfoundland and Labrador.

*Laura C. Snowball* and *Subrata Bhattacharjee*, for the intervener the Commissioner of Official Languages for Canada.

*Michel Doucet* and *Christian E. Michaud*, for the intervener Fédération nationale des conseillères et conseillers scolaires francophones.

*Roger J. F. Lepage* and *Peter T. Bergbusch*, for the intervener Fédération des associations de juristes d'expression française de Common Law Inc.

*Noella Martin* and *Janet M. Stevenson*, for the intervener Conseil scolaire acadien provincial.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ. was delivered by

1 Iacobucci and Arbour JJ. — This appeal involves the nature of remedies available under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for the realization of the minority language education rights protected by s. 23 of the *Charter*. The specific issue is whether a trial judge may, after ordering that a provincial government use its best efforts to build French-language school facilities by given dates, retain jurisdiction to hear reports on the progress of those efforts. The issue of broader and ongoing judicial involvement in the administration of public institutions is not before the Court in this case.

## I. Background and Judicial History

2 The appellants are Francophone parents living in five school districts in Nova Scotia (Kingston/Greenwood, Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare) and Fédération des parents acadiens de la Nouvelle-Écosse Inc., a non-profit organization that monitors the advancement of educational rights of the Acadian and Francophone minority in Nova Scotia. The Attorney General of Nova Scotia is the respondent, acting on behalf of the Department of Education of Nova Scotia.

3 Apart from the specific facts of the case, it is most important to note the historical context on which this dispute is centred. As we will discuss below, French-language education in Nova Scotia has not had an enviable record of success. While the situation improved over the rather dismal record of the previous centuries, the twentieth century left much to be achieved. Section 23 of the *Charter* has been the hope of the French-speaking minority of Nova Scotia to redress the linguistic failings and inequality of history.

4 It is conceded in this appeal that s. 23 of the *Charter* entitles the appellant parents to publicly funded French-language educational facilities for their children. For some time, Francophone parents in these five school districts of Nova Scotia had been urging their provincial government to provide homogeneous French-language schools at the secondary level in addition to the existing primary level facilities. The government of Nova Scotia, for its part, agreed: it did not dispute that the number of students warranted the facilities demanded. The government amended the *Education Act*, S.N.S. 1995-96, c. 1, ss. 11-16, in 1996 to create the Conseil scolaire acadien provincial (the “Conseil”), a province-wide French-language school board, with a view to realizing the *Charter*’s minority language education rights. However, while s. 11(1) empowered the Conseil to deliver and administer all French-language programs, only the Minister, with the approval of the Governor in Council, could construct, furnish and equip schools (see s. 88(1)). Although the government eventually announced the construction of the new French-language school facilities, construction of the promised schools never began. So in 1998, 16 years after the right was entrenched in the Constitution, the appellant parents applied to the Supreme Court of Nova Scotia for an order directing the Province and the Conseil to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level.

5 The application was heard before LeBlanc J. in October 1999. LeBlanc J. declared that the applicants were entitled parents under s. 23 of the *Charter* and that the number of students warranted the provision of French homogeneous secondary school facilities in Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare: (2000), 2000 CanLII 50591 (NS SC), 185 N.S.R. (2d) 246. He noted, however, that the real issue was not the existence and content of the applicants' s. 23 rights, but the date on which the programs and facilities would finally be made available.

6 LeBlanc J. found that the respondents had not given sufficient attention to the serious rate of assimilation among Acadians and Francophones in Nova Scotia. The Province treated s. 23 rights as if they were but one more demand for educational programs and facilities, and failed to accord them due priority as constitutional rights. Meanwhile, assimilation continued. LeBlanc J. stated that "[i]t is beyond any doubt that it is time that homogeneous programs and facilities be provided to s. 23 students" (para. 206).

7 LeBlanc J. considered the state of school programs and facilities, including the progress that had already been made toward complying with s. 23 of the *Charter*, in each of the five school districts at issue. He directed the Province, which, through the Department of Education, is responsible for providing school facilities, and the Conseil, which is responsible for program provision, to build schools and provide programs by more and less specific deadlines. LeBlanc J. required that the respondents use their "best efforts" to comply with his order. Finally, he retained jurisdiction to hear reports from the respondents on their compliance. The precise wording of the order was as follows:

1. In Kingston/Greenwood, the entitled parents under Section 23 have a right to a homogeneous French program from grades Primary to 12 and the entitled parents have a right to a homogeneous French facility for grades Primary to 12 by September 2000.

2. In Cheticamp, the entitled parents under Section 23 have a right to a homogeneous French secondary program in a homogeneous French facility by September 2000.

3. In Île Madame-Archat (Petit-de-Grat), the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades 9 through 12 by September 2000 and the Respondent Department of Education shall use its best efforts (a) to provide a homogeneous French facility (on an interim basis) for grades 9 through 12 by September 2000 and (b) to provide a permanent homogeneous French facility by January 2001.

4. In Argyle, the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall provide a homogeneous French facility for grades Primary through 12 by September 2001.

5. In Clare, the Respondent CSAP shall provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall take immediate steps to provide homogeneous French facilities for grades Primary through 12 by September 2001.

6. The Respondents shall use their best efforts to comply with this Order.

7. The Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

8 The reference to "the Court" in the final paragraph was interpreted by LeBlanc J., and the parties, as a reference to himself sitting as a judge of the provincial supreme court, rather than to the Supreme Court of Nova Scotia generally, which, as a court of first instance, would be competent to hear applications



relating to any failure by the respondents to comply with LeBlanc J.'s order and would require no express retention of jurisdiction. LeBlanc J. presided over several of these "reporting hearings" between July 27, 2000, and March 23, 2001. Prior to each reporting session the trial judge directed the Province to file an affidavit from the appropriate official at the Department of Education, setting out the Department's progress in complying with the trial judge's decision. The trial judge permitted the respondent and Conseil to adduce evidence, including rebuttal evidence on various matters relating to compliance with the best efforts order. The Attorney General of Nova Scotia, on behalf of the Department of Education, appealed the part of the order in which LeBlanc J. retained his jurisdiction to hear reports.

9 The majority at the Nova Scotia Court of Appeal allowed the appeal before the final scheduled reporting hearing took place ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104). Flinn J.A., writing for the majority, emphasized that the declaration of the parents' rights and the order to provide programs and facilities were not in issue in the appeal (para. 6). Only the trial judge's retention of jurisdiction to hear reports was challenged. Flinn J.A. held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. This opinion was based on the common law principle of *functus officio* and Flinn J.A.'s view that the *Judicature Act*, R.S.N.S. 1989, c. 240, not only fails explicitly to authorize the retention of jurisdiction by a trial court after it has decided the issues before it and provided a remedy, but also precludes a trial judge from retaining jurisdiction to determine whether there is compliance with the order. He cited this Court's decision in *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, at pp. 952-53, for the principle that it is for Parliament, and not judges, to fix the jurisdiction of courts and that the *Charter* was intended to fit in, rather than to alter, the existing scheme of Canadian legal procedure. After reviewing the language rights jurisprudence, Flinn J.A. concluded that there was no authority or precedent supporting the trial judge's decision to order and conduct the reporting sessions. He concluded that, while it is true that courts have broad ranging powers under s. 24(1) to fashion remedies, and are encouraged to be creative in so doing, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies. Finally, Flinn J.A. expressed a reluctance to open the door to American jurisprudence on the enforcement of mandatory injunctions and a fear that post-trial intervention by trial judges in the enforcement of remedies would undermine the tradition of co-operation between the judiciary and the other branches of government.

10 Freeman J.A. dissented. In his view, LeBlanc J.'s order was not final and the judge was not *functus officio* until the continuing supervision was completed; the trial judge was able to keep his decision from being final simply by declaring that he was doing so. Freeman J.A. referred to the order as a "creative blending of declaratory and injunctive relief with a means of mediation" and found it to be "of the very essence of the kind of remedy courts are encouraged to seek pursuant to s. 24(1) to give life to *Charter* rights" (para. 70). He noted that requiring fresh applications by the parties each time the Province or the Conseil appeared not to be using its best efforts could have dragged matters out interminably, and would have left the matter to a judge with less familiarity with the issues and legal principles involved. Freeman J.A. concluded that the order, meant to "head off the potential for an enforcement nightmare", "got the job done, virtually on time, with a minimum of inconvenience or unnecessary cost" (para. 84).

## II. Issues

11 A preliminary issue raised by the respondent is whether the Court should decline to hear this appeal because it is moot.

12 The main issue in the appeal is simply this: having found a violation of s. 23 of the *Charter* and having ordered that the Province make its best efforts to provide homogeneous French-language facilities and programs by particular dates, did the Nova Scotia Supreme Court have the authority to retain jurisdiction to hear reports from the Province on the status of those efforts as part of its remedy under s. 24(1) of the *Charter*?

13 Strictly speaking, only the retention of jurisdiction to hear reports, and not the “best efforts” order itself, is at issue in the present appeal. Nonetheless, the best efforts order and the retention of jurisdiction were conceived by the trial judge as two complementary parts of a whole. A full appreciation of the balance and moderation of the trial judge’s approach to crafting this remedy requires that the reports respecting the respondents’ compliance with the order be viewed and evaluated in the context of the remedy as a whole.

### III. *Charter* Provisions

14 LeBlanc J.’s order was designed to remedy a breach of s. 23 of the *Charter* which provides:

**23.** (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

15 LeBlanc J. ordered the remedy challenged in this case pursuant to s. 24(1) of the *Charter* which provides:

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

### IV. *Analysis*

#### A. *Mootness*

16 Before considering the main issue in this case, it is necessary to consider the respondent's argument that this appeal should not be heard because it is moot.

17 The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary.

18 Although this appeal is moot, the considerations in *Borowski, supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):

- (1) the presence of an adversarial context;
- (2) the concern for judicial economy; and
- (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

19 In this case, the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously.

20 As to the concern for conserving scarce judicial resources, this Court has many times noted that such an expenditure is warranted in cases that raise important issues but are evasive of review (*Borowski, supra*, at p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, 1967 CanLII 116 (SCC), [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46). The present appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.

21 Moreover, in deciding whether to hear a moot case, courts must weigh the expenditure of scarce judicial resources against "the social cost of continued uncertainty in the law" (*Borowski, supra*, at p. 361). The social cost of uncertainty as to the available *Charter* remedies is high. The *Charter* is designed to protect those who are most vulnerable to the dangers of majority rule; this aspect of the *Charter's* purpose is evident in the provisions protecting official minority language education rights. If the Court leaves this matter undecided and courts are left under a misapprehension as to the tools available to ensure that government behaviour conforms with the *Charter*, the obvious danger is less than full protection of *Charter* rights. Thus, the expenditure of judicial resources is warranted in the present case despite the fact that the appeal may be moot. The decision of this Court will provide guidance on the important question of the nature and extent of remedies under s. 24 of the *Charter* in similar cases.

22 Finally, the Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this case (*Borowski, supra*, at p. 362). The question of what remedies are available under the *Charter* falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement. Furthermore, unlike in *Borowski, supra*, at p. 365, the appellants are not seeking an answer to an abstract question on the interpretation of the *Charter*; they are not "turn[ing] this appeal into a private reference". The Attorney

General of Nova Scotia appealed successfully against an order made against it by a superior court. Although the immediate grievances of the appellants have now been addressed, deciding in this case will assist the parties to this action, and others in similar circumstances, in their ongoing relationships.

### B. *The Retention of Jurisdiction*

#### (1) The Importance of Context: Sections 23 and 24 of the Charter

23 It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493). The need for a generous interpretation flows from the principle that the *Charter* ought to be interpreted purposively. While courts must be careful not to overshoot the actual purposes of the *Charter*'s guarantees, they must avoid a narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*. In our view, the approach taken by our colleagues LeBel and Deschamps JJ. which appears to contemplate that special remedies might be available in some circumstances, but not in this case, severely undervalues the importance and the urgency of the language rights in the context facing LeBlanc J.

24 The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595; *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 (“*Dunedin*”). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:

[Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures the attainment of its objects . . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a “large and liberal” interpretation . . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that “[i]t is difficult to imagine language which could give the court a wider and less fettered discretion”. This broad remedial mandate for s. 24(1) should not be frustrated by a “(n)arrow and technical” reading of the provision . . . . [Reference omitted.]

25 Purposive interpretation means that remedies provisions must be interpreted in a way that provides “a full, effective and meaningful remedy for *Charter* violations” since “a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach” (*Dunedin*, *supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

26 The purpose of s. 23 of the *Charter* is “to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population” (*Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 362). Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved (see *Reference re Public Schools Act (Man.)*, s. 79(3),

(4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, at p. 849-50 (“*Schools Reference*”). This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

... any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

27 A further aspect of s. 23 of the *Charter* is its remedial nature (see, for example, *Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 26). The section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing (*Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850). Section 23 must therefore be construed “in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights” (*Schools Reference*, at p. 850; see also *Arsenault-Cameron*, *supra*, at para. 27). This Court has made it clear that the fact that language rights arose from political compromise does not alter their nature and importance; consequently, s. 23 must be given the same large and liberal interpretation as all *Charter* rights (*R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra*, at para. 27).

28 The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing “a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (*Mahe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mahe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the “numbers warrant”, and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate (*Mahe*, *supra*, at p. 366; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron*, *supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.

29 Another distinctive feature of the right in s. 23 is that the “numbers warrant” requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to “warrant”. Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected (see, for example, *Marchand v. Simcoe County Board of Education* (1986), 1986 CanLII 2671 (ON SC), 29 D.L.R. (4th) 596 (Ont. H.C.); *Marchand v. Simcoe County Board of Education* (No. 2) (1987), 1987 CanLII 4129 (ON SC), 44 D.L.R. (4th) 171 (Ont. H.C.); *Lavoie v. Nova Scotia (Attorney-General)* (1988), 1988 CanLII 5684 (NS SC), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l’Éducation et de la Formation)* (1996), 1996 CanLII 12465 (ON SCDC), 136 D.L.R. (4th) 704 (Ont. Ct. (Gen. Div.)), *aff’d* (1996), 1996 CanLII 11789 (ON SC), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan*, 1998 CanLII 13468 (SK KB), [1999] 3 W.W.R. 743 (Sask. Q.B.), *aff’d* 1998 CanLII 12371 (SK CA), [1999] 12 W.W.R. 742 (Sask. C.A.);

*Assoc. Française des Conseils Scolaires de l'Ontario v. Ontario* (1988), 1988 CanLII 4759 (ON CA), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de la Colombie-Britannique v. British Columbia* (1998), 1998 CanLII 3969 (BC SC), 167 D.L.R. (4th) 534 (B.C.S.C.)).

30 To put the matter of judicial remedies in greater context, it is useful to reflect briefly on the role of courts in the enforcement of our laws.

31 Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

32 Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

33 This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act*, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

34 In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

35 In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter: Canada and the*

*Paradox of Liberal Constitutionalism* (1993); F. L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (2000); A. Petter, “The Politics of the Charter” (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend*, *supra*, this Court stated, at para. 136:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts.

36 Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 136:

Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

Determining the boundaries of the courts’ proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

37 Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants’ rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

38 As indicated earlier, the history of French-language education in Nova Scotia has been disappointing, resulting in high rates of assimilation that have continued well into the period when this litigation began. While the situation is not what it was in the eighteenth and nineteenth centuries when French-language education in Acadia was for the most part either expressly prohibited or unavailable, the promise of s. 23 had yet to be fulfilled in the five school districts at issue in this appeal when the appellants brought their application demanding homogeneous French-language facilities before the Supreme Court of Nova Scotia in 1998. Through the mid-1990s, s. 23 parents had pressured the government to provide homogeneous French-language facilities in presentations to Legislative Committees and in written and oral submissions to Ministers of Education. They had submitted petitions, letters, and expert analyses on assimilation to the Province. In 1996, amendments to the *Education Act* provided for a French-language school board, the Conseil scolaire acadien provincial, geared toward the fulfilment of the Province’s s. 23 obligations. The school board then decided to provide the facilities at issue in this appeal. From 1997 to 1999, the provincial government announced the construction of homogeneous French-language schools in Petit-de-Grat, Clare, and Argyle. The schools were never built, and the construction projects were officially put on hold in September 1999.

39 The reason for the delay, broadly speaking, was the government’s failure to give due priority to s. 23 rights in educational policy setting. Indeed, LeBlanc J. observed that the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place. The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government’s failure to

fulfill its obligations under s. 23. He found that the government had been treating the provision of s. 23 schools no differently from programs or facilities generally, without attention to purposes of s. 23 of the *Charter* and the role that homogeneous schools play in French linguistic and cultural preservation and flourishing (para. 205). Meanwhile, assimilation continued (para. 210) and enrollment in the Conseil's schools was dropping. Programs were in jeopardy (paras. 229-30).

40 It is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy. He was sensitive to the need for timely execution, the limits of the judicial role, and the desirability of allowing the government flexibility in the manner of fulfilling its constitutional obligations when he ordered the government to make best efforts to provide facilities by particular dates and retained jurisdiction to hear progress reports. However, the urgency of the context does not by itself create jurisdiction in a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*. We now turn to the question of whether LeBlanc J.'s order was within the jurisdiction of a superior court.

(2) The Jurisdiction of a Superior Court to Issue a Remedy Under Section 24(1) of the *Charter*

41 Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1).

42 Clearly, if there is some constitutional limit to the remedial power either in s. 24(1) or in some other part of the Constitution, the judge ordering a remedy must respect this boundary. As a basic rule, no part of the Constitution can abrogate or diminish another part of the Constitution (*New Brunswick Broadcasting, supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148). For example, a court could not compel a provincial government to do something pursuant to s. 24(1) which would exceed the jurisdiction of the province under s. 92 of the *Constitution Act, 1867*.

43 A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's *Charter* rights (see *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the *Education Act* prevented the government from providing minority language education as required by the *Constitution Act, 1982*. On the contrary, the *Education Act*, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather, the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the *Charter*. Section 24(1) is available to remedy this failure.

44 To repeat its text, s. 24(1) of the *Charter* provides:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

45 The purposive reading of s. 24(1) and also the ordinary meaning of the drafter's language make it clear that s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied (see *Nelles v. Ontario*, 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, at p. 196, and *Mills, supra*, at p. 881). The default court of competent jurisdiction is



a superior court established under s. 96 of the *Constitution Act, 1867*. It is also plainly contemplated in s. 24(1) that a court of competent jurisdiction will have the authority to grant a remedy that it considers appropriate and just in the circumstances.

46 The respondent Attorney General of Nova Scotia suggested that *Re Residential Tenancies Act, 1979*, *supra*, and other cases which describe the functions of courts in the context of s. 96 should be read as setting limits on superior courts' remedial power. With respect, that submission must fail. It is true that in *Re Residential Tenancies Act, 1979*, at pp. 734-35, Dickson J. (as he then was) discussed the nature of the "judicial function" of s. 96 courts. But this discussion occurred in the context of a s. 96 challenge to the validity of a statute conferring jurisdiction on an administrative tribunal. Section 96 protects a "core" of superior courts' jurisdiction from being transferred exclusively to provincial inferior courts or administrative tribunals (*MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at para. 15, *per* Lamer C.J.). These cases safeguarding a core do not trace the limits of superior courts' jurisdiction. There is nothing in s. 96 to limit the inherent jurisdiction of the superior courts or the jurisdiction that can be conferred on them by statute (*Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252, at p. 274) and, *a fortiori*, nothing to limit the jurisdiction of a superior court under s. 24(1) of the *Charter*.

47 In a similar vein, the respondent Attorney General suggests that this Court's decisions in *Mills* and *Dunedin*, both *supra*, which set out a framework for determining when a court or tribunal is competent to grant remedies under s. 24(1) of the *Charter*, deny the availability of the remedy ordered in this case. In our opinion, this submission rests on a mistaken view of the source of superior courts' power to grant *Charter* remedies.

48 In *Mills*, the Court considered whether a preliminary hearing magistrate given jurisdiction by particular provisions of the *Criminal Code* was a court of competent jurisdiction for the purposes of entering a stay of proceedings under s. 24(1) of the *Charter*. The unanimous conclusion of the Court was that a magistrate sitting at preliminary hearing was not competent to provide that remedy. McIntyre J., speaking for the majority on this point, emphasized the limited function of a court sitting in preliminary inquiry, which is to commit the accused to trial where there is sufficient evidence, or discharge the accused where there is not. The role does not include entering acquittals or convictions, imposing penalties, or giving remedies. As such, remedies under s. 24(1) could not be granted by that tribunal. Subsequent cases applying *Mills*, including *Dunedin*, *supra*, *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, considered whether administrative tribunals or judges acting under statutory authority had the power to issue particular *Charter* remedies under s. 24(1). In each case, the analysis was directed at discerning what kinds of powers the legislator intended the tribunal to exercise in light of the purposes of the *Charter* as well as the tribunal's function and the practical limits imposed by its structure. This analysis has no application to s. 96 courts which are, of course, not creatures of statute but courts of general inherent jurisdiction.

49 Thus, when McIntyre J. wrote in *Mills*, *supra*, at p. 953, that "the *Charter* was not intended to turn the Canadian legal system upside down", he meant that s. 24(1) did not confer new jurisdiction on statutory and inferior tribunals beyond that which was intended by the legislator as reflected in the tribunal's function and the practical limits imposed by its structure. The test set out in *Mills* does not apply to superior courts since, as McIntyre J. pointed out, a superior court will always be a court of competent jurisdiction under s. 24(1) of the *Charter* (*Mills*, *supra*, at p. 956). Superior courts retain "constant, complete and concurrent jurisdiction" to issue remedies under s. 24(1) (see *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at pp. 603-4, citing *Mills*, *supra*, at p. 892, and *R. v. Smith*, 1989 CanLII 12 (SCC), [1989] 2 S.C.R. 1120, at pp. 1129-30).

50 The foregoing analysis does not preclude review on appeal of a superior court's choice of remedy under s. 24(1). Rather, it simply forecloses the argument that a given remedy under s. 24 is unavailable in a superior court because of the constitutional limitations on its jurisdiction as proposed by the respondent. The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. As McIntyre J. wrote in *Mills, supra*, at p. 965:

What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

McLachlin C.J. recently endorsed this passage in *Dunedin, supra*, at para. 18. Consequently, a party seeking to challenge a *Charter* remedy ordered by a s. 96 court must show that the order is not "appropriate and just in the circumstances".

51 The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".

### (3) The Meaning of "Appropriate and Just in the Circumstances"

52 What, then, is meant in s. 24(1) by the words "appropriate and just in the circumstances"? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.'s words in *Mills, supra*, at p. 965:

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

53 With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as "dialogue" must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The same may be said of common law procedural principles such as *functus officio* which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

54 While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These

general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

55 First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was “smothered in procedural delays and difficulties”, is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin, supra*, at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).

56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

#### (4) Application to this Case: the Remedy Ordered by the Trial Judge Was Appropriate and Just in the Circumstances

##### *(a) The Reporting Order Effectively Vindicated the Rights of the Parents*

60 LeBlanc J. exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education in Kingston (Greenwood, Chéticamp, Île Madame-Archat (Petit-de-Grat), Argyle, and Clare). The facts as found by LeBlanc J. disclosed that continued delay could imperil the already vulnerable s. 23 rights, their exercise depending as it does on the numbers of

potential students. As Freeman J.A. noted in dissent in the Court of Appeal, the reporting hearings were aimed at identifying difficulties with the timely implementation of the trial judge's order as they arose, instead of requiring fresh applications by the appellants every time it appeared that a party was not using its best efforts to comply with the judge's order.

61 In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. The order of reporting hearings was, as Freeman J.A. wrote "a pragmatic approach to getting the job done expeditiously" (para. 74). LeBlanc J.'s order is a creative blending of remedies and processes already known to the courts in order to give life to the right in s. 23.

62 In assessing the extent to which LeBlanc J.'s remedy was appropriate and just in the circumstances, it is useful to examine the options before the trial judge. In doing so we are not intending to usurp the role and discretion of the trial judge but only to gain a fuller understanding of the situation he faced. LeBlanc J. could have limited the remedy to a declaration of the rights of the parties, as the Court considered prudent in *Mahe, supra*, at pp. 392-93. In *Mahe*, however, the primary issues before the Court concerned the scope and content of s. 23 of the *Charter*, including the degree of management of control of schools to be accorded to s. 23 parents, and the determination of when the numbers are sufficient to warrant given programs and facilities. After clarifying the content and scope of the s. 23 rights at issue, the Court chose the remedy of ordering a declaration of those rights. It did so to allow the government the greatest flexibility to fashion a response suited to the circumstances (p. 393). The assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully.

63 After *Mahe*, litigation to vindicate minority language education rights has entered a new phase. The general content of s. 23 in many cases is now largely settled (*Mahe, Schools Reference, Arsenault-Cameron*, all *supra*). In the present case, for example, it was clear to and accepted by the parties from the start that the government was required to provide the homogeneous French-language facilities at issue. The entitled parents sought the assistance of the court in enforcing the full and prompt vindication of their rights after a lengthy history of government inaction.

64 Our colleagues LeBel and Deschamps JJ. state at para. 140 of their reasons that the trial judge was not faced with a government which had understood its obligations but refused to comply with them. Our colleagues suggest that there was some issue as to what s. 23 demanded in the situation. With respect, this portrayal is directly at odds with the findings of fact made by the trial judge. At para. 198 of his reasons, the trial judge wrote:

It is apparent that the real issue between the parties is the date on which these programs and facilities are to be implemented. The Department, in its submissions, does not challenge the applicants' right and entitlement to these programs and facilities but point [*sic*] to a number of factors which ought to satisfy the applicants. The Conseil opposes the applicants' claim for an earlier implementation of the transition plan but supports the applicants in its [*sic*] demand for declaration that the Department ought to be directed to provide homogeneous facilities.

65 LeBlanc J. further noted that the Department of Education did not provide either statistical or financial evidence with respect to the "numbers warrant" test and that, in any case, the number of children of s. 23 parents were greater than the number in the case of *Mahe, supra*, decided by this Court (paras. 200-201). Instead, the government argued at trial that it should be allowed to delay its

obligations because of a lack of consensus in the Acadian and Francophone communities (para. 202) and because the political compromise in s. 23 required a “go-slowly approach” (para. 214). According to the trial judge, the government did not deny the existence or content of the s. 23 rights of the parents but rather failed to prioritize those rights and delayed fulfilling its obligations. The government “did not give sufficient priority to the serious rate of assimilation occurring among Acadians and Francophones in Nova Scotia and the fact that rights established in s. 23 are individual rights” (para. 204) despite clear reports showing that assimilation was “reaching critical levels” (para. 215). These are the findings of fact which can only be made by a judge who has heard all the evidence at trial. These findings are not on appeal and it is not open for appellate judges to reverse these findings without proper justification. LeBlanc J. properly took account of the factual circumstances within which he exercised his discretion to select a remedy which was appropriate and just.

66 LeBlanc J. obviously considered that, given the Province’s failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well-understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. In *Mahe, supra*, at p. 393, Dickson C.J. recognized this possibility:

As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. [Emphasis added.]

This Court’s judgment in *Mahe* speaks to all provincial and territorial governments. LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents’ rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.

67 Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay.

(b) *The Reporting Order Respected the Framework of our Constitutional Democracy*

68 The remedy granted by LeBlanc J. took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. LeBlanc J. considered the government’s progress toward providing the required schools and services (see, e.g., paras. 233-34). Some flexibility was built into the “best efforts” order to allow for unforeseen difficulties. It was appropriate for LeBlanc

J. to preserve and reinforce the Department of Education's role in providing school facilities as mandated by s. 88 of the *Education Act*, as this could be done without compromising the entitled parents' rights to the prompt provision of school facilities.

69 To some extent, the legitimate role of the court *vis-à-vis* various institutions of government will depend on the circumstances. In these circumstances, it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents while leaving the detailed choices of means largely to the executive.

70 Our colleagues LeBel and Deschamps JJ. appear to consider that the issuance of an injunction against the government under s. 24(1) is constitutionally suspect and represents a departure from a consensus about *Charter* remedies (see para. 134 of the dissent). With respect, it is clear that a court may issue an injunction under s. 24(1) of the *Charter*. The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared. Contempt proceedings in the face of defiance of court orders, as well as coercive measures such as garnishments, writs of seizure and sale and the like are all known to courts. In this case, it was open to the trial judge in all the circumstances to choose the injunctive remedy on the terms and conditions that he prescribed.

(c) *The Reporting Order Called on the Function and Powers of a Court*

71 Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties (see R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490). Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. For example, prejudgment remedies developed in such cases as *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.), and *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), involve the court in the preservation of evidence and the management of parties' assets prior to trial. In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors' assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property (see *Bennett on Receiverships* (2nd ed. 1999), at pp. 21-37, 443-45). Similarly, the courts' jurisdiction in respect of trusts and estates may sometimes entail detailed and continuing supervision and support of their administration (see D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 904-9; *Oosterhoff on Wills and Succession* (5th ed. 2001), at pp. 27-28). Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained seized of a matter so as to facilitate the implementation of constitutional language rights: see *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, 1985 CanLII 9 (SCC), [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, 1990 CanLII 35 (SCC), [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 S.C.R. 212. Lower courts have also retained jurisdiction in s. 23 cases: *British Columbia (Association des parents francophones) v. British Columbia* (1996), 1996 CanLII 1455 (BC SC), 139 D.L.R. (4th) 356 (B.C.S.C.), at p. 380; *Lavoie, supra*, at pp. 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 1983 CanLII 3785 (NB KB), 48 N.B.R. (2d) 361 (Q.B.), at para. 109.

72 The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see Sharpe, *supra*, at paras. 1.260-1.380; *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), *aff'd* [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co.*, [1922] 1 Ch. 265, *aff'd* [1922] 2 Ch. 1 (C.A.)).

73 As academic commentators have pointed out, the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts (see W. A. Bogart, “‘Appropriate and Just’: Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy” (1986), 10 *Dalhousie L.J.* 81, at pp. 92-94; N. Gillespie, “Charter Remedies: The Structural Injunction” (1989-90), 11 *Advocates’ Q.* 190, at pp. 217-18; Roach, *Constitutional Remedies in Canada*, *supra*, at paras. 13.50-13.80; Sharpe, *supra*, at paras. 1.260-1.490). The change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.

74 The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.

75 The respondent argues that the reporting order issued by LeBlanc J. violated the common law doctrine of *functus officio*. As we have said, statutes or common law rules cannot strictly pre-empt the remedial discretion in s. 24(1). Nonetheless, the doctrine of *functus officio* properly speaks to the functions and powers of courts. Therefore, an examination of the *functus* question is useful in deciding whether LeBlanc J. issued an order that is appropriately judicial.

76 Flinn J.A. for the majority in the Court of Appeal decided that the trial judge, having issued the best efforts order, had no further jurisdiction with respect to the parties and was therefore precluded from retaining jurisdiction to hear reports on its implementation (para. 21). This view is based on a mis-characterization of the reporting portion of the order as somehow separate from and additional to the best efforts injunctions. On the contrary, in our view, the reporting sessions formed an integral part of the remedy fashioned by LeBlanc J. Moreover, the *functus* doctrine has no application where the trial judge does not purport to alter a final judgment. There was no indication that the retention of jurisdiction included any power to alter the disposition of the case.

77 A closer examination of the doctrine is helpful. The *Oxford Companion to Law* (1980), at p. 508, provides the following definition:

*Functus officio* (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted.

78 But how can we know when a judge’s function is exhausted? Sopinka J., writing for the majority in *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848, at p. 860, described the purpose and origin of the doctrine in the following words:

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division.

79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, 1990 CanLII 158 (SCC), [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. Applying that aspect of the *functus* doctrine to s. 23(1), we face the question of whether the ordering of progress reports denied the respondents a stable basis from which to appeal.

80 In our view, LeBlanc J.'s retention of jurisdiction to hear reports did nothing to undermine the provision of a stable basis for launching an appeal. He did not purport to retain a power to change the decision as to the scope of the s. 23 rights in question, to alter the finding as to their violation, or to modify the original injunctions. The decision, including the best efforts order and the order to appear at reporting sessions, was final and appealable.

81 In any case, the rules of practice in Nova Scotia and other provinces allow courts to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted (Nova Scotia *Civil Procedure Rules*, Rule 15.08(d) and (e); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(c) and (d); *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 390(1)). This shows that the practice of providing further direction on remedies in support of a decision is known to our courts, and does not undermine the availability of appeal. Moreover, the possibility of such proceedings may facilitate the process of putting orders into operation without requiring resort to contempt proceedings.

82 The respondent relies on the Nova Scotia's *Judicature Act* to support its argument that the ordered reporting hearings were improper. However, even if that Act could have the effect of limiting the jurisdiction granted by s. 24(1) of the *Charter*, nothing in the *Judicature Act* appears to remove from a trial judge the power to hear reports on the implementation of his or her order. Section 33 of the *Judicature Act* provides that proceedings in the Supreme Court of Nova Scotia shall be "heard, determined and disposed of" by a single judge, but this does not limit the powers of the court to order reporting hearings. Section 34(d) of the *Judicature Act* allows a presiding judge to reserve judgment for a maximum of six months, but in our view, judgment was not reserved in this case since LeBlanc J. delivered his judgment within the six-month period. Section 38 of the *Judicature Act* provides that "an appeal lies to the Court of Appeal from any decision, verdict, judgment or order" of a judge of the Supreme Court of Nova Scotia. LeBlanc J. did nothing that would preclude the appeal of his decision or choice of remedy.

(d) *The Reporting Order Vindicated the Right by Means that Were Fair*

83 In the context, the reporting order was one which, after vindicating the entitled parents' rights, was not unfair to the respondent government. The respondent argues that it was subject to an overly vague remedy. In our opinion, the reporting order was not vaguely worded so as to render it invalid. While, in retrospect, it would certainly have been advisable for LeBlanc J. to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. In our view, the "reporting" element of LeBlanc J. remedy was not unclear in a way that would render it invalid.

84 Doubtless, as LeBel and Deschamps JJ. point out, the initial retention of jurisdiction by LeBlanc J. could have been more specific in its terms so as to give parties a precise understanding of the procedure at reporting sessions. Nonetheless, the respondent knew it was required to present itself to the court to report on the status of its efforts to provide the facilities as ordered by LeBlanc J. LeBlanc J.'s written order is satisfactory and clearly communicates that the obligation on government was simply to report.



The fact that this was the subject of questions later in the process suggests that future orders of this type could be more explicit and detailed with respect to the jurisdiction retained and the procedure at reporting hearings.

85 It should be remembered that LeBlanc J. was crafting a fairly original remedy in order to provide flexibility to the executive while vindicating the s. 23 right. It may be expected that in future cases judges will be in a better position to ensure that the contents of their orders are clearer. In addition, the reporting order chosen by LeBlanc J. is not the only tool of its kind. It may be more helpful in some cases for the trial judge to seek submissions on whether to specify a timetable with a right of the government to seek variation where just and appropriate to do so.

86 Once again, we emphasize that s. 24(1) gives a court the discretion to fashion the remedy that it considers just and appropriate in the circumstances. The trial judge is not required to identify the single best remedy, even if that were possible. In our view, the trial judge's remedy was clearly appropriate and just in the circumstances.

#### (5) Conclusion

87 Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

88 The remedy crafted by LeBlanc J. meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates.

#### V. Disposition

89 In the result, we would allow the appeal, set aside the judgment of the Court of Appeal, and restore the order of the trial judge.

90 We would award full costs to the appellants on a solicitor-client basis throughout, including the costs for the reporting hearings. The appellants are parents who have, despite their numerous efforts, been consistently denied their *Charter* rights. The Province failed to meet its corresponding obligations to the appellant parents despite its clear awareness of the appellants' rights. Accordingly, in looking at all the circumstances, our view is that solicitor-client costs should be awarded.

The reasons of Major, Binnie, LeBel and Deschamps JJ. were delivered by

LeBel and Deschamps JJ. (dissenting) —

#### I. Introduction

91 The devil is in the details. Awareness of the critical importance of effectively enforcing constitutional rights should not lead to forgetfulness about the need to draft pleadings, orders and judgments in a sound manner, consonant with the basic rules of legal writing, and with an understanding of the proper role of courts and of the organizing principles of the legal and political order of our country. Court orders should be written in such a way that parties are put on notice of what is expected of them. Courts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service. Judicial interventions should end when and where the case of which a judge is seized is brought to a close.

92 In our respectful view, without putting in any doubt the desire of the trial judge to fashion an effective remedy to address the consequences of a long history of neglect of the rights of the Francophone minority in Nova Scotia, the drafting of his so-called reporting order was seriously flawed. It gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized, thereby breaching the constitutional principle of separation of powers. The order did so by reason of the way it was framed and the manner in which it was implemented. In our opinion, the reporting order was void, as the Court of Appeal of Nova Scotia found, and the appeal should be dismissed.

## II. The Nature of the Issues

93 This appeal raises the sole question of the validity of the reporting order made by LeBlanc J. ((2000), 2000 CanLII 50591 (NS SC), 185 N.S.R. (2d) 246). In this context, we do not intend to engage in a full review of the factual background and of the judicial history of this case. For the purposes of our reasons, we are content to rely on their extensive review in the reasons of our colleagues. We will only add such details about the reporting order and its implementation as might be of assistance to our analysis of the legal questions at stake in this appeal.

94 At the outset, we wish to emphasize that we fully agree with our colleagues in their analysis of the nature and fundamental importance of language rights in the Canadian Constitution, as well as on the need for efficacy and imagination in the development of constitutional remedies. Indeed, we dissent because we believe that constitutional remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime, a key principle of which remains the separation of powers. This principle protects the independence of courts. It also flexibly delineates the domain of court action, particularly in the relationship of courts not only with legislatures but also with the executive branch of government or public administration.

95 As to the other issues such as mootness, immunities and mandatory injunctions, we are in broad agreement with our colleagues and do not intend to comment any further on them. We turn now to an analysis of the issues which lie at the root of our disagreement with the majority as to the final disposition of this appeal.

96 In this analysis, we will first review the nature of the reporting order and we will determine whether it can be considered consistent with the principle of procedural fairness. We will then discuss the principles of separation of powers and *functus officio*; we will demonstrate that the question of whether the trial judge had jurisdiction to issue the order is germane to the determination of whether the trial judge breached the separation of powers. In both discussions, the appropriateness of the remedy will be called into question. In the former, we will assess the appropriateness of the order for reporting

hearings from the perspective of the parties subject to it, while in the latter, we will analyse the appropriateness of the order, by taking into consideration the proper role of courts within our constitutional order.

### III. The Drafting of the Order and the Principle of Procedural Fairness

97 The drafting of applications asking for injunctive relief, or of orders granting such remedies, can be a serious challenge for counsel and judges. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment (R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at p. 6-7). Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided (*Sonoco Ltd. v. Local 433* (1970), 1970 CanLII 763 (BC CA), 13 D.L.R. (3d) 617 (B.C.C.A.), at p. 621; *Sporting Club du Sanctuaire Inc. v. 2320-4365 Québec Inc.*, 1989 CanLII 1210 (QC CA), [1989] R.D.J. 596 (Que. C.A.)).

98 Unfortunately, the drafting of the present reporting order was anything but clear. Its brevity and apparent simplicity belie its actual complexity and the state of confusion and uncertainty in which it left not only all of the parties, but the trial judge himself at times. This order was final, not interim, and it was tied to the "best efforts order", which was not couched in terms liable to shed much light on the nature of the obligations of the respondents. Given that this part of the order was not challenged on appeal, we will not discuss it at length, but instead, will focus exclusively on the reporting order which is the object of this appeal.

99 At first, when judgment was rendered, the reporting order read, at para. 245:

The applicants have requested that I should maintain jurisdiction. I agree to do so. I am scheduling a further appearance for Thursday, July 27, 2000 at 1:30 p.m., and at that time the respondents will report on the status of their efforts. I am requesting the respondents to utilize their best efforts to comply with this decision.

This drafting was slightly modified in the final order, dated December 14, 2000:

The Court shall retain jurisdiction to hear reports from the respondents respecting the respondents' compliance with this Order. The respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

100 As Flinn J.A. observed in his reasons in the Court of Appeal ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104), nobody knew the exact nature of these reports. Their form and content were undefined. There was no indication as to whether they should be delivered orally or in writing or both nor as to how detailed they should be and what kind of supporting documents, if any, would be needed. The order also provided for hearings, but again, it left the parties in the dark as to the procedure, purpose or nature of these sessions of the court. The parties learned only shortly before these hearings that affidavits needed to be filed and deponents made available for cross-examination. Further, there seemed to be little direction, if any at all, as to what sort of evidence was required to be included for the purpose of the hearings. The nature of these hearings, as the process developed, appeared to become a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session, for the purpose of monitoring the execution of the school-building program for Francophone students.

101 The trial judge himself seemed unsure about the nature of the hearings he had ordered and of the process he had initiated. At first, he appeared to lean towards the view that those hearings were regular sessions of the court, that he had not issued a final order and that additional relief could be requested. For example, in the July 27, 2000 hearing, the trial judge stated that in the hearings, he “would have the opportunity to determine if the Respondents were indeed making every or best efforts to comply” (appellants’ record, at p. 762). This was a reiteration of a claim made earlier in that hearing (appellants’ record, at p. 720). Similarly, in the August 9, 2000 hearing, the trial judge stated: “the amount of room I have with respect to a decision or direction or comment is very limited” (appellants’ record, at pp. 997-98); this statement implies that the trial judge had the power, albeit limited, to make orders. However, after the setting down of his formal order, at the last hearing in March 2001, he commented that he could not grant further relief, that he had fully disposed of the matter in his order and accompanying reasons, which were released the previous summer. He added that the sessions had a solely informational purpose.

102 In the meantime, schools were built or renovated and made available to Francophone students. It is difficult to determine whether those sessions accomplished anything in this respect. What these sessions certainly did was sow confusion, doubt and uncertainty about the obligations of the respondents and about the nature of a process that went on over several months. The trial judge appeared to view this process as open ended and indeterminate, with more sessions being scheduled as he wished. Nobody really knew when it all would come to an end.

103 The uncertainty engendered by the reporting order was not merely inconvenient for the parties. In our view it amounted to a breach of the parties’ interest in procedural fairness. One essential feature of a fair procedural rule is that its contents are clearly defined, and known in advance by the parties subject to it (*Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219, at pp. 233-36; see also: D. J. Mullan, *Administrative Law* (2001), at p. 233; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1990), vol. 4, at pp. 279-82; S. A. de Smith, H. Woolf and J. L. Jowell, *Judicial Review of Administrative Action* (5th ed. 1995 & Cum. Supp. 1998), at pp. 432-36).

104 Moreover, as we noted above, the trial judge in his initial characterization of the order seemed to believe, and certainly gave the impression, that he had the power to make further orders based on what was presented to him at the reporting sessions. In other words, he purported to have available the coercive power of the state to compel the parties to act, and suggested that he could do so based on conclusions that he would draw from the evidence placed before him. In the result, the parties found themselves before a trial judge who purported to exercise judicial functions and powers, and who provided almost nothing by way of procedural guidelines. The parties were denied notice which, as L’Heureux-Dubé J. has noted, is a rule “so fundamental in our legal system that I do not think there is any necessity to discuss it at length” (*Supermarchés Jean Labrecque, supra*, at p. 233). For this reason alone, the trial judge’s order can be found to be inappropriate under s. 24(1) of the *Canadian Charter of Rights and Freedoms* and therefore void. Nonetheless, we turn now to a discussion of the principles of separation of powers and *functus officio*. Consideration of these principles will aid in assessing the appropriateness of the remedy, in light of the judiciary’s proper role within our constitutional order.

#### IV. The Appropriate Role of the Judiciary

105 While superior courts’ powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice, as we have shown above, and by constitutional boundaries, as we shall see below. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has

been issued, will likely be acting inappropriately on two levels. First, by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle. Second, by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine. We will look at each of these breaches in turn.

### 1. *The Separation of Powers*

106 Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite — or, perhaps, because of — the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities. Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

107 Given the nature of the Canadian parliamentary system, the existence of a true doctrine of separation of powers in Canada was sometimes put in doubt (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at p. 7-24; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at para. 52). It is true that Canadians have never adopted a watertight system of separation of judicial, legislative and executive functions. In the discharge of their functions, courts have had to strike down laws, regulations or administrative decisions. They have imposed liability on the Crown or public bodies and have awarded damages against them. Forms of administrative justice or adjudication have grown out of the development of executive functions (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36). Such developments may be said to have blurred theoretical distinctions between government functions. Nevertheless, in a broad sense, a separation of powers is now entrenched as a cornerstone of our constitutional regime.

108 More particularly, the distinction clearly stands out in respect of the relationship of courts on one side and of the legislatures and executive or public administration on the other (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at pp. 756-57). Our Court has acknowledged the fundamental nature of the separation of powers, although some of its pronouncements emphasize its functional nature (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319). Indeed, our Court has recently characterized this principle as a defining feature of the Canadian Constitution (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 (“*Provincial Court Judges Reference*”); see also *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-70).

109 Our Court has strongly emphasized and vigorously applied the principle of separation of powers in order to uphold the independence of the judiciary (see for example: *Provincial Court Judges Reference*, *supra*; see also *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13). In that context, the principle was viewed as a shield designed to protect the judiciary in order to allow it to discharge its duties under the Constitution with complete independence and impartiality. Nothing less was required to maintain the normative ordering of the Canadian legal system.

110 However, the principle of separation of powers has an obverse side as well, which equally reflects the appropriate position of the judiciary within the Canadian legal system. Aside from their duties to supervise administrative tribunals created by the executive and to act as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.

111 More specifically, once they have rendered judgment, courts should resist the temptation to directly oversee or supervise the administration of their orders. They should generally operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. Once they have declared what the law is, issued their orders and granted such relief as they think is warranted by circumstances and relevant legal rules, courts should take care not to unnecessarily invade the province of public administration. To do otherwise could upset the balance that has been struck between our three branches of government.

112 This is what occurred in the present case. When the trial judge attempted to oversee the implementation of his order, he not only assumed jurisdiction over a sphere traditionally outside the province of the judiciary, but also acted beyond the jurisdiction with which he was legitimately charged as a trial judge. In other words, he was *functus officio* and breached an important principle which reflects the nature and function of the judiciary in the Canadian constitutional order, as we shall see now.

## 2. *Functus Officio*

113 Canadian doctrinal and judicial writing on *functus officio* is sparse, even though the rule itself derives from an old case of the English Court of Appeal (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). Essentially, the rule is that the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court (see *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, 1934 CanLII 1 (SCC), [1934] S.C.R. 186). More recently, this Court affirmed that this rule need not always be rigidly applied to tribunals in the administrative law context when the policy reasons for it are not present (*Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848).

114 The existence and scope of a right of appeal has often been made the focus of analytical attention in applying the *functus* doctrine. Such was the case when the power of the Court of Chancery to rehear cases was extinguished by the *Judicature Acts* in 1873 by fusing common law and equity jurisdictions into one court and providing for a single appeal to a newly created Court of Appeal (*In re St. Nazaire*, *supra*). Originally, this was also the focus of the *functus* analysis for administrative tribunals that had rights of appeal tightly constrained by statute (see *Grillas v. Minister of Manpower and Immigration*, 1971 CanLII 3 (SCC), [1972] S.C.R. 577). However, the underlying rationale for the doctrine is clearly more fundamental: that for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system. The point is plainly made by Sopinka J. in *Chandler*, *supra*, at pp. 861-62:

As a general rule, once . . . a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. . . .

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal.

115 If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding, or, as G. Pépin and Y. Ouellette have perceptively termed it, the providing of [translation] “legal security” for the parties (*Principes de contentieux administratif* (2nd ed. 1982), at p. 221). This concern for finality is evident in the definition of *functus officio*:

[translation] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.

(H. Reid, *Dictionnaire de droit québécois et canadien* (2001), at p. 253)

The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.

116 This common law rule is further reflected in modern rules of civil procedure (see, e.g., *Nova Scotia Civil Procedure Rules*, Rule 15.07) and the interpretation of criminal appeal provisions (see *R. v. H. (E.F.)* (1997), 1997 CanLII 418 (ON CA), 115 C.C.C. (3d) 89 (Ont. C.A.), considering s. 675 of the *Criminal Code*). Whether in its common law or statutory form, the doctrine of *functus officio* provides that only in strictly limited circumstances can a court revisit an order or judgment (see *Nova Scotia Civil Procedure Rules*, Rule 15.08). If it were otherwise, there would be, to paraphrase Charron J.A. in *H. (E.F.)*, *supra*, at p. 101, the recurring danger of the trial process becoming or appearing to become a “never closing revolving door” through which litigants could come and go as they pleased.

117 In addition to this concern with finality, the question of whether a court is clothed with the requisite authority to act raises concerns related to the separation of powers, a principle that transcends procedural and common law rules. In our view, if a court intervenes, as here, in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is “appropriate and just in the circumstances” within the meaning of s. 24(1) of the *Charter*.

#### V. Application of the Relevant Principles to the Present Case

118 When the above principles are applied to the present facts, it is evident that McIntyre J.’s admonition in *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, that s. 24(1) “was not intended to turn the Canadian legal system upside down” is apropos (p. 953). In our view, the trial judge’s remedy undermined the proper role of the judiciary within our constitutional order, and unnecessarily upset the balance between the three branches of government. As a result, the trial judge in the present circumstances acted inappropriately, and contrary to s. 24(1).

119 As we noted above, the trial judge equivocated on the question of whether his purported retention of jurisdiction empowered him to make further orders. Regardless of which position is taken, the separation of powers was still breached. On the one hand, if he did purport to be able to make further orders, based on the evidence presented at the reporting hearings, he was *functus officio*. We find it difficult to imagine how any subsequent order would not have resulted in a change to the original final order. This necessarily falls outside the narrow exceptions provided by *functus officio*, and breaches that rule.

120 Such a breach would also have resulted in a violation of the separation of powers principle. By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration. In *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 96, it was held that in light of the “myriad options” available to the government to rectify the unconstitutionality of the impugned system, it was “not this Court’s role to dictate how this is to be accomplished”.

121 In addition, if he purported to adopt a managerial role, the trial judge undermined the norm of co-operation and mutual respect that not only describes the relationship between the various actors in the constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy. In *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, Iacobucci J. noted that “respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others’ role and the role of the courts” (para. 136). He discussed the wording of provisions of the *Charter* that expressed this norm of mutual respect (para. 137), and remarked that this norm has “the effect of enhancing the democratic process” (para. 139).

122 Similarly, McLachlin J. (as she then was) in the 1990 Weir Memorial Lecture reviewed the elements of our legal culture — including our political climate, our tradition of judicial restraint, and the system of references — that have contributed to a spirit of co-operation, rather than confrontation among the branches of government (B. M. McLachlin, “The Charter: A New Role for the Judiciary?” (1991), 29 *Alta. L. Rev.* 540, at pp. 554-56). Moreover, referring to her reasons in *Dixon v. British Columbia (Attorney-General)* (1989), 1989 CanLII 248 (BC SC), 59 D.L.R. (4th) 247 (B.C.S.C.), she spoke to the importance of considerations of institutional legitimacy for a court crafting a remedy (at p. 557):

It was not for me, I felt, to dictate to the Legislature what sort of law they should enact; that was the responsibility of the elected representatives. But, again following a time-honoured judicial tradition, I offered advice on what limits on the principle of one person-one vote, might be acceptable.

123 McLachlin J. expressed this concern for the principle of democratic legitimacy in respect of the relationship between the judiciary and the legislature, but the principle extends to that between the judiciary and the executive. This Court has recognized that in the Canadian parliamentary system, the executive is inextricably tied to the legislative branch. The Court in *Attorney General of Quebec v. Blaikie*, 1981 CanLII 14 (SCC), [1981] 1 S.C.R. 312, at p. 320, observed that “[t]here is thus a considerable degree of integration between the Legislature and the Government”. In *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, at para. 53, the Court held: “On a practical level, it is recognized that the same individuals control both the executive and legislative branches of government.”

124 Therefore, just as the legislature should, after a judicial finding of a *Charter* breach retain independence in writing its legislative response, the executive should after a judicial finding of a breach, retain autonomy in administering government policy that conforms with the *Charter*. In our constitutional order, the legislature and the executive are intimately interrelated and are the principal *loci* of democratic will. Judicial respect for that will should extend to both branches.

125 Thus, if the trial judge’s initial suggestion that he could continue to make orders, and thereby effectively engage in administrative supervision and decision making accurately characterizes the nature of the reporting sessions, the order for reporting sessions breached the constitutional principle of separation of powers. Since no part of the Constitution can be interpreted to conflict with another, that



order cannot be considered appropriate and just in the circumstances, under s. 24(1). The trial judge's order for reporting sessions should also be considered inappropriate because it put into question the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of democratic will.

126 If, however, the trial judge's statement in the last session that he could not make further orders correctly characterized his remedial order, then he breached the separation of powers in another way. When considered in light of this constitutional principle and applied to the present facts, McLachlin C.J.'s proposition that "s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise" (*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*"), at para. 22) leads to the conclusion that the trial judge's remedy was not appropriate and just in the circumstances.

127 The appellants argued that the trial judge retained jurisdiction only to hear reports, and that these hearings had purely "suasive" value. They also argued that the hearings were designed to hold "the Province's feet to the fire" (SCC hearing transcripts). They further suggested that the threat of having to report to the trial judge functioned as an incentive for the government to comply with the best efforts order. In the words of the appellants:

Is it a coincidence that, after a nine month delay (October 1999 to July 2000) the Province called for tenders eight days before the reporting hearing and "fast tracked" the school? The Province knew that it would have to report on July 27. The Province ensured that a call for tenders and a construction schedule were in place for July 27.

128 If this characterization of the trial judge's activity is accurate, then the order for reporting sessions did not result in the exercise of adjudicative, or any other, functions that traditionally define the ambit of a court's proper sphere. Moreover, it resulted in activity that can be characterized as political. According to the appellants' characterization, a primary purpose of the hearings was to put public pressure on the government to act. This kind of pressure is paradigmatically associated with political actors. Indeed, the practice of publicly questioning a government on its performance, without having any legal power to compel it to alter its behaviour, is precisely that undertaken by an opposition party in the legislature during question period.

129 In the above, we reasoned that the trial judge, by breaching the separation of powers, would have put in question the norm of co-operation that defines the relationship between the branches of government in Canada. We will presently demonstrate how the trial judge, by improperly altering the relationship between the judiciary and the executive, would have breached the separation of powers.

130 In *Provincial Court Judges Reference*, *supra*, Lamer C.J. described the separation of powers as providing that "the relationships between the different branches of government should have a particular character" (para. 139 (emphasis in original)). In particular, according to him, the separation of powers doctrine requires that these relationships be depoliticized (para. 140 (emphasis in original)).

131 In that case, Lamer C.J. remarked that the legislature and the executive cannot exert, and cannot appear to exert political pressure on the judiciary (para. 140). The reciprocal proposition applies to the immediate case. With the reporting hearings, the trial judge may have sought to exert political or public pressure on the executive, and at least appeared to do so. In our view, such action would tend to politicize the relationship between the executive and the judiciary.

132 If the reporting hearings were intended to hold “the Province’s feet to the fire”, the character of the relationship between the judiciary and the executive was improperly altered and, as per the *Provincial Court Judges Reference*, the constitutional principle of separation of powers was breached. Once again, since no part of the Constitution can conflict with another, the trial judge’s order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

133 We would reiterate, at this point, the importance of clarity and certainty in the provisions of a court order. If the trial judge had precisely defined the terms of the remedy, in advance, then the ensuing confusion surrounding his role may not have occurred. Moreover, by complying with this essential element of fair procedure, he may have been able to avoid the constitutional breach of the separation of powers that followed.

#### VI. Neither a Breach of Procedural Fairness nor of the Separation of Powers Was Appropriate

134 We noted above that this Court in *Eldridge* recognized the appropriateness of judicial restraint in issuing a remedy under s. 24(1), given the variety of choices open to the executive in administering policy. Implicit in the declaratory remedy ordered in that case was the presumption that the government will act in good faith in rectifying *Charter* wrongs and the recognition that legislatures and executives, not the courts, are in the best position to decide exactly how this should be done. Turning to the present case then, the trial judge’s decision to provide injunctive relief already represented a departure from the cooperative norm that defines and shapes the relationships among the branches of the Canadian constitutional order. We do not deny that in the appropriate factual circumstances, injunctive relief may become necessary. However, the trial judge’s order for reporting sessions then purported to go even further, and breached both a fundamental principle of procedural fairness and the constitutional principle of separation of powers.

135 One might argue that such a breach is appropriate where it is the only way that a claimant’s rights can be vindicated. Alternatively, one might suggest that if a government has ignored previous, less intrusive judicial measures, and thereby put into question their efficacy, a court might be justified in abandoning the presumption of governmental good will that we referred to above. In our view, the present case gave rise to neither of these arguments.

136 Turning to the first argument, if the hearings were aimed at ensuring the vindication of the claimants’ rights by providing them with the opportunity to enforce or alter the remedy, there were alternatives available. If the claimants felt that the government was not complying with any part of the order, then they could have brought an application for contempt. The majority seems to suggest that contempt proceedings would have been less effective in this case in ensuring timely performance of the order, without being any more respectful of the separation of powers. However, we would note that expedited applications are possible in Nova Scotia and other jurisdictions to deal with cases quickly and efficiently. In addition, the reporting order at issue in this case precluded applying to any other judge for relief and was, in this way, even more limiting than a contempt proceeding. Most importantly, contempt proceedings are more consistent with our adversarial system, which is based on the common law norm of giving the parties primary control over the proceedings (see J. I. H. Jacob, *The Fabric of English Civil Justice* (1987), at p. 13). In contrast, the present order for reporting sessions placed the trial judge in an inappropriate, ongoing supervisory and investigative role despite the availability of the equally effective, well-established, and minimally intrusive alternative of contempt relief.

137 Consequently, it is clear that the order for reporting hearings was not the only means of vindicating the claimants’ rights, and that recourse to a readily available alternative would have been consistent with a defining feature of our legal system. Recourse to this alternative would not have resulted in an interpretation of the court’s remedial powers that was so broad as to purport to endow the court with

powers that it was “never intended to exercise” (*Dunedin, supra*, at para. 22). It is important to stress that in the present case, it is not clear that actual recourse to a contempt application would have been necessary. The point is simply that if judicial enforcement of the deadlines in question were necessary, recourse to this alternative would not have overextended the court’s powers.

138 On a last note, we find it difficult to imagine circumstances where a breach of one party’s fundamental right to notice would aid in the vindication of another’s *Charter* rights. In any event, the present facts do not present such a case. The intrusiveness of the trial judge’s order was in no way necessary to secure the claimants’ s. 23 interests. Given the absence of any causal connection between the breach of the parties’ right to notice and the effectiveness of the purported remedy, we would conclude that the breach cannot be considered appropriate for the purposes of s. 24(1).

139 The second argument is simply not applicable in this case. The facts here do not require us to decide whether previous government non-compliance can ever justify remedial orders that breach principles of procedural fairness and the separation of powers. The Government of Nova Scotia did not refuse to comply with either a prior remedial order or a declaration with respect to its particular obligations in the fact-situation at hand. No such order was made and it is impossible to determine whether the government would have responded in the present case to either a declaration of rights, or the injunction to meet the deadline as these measures were combined with the order purporting to retain jurisdiction to oversee the reporting sessions. Therefore, it cannot be asserted that the trial judge’s order has succeeded where less intrusive remedial measures failed.

140 Moreover, what was required by the Government of Nova Scotia to comply with its obligations pursuant to s. 23 was not self-evident at trial. The trial judge was not faced with a government which was cognizant of how it should fulfill its obligations, but refused to do so. Indeed, at issue before the trial judge was precisely the question of what compliance with s. 23 involved. The present order, therefore, did not overcome governmental recalcitrance in the face of a clear understanding of what s. 23 required in the circumstances of the case. Remedies must be chosen in light of the nature and structure of the Canadian constitutional order, an important feature of which is the presumption of co-operation between the branches of government. Therefore, unless it is established that this constitutional balance has been upset by the executive’s clear defiance of a directly applicable judicial order, increased judicial intervention in public administration will rarely be appropriate.

141 In choosing and reviewing s. 24(1) remedies, it is important to remember that the inquiry into the appropriateness of a remedy should be undertaken from an *ex ante* perspective. The simple fact that a desired result occurs after a remedial order is issued is not relevant to determining the question of the order’s appropriateness. In our view, an adequate *ex ante* assessment must consider the risks that attend a given remedy. In the present case, as Freeman J.A. noted in dissent, if the trial judge “misread the degree of co-operation he could expect from the players, there was a risk of failure” (para. 84). That the present remedy’s susceptibility to failure was tied to the capacities of a particular judge should in itself give pause. In our view, whether a remedy is appropriate should be assessed with reference to the remedy itself and not the particular capacities of a given judge to manage that remedy. More importantly, where a thorough *ex ante* assessment of a remedy reveals that it will certainly be inconsistent with basic legal principles and constitutional doctrines, such a remedy should not be considered appropriate. Available remedies that do not result in such breaches should, *a contrario*, be considered to be more appropriate.

142 The question of the relevant time frame for the inquiry into a remedy’s appropriateness is tied to the more general question of remedial effectiveness. It is important to remember the context in which this Court considered the issue of effectiveness in *Dunedin, supra*. The issue was whether a justice of the peace acting as a trial justice under the Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a

court of competent jurisdiction to direct an order for costs against the Crown for a *Charter* breach. The Court held that if provincial offences courts were deprived of this remedy, an accused may be denied access to a recognized means of remedying a *Charter* breach (para. 82).

143 In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy, as such an order is entirely idiosyncratic. More importantly, refusing superior courts this power would not deprive claimants of access to that which they are guaranteed by s. 23, namely, the timely provision of minority language instruction facilities. Indeed, if the appellants' characterization of the reporting hearings' purpose is correct, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. In our view, the availability of this legal sanction for non-compliance with the order to meet the construction deadline would have provided at least as much incentive for the government to remedy the s. 23 breach as would have reporting hearings, in which the presiding judge was without the power to make further orders. Moreover, at the level of constitutional principle, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive.

144 Also, it should be noted that the trial judge's order was not consistent with this Court's retention of jurisdiction in the *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721. Far from purporting to supervise compliance with a remedy, the Court in that case retained jurisdiction to ask for the government's assistance in fashioning it. The Court did not thereby exceed its constitutional role by purporting to oversee administrative action. The Court was ultimately respectful of the executive's capacity to make the policy choices necessary to comply with constitutional requirements.

## VII. Conclusion

145 In the result, the trial judge breached both a principle of procedural fairness and the constitutional principle of separation of powers, and it is not clear that alternative, less-intrusive remedial measures, would not have achieved the ends sought. While a trial judge's decisions with respect to remedies are owed deference, we believe that this must be tempered when fundamental legal principles are threatened. In light of these principles, and in the presence of untested alternative remedies, we would find that the present trial judge's retention of jurisdiction was not appropriate and just under s. 24(1). The Court of Appeal was correct in declaring that the order to retain jurisdiction for the purposes of reporting sessions was of no force and effect.

146 In closing, we recur to the underlying purpose of s. 24(1), by referring to a passage in *Mills, supra*, at pp. 952-53, in which McIntyre J. wrote:

To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. . .

. . . The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.

147 The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. To read into s. 24(1) a judicial *carte blanche* would not only “turn the Canadian legal system upside down”, but would also be an injustice to the parties who come before the court to have their disputes resolved in accordance with basic legal principles. In our view, proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

*Appeal allowed with costs, Major, Binnie, LeBel and Deschamps JJ. dissenting.*

*Solicitors for the appellants: Patterson Palmer, Halifax.*

*Solicitor for the respondent: Attorney General of Nova Scotia, Halifax.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.*

*Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.*

*Solicitor for the intervener the Commissioner of Official Languages for Canada: Office of the Commissioner of Official Languages, Ottawa.*

*Solicitors for the intervener Fédération nationale des conseillères et conseillers scolaires francophones: Patterson Palmer, Moncton.*

*Solicitors for the intervener Fédération des associations de juristes d'expression française de Common Law Inc.: Balfour Moss, Regina.*

*Solicitors for the intervener Conseil scolaire acadien provincial: Merrick Holm, Halifax.*

TAB 11

# Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 SCR 624

Source: Supreme Court of Canada

Date: 1997-10-09

File number: 24896

Other citations:

151 DLR (4th) 577 — 218 NR 161 — 74 ACWS (3d) 41 — 155 WAC 81 — [1998] 1 WWR 50 — 38 BCLR (3d) 1 — 96 BCAC 81 — 46 CRR (2d) 189 — [1997] CarswellBC 1939 — [1997] SCJ No 86 (QL) — [1997] ACS no 86

**Citation:**

**Eldridge v. British Columbia (Attorney General), 1997 CanLII 327 (SCC), [1997] 3 SCR 624,**  
<<https://canlii.ca/t/1fqx5>>, retrieved on 2026-01-02

**Most recent  
unfavourable  
mention**

**The Society for Canadians Studying Medicine Abroad v The College of Physicians and Surgeons of British Columbia, 2024 BCSC 406 (CanLII)**  
[...] [80] However, Eldridge is distinguishable because the nature of the delegated authority exercised by the hospitals and the Commission in Eldridge is very different to the functions of CaRMS and AFMC. The hospitals had an obligation to deliver “hospital services” as delegated by the Hospital Insurance Act and the Commission [...]

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624

**Robin Susan Eldridge, John Henry Warren**

**and Linda Jane Warren** *Appellants*

*v.*

**The Attorney General of British Columbia**

**and the Medical Services Commission** *Respondents*

and

**The Attorney General of Canada,**

**the Attorney General for Ontario,**

**the Attorney General of Manitoba,**

**the Attorney General of Newfoundland,**

**the Women’s Legal Education and Action Fund,**

**the Disabled Women’s Network Canada,**

**the Charter Committee on Poverty Issues,**

**the Canadian Association of the Deaf,**

**the Canadian Hearing Society and**

**the Council of Canadians with Disabilities** *Interveners*

**Indexed as: Eldridge v. British Columbia (Attorney General)**

File No.: 24896.

1997: April 24; 1997: October 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

*Constitutional law -- Charter of Rights -- Equality rights -- Physical disability -- Publicly funded medicare -- Medicare not providing for sign language interpreters -- Whether, and in what manner, the Charter applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care -- Whether not providing for this service under Acts establishing medicare and hospitalization infringing s. 15(1) equality rights of disabled -- If so, whether legislation saved under s. 1 -- Appropriate remedy if Charter violation found -- Canadian Charter of Rights and Freedoms, ss. 1, 15(1) -- Hospital Insurance Act, R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204), ss. 3(1), 5(1), 9, 10(1), 29(b) -- Medical and Health Care Services Act, S.B.C. 1992, c. 76 (now the Medicare Protection Act, R.S.B.C. 1996, c. 286), ss. 1, 4(1)(c), (j), 6, 8.*

Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded under the *Hospital Insurance Act* by the government which reimburses them for the medically required services provided to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan (established and regulated by the *Medical and Health Care Services Act*). Neither program pays for sign language interpretation for the deaf.

Each of the appellants was born deaf and their preferred means of communication is sign language. They contend that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment.

The appellants unsuccessfully sought a declaration in the Supreme Court of British Columbia that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violates the s. 15(1) of the *Canadian Charter of Rights and Freedoms*. A majority of the Court of Appeal dismissed an appeal from this judgment. The constitutional questions before this Court queried: (1) whether the definition of "benefits" in s. 1 of the *Medicare Protection Act* infringed s. 15(1) of the *Charter* by failing to include medical interpreter services for the deaf, (2) if so, whether the impugned provision was saved under s. 1 of the *Charter*, (3) whether ss. 3, 5 and 9 of the *Hospital Insurance Act* and the Regulations infringed s. 15(1) by failing to require that hospitals provide medical interpreter services for the deaf, and (4) if the answer to 3 is yes, whether the impugned provisions were saved under s. 1. Also at issue were whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care and, if a *Charter* violation were found, what the appropriate remedy would be.

**Held:** The appeal should be allowed. The first and third constitutional questions were answered in the negative. It was not necessary to answer the second and fourth constitutional questions.



The *Charter* applies to provincial legislation in two ways. Firstly, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. The legislation remains valid but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

In the present case the question whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the action of entities exercising decision-making authority pursuant to that legislation must be explored. The failure of the *Medical and Health Care Services Act* to provide expressly for sign language interpretation as a medically required service does not violate s. 15(1) of the *Charter*. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a “medically required” service and hence a benefit under the Act. It is the decision of the authority which has been delegated the power to determine whether a service qualifies as a benefit that is constitutionally suspect, not the statute itself. The discretion accorded to the Medical Services Commission does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. This possibility that the Commission can infringe these rights in the exercise of its authority is, however, incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

The *Hospital Insurance Act* should be read in conformity with s. 15(1). Hospitals are left with substantial discretion as to how to provide the services listed in the legislation. No individual hospital is required to offer all of the services set out in s. 5(1) of the Act. Further, individual hospitals are given considerable discretion by the Act as to how the services they decide to provide are delivered and they are not precluded from supplying sign language interpreters. The fact that this Act does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.

Legislatures may not enact laws that infringe the *Charter* and they cannot authorize or empower another person or entity to do so. Even though a legislature may give authority to a body that is not subject to the *Charter*, the *Charter* applies to all the activities of government whether or not they may be otherwise characterized as “private” and it may apply to non-governmental entities in respect of certain inherently governmental actions. Governments, just as they are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a “public function”, or the fact that a particular activity may be described as “public” in nature, will not be sufficient to bring it within the purview of “government” for the purposes of s. 32 of the *Charter*. In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program.

The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be

ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, the quality of the act at issue, rather than the quality of the actor, must be scrutinized.

Hospitals, in providing medically necessary services, carry out a specific governmental objective. The *Hospital Insurance Act* is not simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program.

A direct and precisely defined connection exists between a specific government policy and the hospital's impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

As well, the Medical Services Commission, in determining whether a service is a benefit under the *Medical and Health Care Services Act*, implements a government policy, namely, to ensure that all residents receive medically required services without charge. There is no doubt that in exercising this discretion the Commission acts in governmental capacity and is subject to the *Charter*.

As deaf persons, the appellants belong to an enumerated group under s. 15(1) -- the physically disabled. There is also no question that the distinction drawn between the appellants and others is based on a personal characteristic that is irrelevant to the functional values underlying the health care system -- the promotion of health, the prevention and treatment of illness and disease, and the realization of those values through a publicly funded health care system.

The only question in this case is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system applies equally to the deaf and hearing populations. The appellants' claim, nevertheless, is one of "adverse effects" discrimination, protection against which is provided by s. 15(1) of the *Charter*.

A discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law.

Adverse effects discrimination is especially relevant in the case of disability. In the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone. Once it is accepted that effective communication is an indispensable component of the delivery of a medical service, it is much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.

Section 15(1) makes no distinction between laws that impose unequal burdens and those that deny equal benefits. The government will be required (at least at the s. 15(1) stage of analysis) to take special measures to ensure that disadvantaged groups are able to benefit equally from government

services. If there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. It is also a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. In s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).

The failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons. Although the standard set is broad, this is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved. For deaf persons with limited literacy skills, sign language interpretation can be surmised to be required in most cases.

The application of the *Oakes* test requires close attention to the context in which the impugned legislation operates. In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It was, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted. At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights.

Moreover, it is purely speculative to argue that the government, if required to provide interpreters for deaf persons, will also have to do so for other non-official language speakers, thereby increasing the expense of the program dramatically. The possibility that a s. 15(1) claim might be made by members of the latter group cannot justify the infringement of the constitutional rights of the deaf. The appellants ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. The government has not made a "reasonable accommodation" of the appellants' disability nor has it accommodated the appellants' need to the point of undue hardship.

The appropriate and just remedy was to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1). A declaration, as opposed to some kind of injunctive relief, was the appropriate remedy because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It was appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response.

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*Constitution Act, 1982*, s. 52(1).

*Hospital Insurance Act*, R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204), ss. 1, 3(1), 5(1)(a), (d) [am. *Miscellaneous Statutes Amendment Act (No. 4)*, 1987, S.B.C. 1987, c. 59, s. 7], (e) [*idem*], (f) [*idem*], 9, 10(1), 13(1), 15(3)(c), 29(b) [am. *Health Statutes Amendment Act*, 1985, S.B.C. 1985, c. 9, s. 19].

*Hospital Insurance Act Regulations*, B.C. Reg. 25/61, ss. 5.1 [am. B.C. Reg. 245/80, s. 6], 5.7 [en. B.C. Reg. 219/65, s. 2; am. B.C. Reg. 245/80, s. 6], 5.8 [*idem*], 5.22 [en. B.C. Reg. 225/88; am. B.C. Regs. 44/89; 218/93].

*Medical and Health Care Services Act*, S.B.C. 1992, c. 76 (now the *Medicare Protection Act*, R.S.B.C. 1996, c. 286), ss. 1 “benefits”, 4(1)(c), (j), (2), 6, 8(1).

*Medical Service Act Regulations*, B.C. Reg. 144/68, ss. 4.04, 4.09.

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APPEAL from a judgment of the British Columbia Court of Appeal (1995), 1995 CanLII 2964 (BC CA), 7 B.C.L.R. (3d) 156, 59 B.C.A.C. 254, 98 W.A.C. 254, 125 D.L.R. (4th) 323, [1995] B.C.J. No. 1168 (QL), dismissing an appeal from a judgment of Tysoe J. (1992), 1992 CanLII 2308 (BC SC), 75 B.C.L.R. (2d) 68, [1992] B.C.J. No. 2229 (QL). Appeal allowed.

*Lindsay M. Lyster and Andrea L. Zwack*, for the appellants.

*Harvey M. Groberman and Lisa J. Mrozinski*, for the respondents.

*Judith Bowers, Q.C.*, and *Simon Fothergill*, for the intervener the Attorney General of Canada.

*Janet E. Minor and Richard J. K. Stewart*, for the intervener the Attorney General for Ontario.

*Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.

*B. Gale Welsh, Q.C.*, for the intervener the Attorney General of Newfoundland.

*Jennifer Scott, Katherine Hardie and Judy Parrack*, for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada.

*Martha Jackman and Arne Peltz*, for the intervener the Charter Committee on Poverty Issues.

*David Baker and Patricia Bregman*, for the interveners the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

//*La Forest J.*//

1 *La Forest J.* -- This appeal raises the question whether a provincial government's failure to provide funding for sign language interpreters for deaf persons when they receive medical services violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The appellants assert that, because of the communication barrier that exists between deaf persons and health care providers, they receive a lesser quality of medical services than hearing persons. The failure to pay for interpreters, they contend, infringes their right to equal benefit of the law without discrimination based on physical disability.

#### Factual Background

2 Medical care in British Columbia is delivered through two primary mechanisms. Hospital services are funded by the government through the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180 (now R.S.B.C. 1996, c. 204), which reimburses hospitals for the medically required services they provide to the public. Funding for medically required services delivered by doctors and other health care practitioners is provided by the province's Medical Services Plan, which is established and regulated by the *Medical and Health Care Services Act*, S.B.C. 1992, c. 76 (now known as the *Medicare Protection Act*, R.S.B.C. 1996, c. 286). Neither of these programs pays for sign language interpretation for the deaf.

3 Until 1990, the Western Institute for the Deaf and Hard of Hearing, a private, non-profit agency, provided free medical interpreting services for deaf persons in the Lower Mainland of British Columbia. This program was funded entirely from private sources without any contribution from the provincial government. In September 1990, the Institute discontinued the service because it no longer had sufficient funds to pay for it.

4 Prior to cancelling the program, the Institute made two requests of the Ministry of Health for funding. At the time, it had contracts with a number of government departments to provide sign language interpreters in connection with various services. The Institute requested similar funding for the provision of interpreters in the medical setting, suggesting that sign language interpretation be covered as an insured benefit under the Medical Services Plan. The first request was made in 1989 and was declined out of hand. The second request was made in May 1990 after the Institute had decided that it could no longer fund the service. The cost of the proposed program, which would have extended throughout the province, was estimated to be \$ 150,000 per year. The Ministry turned down the request on the basis that it would strain available resources and create a precedent for the funding of similar services for the non-English speaking immigrant community.

5 Each of the appellants was born deaf. Their preferred means of communication is sign language. They contend that the absence of interpreters impairs their ability to communicate with their doctors and other health care providers, and thus increases the risk of misdiagnosis and ineffective treatment. One of the appellants, Robin Eldridge, suffers from a number of medical conditions, including diabetes. She sees a general physician and a specialist a number of times per year. Neither of these doctors knows sign language. She has also been a patient in hospital on several occasions. The hospitals did not provide her with sign language interpreters. Prior to its termination, she used the Institute's free medical interpreting service. Subsequently, she hired an interpreter when she had surgery in hospital. She testified that she would continue to hire interpreters for important medical situations but could not afford to hire one for every visit to the doctor or hospital. She finds visiting her doctors without an interpreter very stressful and confusing since, in her view, she cannot communicate adequately with them. Her specialist testified that he was satisfied with the level of communication when a sign language interpreter was present. In the absence of an interpreter, he explained, he was unsure about the accuracy of information conveyed by Ms. Eldridge. Communication with her in these circumstances, he stated, was inhibited and frustrating.

6 The other appellants, John and Linda Warren, see their doctor frequently. Although they had planned to hire an interpreter for the birth of their twin daughters, they were unable to procure one in time as the girls were born prematurely. Linda Warren testified that in the absence of an interpreter, the birth process was difficult to understand and frightening. During the birth, the nurse communicated to her through gestures that the heart rate of one of the babies had gone down. After the babies were born, they were immediately taken from her. Other than writing a note stating that they were "fine", no one explained their condition to her.

7 The Warrens' physician, who does not know sign language, testified that communication by written notes is time consuming, impractical and has the potential to result in harm in some circumstances. Adequate communication, she related, is particularly critical for childbirth. If the doctor can communicate with the patient so that the patient is able to help with the delivery, she explained, complications are less likely to occur and the patient is less apt to have a traumatic birth. In her view, writing notes is not effective in these circumstances; an interpreter is necessary for proper communication. At the time of the trial, the Warrens were expecting another child and wished to have an interpreter present at the birth. They stated that they would not be able to afford one for this purpose or for other visits to their doctor.

8 At trial, the appellants adduced expert testimony explaining that many deaf persons are severely limited in their ability to read and write. The average deaf person, one expert related, has a grade three literacy level. Evidence was also led indicating that miscommunication between deaf persons and their doctors may lead to misdiagnosis. It was also noted that in Alberta and Manitoba the provincial government funds interpreting services for the deaf giving the highest priority to medical interpretation.

9 The respondents presented evidence relating to the budgetary process of the Ministry of Health and the structure of the Medical Services Plan. The government, witnesses explained, does not provide any services directly. Rather, it pays for the provision of medical services by the medical and health care practitioners on a fee-for-service basis. The Plan covers most health services; however there are a number of services that are not included or are funded only in part. These include the services of clinical psychologists, occupational therapists, speech therapists, nutritional counsellors and dentists. Moreover, the province does not pay for such medically related expenses as artificial limbs, hearing aids, or wheelchairs and provides only limited funding for prescription drugs.

10 Hospitals in British Columbia are funded through lump sum “global” payments that they are for the most part free to allocate as they see fit. They are rarely ordered by government to provide specific services. In those instances, they are generally required to fund the service out of their global budgets. The government does provide some funding for specific programs, such as heart transplantation, but this is infrequent.

#### Judicial History

11 The appellants filed an application in the Supreme Court of British Columbia seeking, *inter alia*, a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan violates s. 15(1) of the *Charter*. Tysoe J. dismissed the application ((1992), 1992 CanLII 2308 (BC SC), 75 B.C.L.R. (2d) 68), finding that this failure did not infringe s. 15(1). He determined that sign language interpretation is ancillary to medically required services in much the same way as is transportation to a doctor’s office. Any disadvantage suffered by the deaf, he concluded, is not the result of the government’s failure to provide such services, but is rather the result of a limitation that exists outside the legislation.

12 In Tysoe J.’s view, the *Charter* does not require governments to implement programs to assist disabled persons. If the government provides a benefit, he stated, s. 15(1) requires that it be distributed equally. There is no obligation, however, to provide the benefit in the first place. He thus concluded that while it is desirable that deaf persons have interpreters for medical procedures and that the cost be borne by society if they cannot afford to pay, s. 15(1) does not demand this result.

13 On appeal to the British Columbia Court of Appeal (1995), 1995 CanLII 2964 (BC CA), 7 B.C.L.R. (3d) 156, the majority (Hollinrake and Cumming JJ.A.) held that the lack of interpreting services in hospitals is not discriminatory because the *Hospital Insurance Act* does not provide any “benefit of the law” within the meaning of s. 15(1) of the *Charter*. Writing for the majority, Hollinrake J.A. noted that the extent of the services provided by each hospital is subject to its own decision as to how to spend the global grant received from government. The absence of interpreters, he thus found, results not from the legislation but rather from each hospital’s budgetary discretion. Because hospitals are not “government” within the meaning of s. 32 of the *Charter*, he concluded, their failure to provide interpretation does not engage s. 15(1).

14 He next determined that the *Medical and Health Care Services Act* did not violate s. 15(1) of the *Charter* because it did not create a distinction between the deaf and hearing populations. The proper approach to the application of adverse effects analysis to benefit-conferring legislation, he held, was to focus on the impact of the legislation on the disadvantaged group. In considering this impact, he opined,



a distinction must be drawn between effects attributable to the legislation and those that exist independently of it. In the absence of legislation, deaf people would be required to pay their doctors in addition to translators in order to receive equivalent medical services to hearing persons. The legislation removes the responsibility of both hearing and deaf persons to pay their physicians. The inequality resulting from the fact that the deaf remain responsible for the payment of translators, in his view, exists independently of the legislation. Thus, he concluded that the legislation provided the benefit of free medical services equally to the hearing and deaf populations.

15 Lambert J.A., in contrast, held that the legislation violated s. 15(1). He noted that many deaf patients, including the appellants, have difficulty communicating by writing. As a result, cases will arise where doctors will be unable to discharge their professional obligations without the aid of an interpreter. Because effective communication is an integral part of medical care, he concluded, sign language interpretation should not be considered a merely ancillary service. In his view, it is no answer to say that before the benefit was enacted, deaf persons were at a disadvantage and that this burden has not been increased by the provision of the benefit. The proper question is whether the law confers a benefit to which the disadvantaged group does not have the same access as others. He thus concluded that the *Medical and Health Care Services Act* discriminated against the appellants where they seek to obtain medical services that require, for the discharge of the practitioner's professional obligations, effective communication between the practitioner and the patient, and where effective communication can only be achieved through the provision of translation services.

16 Lambert J.A. found, however, that this infringement was justified under s. 1 of the *Charter*. He noted the *Medical and Health Care Services Act* does not ensure comprehensive health care coverage. It does not provide for a number of products and services that are required by disabled persons, such as artificial limbs, hearing aids and wheelchairs. In the allocation of scarce financial resources, he stated, governments must make choices about spending priorities. In these circumstances, he held, courts should defer to legislative policy and administrative expertise.

17 Leave to appeal to this Court was granted ([1996] 2 S.C.R. vi) and the following constitutional questions were stated:

1. Does the definition of "benefits" in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?
2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?
4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

#### Issues

18 There are four principal issues to be considered in this appeal. First, it must be determined whether, and in what manner, the *Charter* applies to the decision not to provide sign language interpreters for the deaf as part of the publicly funded scheme for the provision of medical care. Second, the Court must

decide whether this decision constitutes a *prima facie* violation of s. 15(1) of the *Charter*. Having found such a violation, it must be determined whether it is saved by s. 1. After concluding that it is not, an appropriate remedy must be crafted.

### Application of the *Charter*

19 There are two distinct *Charter* “application” issues in this case. The first is to identify the precise source of the alleged s. 15(1) violations. As I will develop later, in my view it is not the impugned legislation that potentially infringes the *Charter*. Rather, it is the actions of particular entities -- hospitals and the Medical Services Commission -- exercising discretion conferred by that legislation that does so. The second question is whether the *Charter* applies to those entities. In my view, the *Charter* applies to both in so far as they act pursuant to the powers granted to them by the statutes. I deal with each of these questions in turn.

### *The Sources of the Alleged Charter Violations*

20 Section 32(1)(b) of the *Charter* reads as follows:

**32.** (1) This Charter applies

...

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

There is no question, of course, that the *Charter* applies to provincial legislation; see *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573. There are two ways, however, in which it can do so. First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

21 The s. 32 jurisprudence of this Court has for the most part focused on the first type of *Charter* violation. There is no doubt, however, that the *Charter* also applies to action taken under statutory authority. The rationale for this rule flows inexorably from the logical structure of s. 32. As Professor Hogg explains in his *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol. 1, at pp. 34-8.3 and 34-9:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is also apposite: “The Constitution”, he wrote, “is not to be mocked by substituting executive for legislative interference with freedom”; see *James v. Cowan*, [1932] A.C. 542 (P.C. Australia), at p. 558.

22 The question in the present case, then, is whether the alleged breach of s. 15(1) arises from the impugned legislation itself or from the actions of entities exercising decision-making authority pursuant to that legislation. The proper framework for determining this question was set out by Lamer J. (as he then was) and approved by a majority of this Court in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038. In that case the Court was faced with determining the constitutionality of orders issued by an adjudicator under the *Canada Labour Code*, R.S.C. 1970, c. L-1, that were alleged to violate an employer's s. 2(b) right to freedom of expression. The Code endowed the adjudicator with a broad discretion to remedy the consequences of an unjust dismissal. There being no question that the *Charter* applied to the adjudicator, the only issue was whether it was the legislation or the order that potentially infringed the *Charter*. In determining this question, Lamer J. (as he then was) stated that legislation conferring a discretion must be interpreted, in so far as possible, consistently with the *Charter*. He explained as follows, at p. 1078:

As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.

23 Following this schema, it is first necessary to decide whether the legislation impugned in the present appeal can be interpreted in conformity with the *Charter*. In *Slaight*, it was clear that the legislation granted the adjudicator a broad discretion. It was thus easy to conclude that it did not, either expressly or by necessary implication, confer a power to infringe the *Charter*. In the present case the task is more difficult. Indeed, in the court below the argument proceeded on the basis that the legislation was under-inclusive; that it violated s. 15(1) by failing to include medical interpreter services for the deaf in the definition of “benefits”, in the case of the *Medical and Health Care Services Act*, and “general hospital services”, in the case of the *Hospital Insurance Act*.

24 During the hearing before this Court, however, counsel for the appellants proposed an alternative argument akin to the framework set out in *Slaight*. She suggested that both statutes could be read to conform with s. 15(1). Under this theory, it is not the legislation that is constitutionally suspect, but rather the actions of delegated decision-makers in applying it. In my view, this is the correct approach to the *Charter* application issue in this case. In order to understand how I reach this conclusion, it is necessary to consider the statutory context of this appeal in some depth. With the exception of hospitals, which are the responsibility of the provinces by virtue of s. 92(7) of the *Constitution Act, 1867*, health is not a matter assigned solely to one level of government; see *Schneider v. The Queen*, 1982 CanLII 26 (SCC), [1982] 2 S.C.R. 112, at pp. 141-42 (*per* Estey J.). It is generally agreed, however, that the hospital insurance and medicare programs in force in this country come within the exclusive jurisdiction of the provinces under ss. 92(7) (hospitals), 92(13) (property and civil rights) and 92(16) (matters of a merely local or private nature); see Hogg, *supra*, at p. 6-16, and the Canadian Bar Association Task Force on Health Care, *What's Law Got to Do with It? Health Care Reform in Canada* (1994), at p. 15.

25 This has not prevented the federal Parliament from playing a leading role in the provision of free, universal medical care throughout the nation. It has done so by employing its inherent spending power to set national standards for provincial medicare programs. The *Canada Health Act*, R.S.C., 1985, c.

C-6, requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. (The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court in *Reference Re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 567.) The purpose of the Act is set out in ss. 3 and 4 as follows:

- 3.** It is hereby declared that the primary objective of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers.
- 4.** The purpose of this Act is to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made.

26 Sections 5 and 7 require the federal government to contribute to provincial insurance schemes where certain conditions are met:

- 5.** Subject to this Act, as part of the Canada Health and Social Transfer, a full cash contribution is payable by Canada to each province for each fiscal year.
- 7.** In order that a province may qualify for a full cash contribution referred to in section 5 for a fiscal year, the health care insurance plan of the province must, throughout the fiscal year, satisfy the criteria described in sections 8 to 12 respecting the following matters:
  - (a) public administration;
  - (b) comprehensiveness;
  - (c) universality;
  - (d) portability; and
  - (e) accessibility.

The condition of “comprehensiveness” is of particular importance to this appeal. Its meaning is delineated in s. 9:

- 9.** In order to satisfy the criterion respecting comprehensiveness, the health care insurance plan of a province must insure all insured health services provided by hospitals, medical practitioners or dentists, and where the law of the province so permits, similar or additional services rendered by other health care practitioners. [Emphasis added.]

The phrase “insured health services” is defined in s. 2 of the Act to mean, *inter alia*, “hospital services” and “physician services” provided to insured persons. “Hospital services” are further described as including a number of specific services such as accommodation, nursing services and access to diagnostic and treatment facilities, so long as such services are “medically necessary for the purpose of maintaining health, preventing disease or diagnosing or treating an injury, illness or disability”. The definition of “physician services” does not list any specific benefits. It states only that they consist of “any medically required services rendered by medical practitioners”. The Act does not define the phrases “medically necessary” or “medically required”.

27 At the time of trial, the provision of medical treatment by doctors and other health care practitioners in British Columbia was governed by the *Medical and Health Care Services Act*. (It is now known as the *Medicare Protection Act*.) Its structure accords with the criteria set out in the *Canada Health Act*. Sections 6 and 8 of the *Medical and Health Care Services Act* entitle residents of the province to the benefits provided by the Act:

**6.** (1) A resident who wishes to be enrolled as a beneficiary on his or her own behalf, or on behalf of his or her spouse or children, must apply to the commission in the manner required by the commission.

(2) The commission must, after determining that the applicant, the spouse of the applicant and each of the applicant's children named in the application are residents, enroll as beneficiaries those covered by the application who are residents, effective not more than 3 months after receipt of the application.

**8.** (1) A beneficiary is, subject to sections 9 (1), 10, 13 and 14, entitled to have payment made for a benefit that he or she has received, in accordance with amounts in a payment schedule, less any applicable patient visit charge. [Emphasis added.]

“Benefit” is defined in s. 1 of the Act as follows:

**1.** In this Act

...

“benefits” means

(a) medically required services rendered by a medical practitioner who is enrolled under section 12, unless the services are determined under section 4 by the commission not to be benefits,

(b) required services prescribed as benefits under section 45 and rendered by a health care practitioner who is enrolled under section 12, or

(c) medically required services performed in accordance with protocols agreed to by the commission, or on order of the referring practitioner, who is a member of a prescribed category of practitioner, in an approved diagnostic facility by, or under the supervision of, a medical practitioner who has been enrolled under section 12, unless the services are determined under section 4 by the commission not to be benefits. . . . [Emphasis added.]

28 Notably, the Act does not list the services that are “medically required” such that they qualify as “benefits” under the Act. With the exception of certain specialized services listed as “insured services” under the *Medical Service Act Regulations*, B.C. Reg. 144/68, s. 4.09, as amended, the legislation does not specify the benefits it provides. Section 4.04 of the Regulations does expressly state, however, that certain services, such as those provided solely for legal, industrial or insurance purposes, as well as telephone advice and cosmetic procedures, are not insured. Sign language interpretation is not included. In the usual course, the determination of what constitutes a benefit is left to the discretion of the Medical Services Commission, a nine-member panel composed of representatives from the government, the British Columbia Medical Association and health care consumers. Pursuant to s. 4(1)(j) of the Act, the Commission is authorized to “determine whether a service is a benefit or whether any matter is related to the rendering of a benefit”. Conversely, s. 4(1)(c) empowers it to determine the services that are “not benefits under [the] Act”. The only limit on the Commission’s discretion is set out in s. 4(2), which cautions that its powers must not be exercised “in a manner that does not satisfy the criteria described in section 7 of the *Canada Health Act*”.

29 Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the *Charter* in some circumstances, I do not see how the *Medical and Health Care Services Act* can be interpreted as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a “medically required” service and hence a benefit under the Act. Indeed, the appellants assert in relation to the s. 15(1) issue that sign language interpretation, where it is necessary for effective communication, is integrally related to the provision of general medical services. Their theory, about which I will have more to say later, is that the failure to provide sign language interpreters violates s. 15(1) because it prevents deaf patients from benefiting equally from the provision of medical services in comparison to hearing patients. If this is correct, then the *Charter* demands that free sign language interpretation be provided as part of any medical service offered to the general public, at least where the service requires a level of communication that only an interpreter can ensure. Under this approach, the legislation must be interpreted to include sign language interpretation as a “medically required service” in these circumstances. It is clear, therefore, that the failure to provide expressly for sign language interpretation in the *Medical and Health Care Services Act* does not violate s. 15(1) of the *Charter*. The Act does not list those services that are to be considered benefits; instead, it delegates the power to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

30 I pause to emphasize that not every conferral of statutory discretion may be interpreted consistently with the *Charter*. Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result; see, e.g., *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 1984 CanLII 1824 (ON CA), 5 D.L.R. (4th) 766 (Ont. C.A.), affirming (1983), 1983 CanLII 1923 (ON SC), 147 D.L.R. (3d) 58 (Ont. Div. Ct.). In such cases it will generally be the statute, and not its application, that attracts *Charter* scrutiny; see June M. Ross, “Applying the Charter to Discretionary Authority” (1991), 29 *Alta. L. Rev.* 382. In the present case, however, the discretion accorded to the Medical Services Commission to determine whether a service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in s. 15(1) of the *Charter*. It is possible, of course, for the Commission to infringe these rights in the course of exercising its authority. That possibility, however, is incidental to the purpose of discretion, which is to ensure that all medically required services are paid for by the government.

31 The situation is more complicated in the case of the *Hospital Insurance Act*. Section 3(1) of the Act states that “every qualified person or beneficiary is entitled to receive the general hospital services provided under this Act”. Unlike the *Medical and Health Care Services Act*, the *Hospital Insurance Act* defines the services it provides with some precision. Mirroring the definition of “hospital services” in the *Canada Health Act*, s. 5(1) of the *Hospital Insurance Act* describes the “general hospital services” that are to be provided by acute care hospitals as follows (equivalent provisions list services for extended care and out-patient facilities):

5. (1) The general hospital services provided under this Act are

(a) for qualified persons requiring treatment for acute illness or injury: the public ward accommodation, necessary operating and case room facilities, diagnostic or therapeutic X-ray and laboratory procedures, anaesthetics, prescriptions, drugs, dressings, cast materials and other services prescribed by regulation;

...

but do not include

(d) transportation to or from the hospital,

(e) services or treatment that the minister, or a person designated by him, determines, on a review of the medical evidence, the qualified person does not require, or

(f) services or treatment for an illness or condition excluded by regulation of the Lieutenant Governor in Council. [Emphasis added.]

32 It could be argued that by including a list of the services to be provided in hospitals that does not include sign language interpretation, the *Hospital Insurance Act* implicates s. 15(1) of the *Charter*. In my view, however, it is preferable to read the Act in conformity with s. 15(1). Though the statute entitles beneficiaries to a specific list of services, hospitals are left with substantial discretion as to how to provide them. This discretion operates in two ways. First, it is clear from the regulations enacted pursuant to s. 29(b) of the Act that no individual hospital is required to offer all of the services set out in s. 5(1). Those regulations state that the hospital services to be provided shall include “such of the following services as are recommended by the attending physician and as are available in or through the hospital to which the person is admitted” (emphasis added); *Hospital Insurance Act Regulations*, B.C. Reg. 25/61, as amended, ss. 5.1, 5.7 and 5.8. Generally speaking, the province does not fund specific procedures or services. Instead, it provides hospitals with a global, lump sum payment intended to reimburse them for those listed services that they do in fact provide. This is clear from s. 10(1) of the Act, which reads as follows:

**10.** (1) There shall be paid annually to every hospital from the hospital insurance fund a sum determined by the minister to reimburse the hospital, in whole or in part, for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries admitted for treatment, excluding those sums payable to the hospital under section 5 (4) and section 14.

As stated by the court below, at p. 168, “[t]he extent of the services to be provided by each hospital is thus subject to the hospital’s own decision as to how to spend the global grant they receive for general hospital services. . . .”

33 Second, the Act gives individual hospitals considerable discretion as to the manner in which the services they decide to provide are delivered. Nothing in the legislation precludes them from supplying sign language interpreters. Hospitals have the authority, for example, to provide a sign language interpreter for a diagnostic X ray procedure where one is required in order to ensure its efficacy. Like the *Medicare Protection Act*, moreover, the *Hospital Insurance Act* (in s. 5(1)(d)) and *Regulations* (in s. 5.22) specifically list services, such as transportation to or from hospital, *in vitro* fertilization and cosmetic procedures, that are not covered by the scheme. Sign language interpretation is not included in these lists.

34 Consequently, the fact that the *Hospital Insurance Act* does not expressly mandate the provision of sign language interpretation does not render it constitutionally vulnerable. The Act does not, either expressly or by necessary implication, forbid hospitals from exercising their discretion in favour of providing sign language interpreters. Assuming the correctness of the appellants’ s. 15(1) theory, the *Hospital Insurance Act* must thus be read so as to require that sign language interpretation be provided as part of the services offered by hospitals whenever necessary for effective communication. As in the case of the *Medical and Health Care Services Act*, the potential violation of s. 15(1) inheres in the discretion wielded by a subordinate authority, not the legislation itself.

#### *The Application of the Charter to the Medical Services Commission and Hospitals*

35 Having identified the sources of the alleged s. 15(1) violations, it remains to be considered whether the *Charter* actually applies to them. At first blush, this may seem to be a curious question. As I have discussed, it is a basic principle of constitutional theory that since legislatures may not enact laws that

infringe the *Charter*, they cannot authorize or empower another person or entity to do so; *Slaight, supra*. It is possible, however, for a legislature to give authority to a body that is not subject to the *Charter*. Perhaps the clearest example of this is the power of incorporation. Private corporations are entirely creatures of statute; they have no power or authority that does not derive from the legislation that created them. The *Charter* does not apply to them, however, because legislatures have not entrusted them to implement specific governmental policies. Of course, governments may desire corporations to serve certain social and economic purposes, and may adjust the terms of their existence to accord with those goals. Once brought into being, however, they are completely autonomous from government; they are empowered to exercise only the same contractual and proprietary powers as are possessed by natural persons. As a result, while the legislation creating corporations is subject to the *Charter*, corporations themselves are not part of “government” for the purposes of s. 32 of the *Charter*.

36 Legislatures have created many other statutory entities, however, that are not as clearly autonomous from government. There are myriad public or quasi-public institutions that may be independent from government in some respects, but in other respects may exercise delegated governmental powers or be otherwise responsible for the implementation of government policy. When it is alleged that an action of one of these bodies, and not the legislation that regulates them, violates the *Charter*, it must be established that the entity, in performing that particular action, is part of “government” within the meaning of s. 32 of the *Charter*.

37 Perhaps the fullest discussion of the meaning of “government” in s. 32 is found in *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, and its companion cases, *Harrison v. University of British Columbia*, 1990 CanLII 61 (SCC), [1990] 3 S.C.R. 451, *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570. There, this Court was asked to decide whether the mandatory retirement policies adopted by certain institutions (universities, colleges and hospitals) were subject to *Charter* review. In confirming and elaborating upon the view taken by McIntyre J. in *Dolphin Delivery, supra* (viz., that the *Charter* applies only to Parliament, the provincial legislatures and entities that constitute part of the executive or administrative branches of government, and not to private activity), a majority of the Court in *McKinney*, *Harrison* and *Stoffman* found that the *Charter* did not apply on the facts, since the institutions whose policies were impugned were not themselves part of the apparatus of government in the sense required by s. 32(1), nor were they putting into place a government program or acting in a governmental capacity in adopting those policies.

38 In *Douglas*, however, the same majority found that the *Charter* did apply to the mandatory retirement policy at issue, on the ground that Douglas College was, in light of its constituent Act, simply an emanation of government. I described the differences between *McKinney* and *Harrison*, on the one hand, and *Douglas*, on the other, at pp. 584-85 of the latter case:

As its constituent Act makes clear, the college is a Crown agency established by the government to implement government policy. Though the government may choose to permit the college board to exercise a measure of discretion, the simple fact is that the board is not only appointed and removable at pleasure by the government; the government may at all times by law direct its operation. Briefly stated, it is simply part of the apparatus of government both in form and in fact. In carrying out its functions, therefore, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with persons it employs in performing these functions. Its status is wholly different from the universities in the companion cases of *McKinney* . . . and *Harrison* . . . which, though extensively regulated and funded by government, are essentially autonomous bodies. Accordingly, the actions of the college in the negotiation and administration of the collective agreement between the college and the association are those of the government for the purposes of s. 32 of the *Charter*. The *Charter*, therefore, applies to these activities.



39 This Court's approach to *Charter* application was further elucidated in *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211. There, the principal issue was whether a provision of a collective agreement compelling the appellant to pay union dues despite his non-membership in the respondent union violated the *Charter* guarantees of freedom of expression and association, in so far as the dues were being used to pay for specific political purposes chosen by the union. In addressing whether that provision was subject to the *Charter*, I found for the majority that the appellant's employer, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was, in virtue of the terms of its empowering Act, an emanation of the provincial government. On this basis, I held that the *Charter* applied to the provision in question. Comparing the case to *Douglas*, I remarked as follows, at pp. 311-12:

[*Douglas*], like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the expression of the majority of this Court, in *Harrison . . .* and *Stoffman*

. . ., companion cases to *Douglas*.

40 In *Douglas* and *Lavigne*, the argument was made that even if the entities in question were generally part of "government" for the purposes of s. 32, the *Charter* should not apply to the "private" or "commercial" arrangements they engage in. In each case, the Court rejected this contention, holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as "private". The rationale for this principle is obvious: governments should not be permitted to evade their *Charter* responsibilities by implementing policy through the vehicle of private arrangements. I put the matter thus in *Lavigne*, at p. 314:

It was also argued that the *Charter* does not apply to government when it engages in activities that are . . . "private, commercial, contractual or non-public (in) nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

See also *Douglas*, at p. 585.

41 While it is well established that the *Charter* applies to all the activities of government, whether or not those activities may be otherwise characterized as "private", this Court has also recognized that the *Charter* may apply to non-governmental entities in certain circumstances; see generally Robin Elliot, "Scope of the Charter's Application" (1993), 15 *Advocates' Q.* 204, at pp. 208-9. It has been suggested,

for example, that the *Charter* will apply to a private entity when engaged in activities that can in some way be attributed to government. This possibility was contemplated in *McKinney*, where I stated the following, at pp. 273-74:

Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and . . . there is no statutory requirement imposing mandatory retirement on the universities. [Emphasis added.]

I commented further on as follows, at p. 275:

I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy. [Emphasis added.]

The idea that certain activities of non-governmental entities may be viewed as the responsibility of government was further elucidated in my reasons in *Lavigne* where, after discussing *McKinney*, *Harrison*, *Douglas* and *Stoffman*, I stated as follows, at p. 312:

The majority in the above cases relied solely on the element of control in determining what fell within the apparatus of government, although it made clear that government may, in some circumstances, be subject to *Charter* scrutiny in respect of activities in the private sector where the government could be said to have some responsibility for that activity. [Emphasis added.]

42 It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions. The factors that might serve to ground a finding that an activity engaged in by a private entity is “governmental” in nature do not readily admit of any *a priori* elucidation. *McKinney* makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities. In *McKinney*, I pointed to *Slaight, supra*, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was “part of the governmental administrative machinery for effecting the specific purpose of the statute”. “It would be strange”, I wrote, “if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute”; see *idem*. Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor; see A. Anne McLellan and Bruce P. Elman, “To Whom Does the Charter Apply? Some Recent Cases on Section 32” (1986), 24 *Alta. L. Rev.* 361, at p. 371.

43 Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a “public function”, or the fact that a particular activity may be described as “public” in nature, will not be sufficient to bring it within the purview of “government” for the purposes of s. 32 of the *Charter*. Thus, with specific reference to the distinction between the applicability of the *Charter*, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the Charter. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program. As I stated further on in *McKinney*, at p. 269, “[a] public purpose test is simply inadequate” and “is simply not the test mandated by s. 32”.

44 The second important point concerns the precise manner in which the *Charter* may be held to apply to a private entity. As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

45 In the present case, the controversy over the *Charter*’s application centres on the question of hospitals. The respondents argue that if the failure to provide sign language interpreters does not flow from the Act but rather from the discretion of individual hospitals, then s. 15(1) is not engaged because the *Charter* does not apply to hospitals. Hospitals, they say, are not “government” for the purposes of s. 32 of the *Charter*. In their view, this result flows from a straightforward application of this Court’s decision in *Stoffman*, *supra*.

46 The foregoing analysis, however, establishes that it is not enough for the respondents to say that hospitals are not “government” for the purposes of s. 32 of the *Charter*. In *Stoffman*, the Court found that the Vancouver General Hospital was not part of the apparatus of government and that its adoption of a mandatory retirement policy did not implement a government policy. *Stoffman* made it clear that, as presently constituted, hospitals in British Columbia are non-governmental entities whose private activities are not subject to the *Charter*. It remains to be seen, however, whether hospitals effectively implement governmental policy in providing medical services under the *Hospital Insurance Act*.

47 There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that “there can be no question of the Vancouver General’s being held subject to the *Charter* on the ground that it performs a governmental function, for . . . the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s. 32”. That statement, however, must be read in the context of the entire judgment. I determined only that the fact that an entity performs a “public function” in the broad sense does not render it “government” for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances. Indeed, later in the same paragraph I qualified my position in the following manner:

I would also add that this is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying Regulation 5.04 and the actions of the Government of British Columbia was the requirement that Regulation 5.04 receive ministerial approval. In light of what I have said above in regard to this requirement, a “more direct and a more precisely-defined connection”, to borrow McIntyre J.’s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

48 As this passage alludes to, the hospital’s mandatory retirement policy, which was embodied in Medical Staff Regulation 5.04, was a matter of internal hospital management. Notwithstanding the requirement of ministerial approval, the Regulation was developed, written and adopted by hospital officials. It was not instigated by the government and did not reflect its mandatory retirement policy. Hospitals in British Columbia, moreover, exhibited great variety in their approaches to retirement. That each of these policies obtained ministerial approval reflected the large measure of managerial autonomy accorded to hospitals in this area.

49 The situation in the present appeal is very different. The purpose of the *Hospital Insurance Act* is to provide particular services to the public. Although the benefits of that service are delivered and administered through private institutions -- hospitals -- it is the government, and not hospitals, that is responsible for defining both the content of the service to be delivered and the persons entitled to receive it. As previously noted, s. 3(1) states that every person eligible to receive benefits is “entitled to receive the general hospital services provided under this Act”. Section 5(1) defines “general hospital services” to include various services normally available in hospitals. As the definition of “hospital” in s. 1 makes clear, moreover, hospitals are required to furnish the general hospital services specified in the Act. While no single hospital makes all of these services available, the net effect of the Act is to entitle every qualified person to receive, and to require hospitals to supply, a complete range of medically required hospital services. Indeed, if the legislation did not assure this, it would run afoul of the *Canada Health Act*. It is also apparent that while hospitals are funded on a “lump sum” and not a “fee-for-service” basis, they are not entirely free to spend this money as they choose. This is apparent from s. 10(1) of the Act, which mandates the annual payment of a sum “determined by the minister to reimburse the hospital . . . for the cost of rendering to beneficiaries those general hospital services authorized by this Act the hospital is required by the minister to provide for beneficiaries”, as well as from s. 15(3)(c), which authorizes the minister to make “payments to hospitals for the service provided for under this Act” and s. 13(1), which provides that payments to a hospital “for services rendered by it . . . shall be deemed to be payment in full for the services. . . .”

50 The structure of the *Hospital Insurance Act* reveals, therefore, that in providing medically necessary services, hospitals carry out a specific governmental objective. The Act is not, as the respondents contend, simply a mechanism to prevent hospitals from charging for their services. Rather, it provides for the delivery of a comprehensive social program. Hospitals are merely the vehicles the legislature has chosen to deliver this program. It is true that hospitals existed long before the statute, and have historically provided a full range of medical services. In recent decades, however, health care, including that generally provided by hospitals, has become a keystone tenet of governmental policy. The interlocking federal-provincial medicare system I have described entitles all Canadians to essential medical services without charge. Although this system has retained some of the trappings of the private insurance model from which it derived, it has come to resemble more closely a government service than an insurance scheme; see Canadian Bar Association Task Force on Health Care, *supra*, at p. 9.

51 Unlike *Stoffman*, then, in the present case there is a “direct and . . . precisely-defined connection” between a specific government policy and the hospital’s impugned conduct. The alleged discrimination -- the failure to provide sign language interpretation -- is intimately connected to the medical service

delivery system instituted by the legislation. The provision of these services is not simply a matter of internal hospital management; it is an expression of government policy. Thus, while hospitals may be autonomous in their day-to-day operations, they act as agents for the government in providing the specific medical services set out in the Act. The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. In so far as they do so, hospitals must conform with the *Charter*.

52 The case of the Medical Services Commission is more straightforward. It was not contested that the *Charter* applies to the Commission in exercising its power to determine whether a service is a benefit pursuant to s. 4(1) of the *Medical and Health Care Services Act*. It is plain that in so doing, the Commission implements a government policy, namely, to ensure that all residents receive medically required services without charge. In lieu of setting out a comprehensive list of insured services in legislation, the government has delegated to the Commission the power to determine what constitutes a “medically required” service. There is no doubt, therefore, that in exercising this discretion the Commission acts in governmental capacity and is thus subject to the *Charter*. As there is no need to do so, I refrain from commenting on whether the Commission might be considered part of government for other purposes.

#### Section 15(1) of the *Charter*

53 Having concluded that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters, it remains to be determined whether that failure infringes the appellants’ equality rights under s. 15(1) of the *Charter*. That provision states:

**15. (1)** Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

I emphasize at the outset that s. 15(1), like other *Charter* rights, is to be generously and purposively interpreted; see *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 156, *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at pp. 336 and 344, *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 509, *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 175, *United States of America v. Cotroni*, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469, at p. 1480, and *Reference Re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 179. As Lord Wilberforce proclaimed in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319 (P.C., Bermuda), at p. 328, a constitution incorporating a bill of rights calls for “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to”; see also *Hunter*, at p. 156.

54 In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”. Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups “suffering social, political and legal disadvantage in our society”; see *R. v. Turpin*, 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, at p. 1333 (*per* Wilson J.); see also Beverley McLachlin, “The Evolution of Equality” (1996), 54 *Advocate* 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on

such a ground is an important *indicium* of discrimination; see *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, at para. 15 (*per* Gonthier J.) and at paras. 148-149 (*per* McLachlin J.), and *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at paras. 59-61 (*per* L'Heureux-Dubé J.).

55 As deaf persons, the appellants belong to an enumerated group under s. 15(1) -- the physically disabled. While this fact is not contested, it is nonetheless relevant. As Wilson J. held in *Turpin*, the determination of whether a law is discriminatory is a contextual exercise. It is important, she explained, at p. 1331, "to look not only at the impugned legislation . . . but also to the larger social, political and legal context".

56 It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; see generally M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years -- What Progress? What Prospects?" (1997), 7 *N.J.C.L.* 263. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms; see Sandra A. Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (1994), at pp. 5-6. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed; see Minister of Human Resources Development, *Persons with Disabilities: A Supplementary Paper* (1994), at pp. 3-4, and Statistics Canada, *A Portrait of Persons with Disabilities* (1995), at pp. 46-49.

57 Deaf persons have not escaped this general predicament. Although many of them resist the notion that deafness is an impairment and identify themselves as members of a distinct community with its own language and culture, this does not justify their compelled exclusion from the opportunities and services designed for and otherwise available to the hearing population. For many hearing persons, the dominant perception of deafness is one of silence. This perception has perpetuated ignorance of the needs of deaf persons and has resulted in a society that is for the most part organized as though everyone can hear; see generally Oliver Sacks, *Seeing Voices: A Journey Into the World of the Deaf* (1989). Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.

58 With this context in mind, I turn to the specific elements of the appellants' s. 15(1) claim. While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework; see *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241, at para. 62, *Miron*, *supra*, and *Egan*, *supra*. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this Court have held that it must be shown to be based on an irrelevant personal characteristic; see *Miron* (*per* Gonthier J.) and *Egan* (*per* La Forest J.). Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one

factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory; see *Miron* (per McLachlin J.) and *Thibaudeau v. Canada*, 1995 CanLII 99 (SCC), [1995] 2 S.C.R. 627 (per Cory and Iacobucci JJ.).

59 In my view, in the present case the same result is reached regardless of which of these approaches is applied; for similar reasoning, see *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358 (per Iacobucci J. for the Court). There is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

60 The only question in this case, then, is whether the appellants have been afforded "equal benefit of the law without discrimination" within the meaning of s. 15(1) of the *Charter*. On its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit "distinction" based on disability by singling out deaf persons for different treatment. Both deaf and hearing persons are entitled to receive certain medical services free of charge. The appellants nevertheless contend that the lack of funding for sign language interpreters renders them unable to benefit from this legislation to the same extent as hearing persons. Their claim, in other words, is one of "adverse effects" discrimination.

61 This Court has consistently held that s. 15(1) of the *Charter* protects against this type of discrimination. In *Andrews*, *supra*, McIntyre J. found that facially neutral laws may be discriminatory. "It must be recognized at once", he commented, at p. 164, "... that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality"; see also *Big M Drug Mart Ltd.*, *supra*, at p. 347. Section 15(1), the Court held, was intended to ensure a measure of substantive, and not merely formal equality.

62 As a corollary to this principle, this Court has also concluded that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation; see *Andrews*, at pp. 173-74, and *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at pp. 544-49 (per Lamer C.J.); see also *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at p. 547. A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the effect of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in *Andrews*, at p. 165, "[t]o approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned". In this the Court has staked out a different path than the United States Supreme Court, which requires a discriminatory intent in order to ground an equal protection claim under the Fourteenth Amendment of the Constitution; see *Washington, Mayor of Washington, D.C. v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

63 This Court first addressed the concept of adverse effects discrimination in the context of provincial human rights legislation. In *Simpsons-Sears*, the Court was faced with the question of whether a rule requiring employees to be available for work on Friday evenings and Saturdays discriminated against those observing a Saturday Sabbath. Though this rule was neutral on its face in that it applied equally to all employees, the Court nevertheless found it to be discriminatory. Writing for the Court, McIntyre J. commented as follows, at p. 551:

A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, “No Catholics or no women or no blacks employed here.” . . . On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

See also *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC), [1990] 2 S.C.R. 489, and *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970. I note that in *Andrews*, McIntyre J. made it clear that the equality principles developed by the Court in human rights cases are equally applicable in s. 15(1) cases. The definition of adverse effects discrimination set out in *Simpsons-Sears*, moreover, has been expressly adopted in the context of s. 15(1); see *Egan*, *supra*, at para. 138 (*per* Cory J.).

64 Adverse effects discrimination is especially relevant in the case of disability. The government will rarely single out disabled persons for discriminatory treatment. More common are laws of general application that have a disparate impact on the disabled. This was recognized by the Chief Justice in his dissenting opinion in *Rodriguez*, *supra*, where he held that the law criminalizing assisted suicide violated s. 15(1) of the *Charter* by discriminating on the basis of physical disability. There, a majority of the Court determined, *inter alia*, that the law was saved by s. 1 of the *Charter*, assuming without deciding that it infringed s. 15(1). While I refrain from commenting on the correctness of the Chief Justice’s conclusion on the application of s. 15(1) in that case, I endorse his general approach to the scope of that provision, which he set out as follows, at p. 549:

Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.

65 The Court elaborated upon this principle in its recent decision in *Eaton*, *supra*. Although *Eaton* involved direct discrimination, Sopinka J. observed that in the case of disabled persons, it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination. He remarked, at paras. 66-67:

The principles that not every distinction on a prohibited ground will constitute discrimination and that, in general, distinctions based on presumed rather than actual characteristics are the hallmarks of discrimination have particular significance when applied to physical and mental disability. Avoidance of discrimination on this ground will frequently require distinctions to be made taking into account the actual personal characteristics of disabled persons. In *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 169, McIntyre J. stated that the “accommodation of differences . . . is the essence of true equality”. This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.



The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.

66 Unlike in *Simpsons-Sears* and *Rodriguez*, in the present case the adverse effects suffered by deaf persons stem not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone. It is on this basis that the trial judge and the majority of the Court of Appeal found that the failure to provide medically related sign language interpretation was not discriminatory. Their analyses presuppose that there is a categorical distinction to be made between state-imposed burdens and benefits, and that the government is not obliged to ameliorate disadvantage that it has not helped to create or exacerbate. Before attempting to evaluate these assumptions, it will be helpful to relate the reasoning of the courts below in more detail.

67 As previously noted, both the trial judge and majority of the Court of Appeal determined that, while the access of deaf people to medical services is limited to a certain extent by their communication handicap, this limitation does not result from the denial of any benefit of the law within the meaning of s. 15(1) of the *Charter*. They were able to come to this conclusion because of the manner in which they characterized sign language interpretation. Interpretation services, they held, are not medically required. Rather, they are "ancillary services", which, like other non-medical services such as transportation to a doctor's office or hospital, are not publicly funded.

68 Having determined that sign language interpretation is a discrete, non-medical "ancillary" service, the courts below were able to conclude that the appellants were not denied a benefit available to the hearing population. As the majority of the Court of Appeal explained, prior to the introduction of a universal medicare system, deaf and hearing persons were each required to pay their doctors. When necessary for effective communication, deaf persons were also obliged to pay for sign language translators. The Medical Services Plan, the court observed, removes the responsibility of both hearing and deaf persons to pay their physicians. Deaf persons, of course, remain responsible for the payment of translators in order to receive equivalent medical services as hearing persons, as they would be in the absence of the legislation. In the court's view, however, any resulting inequality exists independently of the benefit provided by the state.

69 While this approach has a certain formal, logical coherence, in my view it seriously mischaracterizes the practical reality of health care delivery. Effective communication is quite obviously an integral part of the provision of medical services. At trial, the appellants presented evidence that miscommunication can lead to misdiagnosis or a failure to follow a recommended treatment. This risk is particularly acute in emergency situations, as illustrated by the appellant Linda Warren's experience during the premature birth of her twin daughters. That adequate communication is essential to proper medical care is surely

so incontrovertible that the Court could, if necessary, take judicial notice of it. As Professor Pothier observes, for the hearing population “conversation between doctor and patient is so basic to the provision of medical services that it is taken for granted”; see Dianne Pothier, “M’Aider, Mayday: Section 15 of the *Charter* in Distress” (1996), 6 *N.J.C.L.* 295, at p. 335.

70 The centrality of communication to the delivery of medical services is particularly evident in the context of negligence law. The duty of disclosure commands physicians to inform patients fully of the risks involved in treatment and answer their questions regarding such risks; see *Reibl v. Hughes*, 1980 CanLII 23 (SCC), [1980] 2 S.C.R. 880, at p. 884, and *Hopp v. Lepp*, 1980 CanLII 14 (SCC), [1980] 2 S.C.R. 192, at p. 210. Physicians cannot discharge this obligation without being able to communicate effectively with their patients. In the absence of sign language interpretation, there may well be cases where it will be impossible for doctors to treat deaf persons without breaching their professional responsibilities.

71 If there are circumstances in which deaf patients cannot communicate effectively with their doctors without an interpreter, how can it be said that they receive the same level of medical care as hearing persons? Those who hear do not receive communication as a distinct service. For them, an effective means of communication is routinely available, free of charge, as part of every health care service. In order to receive the same quality of care, deaf persons must bear the burden of paying for the means to communicate with their health care providers, despite the fact that the system is intended to make ability to pay irrelevant. Where it is necessary for effective communication, sign language interpretation should not therefore be viewed as an “ancillary” service. On the contrary, it is the means by which deaf persons may receive the same quality of medical care as the hearing population.

72 Once it is accepted that effective communication is an indispensable component of the delivery of medical services, it becomes much more difficult to assert that the failure to ensure that deaf persons communicate effectively with their health care providers is not discriminatory. In their effort to persuade this Court otherwise, the respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs, they aver, when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

73 In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence. It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L’Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22, *Haig v. Canada (Chief Electoral Officer)*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at pp. 1041-42, *Native Women’s Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at p. 655, and *Miron*, *supra*. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; see *Miron*, *Tétreault-Gadoury*, and *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679. Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality; *Thibaudeau*, at para. 38 (*per* L’Heureux-Dubé J.).

74 The same principle has been applied by this Court in its interpretation of the equality provisions of provincial human rights legislation. In *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (SCC), [1989] 1 S.C.R. 1219, the Court found that an employer's accident and sickness insurance plan, which disentitled pregnant women from receiving benefits for any reason during a certain period, discriminated on the basis of pregnancy and hence sex. In so holding, it resoundingly rejected the reasoning of *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183, at p. 190, which had held that the inequality resulting from a similar benefit program was "not created by legislation but by nature".

75 In support of the view that the state has no obligation to remedy pre-existing disadvantage in providing benefits to the general population, the respondent relies on this Court's decision in *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695. There, the appellant, a self-employed mother, argued that the wages paid to her nanny were business expenses and that the section of the *Income Tax Act*, R.S.C. 1952, c. 148, that did not allow her to deduct the full cost of these expenses discriminated against her on the basis of sex. The Court rejected this argument, holding that the distinction created between persons who incur child care expenses and those who do not is not related to sex, despite the fact that women are responsible for a disproportionate share of the social costs of child care. Writing for the majority, Iacobucci J. held that the appellant had not proven that the actual expenses of child care were borne disproportionately by women. He thus concluded that the appellant had not demonstrated an adverse effect that was created or contributed to by the legislation. He stated the following, at pp. 764-65:

If the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

76 While this statement can be interpreted as supporting the notion that, in providing a benefit, the state is not required to eliminate any pre-existing "social" disadvantage, it should be remembered that it was made in the context of determining whether the legislation made a distinction based on an enumerated or analogous ground. In *Symes*, the appellant was unable to show that the allegedly adverse effect created by the legislation was suffered by members of such a group. There was no relationship, in other words, between the benefit provided by the government and the social disadvantage suffered by women in child-rearing. In the present case, in contrast, the alleged adverse effect is suffered by an enumerated group. The social disadvantage borne by the deaf is directly related to their inability to benefit equally from the service provided by the government. As a result, I do not believe that *Symes* is helpful to the respondent.

77 This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefit scheme. Section 15(1) expressly states, after all, that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . ." (emphasis added). The provision makes no distinction between laws that impose unequal burdens and those that deny equal benefits. If we accept the concept of adverse effect discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. As I will develop below, if there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the *Charter*.

78 The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field. In *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 1985 CanLII 183 (SK CA), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal refused, [1985] 1 S.C.R. vi, the court found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory. Similarly, in *Howard v. University of British Columbia* (1993), 1993 CanLII 16470 (BC HRT), 18 C.H.R.R. D/353, it was held that the university was obligated to provide a deaf student with a sign language interpreter for his classes. “[W]ithout interpreters”, the Human Rights Council held, at p. D/358, “the complainant did not have meaningful access to the service”. And in *Centre de la communauté sourde du Montréal métropolitain inc. v. Régie du logement*, 1996 CanLII 19 (QC TDP), [1996] R.J.Q. 1776, the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation. Moreover, the principle underlying all of these cases was affirmed in *Haig, supra*, where a majority of this Court wrote, at p. 1041, that “a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15”.

79 It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of “undue hardship”; see *Simpsons-Sears, supra*, and *Central Alberta Dairy Pool, supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of “reasonable limits”. It should not be employed to restrict the ambit of s. 15(1).

80 In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

81 I acknowledge that the standard I have set is a broad one. Given the nature of the evidentiary record before this Court, however, it would not be appropriate to elaborate it in any detail. Some guidance can be provided, however (and I stress that it is guidance -- not authoritative pronouncement), by the experience in the United States under the *Rehabilitation Act*, 29 U.S.C. § 794 (1997), and the *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997). Regulations enacted pursuant to those statutes require health care providers to supply appropriate auxiliary aids and services, including qualified sign language interpreters, to ensure “effective communication” with deaf persons; *Code of Federal Regulations*, 45 C.F.R. § 84.52(c) (1997); 28 C.F.R. § 36.303(b) and (c) (1997). While the term “effective communication” is not defined in the legislation, it has been held to mean that a deaf individual “actually understood” the content of the communication; see *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988), at pp. 563-64. One would suppose that it would also entail that deaf persons be able to inform medical staff of the basic circumstances surrounding their illness or injury; see Elizabeth E. Chilton, “Ensuring Effective Communication: The Duty of Health Care Providers to Supply Sign Language Interpreters for Deaf Patients” (1996), 47 *Hastings L.J.* 871, at p. 883.

82 This is not to say that sign language interpretation will have to be provided in every medical situation. The “effective communication” standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which

the communications will take place and the number of people involved; see 28 C.F.R. § 35.160 (1997). For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases; see Chilton, at p. 886, and the many studies there cited.

83 Finally, I note that it is not in strictness necessary to decide whether, according to this standard, the appellants' s. 15(1) rights were breached. This Court has held that if claimants prove that the equality rights of members of the group to which they belong have been infringed, they need not establish a violation of their own particular rights. In *Egan, supra*, the government contended that, given the net benefit available to them pursuant to other legislation, a homosexual couple was not negatively affected by the denial of a spousal allowance under the *Old Age Security Act*, R.S.C., 1985, c. O-9. In rejecting this submission, I commented as follows, at para. 12:

... the respondent contends that the appellants have suffered no prejudice. . . . I would simply dispose of this argument on the ground that, while this may be true in this specific instance, there is nothing to show that this is generally the case with homosexual couples, which is the point the respondent must establish.

Similarly, Cory J. stated in *Egan*, at para. 153, that the "appellants must demonstrate that homosexual couples in general are denied equal benefit of the law, not that they themselves are suffering a particular or unique denial of a benefit" (emphasis in original). That being said, it is fair to say that the absence of a publicly funded sign language interpretation service discriminated against the appellants by denying them the equal benefit of the British Columbia health care system. The evidence at trial established that, generally speaking, the quality of care received by the appellants was inferior to that available to hearing persons.

#### Section 1 of the Charter

84 I come now to possible justification under s. 1 of the *Charter*, which reads:

**1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In order to justify a limitation of a *Charter* right, the government must establish that the limit is "prescribed by law" and is "reasonable" in a "free and democratic society". In *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. A succinct restatement of that framework can be found in the reasons of Iacobucci J. in *Egan*, at para. 182:

First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

It is not necessary to consider each of these elements in this case. Assuming without deciding that the decision not to fund medical interpretation services for the deaf constitutes a limit "prescribed by law", that the objective of this decision -- controlling health care expenditures -- is "pressing and substantial", and that the decision is rationally connected to the objective, I find that it does not constitute a minimum impairment of s. 15(1).

85 This Court has recently confirmed that the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates; see *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825, at para. 78. The Court has also held that where the legislation under consideration involves the balancing of competing interests and matters of social policy, the *Oakes* test should be applied flexibly, and not formally or mechanistically; see *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 737, *McKinney, supra*, *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 999-1000, *Cotroni, supra*, at p. 1489, *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139, at p. 222 (*per* L'Heureux-Dubé J.), *Egan, supra*, at para. 29 (*per* La Forest J.) and at paras. 105-106 (*per* Sopinka J.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 63 (*per* La Forest J.) and at paras. 127-138 (*per* McLachlin J.). It is also clear that while financial considerations alone may not justify *Charter* infringements (*Schachter, supra*, at p. 709), governments must be afforded wide latitude to determine the proper distribution of resources in society; see *McKinney*, at p. 288, and *Egan*, at para. 104 (*per* Sopinka J.). This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups; see *Egan*, at paras. 105-110 (*per* Sopinka J.). On the other hand, members of this Court have suggested that deference should not be accorded to the legislature merely because an issue is a "social" one or because a need for governmental "incrementalism" is shown; see *Egan*, at para. 97 (*per* L'Heureux-Dubé J.) and at paras. 215-16 (*per* Iacobucci J.). In the present case, the failure to provide sign language interpreters would fail the minimal impairment branch of the *Oakes* test under a deferential approach. It is, therefore, unnecessary to decide whether in this "social benefits" context, where the choice is between the needs of the general population and those of a disadvantaged group, a deferential approach should be adopted.

86 At the same time, the leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals. Thus, I stated the following for the Court in *Tétreault-Gadoury, supra*, at p. 44:

It should go without saying, however, that the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down.

87 In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only \$150,000, or approximately 0.0025 percent of the provincial health care budget at the time. This figure was based on an extrapolation from the services then being provided by the Western Institute for the Deaf and Hard of Hearing in the Lower Mainland area. Although there was little evidence presented of the precise content of this service, it was not suggested that its extension throughout the province would not have fulfilled the requirements of s. 15(1). In these circumstances, the refusal to expend such a relatively insignificant sum to continue and extend the service cannot possibly constitute a minimum impairment of the appellants' constitutional rights.

88 The respondents argue, however, that the situation of deaf persons cannot be meaningfully distinguished from that of other non-official language speakers. If they are compelled to provide interpreters for the former, they submit, they will also have to do so for the latter, thereby increasing the expense of the program dramatically and placing severe strain on the fiscal sustainability of the health care system. In this context, they contend, it was reasonable for the government to conclude that they impaired the rights of deaf persons as little as possible.

89 This argument, in my view, is purely speculative. It is by no means clear that deaf persons and non-official language speakers are in a similar position, either in terms of their constitutional status or their practical access to adequate health care. From the perspective of a patient, there is no real difference between sign language and oral language if there is no ability to communicate with a physician. But from the perspective of the state's obligations, there may very well be. In the present case, the only relevant constitutional provisions are ss. 15(1) and 1 of the *Charter*. In a case involving a claim for medical interpretation for hearing patients, in contrast, the analysis would be more complicated. In such a case, it would be necessary to consider the interaction between s. 15(1) and other provisions of the Constitution, specifically those related to the language obligations of governments. Moreover, the respondents have presented no evidence as to the potential scope or cost of an oral language medical interpretation program. It is possible that the nature and extent of any reasonable accommodation required for hearing persons under s. 1 would differ from that required for deaf persons. Thus, any claim for the provision of such a program, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.

90 Further, it is apparent that deaf persons stand in a special position in terms of their ability to communicate with the mainstream population. As I have discussed, it is extremely difficult for many deaf persons to acquire a high level of proficiency in oral languages, whether in spoken or written form. Moreover, it is apparent that the deaf have particular difficulties in obtaining the service of persons in the community who understand sign language. There is no evidentiary basis from which to assess whether non-official language speakers stand in a similar position. So, without wishing to minimize the difficulties faced by hearing persons whose native tongues are neither English nor French, it is by no means clear that the communications barriers they face are analogous to those encountered by deaf persons. As a result, the success of a potential s. 15(1) claim by members of the latter group cannot be predicted in advance. The possibility that such a claim might be made, therefore, cannot justify the infringement of the constitutional rights of the deaf.

91 The respondents also contend that recognition of the appellants' claim will have a ripple effect throughout the health care field, forcing governments to spend precious health care dollars accommodating the needs of myriad disadvantaged persons. "Virtually everyone in the health care system who is denied a service", they submit, "will either be medically disadvantaged or could argue that a medical disadvantage will arise from the lack of service." Similarly, in his concurring opinion in the Court of Appeal, Lambert J.A. observed that many of the medical services and products required by the disabled are not publicly funded. In these circumstances, he asserted, governments must have the freedom to allocate scarce health care dollars among various disadvantaged groups.

92 These arguments miss the mark. If effective communication is integrally connected with the provision of health care -- a point that Lambert J.A. accepted -- then the fact that there are number of medical services that benefit disabled persons that are not covered by medicare is immaterial. The appellants do not demand that the government provide them with a discrete service or product, such as hearing aids, that will help alleviate their general disadvantage. Their claim is not for a benefit that the government, in the exercise of its discretion to allocate resources to address various social problems, has chosen not to provide. On the contrary, they ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.

93 Viewed in this light, it is impossible to characterize the government's decision not to fund sign language interpretation as one which "reasonably balances the competing social demands which our society must address"; see *McKinney*, *supra*, p. 314. It should be recalled that the Ministry of Health decided not to fund the interpretation program even in part. Other options, such as the partial or interim funding of the program offered by the Western Institute for the Deaf and Hard of Hearing, or the institution of a scheme requiring users to pay either a portion of the cost of interpreters or the full amount if they could afford to do so, were either not considered or were considered and rejected. In this sense, the present case is similar to *Tétreault-Gadoury*, *supra*, where the Court found that the denial of unemployment insurance benefits to persons over 65 violated s. 15(1) and could not be saved under s. 1 of the *Charter*. Writing for the Court, I found that one of the reasons that this denial failed the minimal impairment test was that persons over 65 were not entitled to any benefits. "Even allowing the government a healthy measure of flexibility in legislating in this area", I stated, at p. 47, "the complete denial of unemployment benefits is not an acceptable method of achieving any of the government objectives set forth above. . . ." That being said, I do not wish to be understood as intimating that the alternative measures I have adverted to would survive s. 1 scrutiny. I refer to them solely for the purpose of demonstrating that the government did not attempt to institute a scheme that would constitute a lesser limitation on deaf persons' rights.

94 In summary, I am of the view that the failure to fund sign language interpretation is not a "minimal impairment" of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*.

### Remedy

95 I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.

96 A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in



the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.

#### Disposition

97 I would allow the appeal. Costs are awarded to the appellants from the respondents throughout. I would answer the constitutional questions as follows:

1. Does the definition of “benefits” in s. 1 of the *Medicare Protection Act*, S.B.C. 1992, c. 76, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to include medical interpreter services for the deaf?

No.

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 1, it is not necessary to answer this question.

3. Do ss. 3, 5 and 9 of the *Hospital Insurance Act*, R.S.B.C. 1979, c. 180, and the Regulations enacted pursuant to s. 9 of that Act, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* by failing to require that hospitals in the Province of British Columbia provide medical interpreter services for the deaf?

No.

4. If the answer to question 3 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

Given my response to question 3, it is not necessary to answer this question.

*Appeal allowed with costs.*

*Solicitors for the appellants: Heenan, Blaikie, Vancouver.*

*Solicitor for the respondents: The Attorney General of British Columbia, Victoria.*

*Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.*

*Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.*

*Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.*

*Solicitor for the interveners the Women's Legal Education and Action Fund and the Disabled Women's Network Canada: Women's Legal Education and Action Fund, Toronto.*

*Solicitor for the intervener the Charter Committee on Poverty Issues: Public Interest Law Centre, Winnipeg.*

*Solicitor for the interveners the Canadian Association of the Deaf, the Canadian Hearing Society and the Council of Canadians with Disabilities: Advocacy Resource Centre for the Handicapped, Toronto.*

TAB 12

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

Source: Canadian Human Rights Tribunal  
 Date: 2016-01-26  
 File number: T1340/7008  
 Other citations: [2016] 2 CNLR 270 — 83 CHRR 207

## Citation:

**First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 (CanLII),**  
 <<https://canlii.ca/t/gn2vg>>, retrieved on 2026-01-02

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la  
personne

Citation: 2016 CHRT 2

Date: January 26, 2016

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 Indian Affairs and Northern Development Canada)

Respondent

- and -

**Chiefs of Ontario**

- and -

**Amnesty International**

**Interested Parties**

**Decision**

Members: Sophie Marchildon and Edward Lustig

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*À la douce mémoire de Réjean Bélanger*

*In loving memory of Réjean Bélanger*

## **I. Acknowledgement**

[1] This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.

[2] These proceedings included extensive evidence on the history of Indian Residential Schools and the experiences of those who attended or were affected by them. The Tribunal also heard heartfelt testimony from someone who attended and was directly impacted by attending a residential school. At the outset of these reasons, the Panel Members (the Panel) believe it important to acknowledge the suffering of all residential school survivors, their families and communities. We recognize the courage of those who have spoken about their experiences over the years and before this Tribunal. We also wish to honour the memory and lives of the many children who died, and all who were harmed, while attending these schools, along with their families and communities. We wish healing and recognition for all Aboriginal peoples across Canada for the individual and collective trauma endured as a result of the Indian Residential Schools system.

## **II. Complaint and background**

[3] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect (see Annex, ex. 1 s.v. “child welfare”). Hence the **best interest of the child** is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children.

[4] Each province and territory has its own child and family services legislation and standards and provides those services within its jurisdiction. However, the provision of child and family services to First Nations on reserves and in the Yukon is unique and is the subject of this decision.

[5] At issue are the activities of Indian and Northern Affairs Canada (INAC), known at the time of the hearing as Aboriginal Affairs and Northern Development Canada (AANDC), in managing the First Nations Child and Family Services Program (the FNCFS Program), its corresponding funding formulas and a handful of other related provincial and territorial agreements that provide for child and family services to First Nations living on reserve and in the Yukon Territory. Pursuant to the FNCFS Program and other agreements, child and family services are provided to First Nations on-reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. AANDC funds the child and family services provided to First Nations by FNCFS Agencies or the province/territory.

[6] Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN), allege AANDC discriminates in providing child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint). On October 14, 2008, the Canadian Human Rights Commission (the Commission) referred the Complaint to this Tribunal for an inquiry.

[7] In a decision dated March 14, 2011 (2011 CHRT 4), the Tribunal granted a motion brought by AANDC for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal’s jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[8] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*Caring Society FC*), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (*Caring Society FCA*).

[9] A new panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[10] The Complaint was subsequently amended to add allegations of retaliation (see 2012 TCDP 24 (CanLII), 2012 CHRT 24). In early June 2015, the Panel found the allegations of retaliation to be substantiated in part (see 2015 CHRT 14).

[11] The present decision deals with the merits of the Complaint. During deliberations our friend and colleague, Tribunal Member Réjean Bélanger, passed away. Despite his valued contributions to the hearing and consideration of this matter, he sadly was not able to see the final result of his work. While this decision is signed on behalf of the remaining Members of the Panel, **we dedicate it in his honour and memory.**

### **III. Parties**

[12] The Caring Society is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families. The AFN is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development. The Commission, in appearing before the Tribunal at a hearing, represents the public interest (see section 51 of the *CHRA*). AANDC is the federal government department primarily responsible for meeting the Government of Canada's obligations and commitments to Aboriginal peoples.

[13] Additionally, two organizations were granted "Interested Party" status for these proceedings: Amnesty International and the Chiefs of Ontario (COO). Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. The COO is a non-profit organization representing the 133 First Nations in the Province of Ontario. It was granted interested party status to speak to the particularities of on-reserve child welfare services in Ontario.

### **IV. The hearing, disclosure and admissibility of documents**

[14] The hearing of the Complaint spanned 72 days from February 2013 to October 2014. Throughout the hearing, documentary disclosure and the admissibility of certain documents as evidence became an issue.

[15] All arguably relevant documents were not disclosed prior to the commencement of the hearing. Despite agreeing to complete its disclosure prior to the start of the hearing, and subsequently confirming that it had, AANDC knew of the existence of a number of arguably relevant documents in the summer of 2012 and yet failed to disclose them prior to the hearing. Only after the completion of an *Access to Information Act* request made by the Caring Society, and shortly before the third week of hearings, did AANDC inform the parties and the Tribunal of the existence of over 50,000 additional documents and an unspecified number of emails, which were potentially relevant to the Complaint, but had yet to be disclosed. As a result, the Tribunal vacated hearing dates in June 2013, re-arranged the



proceedings to hear the allegations of retaliation in July and August 2013, and, following a deadline for AANDC to complete its disclosure by August 31, 2013, resumed the hearing on the merits on dates from August 2013 to January 2014 (see 2013 CHRT 16).

[16] Following the disclosure of over 100,000 additional documents by AANDC, the hearing resumed. However, AANDC did not complete the disclosure of all arguably relevant documents until August 2014 due to an objection under section 37(1) of the *Canada Evidence Act*. Specifically, certain documents were characterized as being subject to Cabinet confidence privilege. All the parties agreed to have the Clerk of the Privy Council review the documents to determine if the privilege applied. This review process was completed fairly quickly once the Clerk was provided with the documents.

[17] An issue arose as to how the 100,000 additional documents could be admitted into evidence. The Caring Society requested an order that any additionally disclosed documents upon which it wished to rely be admitted as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document was called as a witness, and whether or not they were put to any other witness. For reasons outlined in 2014 CHRT 2, the Panel ruled as follows:

- a. Rule 9(4) of the Tribunal's Rules of Procedure will continue to apply. As such, documents will continue to be admitted into evidence, on a case-by case basis, once they are introduced during the hearing and accepted by the Panel;
- b. There will be no need to call witnesses for the sole purpose of authenticating documentary evidence. Any issues raised relating to authentication will be considered by the Panel at the weighing stage;
- c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
  - i. which portions of the document are being relied upon; and
  - ii. how these portions of the document relate to an issue in the case.
- d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

[18] Following the completion of the hearing, further issues arose as to which documents ought to form part of the record before the Tribunal. AANDC raised concerns regarding the admissibility of documents relied on by counsel for the Complainants and Commission, but not referred to orally during the hearing. In 2015 CHRT 1, the Panel ordered:

Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

[19] In response to the Panel's order, AANDC provided written representations with respect to the documents at issue. According to AANDC, the Panel should place little, if any, weight on those documents in determining the merits of the Complaint. It also provided a chart summarizing its position on each of the documents.

[20] AANDC's submissions on the documents subject to the Panel's order in 2015 CHRT 1, along with its other submissions regarding the weight to ascribe to the evidence in this matter, have been taken into consideration by the Panel, together with the submissions of the other parties, in making the findings that follow.

## **V. Analysis**

[21] As mentioned above, the present Complaint alleges the provision of child and family services in on-reserve First Nations communities and in the Yukon is discriminatory. Namely that there is inequitable and insufficient funding for those services by AANDC. In this regard, the Complainants have the burden of proof of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (see *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para. 28).

[22] In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[23] The first element is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics.

[24] The second element requires the Complainants to establish that AANDC is actually involved in the provision of a "service" as contemplated by section 5 of the *CHRA*; and, if so, to demonstrate that First Nations are denied services or adversely impacted by AANDC's involvement in the provision of those services.

[25] For the third element, the Complainants have to establish a connection between elements one and two. A "causal connection" is not required as there may be many different reasons for a respondent's acts. That is, it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue (see *Holden v. Canadian National Railway Co.*, (1991) 1990 CanLII 12529 (FCA), 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 44-52 [*Bombardier*]).

[26] In this regard, it should be kept in mind that discrimination is not usually practiced overtly or even intentionally. Consequently, direct evidence of discrimination or proof of intent is not required to establish a discriminatory practice under the *CHRA* (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT); and; *Bombardier* at paras. 40-41).

[27] In response to the Complaint, AANDC led its own evidence and arguments to refute the Complainants' claim of discrimination. It did not raise a statutory exception under sections 15 or 16 of the *CHRA*. Therefore, the Tribunal's task is to consider all the evidence and argument presented by the parties to determine if the Complainants have proven the three elements of a discriminatory practice on a balance of probabilities (see *Bombardier* at paras. 56 and 64; see also *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 80-90).

[28] It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

### **A. AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon**

#### **i. Meaning of “service” under section 5 of the CHRA**

[29] Section 5 of the CHRA provides:

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

[30] Pursuant to the wording of this section, the Complainants must establish that the actions complained of are “...in the provision of...services...customarily available to the general public”. The first part of this analysis involves determining what constitutes the “service” based on the facts before the Tribunal (see *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) per La Forest J. at para. 68 [*Gould*]). In other words, what is the “benefit” or “assistance” being held out (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 31 [*Watkin*]; and, *Gould* per La Forest J. at para. 55). In making this determination, “[r]egard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are “services” (see *Watkin* at para. 33). In this respect, it may be useful to inquire whether the benefit or assistance is the essential nature of the activity (see *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 42).

[31] The next step requires a determination of whether the service creates a public relationship between the service provider and the service user. The fact that actions are undertaken by a public body for the public good is not determinative. In fact, no one factor is determinative. Rather, in ascertaining whether a service creates a public relationship, the Tribunal must examine all relevant factors in a contextual manner (see *Gould* per La Forest J. at para. 68; and, *Watkin* at paras. 32-33). As part of this determination, the Tribunal must decide what constitutes the “public” to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the “public” (see *University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353 at pp. 374-388; and, *Gould* per La Forest J. at para. 68). A public relationship is created where this “public” is extended a “service” by the service provider (see *Gould* per La Forest J. at para. 55).

#### **ii. Evidence indicating AANDC provides a “service”**

[32] Both the Commission and the Caring Society characterize the FNCFS Program, its corresponding funding formulas and the related provincial/territorial agreements as a service provided by AANDC to First Nations children and families on reserves and in the Yukon.

[33] On the other hand, AANDC submits that its role in the provision of child and family services to First Nations is strictly limited to funding and being accountable for the spending of those funds. According to AANDC, funding does not constitute a “service”. Furthermore, AANDC argues the funding it provides is not “customarily available to the general public”. Rather, it is provided on a government to government; or, government to agency basis.

[34] In AANDC’s view, the benefit held out as a service is the provincially mandated child welfare services provided to First Nations by the FNCFS Agencies or the provinces/territory. AANDC does not exert control over the services and programs provided. Rather, decisions as to which services to provide, how they will be provided and whether the delivery is in compliance with statutory and regulatory requirements rests with the agencies and the provinces/territory. In this regard, AANDC relies on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45 (*NIL/TU,O*), to argue that child welfare services are a matter within provincial jurisdiction and that it only became involved in First Nations child and family services as a matter of social policy under its spending power. According to AANDC, its funding does not change the provincial/territorial nature of child and family services.

[35] As explained in the following pages, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves across Canada and in the Yukon. Specifically, AANDC offers the benefit or assistance of funding to “ensure”, “arrange”, “support” and/or “make available” child and family services to First Nations on reserves and in the Yukon. With specific regard to the FNCFS Program, the objective is to ensure the delivery of culturally appropriate child and family services, in the best interest of the child, in accordance with the legislation and standards of the reference province/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and within FNCFS Program authorities. This benefit or assistance is held out as a service by AANDC and provided to First Nations in the context of a public relationship.

#### **a. Jurisdiction of the CHRA over the activities of AANDC**

[36] With regard to the *NIL/TU,O* decision, the question in that case was whether the labour relations of a FNCFS Agency should be regulated under provincial or federal jurisdiction. Labour relations are presumptively a provincial matter. In this regard, the Supreme Court found the *NIL/TU,O* Agency was a child welfare agency regulated by the province in all aspects. Neither the fact that it received federal funding, the Aboriginal identity of its clients and employees, nor its mandate to provide culturally appropriate services to Aboriginal clients, displaced the operating presumption that labour relations are provincially regulated.

[37] The present case raises human rights issues in the context of AANDC’s activities. As opposed to labour relations matters, human rights matters are not presumptively provincial. The *CHRA* applies to “...matters coming within the legislative authority of Parliament” (see *CHRA* at s. 2). While the activities of FNCFS Agencies and provincial governments may well be within provincial jurisdiction for labour relations purposes, this does not have any bearing on the Tribunal’s jurisdiction over AANDC’s activities in this case.

[38] The Complaint is filed against, and is focused upon, the activities of AANDC. AANDC is a federal government department created by Parliament through the *Department of Indian Affairs and Northern Development Act*. Its mandate is derived from a number of federal statutes, including the *Indian Act*. Therefore, any actions taken by AANDC come within the legislative authority of Parliament and could be subject to the *CHRA*.

[39] The issue in this case is not whether AANDC’s activities fall outside the jurisdiction of the *CHRA* because they do not come within the legislative authority of Parliament. Rather, it is whether the *CHRA* applies to AANDC’s activities because its actions are in the provision of a service. The fact that other actors, including provincial actors, may be involved in the provision of the service is not determinative

and does not necessarily shield AANDC from human rights scrutiny (see for example *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624 [*Eldridge*]). As mentioned above, it is for the Tribunal to consider all relevant factors to determine the nature and extent of AANDC's involvement and whether that involvement rises to the status of a "service" under section 5 of the *CHRA*.

#### **b. Funding can constitute a service**

[40] Similarly, even if AANDC's role in the child and family welfare of First Nations is limited to funding, there is nothing in the *CHRA* that excludes funding from the purview of section 5. That is, funding can constitute a service if the facts and evidence of the case indicate that the funding is a benefit or assistance offered to the public pursuant to the criteria outlined above.

[41] A similar argument to the one advanced by AANDC was rejected by the British Columbia Human Rights Tribunal in *Bitonti et al. v. College of Physicians & Surgeons of British Columbia et al.*, (1999) 1999 CanLII 35189 (BC HRT), 36 CHRR D/263 (BCHRT) (*Bitonti*). Among other things, the complainants in that case argued that the allocation of funding provided by the Ministry of Health did not provide foreign medical school graduates with a real opportunity to obtain internships. The Ministry of Health responded that the expenditure of funds by the provincial government was a legislative act that was immune from the Tribunal's review. While the BCHRT ultimately found there was no service relationship between the Ministry of Health and the complainants, at paragraph 315 it was not prepared to accept the Ministry's argument regarding immunity for funding:

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

[42] Similarly, in *Kelso v. The Queen*, 1981 CanLII 171 (SCC), [1981] 1 SCR 199 at page 207 (*Kelso*), the Supreme Court stated (**emphasis added**):

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

[43] Indeed, the Supreme Court has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 (*Robichaud*); *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81 (*Vaid*); and, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). It expresses fundamental values and pursues fundamental goals for our society, such as the fundamental Canadian value of equality (see s. 2 of the *CHRA*; see also *Mowat* at para. 33; and, *Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 SCR 554 at p. 615, per Justice L'Heureux-Dubé). Therefore, the *CHRA* is to be interpreted in a broad, liberal, and purposive manner befitting of this special status (see *Mowat* at para. 62).

[44] Conversely, any exemption from its provisions must be clearly stated (see *Vaid* at para. 81). Again, there is no indication in the *CHRA* or otherwise that Parliament intended to exclude funding from scrutiny under the *Act*, subject of course to the funding being determined to be a service. In line with *Kelso*, where the Government of Canada is involved in the provision of a service, including where the service involves the allocation of funding, that service and the way resources are allocated pursuant to that service must respect human rights principles.

[45] Therefore, the Panel dismisses the argument that funding cannot constitute a “service” within the meaning of section 5 of the *CHRA*. In any event, as will be examined in the following pages, the evidence in this case indicates the essential nature of the “assistance” or “benefit” offered by AANDC for the provision of child and family services on First Nations reserves is something more than funding.

**c. The “assistance” or “benefit” provided by AANDC**

[46] AANDC’s FNCFS Program applies to FNCFS Agencies in all provinces and the Yukon Territory, except Ontario. In Ontario, AANDC has a cost-sharing agreement with the province for the provision of child and family services on First Nations reserves. AANDC also has agreements with the provinces of Alberta and British Columbia to provide child and family services to certain First Nations reserves. A similar agreement is also in place with the Yukon Territory. The provision of child and family services to First Nations in the Northwest Territories and Nunavut were not the subject of this Complaint.

[47] The FNCFS Program were developed to address concerns over the lack of child and family services provided by the provinces to First Nations reserves. Traditionally, assistance to First Nations children and their families was provided informally, by custom, within the network of their extended family. However, over time, this informal assistance became insufficient to meet the needs of children and families living on First Nations reserves.

[48] The Joint Committees of the Senate and the House of Commons in 1946-1948 and again in 1959-1961 urged provinces to increase their involvement in providing services to First Nations people in order to fill in the gaps resulting from disruptions to traditional patterns of community care. However, provincial governments were reluctant to provide those services for financial concerns and given federal jurisdiction over “Indians, and lands reserved for Indians” under section 91(24) of the *Constitution Act, 1867*. This led to disparity in the quantity and quality of services provided to First Nations children and families on reserve from province to province, where some provinces only provided services if they were compensated by the federal government or only in life-and-death situations (see Annex, ex. 2 at p. 39 [the *NPR*]).

[49] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve. Other provinces entered into bilateral agreements whereby AANDC would reimburse them for the delivery of child and family services (see Annex, ex. 3 at ss. 1.1.2 - 1.1.3 [2005 *FNCFS National Program Manual*]).

[50] In the 1970’s and early 1980’s, concerns began being raised over the child and family services being provided to First Nations by the provinces. Namely, the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities. This started a move towards the creation of community-specific FNCFS Agencies. AANDC funded these agencies through *ad hoc* arrangements, but authorities for doing so were unclear and funding was inconsistent (see the *NPR* at p. 24).

[51] In 1986, AANDC put a moratorium on the *ad hoc* arrangements for the development of FNCFS Agencies. This moratorium remained in place until 1990 when AANDC implemented the FNCFS Program (see 2005 *FNCFS National Program Manual* at s. 1.1.6; and, the *NPR* at p. 24).

[52] At section 1.3 of the 2005 *FNCFS National Program Manual*, the objective and principles of the FNCFS Program are outlined and include:

1.3.2 The primary objective of the FNCFS program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.

[...]

1.3.4 FNCFS will be managed and operated by provincially mandated First Nations organizations (Recipients), which provide services to First Nations children and families Ordinarily Resident On Reserve. FNCFS Recipients will manage the program in accordance with provincial or territorial legislation and standards. INAC will provide funding in accordance with its authorities.

1.3.5 The child and family services offered by FNCFS on reserve are to be culturally relevant and comparable, but not necessarily identical, to those offered by the reference province or territory to residents living off reserve in similar circumstances.

1.3.6 Protecting children from neglect and abuse is the main objective of child and family services. FNCFS also provide services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.

1.3.7 First Nation agencies and other Recipients will ensure that all persons Ordinarily Resident On Reserve and within their Catchment Area receive a full range of child and family services reasonably comparable to those provided off reserve by the reference province or territory. Funding will be provided in accordance with INAC authorities.

[53] In 2012, following the filing of the Complaint, the wording of the objective of the FNCFS Program was modified, but is still similarly described as follows:

#### 1.1 Objective

The FNCFS program provides funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.

These services are to be provided in accordance with the legislation and standards of the province or territory of residence and in a manner that is reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities.

(see Annex, ex. 4 at p. 30 [2012 National Social Programs Manual])

[54] The other provincial and territorial agreements for the provision of child and family services in First Nations communities have a similar purpose to the FNCFS Program. In Ontario, the *Memorandum of Agreement Respecting Welfare Programs for Indians* (see Annex, ex. 5 [the 1965 Agreement]), at page 1, provides:

WHEREAS the 1963 Federal-Provincial Conference, in charting desirable long-range objectives and policies applicable to the Indian people, determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities;

AND WHEREAS Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs;

[55] In Alberta, the *Arrangement for the Funding and Administration of Social Services* (see Annex, ex. 6 [the Alberta Reform Agreement]) at page 1 states:

**WHEREAS:**

*Canada continues to have a special relationship with and interest in the Indian people of Canada arising from history, treaties, statutes and the Constitution;*

*Canada and Alberta recognize and agree that this arrangement will not prejudice the treaty rights of Indian people, nor alter any obligations of Canada to Indian people pursuant to treaties, statutes and the Constitution, including any rights protected by section 35 of the Constitution Act, 1982, nor affect any self-government rights that may be negotiated in future constitutional negotiations;*

*Canada and Alberta recognize that Indians and Indian Families should be provided with Social Services which take into account their cultures, values, languages and experiences;*

*Canada and Alberta are desirous of developing an arrangement in respect of the funding and administration for Social Services which would be applicable to Indians in the Province of Alberta; and*

*Canada and Alberta acknowledge that Indians have aspirations towards self-government and both therefore wish to support the establishment, management, and delivery by Indians and Indian organizations of child and family services and other community-based Social Services for Indians in Alberta.*

[56] At section 3 of the *Alberta Reform Agreement*, Canada's role is described as:

3. Canada will by this arrangement and in accordance with Appendix II:

(a) arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a Reserve; and

(b) fund Social Services for Indians and Indian Families ordinarily residing on a Reserve comparable to those provided by Alberta to other residents of the Province; and in particular, reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve.

[57] In British Columbia, the *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve* (see Annex, ex. 7 [the *BC Service Agreement*]), which in 2012 replaced a previous memorandum of understanding between the two parties (see Annex, ex. 8 [the *BC MOU*]), provides:

**1.0 Vision**

Governments working together in British Columbia to ensure that First Nation children, youth and their families live in strong, healthy families and sustainable communities where they are connected to their culture, language and traditions.

DIAND and MCFD will contribute to this vision through a strong focus on providing funding and effective services respectively, to achieve meaningful outcomes for vulnerable First Nations children, youth and their families ordinarily resident on reserve.

[58] Finally, in the Yukon, there is the *Funding Agreement* (see Annex, ex. 9 [the *Yukon Funding Agreement*]). The *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Pursuant to Schedule "DIAND-3" of the *Yukon Funding Agreement*,



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

[59] The history and objectives of the FNCFS Program and other related provincial/territorial agreements indicate that the benefit or assistance provided through these activities is to “ensure”, “arrange”, “support” and/or “make available” child and family services to First Nations children and families on reserve and in the Yukon. Without the FNCFS Program, related agreements and the funding provided through those instruments, First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities. The activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon.

[60] Therefore, the essential nature of the FNCFS Program is to ensure First Nations children and families on reserve and in the Yukon receive the “assistance” or “benefit” of culturally appropriate child and family services to that are reasonably comparable to the services provided to other provincial residents in similar circumstances. The other related provincial/territorial agreements provide a similar “assistance” or “benefit”. AANDC extends this “assistance” or “benefit” to First Nations children and families on reserves and in the Yukon Territory.

#### **d. First Nations children and families are extended the “assistance” or “benefit” by AANDC**

[61] First Nations and, in particular, First Nations on reserve, are a distinct public. AANDC extends the assistance or benefit of the FNCFS Program and other related provincial/territorial agreements to this public through FNCFS Agencies and/or the provinces/territory.

[62] Section 1.5 of the *2005 FNCFS National Program Manual* defines the roles and responsibilities of AANDC’s headquarters and regional offices in ensuring the safety and well-being of First Nations children ordinarily resident on reserve. At section 1.5.2, the role of Headquarters includes: “to provide [...] funding on behalf of children and families as authorized by the approved policy and program authorities”; “to lead in the development of FNCFS policy”; and, “to provide oversight on program issues related to the FNCFS policy and to assist regions and First Nations in finding solutions to problems arising in the regions”.

[63] The role of AANDC’s regional offices is outlined at section 1.5.3 of the *2005 FNCFS National Program Manual* and includes: “to interact with Recipients, Chiefs and Councils, Headquarters, the reference province or territory”; “to manage the program and funding on behalf of Canada and to ensure that authorities are followed”; “to assure Headquarters that the program is operating according to authorities and Canada’s financial management requirements”; and, “to establish, in cooperation with Recipients, a process for dealing with disputes over issues relating to the operation of FNCFS”.

[64] The role of the FNCFS Agencies is, among other things, “to deliver the FNCFS program in accordance with provincial legislation and standards while adhering to the terms and conditions of their funding agreements” (*2005 FNCFS National Program Manual* at section 1.5.4). The provinces mandate, regulate and oversee the FNCFS Agencies (see *2005 FNCFS National Program Manual* at section 1.5.5).

[65] In a more summary fashion, the *2012 National Social Programs Manual* defines the differing roles of AANDC, the provinces/territory and the FNCFS Agencies as follows, at page 30:

#### **1.2 Provincial Delegations**

Child welfare is an area of provincial responsibility whereby each province, in accordance with their legislation, delegates authority to FNCFS agencies to manage and deliver child welfare services on reserve.

The FNCFS agencies, delegated by the province, provide protection services to eligible First Nation children, ordinarily resident on-reserve in accordance with provincial legislation and standards.

The Program funds FNCFS agencies to deliver protection (out of the home) and prevention services (in-home) to First Nation children, youth, and families ordinarily resident on reserve.

[66] AANDC has a “Shared Responsibility for Child Welfare” with the FNCFS Agencies and the provinces/territory (see the *NPR* at p.88). It not only provides funding, but policy and oversight as well. It works as a partner with the FNCFS Agencies and provinces/territory to deliver adequate child and family services to First Nations on reserves. It is not a passive player in this partnership, whereby it only provides funding; it strives to improve outcomes for First Nations children and families. In this regard, Ms. Sheilagh Murphy, Director General of the Social Policy and Programs Branch of AANDC, testified about the goal of AANDC social programs:

Well, I mean we have this broad objective or goal to make sure that First Nations on Reserve -- men, women, and children -- are safe, that they are healthy and that they have the means to become productive members of their communities and can contribute to those communities and to Canada more generally as citizens.

(StenoTran Services Inc.’s transcript of *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* (CHRT), Ottawa, Vol. 54 at pp. 17-18 [*Transcript*])

[67] The FNCFS Program is one of the social programs meant to achieve this objective. A “Fact Sheet” developed in October 2006 and previously posted on AANDC’s website (see Annex, ex. 10 [*Fact Sheet*]), demonstrates how the department previously held out the FNCFS Program:

**The First Nations Child and Family Services Program** is one component of a suite of Social Programs that addresses the well-being of children and families. The main objective of the Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to them are comparable to those available to other provincial residents in similar circumstances.

[68] AANDC works directly with its partners, including First Nations, to ensure the objectives of the FNCFS Program and other related provincial/territorial agreements are being met. The *2005 FNCFS Program Manual* provides for consultation among AANDC and First Nations communities with regard to disputes over the program (see ss. 1.5.2-1.5.3). The *Alberta Reform Agreement* specifically provides for consultation with First Nations communities in reviewing the effectiveness of the arrangement (see ss. 13-14). Similarly, the agreements in British Columbia and the Yukon provide for evaluation and review by AANDC of the effectiveness of the programs, services and activities it funds (see ss. 9.2 and 10.1 of the *BC Service Agreement*; and, s. 13.4.1 of the *Yukon Funding Agreement*).

[69] In its previous website *Fact Sheet*, AANDC held out this partnership as follows:

The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.

[70] Ms. Murphy provided some insight into the nature of AANDC's role and partnership in ensuring adequate child and family services to First Nations reserves:

I mean, we continue to be a funder, we don't espouse to be experts in the area of child welfare practice. I mean, our role I think has changed in some ways in that when you look at the progression of this program -- we do audits and we do evaluations, the Auditor General looked at this program in 2008 and again in 2011. We do need to have -- we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nation Agencies are delivering the program according to the legislation and regulation, that they have the capacity to do that, that we are getting to outcomes.

So we are not a passive player in terms of being interested in how First -- I mean, it's program risk management, it is financial risk management, to make sure that they are delivering the program that is within the authorities, that they are paying for the right things that we have been given the money for.

(*Transcript* Vol. 54 at pp. 51-52)

[71] As the above indicates, AANDC plays a significant role in the effort to improve outcomes for First Nations children and families residing on reserve. While AANDC argues that it does not control services, the manner and extent of AANDC's funding significantly shapes the child and family services provided by the FNCFS Agencies and/or the provinces/territory. This will be further elaborated upon in section B of this Analysis below. For the purposes of this "service" analysis, suffice it to say AANDC's involvement in the FNCFS Program and other related provincial/territorial agreements determines whether and to what extent child and family services are provided to First Nations reserves and in the Yukon.

[72] For example, a document entitled *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* authored by three AANDC employees and signed by the Assistant Deputy Minister at the time, Ms. Christine Cram (see Annex, ex. 11), at page 2, explains the ultimate consequence that AANDC's funding can have on FNCFS Agencies:

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

[73] It is AANDC that created the FNCFS Program and its corresponding funding formulas, and who negotiated and administers the provincial/territorial agreements. While the FNCFS Program is set up to work in a tripartite fashion, and the other agreements in a bilateral fashion, at the end of the day it is AANDC's involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard. Again, this will be elaborated upon in section B of this Analysis. However, by way of example, in a document entitled *Reform of the FNCFS Program in Québec (Information for the Deputy Minister)*, at pages 1-3 (see Annex, ex. 12), two AANDC employees explain the Department's decision not to transition Québec to a new funding methodology:

INAC has been in discussion with the First Nations of Québec and Labrador Health and Social Services Commission (Commission) and Québec's Ministry of Health and Social Services since June, 2007 regarding transitioning the Quebec FNCFS Agencies to an enhanced prevention approach.

The three parties have developed a Partnership for Results Framework that outlines the strategic direction, key outcomes and performance indicators for FNCFS on reserve in Québec. Both the First Nations leadership and the Province have submitted letters of endorsement for this initiative.

In November of 2007, a number of issues were raised by the First Nations of Québec and Labrador Health and Social Services Commission. The issues largely pertain to the overall funding formula that was proposed as a model for the Québec First Nations agencies (See Annex A for detailed list of concerns and our proposed action).

A decision was made in December 2007, to move forward in the transition to the enhanced prevention focused approach without Québec in order to give the Department time to address First Nations' concerns with the transition process.

The Department has not yet informed Québec First Nations and the Province of Québec of the decision to delay the transition to the Enhanced Prevention Focused Approach in Québec.

[...]

There is a risk that once the Commission and Québec First Nations are informed of the decision that was made; they will not want to proceed with the transition to the new enhanced prevention-focused approach. It is hoped that the delivery of messaging from a senior official will reassure the First Nations of the Department's commitment and enable the working level to address concerns raised and move the transition forward.

[74] This document is an official position to be adopted by AANDC's Deputy Minister, informed by high level AANDC employees. It illustrates that, despite a tripartite relationship where its partners support a new funding approach, AANDC is the one who controls the process and makes the final decision in determining the approach to be taken.

[75] Furthermore, AANDC has the power to withhold funds if FNCFS Agencies and/or the provinces/territory do not comply with its funding requirements. This could result in agencies closing their doors and, as a consequence, inadequate child and family services being provided to First Nations children and families on reserves and in the Yukon (see testimony of William McArthur, Manager, Social Programs, British Columbia Regional Office, AANDC, *Transcript* Vol. 64 at pp. 45-47).

[76] All the above indicates a public relationship between AANDC and First Nations children and families in the provision of child and family services. In sum, AANDC extends the FNCFS Program and other related provincial/territorial agreements as a partnership, including with First Nations, to improve outcomes for First Nations children and families on reserve. Ultimately, through the FNCFS Program, its funding formulas and the related provincial/territorial agreements, AANDC has a direct impact on the child and family services provided to First Nations children and families living on reserves and in the Yukon Territory.

[77] This public relationship between AANDC and First Nations on reserves and in the Yukon in the provision of child and family services is reinforced by the federal government's constitutional responsibilities and its special relationship with Aboriginal peoples.

**e. Section 91(24) of the Constitution Act, 1867**

[78] The fact that AANDC does not directly deliver First Nations child and family services on reserve, but funds the delivery of those services through FNCFS Agencies or the provincial/territorial governments, does not exempt it from its public mandate and responsibilities to First Nations people. AANDC argues that child welfare services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, that position does not take into consideration Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*.

[79] In Canada, legislative power is divided between the federal government and the provincial/territorial governments. As stated by the Supreme Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paragraph 22 (*Central Western Bank*):

...federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[80] The Supreme Court also noted that “the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society” (*Central Western Bank* at para. 23). This is referred to as the “living tree” doctrine.

[81] The legislative powers defined in the *Constitution Act, 1867* are deemed to be exclusive to the extent that, even if Parliament does not legislate in its fields of jurisdiction, the provinces/territories are not allowed to do so (see *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.) at p. 588). However, the Court has indicated clearly that this doctrine of inter-jurisdictional immunity is to be construed narrowly, among other reasons, so as not to allow any legal vacuum. It is used “...to protect that which makes certain works or undertakings, things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction” (*Central Western Bank* at para. 41). As also noted in *Central Western Bank* at paragraph 42:

Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

[82] Despite the doctrine of inter-jurisdictional immunity, cooperative federalism can exist in situations where federal and provincial authorities connect. In the recent case of *Quebec (A.G.) v. Canada (A.G.)*, 2015 SCC 14 (*Canadian Firearms Registry*), where Quebec challenged the constitutionality of the federal government's decision to destroy the firearms registry, the Supreme Court found itself divided on the scope of cooperative federalism. Nonetheless, the majority in *Canadian Firearms Registry* held that cooperative federalism cannot override or modify the constitutional division of powers:

[17] Cooperative federalism is a concept used to describe the “network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process [...] From this descriptive concept of cooperative federalism, courts have developed a legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action [...] With respect to interjurisdictional immunity, for example, the principle of cooperative federalism has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government: “In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest” (*Canadian Western Bank*, at para. 37).

[18] However, we must also recognize the limits of the principle of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 53. This is especially the case with regard to the division of powers:

... the text of the federal constitution as authoritatively interpreted in the courts remains very important. It tells us who can act in any event. In other words, constitutionally it must always be possible in a federal country to ask and answer the question — What happens if the federal and provincial governments do not agree about a particular measure of co-operative action? Then which government and legislative body has power to do what?

(Emphasis added; footnote omitted)

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities. In a comparable situation argued under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the Supreme Court stated in *Eldridge* at paragraph 42:

...the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[84] Similarly, AANDC should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territory. AANDC should not be allowed to escape the scrutiny of the *CHRA* because it does not directly deliver child and family services on reserve.

[85] As explained above, despite not actually delivering the service, AANDC exerts a significant amount of influence over the provision of those services. Ultimately, it is AANDC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit AANDC holds out and intends to provide to First Nations children and families.

[86] Parliament's constitutional responsibility towards Aboriginal peoples, in a situation where a federal department dedicated to Aboriginal affairs oversees a social program and negotiates and administers agreements for the benefit of First Nations children and families, reinforces the public relationship between AANDC and First Nations in the provision of the FNCFS Program and the related provincial/territorial agreements.

#### **f. The Crown's fiduciary relationship with Aboriginal peoples**

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a “political trust of the highest obligation”:

The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.

(*St. Ann's Island Shooting And Fishing Club v. The King*, 1950 CanLII 28 (SCC), [1950] SCR 211 at p. 219 [per Rand J.])

[91] However, this “political trust” was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to at the time of the surrender, the Supreme Court qualified the relationship between the Crown and Aboriginal peoples as a fiduciary relationship in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR.335, at page 376 (*Guerin*):

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[92] This special relationship is also rooted in the large degree of discretionary control assumed by the Crown over the lives and interests of Aboriginal peoples in Canada:

English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow, supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as “fiduciary” in *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335.

(*Mitchell v. M.N.R.*, 2001 SCC 33, at para. 9)

[93] After the entry into force of section 35 of the *Constitution Act, 1982*, in *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, at page 1108, the Supreme Court further confirmed and defined the duty of the Crown to act in a fiduciary capacity as the “general guiding principle” for section 35:

In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 1981 CanLII 1657 (ON CA), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial and, contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[94] This general guiding principle is not limited to section 35(1) of the *Constitution Act, 1982*, but has broader application as confirmed by the Supreme Court in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at paragraph 79 (*Wewaykum*).

[95] First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, “the degree of economic, social and proprietary control and discretion asserted by the Crown” leaves First Nations children and families “...vulnerable to the risks of government misconduct or ineptitude” (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel’s analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in *Haida Nation*, at paragraph 17:

Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[96] That being said, it is also well established that this fiduciary relationship does not always give rise to fiduciary obligations. While the fiduciary relationship may be described as general in nature, requiring that the Crown act in the best interest of Aboriginal peoples, fiduciary obligations are specific, related to precise aboriginal interests:

This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically [...]

But there are limits. The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

(*Wewaykum* at paras. 80-81)

[97] The Supreme Court has relied on private law concepts to define circumstances that can give rise to a fiduciary obligation because, although the Crown’s obligation is not a private law duty, it is nonetheless in the nature of a private duty, susceptible of giving rise to enforceable obligations :

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the “political trust” cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians’ behalf does not of itself remove the Crown’s obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians’ interest in land is an independent legal interest. It is not a creation of either the legislative or executive



branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.

(*Guerin* at p. 385)

[98] *Guerin* stands for the principle that a fiduciary obligation on the Crown towards Aboriginal peoples arises from the fact that their interest in land is inalienable except upon surrender to the Crown. In another case where the Supreme Court found that the Crown has a fiduciary obligation to prevent exploitative bargains in the context of a surrender of reserve land, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (SCC), [1995] 4 SCR 344 at paragraph 38, it referred to private law criteria to define a situation that could give rise to a fiduciary obligation:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[99] The present case does not raise land related issues. The Panel is aware that fiduciary obligations have yet to be recognized by the Supreme Court in relation to Aboriginal interests other than land outside the framework of section 35(1) of the *Constitution Act, 1982* (see *Wewaykum* at para. 81). However, the Panel is also aware that in *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 SCR 99, at paragraph 60, Wilson J. held that fiduciary duties did not apply only to legal and economic interests but could extend to human and personal interests:

To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.

[100] In fact, in *Wewaykum* the Supreme Court noted that since the *Guerin* case the existence of a fiduciary obligation has been argued in a number of cases raising a variety of issues (see at para. 82). While it did not comment on these cases, the Court in *Wewaykum*, at paragraph 83, did state that a case by case approach would have to focus on the specific interest at issue and whether or not the Crown had assumed discretionary control giving rise to a fiduciary obligation:

I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature [...], and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[101] Recent case law from the Supreme Court confirms that a fiduciary obligation may also arise from an undertaking. The following conditions are to be met:

In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36 (*Elder Advocates Society*); see also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 50 [*Manitoba Metis Federation*])

[102] AANDC argues that there must be an undertaking of loyalty by the Crown to the point of forsaking the interests of all others in favour of those of the beneficiaries for a fiduciary obligation to apply (see *Elder Advocates Society* at para. 31; and, *Manitoba Metis Federation* at para. 61).

[103] However, in *Elder Advocates Society*, at paragraph 48, it should be noted that the Supreme Court held that the necessary undertaking was met with respect to Aboriginal peoples:

In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The FNCFS Program and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the FNCFS Program through policy and other administrative directives. It also exercises discretionary control over the application of the other related provincial/territorial agreements as First Nations are not party to their negotiation. The FNCFS Program and other related provincial/territorial agreements also have a direct impact on a vulnerable category of people: First Nations children and families in need of child and family support services on reserve.

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees with the AFN, Caring Society and the COO that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté*, 1996 CanLII 170 (SCC), [1996] 3 SCR 139 at paragraph 56:

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

[107] Similarly, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 26 (*Doucet-Boudreau*), the Supreme Court stated the following with regard to the relation between language and culture:

This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

... any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[108] In certifying a class action based on the operation of the child welfare system on reserve in Ontario, Justice Belobaba on the Ontario Superior Court of Justice, in *Brown v. Canada (AG)*, 2013 ONSC 5637 at paragraph 44, expressed his views on the existence of a fiduciary duty based on the discretionary Crown control over Aboriginal interests in culture:

it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were “wards of the state whose care and welfare are a political trust of the highest obligation”; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as “specific indigenous interests” which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA*.

[110] Suffice it to say, AANDC’s development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current “services” analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

### **iii. Summary of findings**

[111] Overall, the Panel finds the evidence indicates the FNCFS Program and other related provincial/territorial agreements are held out by AANDC as assistance or a benefit that it provides to First Nations people. The FNCFS Program and other provincial/territorial agreements were created and negotiated on behalf of First Nations by AANDC, a federal government department with the mandate and mission to do so. First Nations are a distinct public, served by AANDC in the context of a unique constitutional and fiduciary relationship. AANDC has undertaken to ensure First Nations living on reserve receive culturally appropriate child and family services that are reasonably comparable to the services provided

to other provincial residents in similar circumstances. Therefore, the Panel finds there is a clear public nature and relationship with First Nations in AANDC's provision of the FNCFS Program and other related provincial/territorial agreements.

[112] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

[113] As a result, and for the reasons above, the Panel finds AANDC provides a service through the FNCFS Program and other related provincial/territorial agreements. In the following pages, the Panel will examine the impacts of AANDC's service and, specifically, how AANDC's method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

**B. First Nations are adversely impacted by the services provided by AANDC and, in some cases, denied services as a result of AANDC's involvement**

[114] Before dealing with how the FNCFS Program and other related provincial/territorial agreements are funded, it is helpful to have a basic understanding of how child welfare services are provided in Canada. Dr. Cindy Blackstock, Executive Director of the Caring Society, provided helpful testimony in this regard (see *Transcript* Vol. 1 at pp. 110, 112, 124-129, 132-136, 138-142 and 151; see also Annex, ex. 1).

**i. General child welfare principles**

[115] As indicated earlier, child welfare in Canada includes a range of services designed to protect children from abuse and neglect and to support families so that they can stay together. The main objective of social workers is to do all they can to keep children safely within their homes and communities. There are two major streams of child welfare services: prevention and protection.

[116] Prevention services are divided into three main categories: primary, secondary and tertiary. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education on the healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. As opposed to separating a child from his or her family, tertiary prevention services are designed to be "least disruptive measures" that try and mitigate the risks of separating a child from his or her family. Early interventions to provide family support can be quite successful in keeping children safely within their family environment, and provincial legislation requires that least disruptive measures be exhausted before a child is placed in care.

[117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child

“in care”. The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.

[118] The child welfare system is typically called into action when someone has concerns about the safety or well-being of a child and reports these concerns to a social worker. The first step is for the social worker to do a preliminary assessment of the report in order to decide whether further investigation is called for. If the social worker concludes that an investigation is warranted, he or she can meet with family members and can interview the child. The child is not removed from the home during the investigation unless his or her safety is at risk. The social worker will develop a plan of action for the child and his or her family in coordination with the child’s extended family and professionals such as teachers, early child care workers and cultural workers. A whole range of services may include personal counselling, mentoring by an Elder, access to childhood development programs or to programs designed to enhance the homemaking and parental skills of the caregiver.

[119] There are circumstances, however, when the risk to the child’s safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

[120] The major categories of child maltreatment are: sexual, physical, or emotional abuse, or exposure thereto, and neglect. For First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic needs. Poverty, poor housing and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services.

## **ii. The allocation of funding for First Nations child and family services**

[121] AANDC funds child and family services on reserves and in the Yukon in various ways. At the time of the complaint, there were 105 FNCFS Agencies in the 10 provinces across Canada (104 at the time of the hearing). The FNCFS Program, applies to most of the FNCFS Agencies in Canada, uses two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach (the EPFA). In Ontario, funding is provided through the *1965 Agreement*. In certain parts of Alberta and British Columbia, funding is provided through the *Alberta Reform Agreement* and the *BC MOU* and, since 2012, the *BC Service Agreement*. Finally, in the Yukon funding is allocated pursuant to the *Yukon Funding Agreement* (see testimony of Ms. Barbara D’Amico, Senior Policy Analyst at the Social and Policy Branch of AANDC, *Transcript* Vol. 50 at p. 141). Each method of funding is addressed in turn.

### **a. The FNCFS Program**

[122] Beginning with the FNCFS Program, AANDC’s authorities require that, before entering into a funding arrangement with an FNCFS Agency (or Recipient), an agreement be in place between the province or territory and the agency that meets the requirements of AANDC’s national FNCFS Policy (see *2005 FNCFS National Program Manual* at s. 4.1). Thereafter, funding is provided through a comprehensive funding arrangement (CFA), which is “...a program-budgeted funding agreement that [AANDC] enters into with Recipients...” (*2005 FNCFS National Program Manual* at s. 4.4.1). According to the *2005 FNCFS National Program Manual* at section 4.4.1:

[A CFA] contains components funded by means of a Contribution, which is a reimbursement of eligible expenses and Flexible Transfer Payments, which are formula funded. Surpluses from the Flexible Transfer Payment may be retained by the Recipient provided the terms and conditions of the CFA have been fulfilled. The FNCFS program expects that all surplus money will be used for FNCFS. It is also expected that Recipients will absorb any deficits.

[123] Funding for FNCFS Agencies is determined in accordance with AANDC “authorities” (see *2005 FNCFS National Program Manual* at s. 1.4). Those “authorities” are obtained from the federal government through Cabinet and Treasury Board and “...are reflected in the [...] Program Directive” (*2005 FNCFS National Program Manual* at s. 1.4.5). The Program Directive, also called Directive 20-1 and found at Appendix A of the *2005 FNCFS National Program Manual*, “...interprets the authorities and places them into a useable context” (*2005 FNCFS National Program Manual* at s. 1.4.5). Directive 20-1 is AANDC’s “...national policy statement on FNCFS” (see definition of “Program Directive 20-1 CHAPTER 5 (Program Directive)”, *2005 FNCFS National Program Manual* at s. 7, p. 51). It is also:

...a blueprint on how INAC will administer the FNCFS program from a national perspective, it is also intended to be a teaching document, for new staff at both INAC Headquarters and Regions. The combination of the national manual and the regional manuals should create a clear picture of INAC’s role in FNCFS in Canada

(*2005 FNCFS National Program Manual* at Introduction, p. 2)

[124] Prior to 2007, around the time of the Complaint, all provinces and the Yukon, except Ontario, functioned under Directive 20-1. Currently, New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon are subject to the application of Directive 20-1.

[125] In line with the FNCFS Program, the principles of Directive 20-1 include a commitment to “...expanding First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances [...] in accordance with the applicable provincial child and family services legislation” (see *2005 FNCFS National Program Manual* at Appendix A, ss. 6.1 and 6.6). Furthermore, Directive 20-1 supports “...the creation of First Nations designed, controlled and managed services” (see *2005 FNCFS National Program Manual* at Appendix A, s. 6.2). Under Directive 20-1, funding for FNCFS agencies is determined through two separate categories: operations and maintenance.

[126] Operational funding is intended to cover operations and administration costs for such items as salaries and benefits for agency staff, travel expenses, staff training, legal services, family support services and agency administration, including rent and office expenditures (see *2005 FNCFS National Program Manual* at s.2.2.2 and at Appendix A, s. 19.1). It is calculated using a formula based on the on-reserve population of children aged 0-18 as reported annually by First Nations bands across Canada. The calculation of the operations funding is done annually by AANDC as of December 31 of each year, based on the population statistics of the preceding year (see *2005 FNCFS National Program Manual* at s. 3.2). FNCFS Agencies are eligible to receive a fixed administrative allocation pursuant to the following formula:

A fixed amount \$143,158.84 per organization + \$10,713.59 per member band + \$726.91 per child (0-18 years) + \$9,235.23 x average remoteness factor + \$8,865.90 per member band x average remoteness factor + \$73.65 per child x average remoteness factor + actual costs of the per diem rates of foster homes, group homes and institutions established by the province or territory.

(see *2005 FNCFS National Program Manual* at Appendix A, s. 19.1(a); see also *2005 FNCFS National Program Manual* at ss. 3.2.1-3.2.3)

[127] The adjustment factor is multiplied by \$9,235.23, the remoteness factor is multiplied by \$8,865.90 times the number of bands within the agency's catchment area and the child population (0 to 18 years) is multiplied by \$73.65 times the remoteness factor (see *2005 FNCFS National Program Manual* at s. 3.2.3). The remoteness factor takes into account such things as the distance between the First Nation and a service centre, road access, and availability of services. It can range from 0 to 1.9. If multiple communities are served by an FNCFS Agency, the remoteness factors of each of the communities is averaged to come to the 'average remoteness factor' (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 28-29).

[128] The amounts in the operational funding formula are based on certain assumptions emanating from the time it was put in place in the early 1990's:

- On average, 6% of the on reserve child population is in care;
- On average, 20% of families on reserve require child and family services or are classified as multi-problem families;
- One child care worker and one family support worker for every 20 children in care;
- One supervisor and one support staff for every 5 workers;
- Wages based on average salaries in Ontario and Manitoba

(see Annex, ex. 13 at pp. 7-8 [*Wen:De Report One*]).

[129] According to Ms. D'Amico, the 6% assumption regarding children-in-care is based on the 2007 national average and it provides FNCFS Agencies with stability. That is, even if an agency has or later achieves a smaller percentage of children-in-care, their budget is not affected. The 20% of families requiring services is determined using an assumption that there are on-average three children per family. By dividing the total on-reserve child population by three, AANDC arrives at the number of families it believes would normally be served by the applicable FNCFS Agency. It then takes 20% of that population calculation as a variable in determining the FNCFS Agency's budget (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 25-31).

[130] In the first four years of operation of a new FNCFS Agency, the funding formula is gradually implemented at a rate of 75% in the first year, 85% the second year, 95% the third year and 100% in the fourth year [see *2005 FNCFS National Program Manual* at section 3.2.1 and Appendix A, s. 19.1(c)]. Furthermore, for agencies that serve less than 1,000 children, the fixed maximum amount of \$143,158.84 is decreased as follows: \$71,579.43 (501-800 children); \$35,789.10 (251-500); and, regions with a child population of 0 to 250 receive no administrative allocation [see *2005 FNCFS National Program Manual* at Appendix A, s. 19.2(b)]. However, in British Columbia, the full allocation for population begins with at least 801 children (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 23).

[131] Maintenance funding is intended to cover the actual costs of eligible expenditures for maintaining a First Nations child ordinarily resident on reserve in alternate care out of parental home. Children must be taken into care in accordance with provincially or territorially approved legislation, standards and rates for foster home, group home and institutional care. FNCFS Agencies are required to submit monthly invoices for children in care out of the parental home and are to be reimbursed on the basis of actual expenditures (see *2005 FNCFS National Program Manual* at ss. 3.3.1-3.3.2 and Appendix A, s. 20.1).

[132] Until 2011, FNCFS Agencies in British Columbia were funded on a per diem structure, but have since transitioned to reimbursement for maintenance expenses based on actual costs. However, if funding based on actuals provides for less funding, the previous per diem funding levels are maintained as part of a plan to eventually transition FNCFS Agencies in that province to the EPFA (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 35-36; and, testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 150-151).

[133] FNCFS Agencies also have the option of applying for “flexible” funding for maintenance under Directive 20-1 (see *2005 FNCFS National Program Manual* at Appendix A, s. 20.2). This option allows agencies to receive a payment of their total operational funding allocation, along with a historically based estimate of their maintenance costs. This flexible funding option is meant to provide FNCFS Agencies with increased flexibility to re-profile maintenance funding to provide increased resources for prevention. To access this flexible funding option an FNCFS Agency must undergo an assessment and receive approval from AANDC’s regional office, along with approval from AANDC Headquarters. In 2006, only 7 out of 105 FNCFS Agencies utilized the flexible funding option (see Annex, ex. 14 at p. 5 [2007 *Evaluation of the FNCFS Program*]).

[134] The monetary amounts reflected in Directive 20-1 reflect 1995-1996 values and have not been significantly modified since that time, despite the directive providing for them to be increased by 2% every year, subject to the availability of resources (see *2005 FNCFS National Program Manual* at Appendix A, s. 22.00; and, testimony of W. McArthur, *Transcript* Vol. 64 at pp. 3-4). Furthermore, maximum funding by AANDC is 100 percent of eligible costs. FNCFS Agencies may be required to repay funds to AANDC if their total funding from all sources, including from voluntary sector sources, exceeds eligible expenditures and when AANDC’s contribution thereto is in excess of \$100,000 (see *2012 National Social Programs Manual* at p. 10, s. 11.0 [the stacking provisions]).

[135] Since 2005, an 8.24 percent increase has been applied to each FNCFS Agency’s total allocation under Directive 20-1 (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 32; and, testimony of B. D’Amico, *Transcript* Vol. 51 at p. 17). Additional funding is also provided in New Brunswick for the Head Start program and for in-home care as a precursor to the transition to the EPFA (see testimony of B. D’Amico, *Transcript* Vol. 51 at pp. 169-173).

[136] That is, since 2007, AANDC has transitioned the funding model for certain provinces under the FNCFS Program from Directive 20-1 to the EPFA. An agreement was reached to implement the EPFA in Alberta and Saskatchewan in 2007, Nova Scotia in 2008, Québec in 2009, Prince Edward Island in 2009 and Manitoba in 2010.

[137] Under EPFA, prevention is included as a third funding stream to operations and maintenance. Prevention services are “...designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care or the amount of time a child remains in Alternate Care” (*2012 National Social Programs Manual* at p. 33, s. 2.1.17; see also p. 38, s. 4.4.1). Eligible expenses under this prevention funding stream include: salaries and benefits for prevention and resource workers, travel, paraprofessional services, family support services, mentoring services for children, home management services, and non-medical counselling services not covered by other funding sources (see *2012 National Social Programs Manual* at p. 38, s. 4.4.2).

[138] Implementation of the EPFA begins with tri-partite discussions between the province, First Nation community and AANDC. From the tripartite discussions, a Tripartite Accountability Framework is developed outlining the goals, objectives, performance indicators, and roles and responsibilities of the parties. Using the Tripartite Accountability Framework as a benchmark, the FNCFS Agency prepares an initial 5-year business plan, which is subject to AANDC review and acceptance by the province. The business plan is a pre-requisite in order to receive funding under the EPFA (see *2012 National Social Programs Manual* at p. 37, s. 4.3; see also testimony of B. D’Amico, *Transcript* Vol. 50 at pp. 146-152).

[139] Once the framework and business plan are in place, the costing discussions take place. According to the *2012 National Social Programs Manual*, funding for operations and prevention services are based on a cost-model developed at regional tri-partite tables and are consistent with reasonable comparability to the respective province within AANDC’s program authority (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). That is, the EPFA is to be tailored to each jurisdiction using a formula made-up of line-items that are identified at tripartite tables. The determination of staffing numbers and which line items to include in the formula, and the dollar values assigned to each of those line items, is based on variables provided by the province (for example staffing ratios, caseload ratios,



and salary grades). Those amounts are then worked into AANDC's operations and prevention cost-model. A cost-model is utilized because the provinces do not always use a funding formula that AANDC can replicate (see testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 56, 150-151; and, Vol. 51 at pp.18-66, 153-154).

[140] Similar to Directive 20-1, the formula for the EPFA is based on the child population served by the FNCFS Agency and the assumptions that a minimum of 20% of families are in need of child and family services and that 6% of children are in care (although in Manitoba an assumption of 7% of children in care is used in the EPFA formula). The prevention focused services component of the EPFA formula is largely based on the salaries needed for service delivery staff, where the amount of staff needed is calculated based on the assumed amount of children in care and families in need of services. The estimated amount of children in care is calculated by multiplying the child population served by the FNCFS Agency by the assumed percentage of children in care. As mentioned above, the number of families in need of services is calculated by taking the total child population served by the FNCFS Agency, dividing it by the average amount of children per First Nation family (3), and then multiplying that number by the assumed percentage of families in need of prevention services (20%) (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 24-31).

[141] The calculated estimates of children in care and families in need of care are then used to determine the amount of service delivery staff needed for the FNCFS Agency. Similar to Directive 20-1, provincial ratios in terms of social workers per children in care or families in need, supervisors per amount of socials workers, and support staff per amount of workers are used to estimate the staff needed for specific positions. The average salaries for those positions within the province, at the time EPFA is implemented, then make up the bulk of funding provided for the prevention focused services component of the funding formula (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 32-79). As Ms. Murphy explained:

We are from a funding perspective, so how the provinces fund is what we want to stay comparable with, not the types of services that the province funds -- or provides, excuse me.

[...]

And the only way that we could find that, a way to be comparable, was to identify the variables, those calculation variables; so the salary grids, the ratios – the staffing ratios, the caseload ratios. Those were the only funding tools that we could find to be comparable, and that is why we had incorporated that into the EPFA formula.

(*Transcript* Vol. 51 at pp. 178-179)

[142] Eligible expenditures for maintenance and operations under the EPFA are outlined at sections 3.4 and 3.5 of Directive 20-1 (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). AANDC expects FNCFS Agencies to manage their operations and prevention costs within the budgets they have (see testimony of S. Murphy, *Transcript* Vol. 54 at p. 170). However, the EPFA does allow agencies flexibility in moving funding from one stream (operations, maintenance or prevention) to another "...in order to address needs and circumstances facing individual communities" (*2012 National Social Programs Manual* at p. 38, s. 4.4.1).

[143] Under EPFA, funding for prevention and operations is determined at the beginning of a five year period on a fixed cost basis (see testimony of B. D'Amico, *Transcript* Vol. 53 at p.16). EPFA funding is then rolled-out over a 3-4 year period, where the FNCFS Agency receives 40% of funding in year 1, 60% in year 2 and between 80% and 100% in year 3. The full funding amount is provided by year 4 (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 145-146). Once EPFA is fully implemented, the only revision in the funding formula from year to year is to account for the child population served by the FNCFS Agency. EPFA does not provide additional funding for increases in operations or prevention

costs over time, such as for changes to professional services rates or incremental increases in salaries (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 147-150; see also *2012 National Social Programs Manual* at p. 37, s. 4.1)

[144] For example, in Alberta, where the EPFA was first implemented in 2007, the average salaries for service delivery staff from that initial implementation of the EPFA, based on 2006 values, are still being applied eight years later to the calculation of 2014 budgets (see testimony of B. D'Amico, *Transcript* Vol. 52 at p. 153; and, testimony of Ms. Carol Schimanke, Manager of Social Development, Child and Family Services Program, AANDC Alberta Regional Office, *Transcript* Vol. 61 at pp. 115-116). According to Ms. D'Amico, the rationale behind this is as follows:

Because what the idea of EPFA was that if you placed more money in prevention and did a lot more early intervention work, your maintenance costs would go down. When those maintenance costs go down, that money could be reinvested into operations.

So the idea -- and this is not in practice, but the idea behind this was for it -- for the Agencies to be self-sufficient and be able to move the monies from one stream to another. So that's why there was no escalator included in here.

This is an issue we are now reviewing about what happens after year five if the maintenance isn't supplying the operations anymore, or never did, so, what if that theory doesn't work?

(*Transcript* Vol. 52 at pp. 150-151)

[145] Ms. D'Amico specified that in practice, given that some FNCFS Agencies are doing more intake and investigations as part of their prevention strategies, this has led to more kids in care and no reduction in maintenance costs (see *Transcript* Vol. 51 at pp. 91-92). The EPFA funding formula also does not include funds for intake and investigation.

[146] Maintenance funding under the EPFA is budgeted annually based on actual expenditures from the previous year (see *2012 National Social Programs Manual* at p. 38, section 4.4.1). AANDC "re-bases" an agency's maintenance budget each year. For example, if an agency's maintenance budget is \$100 in year one, but its expenditures for that year total only \$80, AANDC will reduce its maintenance budget in the second year to \$80. If in the second year that agency's number of children in care increases unexpectedly, the agency must work within its existing budget to manage those costs in the interim.

[147] In other words, if maintenance costs are greater than the set amount of maintenance funding, the FNCFS Agency must recover the deficit from its operations and/or prevention funding streams. If there is still a deficit in maintenance, AANDC has some funds that it holds back centrally at the beginning of each fiscal year to help manage those types of situations. When that fund is depleted, AANDC reallocates money from other programs within AANDC to cover the maintenance costs. If an FNCFS Agency has a surplus from its maintenance budget, the agency can keep it and re-apply it to other eligible expenses (see testimony of C. Schimanke, *Transcript* Vol. 61 at pp. 91, 96-98; testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 174-181; and, testimony of S. Murphy, *Transcript* Vol. 54 at pp. 167-168, 172-174).

[148] AANDC receives a 2% increase in its budget for Social Programs every year. However, for the FNCFS Program, that 2% increase is calculated based on the budget of the FNCFS Program prior to the implementation of the EPFA, at about \$450 million. Ms. Murphy estimated the current budget of the FNCFS Program, with the implementation of the EPFA, to be approximately \$627 million. In her words:

So the difference in that, between that 450 million has been made up of some of the two percent -- the portion of growth, some of it's the incremental investments that have come to the Department through the EPFA for those six jurisdictions and the rest of it is resource re-allocations.

(*Transcript* Vol. 54 at pp. 177, 189-191; see also, Vol. 55 at pp. 188-189)

### **b. Reports on the FNCFS Program**

[149] The FNCFS Program has been examined in multiple reports: the First Nations Child and Family Services Joint National Policy Review, referred to above as the *NPR*, in 2000; three related studies from 2004-2005 referred to as the Wen:De reports; and, two Auditor General of Canada reports in 2008 and 2011, along with follow-up reports thereon by the House of Commons Standing Committee on Public Accounts.

### ***First Nations Child and Family Services Joint National Policy Review Final Report***

[150] The *NPR* was published in 2000. It is a collaborative report by AANDC and the Assembly of First Nations. Although the *NPR* pre-dates the complaint by about 8 years, its study of the impacts of Directive 20-1 is still relevant given that the funding formula still applies to many FNCFS Agencies and in the Yukon. The report also outlines a rigorous methodology and consultation in arriving at its conclusions. The Panel finds this early study of Directive 20-1 informative and a useful starting point in understanding the impacts of AANDC's funding formula on First Nations children and families on reserves.

[151] The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:

First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[152] According to the *NPR*, "Program Directive 20-1 was developed to provide equity, predictability and flexibility in the funding of first nations child and family services agencies" (at p.10). A principle of Directive 20-1 is that AANDC is committed to the expansion of child and family services on reserve to a level comparable to the services off reserve in similar circumstances (see *NPR* at p. 20). This is AANDC's own standard and it expects FNCFS Agencies to abide by it:

FNCFS Agencies are expected through their delegation of authority from the provinces, the expectations of their communities and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20-1.

(*NPR* at p. 83, emphasis added)

[153] However, the *NPR* found the funding formula under Directive 20-1 inhibited FNCFS Agencies' ability to meet the expectation of providing a comparable range of child and family services on reserve for a number of reasons:

- The formula provides the same level of funding to agencies regardless of how broad, intense or costly, the range of service is (at p. 83).
- Variance in the definition of maintenance expenses from region to region, resulting in AANDC rejecting maintenance expenses that ought to have been reimbursed in accordance with provincial/territorial legislation and standards (at pp. 13-14, 84).
- Insufficient funding for staff and not enough flexibility in the funding formula for agencies to adjust to changing conditions (increases in number of children coming into care; development

of new provincial/territorial programs; or, routine price adjustments for remoteness) (at pp. 13-14, 65, 70, 92-93, 96-97).

- There has not been an increase in cost of living since 1995-1996 (at pp. 18, 26).
- Funding only provided to new FNCFS agencies for 3 year and 6 year evaluations; however, provincial legislation requires on-going evaluations (at p. 11).
- First Nations have to comply with the same administrative burden created by change in provincial legislation but have not received any increased resources to meet those responsibilities, contradicting the principle of Directive 20-1 (at p. 12).
- Unrealistic amount of administration support to smaller agencies, often compounded by remoteness (at pp. 14, 97).
- The maximum annual budgetary increase of 2% did not reflect the average annual increase of 6.2% in the FNCFS Agencies (at p. 14).
- The average per capita per child in care expenditure was 22% lower than the average in the provinces (at p. 14).
- The formula does not provide adequate resources to allow FNCFS Agencies to do legislated/targeted prevention, alternative programs and least disruptive/intrusive measures for children at risk (at p. 120).

[154] The *NPR* made 17 recommendations to address these areas of concern with respect to Directive 20-1, including investigating a new methodology for funding operations. It was recommended that the new funding methodology consider factors such as work-load case analysis, national demographics and the impact on large and small agencies, and economy of scale (see *NPR* at pp. 119-121). A further recommendation was to develop a management information system in order to ensure the establishment of consistent, reliable data collection, analysis and reporting procedures amongst AANDC, FNCFS Agencies and the provinces/territory (see *NPR* at p. 121).

### ***The Wen:De Reports***

[155] The *NPR* led to the establishment of the Joint National Policy Review National Advisory Committee (the NAC) in 2001. The NAC involved officials from AANDC, the AFN and FNCFS Agencies. One of the tasks of the NAC was to explore how to change parts of Directive 20-1 in line with the *NPR* recommendations. Funded by AANDC, the NAC commissioned further research in order to establish that revisions of the FNCFS Program and Directive 20-1 were warranted. Three reports were produced on the subject: the Wen:De Reports. Each of the three reports outlines clearly the methodology used to arrive at its findings and explains those findings in great detail. Three important contributing authors of the Wen:De reports, Dr. Cindy Blackstock, Dr. John Loxley, and Dr. Nicolas Trocmé testified at length about the reports at the hearing and confirmed the findings in these reports.

[156] The objective of the first Wen:De report in 2004 was to identify three new options for FNCFS Agency funding and the research agenda needed to inform each of those options (see *Wen:De Report One* at p. 4). The authors explain how they reviewed pertinent literature from Canada and abroad; conducted interviews with informed observers and participants, including the Operations Formula Funding Design Team; and met with six FNCFS Agencies representing differing agency sizes, service contexts, regions and cultural groups (see *Wen:De Report One* at p. 6).

[157] The authors noted that the concerns and challenges expressed by the FNCFS Agencies that it interviewed were in line with the *NPR* findings and recommendations, such as the lack of funding for prevention services, legal services, capital costs, management information systems, culturally based programs, caregivers, staff salaries and training, and costs adjustments for remote and small agencies (see *Wen:De Report One* at pp. 6, 8).

[158] Notably, the report found FNCFS Agencies “...are not funded on the basis of a determination of need but rather on population levels” resulting in “...significant regional variation in the implementation of Directive 20-1 as funding officials within the department adapted to their local context” (*Wen:De Report One* at p. 5). As a result, it concluded:

Overall, our findings affirm that the findings and recommendations of the NPR which was completed in June of 2000 continue to be reflective of the concerns that FNCFS are experiencing today. [...] All agencies agreed that immediate redress of inadequate funding was necessary to support good social work practice in their communities.

(*Wen:De Report One* at p. 6)

[159] *Wen:De Report One* presents three options to address this conclusion: (1) redesign the existing funding formula; (2) follow the funding model of the province/territory in which the agency is located; or, (3) a new First Nations based funding formula that funds agencies on the basis of community needs and assets, along with the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve (see *Wen:De Report One* at pp. 7-13).

[160] The second *Wen:De* report analyzed the three options presented in the first report (see Annex, ex. 15 [*Wen:De Report Two*]). To do so, the various authors of the report conducted literature reviews and key informant interviews with twelve sample FNCFS Agencies. A key method was to conduct detailed case studies of the twelve sample agencies and the provinces using standardized questionnaires administered by regional researchers. The research approach involved specialized research projects on the incidence and social work response to reports of child maltreatment respecting First Nations children, prevention services, jurisdictional issues, extraordinary circumstances, management information services and small agencies (see *Wen:De Report Two* at pp. 7, 9-11).

[161] *Wen:De Report Two* begins by examining the experience of First Nations children coming into contact with the child welfare system in Canada. It notes that the key drivers of neglect for First Nations children are poverty, poor housing and substance misuse. The report underscores that two of those three factors are arguably outside the control of parents: poverty and poor housing. As such, parents are unlikely to be able to redress these risks and it can mean that their children are more likely to stay in care for prolonged periods of time and, in some cases, permanently (see *Wen:De Report Two* at p. 13). On this issue, *Wen:De Report Two* indicates:

- There are approximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940s (see at p. 8).
- Aboriginal children are more than twice as likely to be investigated compared to non-Aboriginal children (see at p. 15).
- Once investigated, cases involving Aboriginal children are more likely to be substantiated and more likely to require on-going child welfare services (see at p. 15).
- Aboriginal children are more than twice as likely to be placed in out of home care, and more likely to be brought to child welfare court (see at p. 15).
- The profiles of Aboriginal families differ dramatically from the profile of non-Aboriginal families (see at p. 15).
- Aboriginal cases predominantly involve situations of neglect where poverty, inadequate housing and parent substance abuse are a toxic combination of risk factors (see at p. 15).

[162] Overall, with regard to funding under the FNCFS Program, at page 7, *Wen:De Report Two* found that:

First Nations child and family service agencies are inadequately funded in almost every area of operation ranging from capital costs, prevention programs, standards and evaluation, staff salaries and child in care programs. The disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.

[163] Based on its research findings, the report indicates that Directive 20-1 would need substantial alteration in order to meet the requirements of the FNCFS Program and to ensure equitable child welfare services for First Nations children resident on reserve. There are a number of issues causing an

inadequacy in funding. The lack of an adjustment to funding levels for increases in the cost of living is identified as one of the major weaknesses of Directive 20-1. Although Directive 20-1 contains a cost of living adjustment, it has not been implemented since 1995. According to *Wen:De Report Two*, not adjusting funding for increases in cost of living "...leads to both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional (at p. 45). *Wen:De Report Two* calculates prices increased by 21.21% over the ten year period since Directive 20-1 was last adjusted for cost of living (see a p. 45). To restore the loss of purchasing power since 1995, it found \$24.8 million would be needed to meet the cost of living requirements for 2005 alone (see *Wen:De Report Two* at p. 51).

[164] Similarly, Directive 20-1 contains no periodic reconciliation for inflation. For example, since Directive 20-1 was introduced in 1990, there has been no adjustment for salary increases. Two thirds of FNCFS Agencies participating in *Wen:De Report Two* reported funding for salaries and benefits was not sufficient (see at pp. 35, 57). *Wen:De Report Two* estimates the loss of funds due to inflation for the operations portion of Directive 20-1 to be \$112 million (at p. 57). It adds, any increases in funding only come with increases in the number of children served. Therefore, in the circumstances, "either the quality of services must have declined if child and family needs grew proportionately with population or, increases in costs of services can have been covered, if at all, only from a reduction in the proportion of children or families receiving services" (at p. 121).

[165] The population thresholds were also found by all agencies to be an inadequate means of benchmarking operations funding levels. Approximately half of the respondents to the study stated funding should be based on community needs not child population. Some added that the entire community population should be taken into account, not just that of children, since it is the entire family that needs support when a child is at risk or is unsafe. In fact, small agencies (those serving child populations of less than 1,000) represent 55% of the total number of FNCFS Agencies. According to 75% of the small agencies who participated in *Wen:De Report Two*, their salary and benefits levels for staff were not comparable to other child welfare organizations (see at pp. 46-48, 213).

[166] In addition, Directive 20-1 provides no adjustment for the different content of provincial/territorial legislation and standards. While the FNCFS Program includes a guiding principle that services should be reasonably comparable to those provided to children in similar circumstances off reserve, it contains no mechanism to ensure this is achieved (see *Wen:De Report Two* at p. 50).

[167] Aside from the above, *Wen:De Report Two* found consensus among FNCFS Agencies it canvassed that Directive 20-1 makes inadequate provision for travel, legal costs, front-line workers, program evaluation, accounting and janitorial staff, staff meetings, Health and Safety Committee meetings, security systems, human resources staff for large agencies, quality assurance specialists and management information systems. Furthermore, *Wen:De Report Two* comments that funding has not reflected the significant technology changes in computer hardware and software over the past decade. Moreover, liability insurance premiums have increased substantially over that same period and are not reflected in Directive 20-1 (see at p. 122). *Wen:De Report Two* also identified management information systems as not meeting minimum standards in the vast majority of cases (see at p. 57).

[168] Of particular note, funds for prevention and least disruptive measures were identified as inadequate, along with 84% of reporting FNCFS Agencies feeling that current funding levels were insufficient to provide adequate culturally based services (see *Wen:De Report Two* at p. 57). In this regard, the report found that "the present funding formula provides more incentives for taking children into care than it provides support for preventive, early intervention and least intrusive measures" (*Wen:De Report Two* at p. 114). This is because the funding formula provides dollar-for-dollar reimbursement of "maintenance" expenditures and prevention services are often not deemed to fall under "maintenance" (see *Wen:De Report Two* at p. 19-21). As a result, prevention funding was identified as being inadequate, in spite of the fact that such services are mandated under most provincial child welfare legislation (see *Wen:De Report Two* at p. 91). On this basis, the report states:

This means that agencies in this situation effectively have no money to comply with the statutory requirement to provide families with a meaningful opportunity to redress the risk that resulted in their child being removed. More importantly, the children they serve are denied an equitable chance to stay safely at home due to the structure and amount of funding under the Directive. In this way the Directive really does shape practice – instead of supporting good practice.

(*Wen:De Report Two* at p. 21)

[169] *Wen:De Report Two* concludes option three, a new First Nations based funding formula that funds agencies based on needs and assets, is the most promising way to address these deficiencies because of the “...possibility of re-conceptualizing the pedagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children” (*Wen:De Report Two* at p. 9). In sum, *Wen:De Report Two* recommends: targeted funding for least disruptive measures; funds for adequate culturally based policy and standards development; ensure that human resources funds are sufficient; increased investment in research to inform policy and practice for FNCFS Agencies; and, introduce financial review and adjustment to account for changes to provincial child welfare legislation (see *Wen:De Report Two* at p. 56).

[170] The third *Wen:De* report involved the development and costing of the recommended changes arising from the second report (see Annex, ex. 16 [*Wen:De Report Three*]). A national survey instrument was developed and sent out to 93 FNCFS Agencies. Thirty-five surveys were completed, representing 32,575 children, 146 First Nations and \$28.6 million in operating funds. This covered 38% of all FNCFS Agencies, 49% of all bands, 31.4% of all children 0-18 and 28.7% of all funding for operations (see *Wen:De Report Three* at pp. 9-10).

[171] *Wen:De Report Three* reiterates the weaknesses in Directive 20-1 as follows at pages 11-12:

- 1) uncertainty in what the original rationale was underlying the development of the formula
- 2) regional interpretations of sometimes vaguely worded guidelines,
- 3) a failure to implement certain elements of the formula such as the annual inflation adjustment and
- 4) a failure of the policy to keep pace with advances in social work evidence based practice, child welfare liability law and the evolution of management information systems and
- 5) the policy appeared to leave out some child welfare expenses altogether or fund them inadequately such as the failure of the policy to support agencies to provide in home interventions to abused and neglected children to keep them safely at home as opposed to bringing them into care.

[172] Despite these weaknesses, *Wen:De Report Three* also indicates Directive 20-1 has some positive features, including that it is national in scope, has undergone two national studies, has enabled the development of FNCFS Agencies throughout Canada, and offers a baseline for judging the impacts of possible changes to the current regime.

[173] These reasons were the principle basis forming the recommendation in *Wen:De Report Three* to implement both options 1 and 3. That is, redesign Directive 20-1 now, with a priority on funding prevention services and providing redress for losses in funding due to inflation, while providing a foundation for the development of a First Nations based formula over time (see *Wen:De Report Three* at pp. 11-12). In also pursuing option 1, the report noted the development of a First Nations funding model would not provide a quick fix to the problems with the existing funding formula (see *Wen:De Report Three* at p. 14).

[174] Option two, tying FNCFS Agency funding to provincial formulae, was found to be the least promising option, notably because in several provinces it is not clear what their formula is and First Nation communities do not have the same degree of infrastructure of programs, services and volunteer

agencies. Moreover, provincial funding traditions are not based on the particular needs and conditions faced by First Nation families living on reserve, including that it costs more to service First Nations children and families due to their high needs levels (see *Wen:De Report Three* at p. 13).

[175] In recommending reforms to Directive 20-1, *Wen:De Report Three* noted that “[a] shift in funding mentality is vital” (at p. 20). That is, as stated at page 20 of *Wen:De Report Three*:

An approach that invests in the community and engages the community at all levels – children, adolescents, youth, parents and Elders means directing resources at growth and development of the people rather than the breakdowns of the people in the community. This approach demonstrates long term commitment to the growth of a child and family and invests in the future of contributing members to society.

[176] Furthermore, at page 15, *Wen:De Report Three* provides the following caution:

Although each suggested change element is presented as a separate item, it is important to understand that these elements are interdependent and adoption in a piecemeal fashion would undermine the overall efficacy of the proposed changes. For example, providing least disruptive measures funding for at home child maltreatment interventions without providing the cost of living adjustment would result in agencies not having the infrastructure and staffing capacity to maximize outcomes. Similarly, these recommendations assume that there will be no reductions in the First Nations child and family service agency funding envelope. Situations where funds in one area are cut back and redirected to other funding streams in child and family services should be avoided as our research found that under funding was apparent across the current formula components.

[177] *Wen:De Report Three* recommends certain economic reforms to Directive 20-1, along with policy changes to support those reforms. The recommended economic reforms from *Wen:De Report Three*, include: a new funding stream for prevention/least disruptive measures (at pp. 19-21); adjusting the operations budget (at pp. 24-25); reinstating the annual cost of living adjustment on a retroactive basis back to 1995 (at pp. 18-19); providing sufficient funding to cover capital costs (buildings, vehicles and office equipment) (at pp. 28-29); and, funding for the development of culturally based standards by FNCFS Agencies (at p. 30).

[178] 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:

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 Shangreux, 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.)

[179] For small agencies the report found that the fixed amount per agency or the provision for overhead did not provide realistic administrative support for two reasons. The first is that no agency representing communities with a combined total of 250 or fewer children receives any overhead funding whatsoever. The second problem is that available funding is currently fixed in three large blocks: 251-500 = \$ 35,790; 501-800 = \$ 71,580; and, 801 and up = \$143,158. A slight increase or decrease in child population can result in a huge increase or decrease in overhead funding available to an agency (see *Wen:De Report Three* at p. 23).



[180] Therefore, *Wen:De Report Three* recommends two reforms. First, that overhead funding be extended to agencies serving populations of 125 and above. The report proposes a minimum of \$20,000 be made available to the smallest agency representing 125 children. Thereafter, the second proposal is to give agencies additional funding for every 25 children in excess of 125. Under this approach, 6 agencies would still be too small to receive any fixed amount; 8 small agencies which never before received a fixed amount of overhead funding would now do so; 23 agencies of medium size would receive funding increases; and, 56 large agencies would receive no change in their funding. In the future, *Wen:De Report Three* believes a minimum economy of scale for small agencies will be required to provide a basic level of child and family services (see at p. 23-24).

[181] In terms of the remoteness factor in Directive 20-1, *Wen:De Report Three* identified a number of weaknesses, including that the average adjustment is considered by 90% of the agencies canvassed to be too small to compensate for the actual costs of remoteness; and, that the remoteness index is usually based on accessibility to the nearest business centre, which are not necessarily able to offer specialized child welfare services. According to *Wen:De Report Three*, these weakness have led to some communities receiving less than their population warrants and some receiving more. As such, it proposes an across the board increase in remoteness allowances and to adjust the index from the current service centre base to a city centre base (see at pp. 25-26).

[182] Other policy recommendations from *Wen:De Report Three* include: that AANDC clarify that legal costs related to children in care are billable under “maintenance”; that support services related to reunifying children in care with their families be eligible “maintenance” expenses, since they are mandatory services according to provincial child welfare statutes; validation of the need for research and mechanisms to share best practices at a regional and national level; and, that AANDC clarify the “stacking provisions” in Directive 20-1 in order to make it easier for First Nations to access voluntary sector funding sources (at pp. 16-18).

[183] Finally, *Wen:De Report Three* found jurisdictional disputes between federal government departments and between the federal government and provinces over who should fund a particular service took about 50.25 person hours to resolve, resulting in a significant tax on the limited resources of FNCFS Agencies. As a result, it recommends the immediate implementation of Jordan’s Principle for jurisdictional dispute resolution and its integration into any funding agreements between AANDC and the provinces. Jordan’s Principle asserts that the government (federal or provincial) or department that first receives a request to pay for a service must pay for the service and resolve jurisdictional issues thereafter (see *Wen:De Report Three* at p. 16).

[184] Total costs of implementing all the reforms recommended in *Wen:De Report Three* were estimated at \$109.3 million, including \$22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment) and insurance premiums; and, \$86.4 million for annual funding needs (see at p. 33).

[185] The EPFA was designed in an effort to address some of the shortcomings of Directive 20-1 identified in the *NPR* and the *Wen:De* reports. However, despite *Wen:De Report Three*’s caution that the recommended changes are interdependent and adoption in a piece meal fashion would undermine the efficacy of those proposed changes, this is in fact the approach AANDC took. This becomes clear in reviewing the Auditor General of Canada’s 2008 report on the FNCFS Program and AANDC’s corresponding responses, along with the rest of the evidence to follow.

### **2008 Report of the Auditor General of Canada**

[186] Following a written request from the Caring Society, the Auditor General of Canada initiated a review of AANDC’s FNCFS Program and reported the findings to the House of Commons in 2008 (see Annex, ex. 17 [2008 Report of the Auditor General of Canada]). The purpose of the review was to examine the “...management structure, the processes, and the federal resources used to implement the federal policy...” on reserves (2008 Report of the Auditor General of Canada at p.1).

[187] The *2008 Report of the Auditor General of Canada* echoed the findings of the NPR and Wen:De reports. Namely, that “[c]urrent funding practices do not lead to equitable funding among Aboriginal and First Nations communities” (*2008 Report of the Auditor General of Canada* at p.2). The findings of the *2008 Report of the Auditor General of Canada* include:

- The funding formula is outdated and does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided (see at p. 20, s. 4.51),
- AANDC has limited assurance that child welfare services delivered on reserves comply with provincial legislation and standards. Funding levels are pre-determined without regard to the services the agency is bound to provide under provincial legislation and standards (see at pp.14-15, ss. 4.30, 4.34).
- There is no definition of what is meant by reasonably comparable services or way of knowing whether the services that the program supports are in fact reasonably comparable. Furthermore, child welfare may be complicated by other social problems or health issues. Access to social and health services, aside from child welfare services, to help keep a family together differs not only on and off reserves but among First Nations as well. AANDC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services (see at pp. 12-13, ss.4.20, 4.25).
- There are no standards for FNCFS Agencies to provide culturally appropriate child welfare services that meet the requirements of provincial legislation. The number of FNCFS Agencies being funded is the main indicator of cultural appropriateness that AANDC uses. According to AANDC, the fact that 82 First Nations agencies have been created since the current federal policy was adopted means there are more First Nations children receiving culturally appropriate child welfare services. However, the Auditor General found that many agencies provide only a limited portion of the services while provinces continue to provide the rest. Further, AANDC does not know nationally how many of the children placed in care remain in their communities or are in First Nations foster homes or institutions (see at p. 13, ss. 4.24-4.25).
- The formula is based on the assumption that each FNCFS Agency has 6% of on-reserve children placed in care. This assumption leads to funding inequities among FNCFS Agencies because, in practice, the percentage of children that they bring into care varies widely. For example, in the five provinces covered by the report, that percentage ranged from 0 to 28% (see at p. 20, s. 4.52).
- The funding formula is not responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by FNCFS Agencies (see at p. 20, s. 4.52).
- The formula is not adapted to small agencies. It was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. The Auditor General found 55 of the 108 agencies funded by AANDC were small agencies serving a population of less than 1000 children living on reserve who did not always have the funding and capacity to provide the required range of child welfare services (see at p. 21, ss. 4.55-4.56).
- The shortcomings of the funding formula have been known to AANDC for years (see at p. 21, s. 4.57).

[188] As certain provinces were transitioned to the EPFA at the time of the report, the *2008 Report of the Auditor General of Canada* also comments on the new funding formula. It found that while the new funding formula provides more funds for the operations of FNCFS Agencies and offers more flexibility to allocate resources, it does not address the inequities noted under the current formula. It still assumes

that a fixed percentage of First Nations children and families need child welfare services and, therefore, does not address differing needs among First Nations (see *2008 Report of the Auditor General of Canada* at p. 23, ss. 4.63-4.64).

[189] Overall, the Auditor General of Canada was of the view that:

the funding formula needs to become more than a means of distributing the program's budget. As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.

(*2008 Report of the Auditor General of Canada* at p. 23, s. 4.66)

[190] The Auditor General further noted that because the FNCFS Program's expenditures were growing faster than AANDC's overall budget, funds had to be reallocated from other programs, such as community infrastructure and housing. This means spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate. In the Auditor General's view, AANDC's budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs (see *2008 Report of the Auditor General of Canada* at p. 25, ss. 4.72-4.73).

[191] The Auditor General of Canada made 6 recommendations to address the findings in its report. AANDC agreed with all the recommendations and indicated the actions it has taken or will take to address the recommendations (see *2008 Report of the Auditor General of Canada* at p. 6 and Appendix). AANDC's response to the *2008 Report of the Auditor General of Canada* demonstrates its full awareness of the impacts of its FNCFS Program on First Nations children and families on reserves, including that its funding is not in line with provincial legislation and standards. Furthermore, despite the flaws identified with the new funding formula, AANDC still viewed EPFA as the answer to the problems with the FNCFS Program:

**4.67 Recommendation.** Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.

**The Department's response.** Indian and Northern Affairs Canada's current approach to Child and Family Services includes reimbursement of actual costs associated with the needs of maintaining a child in care. The Department agrees that as new partnerships are entered into, based on the enhanced prevention approach, funding will be directly linked to activities that better support the needs of children in care and incorporate provincial legislation and practice standards.

(*2008 Report of the Auditor General of Canada* at pp. 23-24, s. 4.67)

[192] The flaws with Directive 20-1 and the EPFA would subsequently be scrutinized by the Standing Committee on Public Accounts.

### ***2009 Report of the Standing Committee on Public Accounts***

[193] In February 2009, the House of Commons Standing Committee on Public Accounts held a hearing on the *2008 Report of the Auditor General of Canada*. This hearing was held with officials from the Office of the Auditor General of Canada and AANDC “[g]iven the importance of the safety and well-being of all Canadian children and the disturbing findings of the audit” (Annex, ex.18 at p.1 [2009 *Report of the Standing Committee on Public Accounts*]).

[194] The Committee noted the *2008 Report of the Auditor General of Canada* made 6 recommendations and that it fully supports those recommendations. As AANDC agreed with all the recommendations, “the Committee expects that the Department will fully implement them” (2009 *Report of the Standing Committee on Public Accounts* at p. 3).

[195] AANDC’s Deputy Minister Michael Wernick acknowledged the flaws in the older funding formula and pointed to the new approach:

What we had was a system that basically provided funds for kids in care. So what you got was a lot of kids being taken into care. And the service agencies didn't have the full suite of tools, in terms of kinship care, foster care, placement, diversion, prevention services, and so on. The new approach that we're trying to do through the new partnership agreements provides the agencies with a mix of funding for operating and maintenance--which is basically paying for the kids' needs--and for prevention services, and they have greater flexibility to move between those.

(2009 *Report of the Standing Committee on Public Accounts* at pp. 7-8 [footnote omitted])

[196] Assistant Deputy Minister Christine Cram’s testimony before the Standing Committee echoed that of the Deputy Minister:

We currently have two formulas in operation. We have a formula for those provinces where we haven't moved to the new model. Under that formula, we reimburse all charges for kids who are actually in care, and that's why the costs have gone up so dramatically over time. There were comments made about the fact that under the old formula there wasn't funding provided to be able to permit agencies to provide prevention services. That's a fair criticism of the old formula. Under the new formula, as the deputy was mentioning, we have three categories in the funding formula. We have operations, prevention, and maintenance. So those are each determined on a different basis.

(2009 *Report of the Standing Committee on Public Accounts* at p. 8 [footnote omitted])

[197] With regard to the continued application of Directive 20-1 in many provinces and in the Yukon, the Standing Committee expressed concern:

The Committee is quite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed. According to the Joint National Policy Review, “The funding formula inherent in Directive 20-1 is not flexible and is outdated.” The 2005 Wen:de report, which undertook a comprehensive review of funding formulae to support First Nations child and family service agencies, found that the current funding formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures. The report writes, “The lack of early intervention services contributes to the large numbers of First Nations children entering care and staying in care.” An evaluation prepared in 2007 by INAC’s Departmental Audit and Evaluation Branch recommended that INAC, “correct the weaknesses in the First Nations Child and Family Service Program’s funding formula.” The OAG concluded, “As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One

consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.”

Yet, this funding formula continues. As the Auditor General puts it, “Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care.”

While the Committee appreciates the efforts the Department is making to develop new agreements based on the enhanced prevention model, the Committee completely fails to understand why the old funding formula is still in place. Moving to new agreements should in no way preclude making improvements to the existing formula, especially as it may take years to develop agreements with the provinces. In the meantime, many First Nations children are taken into care when other options are available. This is unacceptable and clearly inequitable.

*(2009 Report of the Standing Committee on Public Accounts at pp. 9-10 [footnotes omitted])*

[198] With regard to the new EPFA funding formula, the Standing Committee agreed with the Auditor General's comments regarding the fact that this new formula does not address the inequities of Directive 20-1 (i.e. the assumptions built into the formula regarding the percentage of first nations children and families in need of care):

The Committee could not agree more, especially as the Department has known about this problem in the old formula yet has repeated it in the new formula. The Committee is very disturbed that the Department would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed. The result of this approach is that communities that need funding the most, that is, where more than six percent of the children are in care, will continue to be underfunded and will not be able to provide their children the services they need. The Committee strongly believes that INAC needs to develop a funding formula that is flexible enough to provide funding based on need, rather than a fixed percentage.

*(2009 Report of the Standing Committee on Public Accounts at p. 10)*

[199] Finally, with regard to the Auditor General's finding that AANDC has not analyzed and compared the child welfare services available on reserves with those in neighbouring communities off reserve, the Standing Committee made the following observations:

Nonetheless, it should be possible to compare the level of funding provided to First Nations child and family services agencies to similar provincial agencies, and given their unique and challenging circumstances, it would be reasonable to expect First Nations agencies to receive a higher level of funding. Yet, when asked how the funding for First Nations child and family service agencies compares to agencies for non-natives, the Assistant Deputy Minister said, “I'm sorry, but we don't know the answer.” The same question was put to the Deputy Minister and he replied, “Our accountability is for the services delivered by those agencies to the extent that we fund them.”

The Committee finds these responses quite disappointing. The Deputy Minister's response was unsatisfactory because the issue under discussion is the extent to which the agencies are funded. Also, to not know how the funding compares to provincial agencies makes the Committee wonder how the level of funding is determined, and how the Department can be assured that it is treating First Nations children equitably.

[...]

As the policy requires First Nations child welfare services to be comparable with services provided off reserves and the Committee believes that First Nations children should be treated equitably, the Committee believes that INAC must have comprehensive information about the funding level provided to provincial child welfare agencies and compare that to the funding of First Nations agencies. This does not mean that INAC should adopt provincial funding formulae for First Nations agencies as the needs for First Nations agencies are unique and often greater. Nonetheless, at the very least, INAC should be able to compare funding.

(*2009 Report of the Standing Committee on Public Accounts* at pp. 5-6 [footnotes omitted])

[200] After hearing from the officials of the Office of the Auditor General of Canada and AANDC, including Sheila Fraser, the Auditor General of Canada, Michael Wernick, Deputy Minister of AANDC, and Christine Cram, Assistant Deputy Minister of AANDC, the Standing Committee on Public Accounts made 7 recommendations of its own. Those recommendations include: that AANDC provide a detailed action plan to the Public Accounts Committee on the implementation of the recommendations arising out of the *2008 Report of the Auditor General of Canada*; that AANDC conduct a comprehensive comparison of its funding under the FNCFS Program to provincial funding of similar agencies; that AANDC immediately modify Directive 20-1 to allow for the funding of enhanced prevention services; that AANDC ensure its funding formula is based upon need rather than an assumed fixed percentage of children in care; that AANDC determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements; and, that AANDC develop measures and collect information based on the best interests of children for the results and outcomes of its FNCFS Program (see *2009 Report of the Standing Committee on Public Accounts* at pp. 4-12).

[201] In response to the Standing Committee's report, presented to the House of Commons on August 19, 2009, AANDC generally accepted the recommendations, although with some nuances (see Annex, ex. 19 [*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*]). For example, AANDC generally responded:

The Standing Committee on Public Accounts' recommendations speak to the link between provincial comparability, revising Directive 20-1, moving to a needs based formula and to determining the full costs of the FNCFS Program nationally. This suggests INAC should undertake a one-time simultaneous reform of the program in all provinces. INAC is in fact undertaking similar steps towards reform, however, it is being done province-by-province. Rather than taking a one-size-fits all approach that would overlook community level needs and compromise partnerships and accountability, INAC is addressing provincial comparability, including a needs component in the formula and finalizing the process with a full costing analysis for each jurisdiction. All of this is done at tripartite tables ensuring buy-in by all partners, reasonable comparability with the respective province and sound accountability aimed at achieving positive outcomes for children and their families. As well, INAC is committing to review Directive 20-1.

(*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Introduction)

[202] With regard to the recommendation that AANDC conduct a comprehensive comparison of its funding to provincial funding, AANDC responded:

INAC agrees with this recommendation on the understanding that a comparative analysis can only be provided with the limited data we have access to and on a phased basis. This review will require a substantial amount of time and work with the provinces and First Nations. The information available in provincial annual reports is general and the funding provided under

their children's services often includes programs beyond child and family services. Overall, these provincial reports do not contain the level of detail required to make the kind of comprehensive comparison expected by the Committee. Relationships must be strengthened with provincial partners as they are key in providing INAC with the necessary information concerning the funding of their child welfare programs. This is what INAC is doing as it proceeds with the Enhanced Prevention Focused Approach. Provinces must also agree to allow INAC to make this information available to the public.

It should also be noted that due to the complexity of child welfare service delivery across the country, comparability between FNCFS agencies and provincial child welfare providers on-reserve, is challenging. Specifically, child welfare services in the provinces are delivered in a variety of ways. The services can vary by jurisdiction based on need; be provided directly by the province; or by provincially delegated authorities or regional/districts. A province can also fund agencies to deliver the services and/or contract third parties.

Therefore, INAC cannot commit to conducting such a comprehensive review nor can it be done for all jurisdictions by the timelines required by the Committee. INAC would be able to provide a basic comparison of jurisdictions that are currently under the Enhanced Prevention Focused Approach and where INAC has basic information on salary rates and caseload ratios. INAC expects to complete this first phase by or before December 31, 2009.

As INAC moves forward on transitioning other jurisdictions and as relationships are built with each province at the tripartite tables, INAC will be in a better position to conduct a comparison of funding between FNCFS agencies and provincial systems. This phase will consist of the provinces with whom INAC has not yet developed or completed tripartite accountability frameworks. This phase is expected to be completed by 2012.

*(AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts at Recommendation 2 – Provincial Comparison)*

[203] In response to the recommendation that AANDC revise the funding formula to provide funding based on need, AANDC responded:

It is important to note that the 6% average number of children in care calculation is one of many factors used only to model operations funding which includes the number of protection workers. This is then translated into a portion of the operations funding that agency receives. This 6% number was arrived at through discussions with First Nations Agency Directors and provincial representatives, and was thought to be fairly representative of the overall needs of the communities. Under the Enhanced Prevention Focused Approach, FNCFS agencies have the flexibility to shift funds from one stream to another in order to meet the specific needs of the community. This costing model provides all FNCFS agencies under the new approach with the necessary resources to offer a greater range of child and family services.

Through discussions with provincial and First Nations partners, it is clear that they preferred to create a costing model that would provide recipients stable funding for operations. The majority of partners indicated they would not be supportive of a model that generated more resources for Recipients based upon a higher percentage of children in care. Also, this model ensures that FNCFS agencies supporting communities with lower populations are provided with sufficient funding to operate both prevention and protection programs. Without the fixed percentage formula used to calculate and fund Operations, agencies with a very low percentage of children in care would not have the necessary resources to operate. Moreover, if the operations budget were based upon need rather than a fixed percentage, the agencies could find themselves with widely fluctuating operations budgets year to year which would

hamper their ability to plan and provide services. The new costing models provide a stable operating and prevention budget that does not rely on the number of children in care as one of its determinants.

(AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts at Recommendation 5 – Funding Formula based on Need)

[204] AANDC's response to the recommendations of the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* would be revisited in 2011 by the Auditor General.

### **2011 Status Report of the Auditor General of Canada**

[205] In 2011, the Auditor General of Canada assessed AANDC's progress in implementing the recommendations from the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* (see Annex, ex. 20 [2011 Status Report of the Auditor General of Canada]).

[206] With regard to comparability of services, the Auditor General noted that while AANDC had agreed to define what is meant by services that are reasonably comparable, it had not done so. The Auditor General stated that "[u]ntil it does, it is unclear what is the service standard for which the Department is providing funding and what level of services First Nations communities can eventually expect to receive" (see *2011 Status Report of the Auditor General of Canada* at pp. 23-24, s. 4.49). In addition, the Auditor General found AANDC had not conducted a review of social services available in the provinces to assess whether the services provided to children on reserve are the same as what is available to children off reserve (see *2011 Status Report of the Auditor General of Canada* at p. 24, s. 4.49).

[207] Concerning the new EPFA funding formula, the Auditor General reiterated its previous finding that it did not address all of the funding disparities that were noted in the *2008 Report of the Auditor General of Canada*. While the Auditor General acknowledged that the EPFA enables additional services beyond those offered by Directive 20-1, it noted that:

without having defined what is meant by comparability, the Department has been unable to demonstrate that its new Enhanced Prevention Focused Approach provides services to children and families living on reserves that are reasonably comparable to provincial services.

(*2011 Status Report of the Auditor General of Canada* at p. 24, ss. 4.50-4.51)

[208] With respect to the recommendation that AANDC determine the full costs of meeting the policy requirements of the FNCFS Program, the Department agreed to regularly update the estimated cost of delivering the program with the new EPFA funding approach on a province-by-province basis and to periodically review the program budget. The Auditor General reported that AANDC had identified the costs it would have to pay for services in each province before transitioning to EPFA. AANDC determined that it needed an increase of between 50 and 100% in its funding for operations and prevention services in each of the provinces that transitioned to EPFA. With all cost components taken into consideration, on average, EPFA led to an increase of over 40% in the cost of the FNCFS Program in the participating provinces (see *2011 Status Report of the Auditor General of Canada* at pp. 24-25, ss. 4.53-4.54). In this regard, the Auditor General noted the FNCFS Program budget has increased by 32% since the 2005-2006 fiscal year, partly reflecting the increased funding levels needed to implement EPFA (see *2011 Status Report of the Auditor General of Canada* at p. 25, s. 4.55).

[209] On the comprehensive comparison of funding to FNCFS Agencies with provincial funding to similar agencies requested by the Standing Committee on Public Accounts, the Auditor General reported that AANDC had compared some elements of child and family services programs on and off reserve, such as social workers' salaries and benefits in preparation for framework negotiations with the



provinces. However, AANDC did not provide any information about social workers' caseloads, stating that it is not public information. In addition, AANDC asserted certain services provided by the provinces, such as services related to health issues and youth justice, were not within AANDC's mandate (see *2011 Status Report of the Auditor General of Canada* at p. 25, ss. 4.56- 4.57).

[210] In general, the Auditor General's review of programs for First Nations on reserves, including its follow-up on the status of AANDC's progress in addressing some of the recommendations from the *2008 Report of the Auditor General of Canada*, was as follows:

Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, we have seen a lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. We recognize that the issues are complex and that solutions will require concerted efforts of the federal government and First Nations, in collaboration with provincial governments and other parties.

We believe that there have been structural impediments to improvements in living conditions on First Nations reserves. In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserves will approach those existing elsewhere across Canada. There needs to be stronger emphasis on achieving results.

We recognize that the federal government cannot put all of these structural changes in place by itself since they would fundamentally alter its relationship with First Nations. For this reason, First Nations themselves would have to play an important role in bringing about the changes. They would have to become actively engaged in developing service standards and determining how the standards will be monitored and enforced. They would have to fully participate in the development of legislative reforms. First Nations would also have to co-lead discussions on identifying credible funding mechanisms that are administratively workable and that ensure accountable governance within their communities. First Nations would have to play an active role in the development and administration of new organizations to support the local delivery of services to their communities.

Addressing these structural impediments will be a challenge. The federal government and First Nations will have to work together and decide how they will deal with numerous obstacles that surely lie ahead. Unless they rise to this challenge, however, living conditions may continue to be poorer on First Nations reserves than elsewhere in Canada for generations to come.

(*2011 Status Report of the Auditor General of Canada* at pp. 5-6)

## **2012 Report of the Standing Committee on Public Accounts**

[211] In February 2012, the Standing Committee on Public Accounts issued a report following the *2011 Status Report of the Auditor General of Canada* (see Annex, ex. 21 [*2012 Report of the Standing Committee on Public Accounts*]).

[212] Deputy Minister of AANDC, Michael Wernick, testified before the Committee and "...agreed, without reservation, with the OAG's diagnosis of the problem..." (*2012 Report of the Standing Committee on Public Accounts* at p. 3). Mr. Wernick stated to the Committee:

One of the really important parts of the Auditor General's report is that it shows there are four missing conditions. The combination of those is what's likely to result in an enduring change. You could pick any one of them, such as legislation without funding, or funding without legislation, and so on. They would have some results, but they would probably, in our view, be temporary. If you want enduring, structural changes, it's the combination of these tools." He also said, "With all due respect, I want to send the message that, if Parliament demands better results, it has to provide us with better tools.

(*2012 Report of the Standing Committee on Public Accounts* at p. 3 [footnotes omitted])

[213] With specific regard to the FNCFS Program, the Deputy Minister stated:

We have fixed the funding formula. We make sure resources are available for prevention services. And we've put in place these kinds of tripartite agreements, because these are creatures of the provincial child protection statutes. In six of the provinces, I think it is, we have \$100 million or more in funding over several budgets. They go at the pace at which we can conclude agreements with the provinces--I can certainly provide the list--but we're now covering about 68% of first nations kids with this prevention approach.

(*2012 Report of the Standing Committee on Public Accounts* at p. 9 [footnote omitted])

[214] The Standing Committee concluded its report with the following statements:

The Committee notes that the government is taking a number of concrete actions to improve conditions for First Nations on reserves, and the Deputy Minister of AANDC expressed his commitment to address the structural impediments identified by the OAG. Like the Deputy Minister, the Committee is optimistic that progress can be made, but it will require significant structural reforms and sustained management attention. The Committee believes that AANDC, in coordination with other departments, needs to develop and commit to a plan of action to take the necessary steps, and the Committee intends to monitor the government's progress to ensure that First Nations on reserves experience meaningful improvements in their social and economic conditions.

(*2012 Report of the Standing Committee on Public Accounts* at p. 12)

[215] The then Minister of AANDC, Mr. John Duncan, responded to the *2012 Report of the Standing Committee on Public Accounts* (see Annex, ex. 22 [*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*]). Of note, Minister Duncan acknowledged the following:

I would also like to acknowledge the work of the Office of the Auditor General in providing Parliament, the Government of Canada, and Canadians with valuable insights into Canada's approach to program delivery for First Nations on reserves. I consider the six-page preface to Chapter 4 of the 2011 Status Report of the Auditor General of Canada to be an important roadmap for Parliament in moving forward on First Nation issues.

[...]

I agree that many of the problems faced by First Nations are due to the structural impediments identified – the lack of clarity about service levels, lack of a legislative base, lack of an appropriate funding mechanism, and a lack of organizations to support local service delivery.

[...]

Through the Enhanced Prevention Focused Approach for First Nations Child and Family Services clarity about service levels and comparability of services and funding levels have been addressed at tripartite tables with the six provinces that have transitioned to the new approach.

[...]

The Office of the Auditor General observed that there are challenges associated with the use of contribution agreements to fund programs and services for First Nations. For instance, agreements may not always focus on service standards or the results to be achieved; agreements must be renewed yearly and it is often unclear who is accountable to First Nations members for achieving improved outcomes. In addition, contribution agreements involve a significant reporting burden, and communities often have to use scarce administrative resources to respond to the numerous reporting requirements stipulated in their contribution agreements.

The Government of Canada recognizes that reliance on annual funding agreements and multiple accountabilities when funding is received from multiple sources can impede the provision of timely services and can limit the ability of First Nations to implement longer term development plans.

To address these concerns, Aboriginal Affairs and Northern Development Canada is implementing a risk-based approach to streamlining funding agreements, and reporting requirements. The General Assessment tool supports increased flexibility by assessing the capacity of recipients to access a wider range of funding approaches, including multi-year funding agreements. In addition, a pilot initiative with 11 First Nations communities is currently being implemented using a new approach to reporting which is increasing transparency and accountability at the community level by using the First Nations website as a reporting tool and addressing capacity issues created by the reporting burden.

*(AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts)*

[216] The *NPR*, Wen:De reports and the Auditor General and the Standing Committee reports all have identified shortcomings in the funding and structure of the FNCFS Program. This was further demonstrated in other evidence presented to the Tribunal and to which the Panel will return to below. First, however, we will outline the evidence advanced with regard to the funding of child and family services under the *1965 Agreement* in Ontario, along with the other provincial agreements in Alberta and British Columbia.

### **c. 1965 Agreement in Ontario**

[217] There is also evidence indicating shortcomings in the funding and structure of the *1965 Agreement* in Ontario.

[218] In 1965, the federal government entered into an agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations communities on reserve. Around the same time, child welfare authorities in Ontario began the large-scale removal of Aboriginal children from their homes and communities, commonly referred to as part of the "Sixties Scoop". Ms. Theresa Stevens, Executive Director for Anishinaabe Abinoojii Family Services in Kenora, Ontario, described how buses would drive into communities and take all the children away (see *Transcript* Vol. 25 at pp. 28-30). As will be explained in more detail below, the collective trauma experienced by many First Nations in Ontario as a result of the Sixties Scoop informs the climate for the provision of child and family services in the province. The Panel acknowledges the suffering of Aboriginal children, families and communities as a result of the Sixties Scoop.

[219] The *1965 Agreement* is a cost-sharing agreement where Ontario provides or pays for eligible services up front and invoices Canada for a share of the costs of those services pursuant to a cost-sharing formula. Eligible services for cost sharing under the *1965 Agreement* are described in its Schedules. Mr. Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, testified at the hearing and explained how the *1965 Agreement* works. At the beginning of each fiscal year, Ontario provides AANDC with a cash flow forecast. Once approved, AANDC provides Ontario with a one-month cash advance, followed by monthly instalments. There is a 10% holdback on the payments, which is paid out (with any adjustments) at the end of the year after an audit. There is no overall cap on expenditures under the *1965 Agreement*.

[220] The cost-sharing formula is set out at clause 3 of the *1965 Agreement* and is based on two elements: the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to persons other than Indians with Reserve Status in Ontario"; and, the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to Indians with Reserve Status in Ontario".

[221] According to Mr. Digby, social assistance is the area where there was the best data that gave a good proxy for the proportionate share of costs and relative share of costs in First Nations communities vis-à-vis the rest of Ontario. As of 2011-12 the average cost of providing social assistance to persons living off reserve was approximately \$200. For First Nations living on reserve it was about \$1,200. AANDC's share of the costs is calculated by taking 50% of the average cost of providing social assistance to persons living off reserve ( $200 \times 0.50 = 100$ ) and dividing it by the average cost of providing social assistance to persons living on reserve ( $100/1200 = 0.0833$ ); subtracting the average cost of providing social assistance to persons living off reserve from the average cost of providing social assistance to persons living on reserve ( $1200 - 200 = 1000$ ) and dividing that amount by the average cost of providing social assistance to persons living on reserve ( $1000/1200 = 0.8333$ ); and then, adding those two numbers together to arrive at the cost-sharing ratio ( $0.0833 + 0.8333 = 0.9166$ ). Pursuant to these numbers, AANDC paid approximately 92% of the eligible costs under the *1965 Agreement* in 2011-12. According to Mr. Digby, the *1965 Agreement* cost-sharing formula recognizes the higher per capita costs of providing social assistance to First Nations on reserves and AANDC's agreement to take the financial responsibility for these additional costs (see testimony of P. Digby, *Transcript* Vol. 59 at pp. 24-28).

[222] There are two mechanisms used by the province of Ontario to provide child welfare services on reserve: (i) child welfare societies, including provincial child welfare agencies and FNCFS Agencies; and (ii) service contracts for prevention services. There are seven fully-mandated FNCFS Agencies in Ontario and they are funded according to the same funding model as provincial child welfare agencies in Ontario. There are also six pre-mandated FNCFS Agencies who do not have a full protection mandate and are in the process of developing their capacity to become fully-mandated FNCFS Agencies. There are also approximately 25 First Nations reserves that receive prevention services via service contract.

[223] The *1965 Agreement* has never undergone a formal review by AANDC. The sections of the agreement dealing with child and family services have not been updated since 1981, and the Schedules to the agreement have not been updated since 1998. This is significant given in 1984 Ontario implemented the *Child and Family Services Act*, which incorporated elements from other pieces of legislation (for example, youth justice and mental health) to address the child and family services needs of Ontarians. At that time, the Government of Canada took the position that AANDC did not have the mandate or resources to start funding justice and health programs, as those types of programs would fall under a different department (see testimony of P. Digby, *Transcript* Vol. 59 at p. 69).

[224] In 2000, the *NPR* recommended a tripartite review be done of the *1965 Agreement* (see at pp. 18 and 121). The *2008 Report of the Auditor General of Canada* also noted that there are provisions in the *1965 Agreement* to keep it up-to-date and that they could be used to ensure both the *1965 Agreement* and the services that the federal government pays for are current.

[225] The fact that the *1965 Agreement* has not been kept up-to-date with Ontario's *Child and Families Services Act* was highlighted by Mr. Digby in a 2007 discussion paper (see Annex, ex. 23 [*1965 Agreement Overview*]). The Panel finds the *1965 Agreement Overview* document to be relevant and reliable, especially given Mr. Digby's involvement in its authorship. According to the *1965 Agreement Overview* discussion paper, at page 4, issues raised by various stakeholders with regard to the *1965 Agreement* and its implementation include:

Concern that the agreement is bilateral, not tripartite, since First Nations were not asked to be signatories in 1965. While clause 2.2 of the *1965 Agreement* indicates that bands are to signify concurrence to the extension of provincial welfare programs, this does not reflect the type of intergovernmental relationship sought by many First Nations.

[...]

First Nations and the provincial government have, from time to time, expressed interest in INAC cost-sharing additional provincial social service programs to be extended on reserve. INAC has generally not had the resources to 'open up' new areas for cost-sharing. [...] There has been no update to the agreement schedule with regard to cost-sharing child welfare. As several programs within the provincial Child and Family Services Act (CFSA) fall outside of INAC's mandate, the department is not in a position to 'open up' discussion on cost-sharing the full CFSA.

[226] In 2011, the Commission to Promote Sustainable Child Welfare (the CPSCW) prepared a discussion paper regarding Aboriginal child welfare in Ontario (see Annex, ex. 24 [*CPSCW Discussion Paper*]). The CPSCW was created by the Minister of Children and Youth Services in Ontario to develop and implement solutions to ensure the sustainability of child welfare. It reports to the Minister thereon. In light of this public mandate, the Panel finds the discussion paper relevant and reliable to the issue of the provision of child and family services to First Nations on reserve in Ontario.

[227] The *CPSCW Discussion Paper*, at page 4, begins by noting the impact of history on many Aboriginal communities:

The combination of colonization, residential schools, the Sixties Scoop, and other factors have undermined Aboriginal cultures, eroded parenting capacity, and challenged economic self-sufficiency. Many Aboriginal people live in communities that experience high levels of poverty, alcohol and substance abuse, suicides, incarceration rates, unemployment rates, and other social problems. Aboriginal children are disproportionately represented in the child welfare system and in the youth justice system. Suicide rates for Aboriginal children and youth surpass those of non-Aboriginals by approximately five times. Aboriginal youth are 9 times more likely to be pregnant before age 18, far less likely to complete high school, far more likely to live in poverty, and far more likely to suffer from emotional disorders and addictions.

[228] Despite these specific risk factors for Aboriginal peoples, the *CPSCW Discussion Paper* notes that many provincial child welfare agencies give little attention to the requirements for providing services to Aboriginal children set out in Ontario's *Child and Families Services Act* (see at p. 26). Specifically, the discussion paper points to sections 213 and 213.1 of the *Child and Families Services Act* whereby a society or agency that provides services with respect to First Nations children must regularly consult with the child's band or community, usually through a Band Representative, about the provision of the services, including the apprehension of children and the placement of children in care; the provision of family support services; and, the preparation of plans for the care of children.

[229] According to the *CPSCW Discussion Paper*, Band Representatives can be crucial and tend to fulfill the following functions: serving as the main liaison between a Band and Children's Aid Societies [CASs]; providing cultural training and advice to CASs; monitoring Temporary Care Agreements and Voluntary

Service Agreements with CASs; securing access to legal resources; attending and participating in court proceedings; ensuring that the cultural needs of a child are being addressed by the CAS; and, participating in the development of a child's plan of care (see at p. 26).

[230] The *CPSCW Discussion Paper* indicates that, in the past, First Nations were funded on a claims basis by the federal government to hire a Band Representative. However, since 2003, that funding was discontinued. Therefore, some First Nations divert resources from prevention services to cover the cost of a Band Representative, while others simply do not have one (see *CPSCW Discussion Paper* at p. 26).

[231] Providing child welfare services in remote and isolated Northern Ontario communities was also identified by the *CPSCW Discussion Paper* as a challenge for CASs. Those challenges include the added time and expense to travel to the communities they serve, where some communities do not have year round road access and where flying-in can be the only option for accessing a community. In fact, one agency was required to make up to 80 flights in a day.

[232] Another challenge for remote and isolated communities is recruiting and retaining staff, especially qualified staff from the community. The legacy of the Sixties Scoop and the association of CASs with the removal of children from the community have caused some First Nations community members to resent or resist CAS workers and can create a hostile working environment.

[233] Other challenges for remote and isolated communities are a lack of suitable housing, which makes it difficult to hire staff from outside the community and to find suitable foster homes; limited access to court; and, the lack of other health and social programs, which impacts the performance and quality of child and family services (see *CPSCW Discussion Paper* at pp. 28-29). On this last point, the *CPSCW Discussion Paper* emphasizes that “[p]romoting positive outcomes for children, families and communities, requires a full range of services related to the health, social, and economic conditions of the community: child welfare services alone are not nearly enough” (at p. 29).

[234] The *CPSCW Discussion Paper* also notes that there are many distinct differences between designated Aboriginal and non-Aboriginal CASs: they serve significantly larger and less inhabited geographic areas with lower child and youth populations, they have significantly larger case volumes per thousand, they serve more of their children and youth in care versus in their own homes, and they have smaller total expenditures, but significantly higher expenditures per capita and higher expenditures per case (see *CPSCW Discussion Paper* at p. 29).

[235] Finally, in discussing the federal-provincial dynamics of providing child and family services on reserve, the *CPSCW Discussion Paper* comments that instead of working collaboratively towards providing effective service delivery to Aboriginal peoples, the federal government has devolved some of its responsibilities for Aboriginal peoples to the provincial governments, which contributes to some confusion over ultimate jurisdiction (see *CPSCW Discussion Paper* at pp. 34-35).

[236] On this last point, in 2007 the Ontario Ministry of Children and Youth Services wrote to AANDC expressing their concern over AANDC's decision to no longer provide funding for Band Representatives: “with the withdrawal of federal funding, many First Nations do not have the financial resources required to participate in planning for Indian and native children involved with a children's aid society or to take part in child protection legal proceedings” (Annex, ex. 25 at p. 2).

[237] In 2011, the Ontario Ministry of Children and Youth Services again wrote to AANDC on the issue of funding for Band Representatives:

The paramount purpose of the CFSA is to “promote the best interests, protection and well-being of children.” The band representative function supports not only the purpose of the Act but also the other important purposes and provisions to which the Act pertains. A lack of sufficient capacity within First Nation communities limits their ability to respond effectively

and in accordance with legislated times frames for action. The withdrawal of [INAC's] funding for band representation functions has eroded First Nations' ability to participate as intended in the CFSA.

(Annex, ex. 26 at p. 2)

[238] Despite the discordance between Ontario's *Child and Families Services Act* and AANDC's policy to no longer fund Band Representatives, Minister Duncan indicated that "it falls within the responsibilities of First Nation governments to determine their level of engagement in child welfare matters" and "we do not foresee the Government of Canada providing funding support in this area" (Annex, ex. 27 at p.1).

[239] Ambiguity surrounding jurisdiction for the provision of mental health services to First Nations youth has also been a cause for concern. When the Anishinaabe Abinoojii Family Services agency sought a mandate to provide children's mental health services, an AANDC employee prepared a document to provide information to the Regional Director General and Assistant Regional Directors General on the issue (see Annex, ex. 28 [*Abinoojii Mental Health Services Mandate*]). The Executive Director for Anishinaabe Abinoojii Family Services, Ms. Stevens, testified as to the content of the document (see *Transcript* Vol. 25 at pp. 174-178).

[240] According to the *Abinoojii Mental Health Services Mandate* document, there are waiting lists for First Nations children served by the Abinoojii Family Services agency who require mental health services. The document adds that while there is some cooperation between mental health service organizations and the Abinoojii agency to manage these waiting lists, there is also a need for more resources and culturally appropriate assessment tools and counsellors. The Ministry of Children and Youth Services has a Mental Health Policy for Children and Youth and has some resources for mental health counselling, but the needs outstrip the funding (see *Abinoojii Mental Health Services Mandate* at pp. 1-2).

[241] In considering the request, the *Abinoojii Mental Health Services Mandate* document states that AANDC does not have a mandate for mental health services and that these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling (see *Abinoojii Mental Health Services Mandate* at p. 2).

[242] In a roundtable meeting between Abinoojii Family Services agency, AANDC, Health Canada and the Ministry of Children and Youth Services for Ontario, Health Canada recognized a need to look at the whole system as services/programs tend to work in silos and raised the possibility of re-prioritizing resources or seeking additional funding. AANDC indicated that the province is the lead on child welfare and Health Canada is the lead on health issues at the federal level, but that it supports the work on examining existing programs, outlining gaps and working together to ensure First Nations receive services that are comparable and culturally appropriate (see *Abinoojii Mental Health Services Mandate* at p. 2).

[243] In 2012, the Ontario Association of Children's Aid Societies (the OACAS) produced a report regarding trends in child welfare in Ontario, including in Aboriginal communities (see Annex, ex. 29 [*Child Welfare Report*]). The OACAS is an advocacy group representing the interests of 45 CASs member organizations. Governed by a voluntary board of directors, OACAS consults with and advises the provincial government on issues of legislation, regulation, policy, standards and review mechanisms. It promotes and is dedicated to achieving the best outcomes for children and families (see *Child Welfare Report* at p. 2). Given the OACAS's mandate and focus, the Panel finds its report relevant and reliable.

[244] According to the *Child Welfare Report*, the current funding model does not reflect the needs of Aboriginal communities and agencies for several reasons including: insufficient resources for services, where they tend to be crisis driven; shortage of funding for administrative requirements; lack of funding to establish infrastructure necessary to deliver statutory child protection services, while operating within the extraordinary infrastructure deficits of many of the communities they serve; and, insufficient funds to retain qualified staff to deliver culturally appropriate services (at p. 7). Among other things, at page 7 of the *Child Welfare Report*, the OACAS asked the Ontario government to:

Establish an Aboriginal child welfare funding model and adequate funding to support culturally appropriate programs that encompass the unique experiences of diverse Aboriginal populations – on-reserve, off-reserve, remote, rural, and urban. Invest in capacity building to enable the proper recruitment, training and retention of child welfare professionals in emerging Aboriginal Children’s Aid Societies.

[245] In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, *Transcript* Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see *Transcript* Vol. 25 at p. 32).

[246] Again, the above evidence on the *1965 Agreement* identifies shortcomings in AANDC’s approach to the provision of child and family services on First Nations reserves in Ontario. In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement* “...to make available to the Indians in the Province the full range of provincial welfare programs”.

#### **d. Other provincial/territorial agreements**

[247] As mentioned above, two other provinces have agreements with AANDC for the provision of child and family services on reserve: Alberta and British Columbia. While in the Yukon, the *Yukon Funding Agreement* applies.

[248] As mentioned above, the *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Schedule “DIAND-3” of the *Yukon Funding Agreement* provides for the application of Directive 20-1 to the funding of child and family services to those First Nations children and families.

[249] In Alberta and British Columbia, AANDC reimburses the provinces for the delivery of child and family services to certain First Nations communities on reserve where there are no FNCFS Agencies. In Alberta, six First Nations communities are served by the *Alberta Reform Agreement* for child and family services. In British Columbia, seventy-two First Nation communities receive services under the *BC Service Agreement*.

[250] Pursuant to the *Alberta Reform Agreement*, AANDC reimburses Alberta for the costs of providing various social services, including child welfare services, to certain First Nations reserves in the province. For those child welfare services, funding is provided at the beginning of the fiscal year based on a funding formula using year-end costs of the preceding fiscal year. Adjustments are made based on actual expenditures during the fiscal year (see *Alberta Reform Agreement* at Schedule A, s. 1).

[251] In British Columbia, the *BC MOU* was in place from 1996 to 2012. Under the *BC MOU*, AANDC reimbursed the province for eligible maintenance expenses based on a per diem formula which accounted for the province’s administration, supervision and maintenance costs (see *BC MOU* at s. 5.0;



and Appendix B and D). The per diem rates could be adjusted annually and the province could receive an adjustment to the previous year's per diem rates based on actual expenditures (see *BC MOU* at Appendix C). Those adjustments included rate increases based on inflation and increased emphasis on prevention services. For the fiscal year 2006/2007, the recalculation of per diem rates resulted in an invoice to AANDC for over \$5 million dollars (see Annex, ex. 30).

[252] In 2012, the *BC MOU* was replaced by the *BC Service Agreement*. The *BC Service Agreement* now provides for reimbursement of maintenance expenses based on actual expenditures. It also provides funding to the province for operations expenses based on a costing model agreed to between the province and AANDC (see *BC Service Agreement* at s. 7; and Appendix A). For fiscal year 2012-2013, operations funding amounted to \$15 million.

[253] The *Alberta Reform Agreement*, the *BC MOU* and the *BC Service Agreement* provide reimbursement for actual eligible operating and administrative expenditures, including retroactive adjustments for inflation and increases for changes in programming. This is quite different from FNCFS Agencies in those provinces, including under the EPFA in Alberta, where there is no such adjustments for those types of increases in costs (see testimony of C. Schimanke, *Transcript* Vol. 62 at pp. 53-54). As expressed in the *2008 Report of the Auditor General of Canada* at page 19, these adjustments and reimbursements for actuals are linked directly to provincial child welfare legislation:

4.49 INAC funds some provinces for delivering child welfare services directly where First Nations do not. INAC has agreements with three of the five provinces we covered on how they will be funded to provide child welfare services on reserves. We found that in these provinces, INAC reimburses all or an agreed-on share of their operating and administrative costs of delivering child welfare services directly to First Nations and of the costs of children placed in care. [...]

4.50 INAC funding to cover the costs of operating and administering First Nations agencies is established through a formula. Although the program requires First Nations agencies to meet applicable provincial legislation, we found that INAC's funding formula is not linked to this requirement. The main element of the formula is the number of children aged from 0 to 18 who are ordinarily resident on the reserve or reserves being served by a First Nations agency. [...]

[254] The Panel will return to this comparison in the section that follows.

### **iii. AANDC's position on the evidence**

[255] AANDC argues the evidence above is not sufficient to establish adverse treatment in the provision of funding for First Nations child and family services, including that there is a lack of specific examples to support the allegation of a denial of such services. In sum, it claims the reports and evidence regarding the FNCFS Program above should be given little weight, that the choices of FNCFS Agencies in administering their budgets should be considered in evaluating any adverse impacts, along with any additional funding they receive beyond Directive 20-1 or the EPFA, that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*, and, even if it were, such comparative evidence is lacking in this case. Each argument is addressed below.

#### **a. The relevance and reliability of the studies on the FNCFS Program**

[256] AANDC views the various studies of the FNCFS Program outlined above as having little weight. It questions the comprehensiveness of the studies, noting the experience of a few agencies does not establish differential treatment.

[257] The Panel finds the *NPR* and *Wen:De* reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

[258] In its October 2006 *Fact Sheet* (see Annex, ex. 10), AANDC acknowledged the impacts and findings of the *Wen:De* reports, along with the *NPR*, and committed to refocusing the FNCFS Program to improve outcomes for First Nations children and families on reserve:

Currently, Program funding is largely based on protection services, which encourage Agencies to remove First Nation children from their parental homes, rather than providing prevention services, which could allow children to remain safely in their homes.

- Program expenditures were \$417 million in 2005-2006 and are expected to grow to \$540 million by 2010-11 if the program continues to operate under the protection-based model.
- From 1996-97 to 2004-05, the number of First Nation children in care increased by 64.34%.
- Approximately 5.8% of First Nation children living on reserve are in care out of their parental homes.

**Current Issues:** First Nation children are disproportionately represented in the child welfare system. Placement rates on reserve reflect a lack of available prevention services to mitigate family crisis.

[...]

**Changes in the landscape:** Provinces and territories have introduced new policy approaches to child welfare and a broader continuum of services and programs that First Nations Child and Family Services must deliver to retain their provincial mandates as service providers. However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for the agencies to meet their mandated responsibilities.

**The Future:** A Joint National Policy Review on First Nations Child and Family Services, completed in 2000, recommended that the federal government increase prevention services for children at risk-services that must be provided before considering the removal of the child and placement in out of home care-and that it provide adequate funding for this purpose.

- Indian and Northern Affairs Canada funded research undertaken by the First Nations Child and Family Caring Society of Canada in 2004 and 2005. The reports: *WEN: DE: We are coming to the light of day*, and *WEN: DE: The journey continues*, included recommendations for investments and policy adjustments required to address the shortcomings of the current system. This research will form the basis of Indian and Northern Affairs Canada's request for investments and policy renewal.

[...]

- The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.
- The strategy is to refocus the program from a protection-based approach towards a preventive-based model, promote a variety of care options to provide children and youth with safe, nurturing and permanent homes, and build on partnerships and implement practical solutions to improve child interventions services.

[259] Ms. Murphy and Ms. D'Amico also testified about AANDC's reliance on the *NPR* and *Wen:De* reports in implementing the EPFA (see *Transcript* Vol. 53 at pp. 46-47; and, Vol. 54 at pp. 50-51).

[260] Internal AANDC documents presented at the hearing also support the department's adherence to the findings in the *NPR* and *Wen:De* reports. AANDC submits the Panel should rely on the testimony of its witnesses rather than what is found in internal documents, given that many of the authors did not testify before the Tribunal in order to provide context and the documents may merely reflect the opinion of employees at a specific time. Therefore, AANDC submits that the Tribunal should assess the weight of documents contextually, with reference to oral evidence regarding their proper interpretation, and considering the scope of the author's authority to prepare the document in question.

[261] The Panel has considered these arguments in weighing the evidence and finds the documents relied upon below to be straightforward and clear. Many of these documents are presentations prepared for, or delivered to, high level AANDC officials. The Panel finds these presentations highly relevant and reliable given they are the means by which information on the FNCFS Program is provided to AANDC management, including Deputy or Assistant Deputy Ministers, in order to inform policy decisions or future requests to Cabinet (see *Transcript* Vol. 54 at pp. 159, 166; and, Vol. 55 at p. 199). Furthermore, the other AANDC documents referred to below corroborate the information found in those presentations.

[262] A 2005 presentation to the 'Policy Committee' refers to the *NPR* by stating: "[a] 2000 review of FNCFS found that Indian Affairs was funding [FNCFS Agencies] 22% less, on average, than their provincial counterparts" (see Annex, ex. 31 at p. 2 [*Policy Committee presentation*]). The *Policy Committee presentation*, at page 3, goes on to state that, despite maintenance expenditures increasing by 7% to 10% annually, the Department only receives a 2% annual adjustment to the departmental budget. According to the *Policy Committee presentation* at page 3, "[a]dditional investments are now required for further stabilization for basic supports with respect to Enhanced Organizational Support, and Maintenance Volume Growth."

[263] The 2005 *Policy Committee presentation* also indicates FNCFS Agencies are threatening to withdraw from service delivery because they cannot deliver provincially mandated services within their current budgets. The presentation continues by stating that provincial governments have written to the Minister of AANDC indicating their concern that the department is not providing sufficient funding to permit FNCFS Agencies to meet provincial statutory obligations. As a result, the *Policy Committee presentation* warns that provinces may refuse to renew the mandates of FNCFS Agencies or give mandates to new agencies (see at p. 4).

[264] In line with the *NPR* and *Wen:De* reports, the *Policy Committee presentation* states: "In addition to enhanced basic supports for First Nation Child and Family Services, fundamental change in the approach to child welfare is required in order to reverse the growth rate of children coming into care" (at p. 5). In this regard, the presentation proposes transformative measures be put in place to allow investment in prevention services according to provincial legislation and standards (see at p. 6). This "[e]nables the availability of a full spectrum of culturally-appropriate programs and services that would eventually reduce the over representation of First Nations children in the child welfare system" (*Policy Committee presentation* at p. 6). It also "...addresses immediate critical funding pressures and would

stabilize the child welfare situation on reserve” (*Policy Committee* presentation at p. 6). Finally, according to the *Policy Committee* presentation, “[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).

[265] Similarly, in another document entitled “First Nations Child and Family Services (FNCFS) Q’s and A’s”, it states:

Circumstances are dire. Inadequate resources may force individual agencies to close down if their mandates are withdrawn, or not extended by the provinces. This would result in provinces taking over responsibility for child welfare, likely at a higher cost to Indian and Northern Affairs Canada.

[...]

Over the past decade the trend in child welfare has been towards prevention or least disruptive measures. INAC recognizes that the current funding formula is not flexible enough to follow this trend and needs to be revised. [...]INAC received authority in 2004-2005 to implement a Flexible Funding Option for Maintenance resources. This will permit some agencies to reprofile Maintenance resources to allow for greater flexibility in how these funds are utilized by placing greater emphasis on prevention services.

Incremental Operations funding will assist agencies to a very limited extent in providing additional prevention services. Additional Operations resources will assist agencies in coping with funding pressures resulting from increased legal fees, insurance costs and other operational expenses that have not been adjusted for since Program Review was implemented in 1994-1995.

(Annex, ex. 32 at pp. 1-2, 5)

[266] Similarly, the *2005 National Program Manual*, at page 14, section 2.2.3, outlines some of the cost pressures experienced by FNCFS Agencies in terms of their operational funding:

Although the authorities are clear on what to be included in the operations formula, First Nations have expressed a concern that because the formula was developed in the late 1980's, legislation, standards and practices have changed significantly. Although the following items are included in the Operations, First Nations have stated that Recipients are under increasing pressures due to changes over time with respect to:

- *Information Technology*: In the late 1980's, use of computers was limited. Today, however, they are vital to operating social programs and services.
- *Prevention (Least disruptive measures)*: Recent trends in provincial and territorial legislation have placed a greater emphasis on prevention. Although prevention resources were included in the current formula, the level of funding may not provide enough resources to meet current needs.
- *Liability Insurance*: As with prevention, the Operations formula includes funding for insurance. However, since September 11, 2001 (9/11) insurance costs have increased dramatically.
- *Legal Costs*: Although legal costs are included in the Operations formula, they have become a larger issue than planned for when the formula was developed. A higher incidence of contested cases plus changes in provincial practice requiring cases to be presented by legal

representatives rather than social workers has resulted in higher costs. Further, litigation on behalf of injured children can be very expensive, even when adequate liability insurance is carried.

It is anticipated that the review of the Operational formula will address these issues. At the present time, however, the current authorities must be applied.

(Emphasis added)

[267] In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the cycle of dependency (see Annex, ex. 33 at pp. 1-2 [*Explanations on Expenditures of Social Development Programs* document]). The document describes AANDC's social programs as "...limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (*Explanations on Expenditures of Social Development Programs* document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a significant increase in costs for AANDC. The document provides the example of the Kasohkowew Child Wellness Society in Alberta, where it would cost an additional \$2.2 million beyond what AANDC currently funds if social services on that reserve reverted back to the province of Alberta (see *Explanations on Expenditures of Social Development Programs* document at p. 2).

[268] Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [*Social Programs presentation*]). With specific regard to the FNCFS Program, the presentation states that "efforts have been concentrated on child protection and removal of the child from the parental home with the result that the children in care rate continues to increase" (see *Social Programs presentation* at p. 5).

[269] In general, the *Social Programs presentation* states that "[m]any First Nation and Inuit children and families are not receiving services reasonably comparable to those provided to other Canadians" (at p. 3). Relatedly, the presentation notes that "[p]rovinces/territories have been critical of [AANDC] funding levels as they do not enable First Nation service providers to meet the standards stipulated in provincial/territorial legislation" (*Social Programs presentation* at p. 6). According to the presentation, the delivery of social programs on reserves is hampered by the absence of legislation, inadequate funding and a division of responsibilities between federal departments which impedes comprehensive program responses (see *Social Programs presentation* at p. 3).

[270] In another presentation, AANDC describes Directive 20-1 as "broken":

The current system is BROKEN, i.e. piecemeal and fragmented

The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality

[...]

The current program focus is on protection (taking children into care) rather than prevention (supporting the family)

[...]

Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand

INAC CFS has been unable to keep up with the provincial changes

Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced

(Annex, ex. 35 at pp. 2-3 [*Putting Children and Families First in Alberta presentation*])

[271] The *Putting Children and Families First in Alberta presentation* touts prevention as the ideal option to address these problems at page 4:

Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve

Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health

[272] Finally, the *Putting Children and Families First in Alberta presentation* states at page 5:

The facts are clear:

- *Wen:De* Report - Early intervention/prevention is KEY

[...]

- First Nation agencies have been lobbying Canada since 1998 to change the system

[273] AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [*2007 Evaluation of the FNCFS Program*]). The findings and recommendations of the *2007 Evaluation of the FNCFS Program* reflect those of the *NPR* and *Wen:De* reports. Of note, at page ii, the *2007 Evaluation of the FNCFS Program* makes the following findings:

Although the program has met an increasing demand for services, it is not possible to say that it has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed.

[274] In response to these findings, the *2007 Evaluation of the FNCFS Program* made six recommendations at page iii, including that AANDC:

1. clarify the department's hierarchy of policy objectives for the First Nations Child and Family Services Program, placing the well-being and safety of children at the top;

2. correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions;

[275] The *2007 Evaluation of the FNCFS Program* goes on to state that the first step in improving the FNCFS Program is to change Directive 20-1 by providing FNCFS Agencies with a new funding stream that ensures adequate support for prevention work (see at p. 35). In discussing the costs and benefits of increasing the FNCFS Program's focus on prevention, the cost estimates provided in *Wen:De Report Three* are outlined, including the \$22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment), and insurance premiums; and, the \$86.4 million for annual funding needs for such things as an inflation adjustment to restore funding to 1995 levels, adjusting the funding formula for small and remote agencies, and increasing the operations base amount from \$143,000 to \$308,751 (see *2007 Evaluation of the FNCFS Program* at pp. 35-36).

[276] In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "...approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children.

[277] Similarly, at the hearing, Ms. Murphy described the EPFA as follows:

MS MacPHEE: Okay. And I think you touched on this earlier, but I wanted to get you to elaborate a little bit more. Could you tell us a little bit how, more specifically maybe, the new Enhanced Prevention Focused Approach was developed? You know, what was the impetus for developing this new approach?

MS MURPHY: We weren't getting good outcomes. MS MURPHY: We were having challenges with First Nations, we were having challenges with the number of children in care, and we wanted to reduce that number and we wanted to have kids be safe and we wanted to avoid having kids having to come into care. I mean, the challenge for first Nations communities -- and I'm sure this has already been outlined here by others, is that, especially for small, remote communities, when child needs to be taken into care, sometimes there's not community-based options, so the child may not stay in that community. And taking a child away from their family and from their community has impacts for sure. So we wanted to find community-based solutions so kids could stay in their communities, be close to -- and hopefully have the families be able to be reunited. So we wanted to do that early intervention work which would actually avoid having to have the children actually being removed from their parental home and perhaps being located outside at a distance from their community.

(*Transcript Vol. 54 at pp.49-50*)

[278] However, as the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada*, and the *2012 Report of the Standing Committee on Public Accounts* pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA.

[279] AANDC argues the *2008 Report of the Auditor General of Canada*, and the *2011 Status Report of the Auditor General of Canada*, should also be given minimal weight since the authors of the reports were not called to substantiate the documents or provide the context of statements or opinions contained therein. Additionally, AANDC argues these reports are not probative of the facts in issue.

[280] The Panel rejects AANDC's arguments concerning the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*. The Auditor General of Canada did not testify before the Tribunal as she or he is not a compellable witness (see section 18.1 of the *Auditor General Act*). Nevertheless, the Panel is satisfied the *2008 Report of the Auditor General of Canada* and *2011 Status Report of the Auditor General of Canada* are highly reliable, relevant, and clear. They are written to report findings in a comprehensive manner so as to allow Parliament and all Canadians to understand its recommendations. As stated at section 7(2) of the *Auditor General Act*, reports of the Auditor General of Canada are filed annually with the House of Commons in order to "...call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons..."

[281] Given that the Auditor General is an independent public office in Canada, serving the interests of all Canadians, it would be unreasonable to expect the Panel give little or no weight to the report and findings in the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*, especially given the fact that many findings in the reports are specific to the FNCFS Program. In addition, as was outlined above, AANDC publicly accepted the recommendations emanating from the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*, reinforcing the reports' relevance and reliability in this matter. The Panel accepts the findings of the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*.

[282] Similarly, the Panel finds the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts* to be highly relevant and reliable in this case. In addition to the fact that the reports relate directly of the FNCFS Program, they are also authored by elected officials performing public duties for the benefit of all Canadians. High ranking officials from AANDC were able to testify before the Committee and, in doing so, acknowledged the findings in those reports. Again, the Panel accepts the findings of the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts*.

[283] The statements of the Deputy Minister and Assistant Deputy Minister before the Standing Committee on Public Accounts also indicate that they viewed the EPFA as the solution to address the flaws in Directive 20-1. Again, internal AANDC documents support the findings in the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada* and the *2012 Report of the Standing Committee on Public Accounts*, regarding the need to transition those jurisdictions still under Directive 20-1 to the EPFA, while also acknowledging the need to improve the EPFA.

[284] In 2010, AANDC's Evaluation, Performance Measurement and Review Branch did its own evaluation of the implementation of the EPFA in Alberta (see Annex, ex. 37 [*AANDC Evaluation of the Implementation of the EPFA in Alberta*]). The evaluation found that the design of the EPFA was a move in the right direction with potential for positive outcomes. However, it identified some challenges with the EPFA model, including: timing, provincial requirements, human resources shortages, salaries, support from government/agency management, community linkages, training and geographical isolation. All these were considered by FNCFS Agencies to be essential to the successful implementation of the approach. An additional challenge identified is ensuring that reliable data is collected to allow for accurate performance measurement and some comparability of prevention services (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. vi, 11,16-17, 21-24).

[285] Moreover, the evaluation noted that, as the EPFA is based on an annual allocation for most aspects and some pieces being determined by a formula, "there is not the flexibility to respond quickly to changes in provincial policy or other external drivers..." (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27). According to the evaluation, this lack of flexibility "...is common to INAC programs that adhere to provincial legislation and [...] [is] an in-built risk to the program" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27).



[286] Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. 16-18, 21-24).

[287] The evaluation recommended revisiting the EPFA funding model within the next year to learn from the past two years of implementation and to incorporate additional resources to address some of the issues faced by rural and remote communities. As part of this review, it recommended AANDC also determine if the calculations that are based on assumed population of children in care are relevant in achieving desired outcomes (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at p.i).

[288] In 2012, the Evaluation, Performance Measurement and Review Branch of AANDC also did its own evaluation of the implementation of the EPFA in Saskatchewan and Nova Scotia (see Annex, ex. 38 [*AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*]; see also, Annex, ex. 39). Again, the findings are in line with those of the other reports on the FNCFS Program.

[289] 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).

[290] One of the main challenges identified in the implementation of the EPFA in Saskatchewan and Nova Scotia was unrealistic expectations, largely by community leadership, of what agencies are able to achieve with the funding they receive. According to the evaluation, community leadership occasionally expect agencies to cover costs that are social in nature but that do not fall under the agency's eligible expenditures. That is, the conditions which contribute most to a child's risk are conditions that the child welfare system itself does not have the mandate or capacity to directly address, including economic development, health programming, education and cultural integrity (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35, 49, 51). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* states, at page 49: "AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs".

[291] Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had

to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35-36).

[292] In an August 2012 presentation, entitled “First Nations Child and Family Services Program (FNCFS) The Way Forward”, Ms. Odette Johnson, Director of the Children and Family Services Directorate of AANDC outlined to Françoise Ducros, Assistant Deputy Minister, ESDPPS, the need to reassess the EPFA (see Annex, ex. 40 [the *Way Forward presentation*]). The purpose of the presentation was “[t]o provide options and seek approval for next steps in the reform of the FNCFS Program” (*Way Forward presentation* at p. 2). It identifies the drivers behind this reform as: the provincial/territorial shift to prevention, the high numbers/costs of First Nation children in care, AANDC internal audits and evaluations of the FNCFS (along with those of the Auditor General), the reports of Parliamentary Committees, the human rights complaint, and child advocate reports and other research (see the *Way Forward presentation* at p. 5).

[293] According to the *Way Forward presentation*, “[a]udits and evaluations of between 2008 and 2012 demonstrate a need for the EPFA, but also a need to annually review the EPFA formula as constant provincial changes make it difficult to stay current and enable Agencies to provide a full range of child welfare services” (at p. 9). Furthermore, “[p]rovinces have been shifting their caseloads towards greater emphasis on intake and investigation which may not have been part of original EPFA discussions and are now creating pressures on Agencies” (see the *Way Forward presentation* at p. 9).

[294] At page 13, the *Way Forward presentation* provides a comparative table of “where we are” and “where we need to go”:

## Where we are

Taking children into care and some work with families in the home

Fund agencies and provinces for basic protection services and some prevention with families in the home.

## Where we need to go

Taking children in care for  
→critical cases but more with the families in the home.

Either fund full range of services provided by provinces (differs among jurisdictions)  
→OR transfer child welfare on reserve to the Provincial/Territorial governments.

Initial investments in EPFA in 6 jurisdictions but not necessarily addressing all aspects of child welfare.

EPFA in all jurisdictions **fully costed at \$108.13M**, supporting all aspects of child welfare including intake, early intervention and allowing for developmental phase.

Developing some capacity for prevention in communities.

All communities have capacity in prevention.

[295] The presentation proposes three options to address these issues: (1) implement EPFA in the remaining jurisdictions; (2) expand the EPFA with increased investments to address cost drivers, including implementing the model in the remaining jurisdiction; and, (3) transfer the program to the provinces/territories.

[296] Under option 1, the costs of transferring the remaining jurisdictions to EPFA are estimated at: \$21 million for British Columbia; \$2 million for the Yukon; \$5 million for Ontario; \$2 million for New Brunswick; and, \$2 million for Newfoundland and Labrador. (see *Way Forward presentation* at p. 15). There is also an additional \$4 million listed for “Maintenance” which Ms. Murphy explained as an infusion of additional funds to avoid having to re-allocate money from elsewhere in AANDC to cover additional costs that go beyond the standard funding formula (see *Transcript* Vol. 54 at pp. 167-168). Furthermore, an additional \$2 million is estimated for “Strength and Accountability” to allow AANDC to better administer the FNCFS Program internally (see testimony of S. Murphy, *Transcript* Vol. 54 at pp. 168).

[297] The presentation lists as a “PRO” for this option the recognition that the FNCFS Program cannot address all root causes of the over-representation of children in care. Under “CONS” it states the “5-year EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies” (*Way Forward presentation* at p. 15). According to Ms. Murphy, who stated she had signed off on the presentation, the major cost drivers are increases in the rates for maintaining children in care, growth in the number of children that come into care and salary increases (see *Transcript* Vol. 54 at pp. 158-159, 179 and 181). She elaborated on the “CON” for option 1 as follows:

So with this option we were talking about maintenance, but we weren't necessarily dealing with all of the cost drivers that we were observing.

So, as an example, we know that the cost of foster care is going up and so, Agencies are trying to pay those bills and we hadn't properly calculated that in our model.

This option wasn't trying to re-stabilize the existing EPFA jurisdictions for the cost changes that had happened since we introduced the funding models, it was really about the five. So it was sort of the minimum option at the time.

(*Transcript* Vol. 54 at p. 169)

[298] For option 2, the implementation of the expanded EPFA in the remaining jurisdictions is estimated at \$65.03 million, while topping-up the existing EPFA jurisdictions is estimated at \$43.10 million, for a total of \$108.13 million. In addition to these amounts, the presentation indicates that a 3% escalator will be required every year. The “PROS” of this option are that it ensures agencies are able to meet changing provincial standards and salary rates while maintaining a high level of prevention programming; and, that funding remains reasonably comparable with provinces and territories. Under “CONS”, the presentation states: “Option 2 is more costly than Status Quo EPFA implementation” (*Way Forward presentation* at p. 16). During testimony, Ms. Murphy was asked whether the “PROS” of this option suggest that AANDC is not able to provide a reasonably comparable level of services under the FNCFS Program. Ms. Murphy responded:

It has always been our intention to provide reasonably comparable services.

We were noticing trends in increasing kids in care and we were having stresses in our budget to be able to maintain those levels and, of course, the Department's doing re-allocations, but we weren't – we noticed changes for sure and we needed to keep up with those changes and we weren't necessarily being successful in all cases of being able to do that.

(*Transcript* Vol. 54 at pp. 163-164)

[299] Finally, the third option of transferring child welfare on reserve to the provinces/territory does not have an estimated cost, but the presentation indicates there is “[p]otential for dramatic increases in costs” (*Way Forward presentation* at p. 17). As Ms. Murphy put it:

it's certainly expected that if you were to ask someone else to start to take on the delivery of a program, they're going to have their administrative cost structure, they're going to potentially look for funds to offset the cost of them assuming that role.

[...]

It doesn't mean that it would. We didn't -- necessarily hadn't costed any of that, but we wanted to at least highlight that there might be a potential for an increase in costs because we might have to absorb, for instance, increased administrative costs that weren't necessarily there right now in the way that we're funding individual Agencies.

And other costs, we don't know. They may want to negotiate other things as part and parcel of taking on that responsibility and we wouldn't wait until you got to negotiation to find out what that was.

(*Transcript* Vol. 54 at pp. 166-167).

[300] The “PROS” of option 3 include: comparability issue would be resolved and better oversight/compliance of child and family services on reserve. Along with the potential for a dramatic increase in costs, the presentation also includes as “CONS” for this option that support for all First Nations is uncertain, and that it involves complimentary programs, therefore, it is a big task to implement and involves cost implications beyond AANDC (*Way Forward presentation* at p. 17).

[301] Following on the *Way Forward presentation*, in two similar presentations in October and November 2012, Ms. Murphy expanded on the options for reforming the FNCFS Program (see testimony of S. Murphy, *Transcript* Vol. 55 at p. 199). In these presentations Ms. Murphy proposed that AANDC complete the reform of the FNCFS Program to EPFA in the remaining jurisdictions (estimated at \$139.7 million over 5 years and \$36.6 million ongoing); stabilize pressures in existing EPFA jurisdictions (estimated at 164.1 million over 5 years); add a 3% escalator per year for all jurisdictions to

ensure provincial/territorial comparability (estimated at \$105.5 million over 5 years and \$23.9 million ongoing); and seek additional resources for increased program management and strengthened accountability (estimated at \$11.2 million over 5 years and \$2.3 million ongoing) (see Annex, ex. 41 at p. 2 [the *Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation*]; and, Annex, ex. 42 at pp. 2, 5 [the *Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation*]).

[302] The need for this increased funding is explained as:

Maintenance rate increases for children in care have far exceeded the two percent AANDC receives annually. As a result, the Department must reallocate funds from other program areas to cover the deficit.

AANDC must pay the costs to support children in care and these costs are still rising dramatically. As maintenance rates are essentially dictated by provinces, AANDC has no choice but to support the costs of children in care based on these rates.

In addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve.

[...]

Currently, AANDC has very limited human resources dedicated to the FNCFS Program.

No funding for strengthened accountability for results was provided when EPFA was approved in 2007.

AANDC's activities have increased dramatically with the implementation of EPFA in the 6 jurisdictions.

AANDC is currently limited in how effectively it can manage and monitor the program while developing tripartite partnerships to fully implement EPFA.

*(Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation at pp. 5-6)*

[303] In Ms. Murphy's view, while positive outcomes from the EPFA have been identified, "the program is losing ground due to increasing provincial costs" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 3). Furthermore, she views her proposal as addressing "...rising maintenance costs in all jurisdictions", it "allows the program to accommodate provincial rate changes thereby maintaining comparability", and "will allow agencies to devote appropriate resources to prevention, which will lead to a decrease in long term care placements in the medium to longer term" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 6). The impacts of no new investments in the FNCFS Program would, according to Ms. Murphy, "...not advance improved outcomes for First Nations children and their families" and "[t]he Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 8). At the hearing, Ms. Murphy was asked to expand on this last point:

MEMBER BELANGER: "The Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support." What are we comparing here?

MS MURPHY: I think what we were saying there was that we were starting to have issues in terms of being able to match salaries and the costs of keeping children in care, those other elements that I have laid out, and that so we may have trouble paying those bills.

We are paying those bills now, but if you keep going, at some point you hit the wall and you don't have the ability to continue to reallocate, you put at risk that policy concept of comparability.

(*Transcript* Vol. 55 at p. 216)

[304] For reasons that were not elaborated upon at the hearing, the above options and recommendations were not implemented in AANDC's 2013 or 2014 budgets (see *Transcript* Vol. 55 at pp. 206-208, 221; see also *Transcript* Vol. 61 at pp. 159-162).

[305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and *Wen:De* reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and, subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.

#### **b. The choices of FNCFS Agencies and additional funding provided**

[306] AANDC argues the difference between the level of services and programs offered on and off reserve may have little to do with funding and more to do with the choices made by FNCFS Agencies about the type of services and programs they want to provide and other administrative issues affecting the overall budget. For example, some agencies decide to allocate funds to the salaries of their board members when the budget should be spent on front line services. Also, AANDC points out that some agencies are successful with their budget, including some agencies who have posted surpluses. AANDC submits it also provides additional funding or reallocates funds where FNCFS Agencies require further funding. Therefore, if there are gaps in funding, AANDC contends it has bridged those gaps through additional funds.

[307] As outlined above, Directive 20-1 and the EPFA have certain assumptions built into their funding formulas. In general, that the child population they serve is 1000 children aged 0-18, that 6% of the total on reserve child population is in care, and that 20% of families are in need of services. Ms. D'Amico explained the use of assumptions as providing stability for FNCFS Agencies. That is, even if less than 6% of its children are in care and 20% of its families are in need of services, it would not reduce the agency's budget. That may indeed be a beneficial situation for agencies where these assumptions accurately reflect their clientele and may even result in the agency receiving a surplus of funding. However, on this last point, the Panel notes *Wen:De Report Two* stated: "Not surprisingly, it was only BC agencies that advised that they had surpluses and, in almost all cases, the surplus came from the maintenance per diem arrangement" (at p. 213). More fundamentally though, where the assumptions do not accurately reflect the clientele of an FNCFS Agency - where the percentage of children in care and families in need of services is higher than 6% and 20% respectively - the funding formula is bound to provide inadequate funding.

[308] In 2006, 18 FNCFS Agencies had over 10% of their children in care out of the parental home (see *Social Programs presentation* at p. 13). In the same year, there were 257 First Nations communities on reserves with no access to child care and many more communities did not have enough resources to support 20% of children from birth to six years of age (see *Social Programs presentation* at p. 14).

[309] For Alberta, Ms. Schimanke indicated that most FNCFS Agencies have around 6% of children in care, but there are some that have anywhere from 11 to 14% (see *Transcript* Vol. 61 at pp. 113-115). Also, as stated above in the *2008 Report of the Auditor General of Canada*, in the five provinces covered by the report, the percentage of children in care ranged from 0 to 28%.

[310] In Manitoba, Ms. Elsie Flette, Chief Executive Office of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), described the effects of the assumptions on FNCFS Agencies:

If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by AANDC as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in care that you have to spend that money on and, so, you have some flexibility for how else to use that money.

But if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the Southern Authority I believe right now four Agencies that exceed those assumptions. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.

When we look at the families and prevention services, I believe there's about five Agencies that exceed that 20 percent. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on- Reserve are getting service.

They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go -- they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.

[...]

So, it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if you have higher than seven percent you have unfunded workload.

(*Transcript* Vol. 20 at pp. 104-105, 118)

[311] While additional funds have been provided or reallocated to cover maintenance expenditures and/or some *ad hoc* exceptional circumstances, FNCFS Agencies are expected to cover their operations and prevention costs within their fixed budgets, including using those funds to cover any deficits in maintenance expenditures. Those budgets are based on the formulas that, again, do not account for the actual needs of the FNCFS Agencies. They are also static formulas. That is, as the years go by, the formulas become more and more disconnected from the actual needs of FNCFS Agencies and the children and families they serve. Specifically, the formulas do not apply an escalator for regular increases in costs, including for salaries, where the bulk of funding is spent. While Directive 20-1 calls for a cost of living increase of 2% every year, that increase has not been applied since 1995-1996. Similarly, once EPFA is implemented in a jurisdiction, aside from adjustments for population size,

yearly increases in costs are not accounted for in the funding formula. In Alberta for example, as indicated above, funding under EPFA is provided based on provincial rates from 2006. According to an AANDC official, it is up to FNCFS Agencies to work with the budgets they have:

MR. POULIN: So for an Agency that is over 6 percent, where you need more protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services.

MS SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.

MR. POULIN: That means paying -- you know, that means in effect paying your workers less than what the province does.

MS SCHIMANKE: It could be, yes. That could be one example of things, yes.

MR. POULIN: It could be having less workers and therefore having a higher case ratio than your workers -- than the province does.

MS SCHIMANKE: It could be, yes.

I do have to show, though, that there are Agencies who are above the 6 percent who still show surpluses, so I don't know what they are doing differently. It could be their salaries have been adjusted very low; we don't know what they are doing to make that happen. It may be they're short-staffed and they are just not -- and the staff are carrying higher caseloads, yeah. So there are various examples of what different Agencies are doing, yes.

(*Transcript* Vol. 62 at pp. 51-52)

[312] These last statements highlight the dichotomy between the objective of the FNCFS Program and its actual implementation through Directive 20-1 and the EPFA. While the program is premised upon provincial comparability, the funding mechanisms do not allow many FNCFS Agencies, particularly those agencies that do not match AANDC's assumptions about children in care and families in need, to keep up with provincial standards and changes thereto.

[313] As noted by the reports on the FNCFS Program, given that funding under Directive 20-1 and the EPFA is largely based on population levels, small and remote agencies are also disproportionately affected by AANDC's funding formulas. In British Columbia for example, small agencies are the norm, not the exception, including many that serve rural and isolated communities. Their challenges include added costs for travel, accessing the communities they serve and getting and retaining staff (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 87).

[314] Given these agencies are funded pursuant to Directive 20-1, most do not have the flexibility or resources necessary to provide prevention services, even with additional funds. In these rural and isolated communities, it is also difficult for First Nations people to access services which are available off reserve, including: mental health services; services to strengthen families; and services for family preservation and reunification (see Annex, ex. 43; see also testimony of W. McArthur, *Transcript* Vol. 63 at p. 87 and Vol. 64 at pp. 6, 167). Despite moving FNCFS Agencies in British Columbia to funding based on actuals in 2011, with the intent to transition them to the EPFA shortly thereafter to address some of these concerns; and, despite the repeated requests of FNCFS Agencies and the province of British Columbia, that transition had yet to occur at the time of the hearing and no announcement was made for EPFA in the 2013-2014 budgets (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 96-97, 156, 172-173).



[315] The effects of the population thresholds in Directive 20-1, along with the other assumptions built into Directive 20-1 and the EPFA, indicate that a “one-size fits all” approach does not work for child and family services on reserve. The overwhelming evidence in this case suggests that because AANDC does not fund FNCFS Agencies based on need but, rather, based on assumptions of need and population levels, that funding is inadequate to provide essential child and family services to many First Nations. Moreover, the internal AANDC documents outlined above, namely the *Way Forward presentation* and the *Renewal of the First Nations Child and Family Services Program presentation*, indicate that, despite any additional funds provided or reallocated to FNCFS Agencies, there is still quite a significant difference in funding levels to bring the FNCFS Program into comparability with the provinces. This point is addressed in more detail in the following section.

### **c. Comparator evidence**

[316] AANDC contends that comparison is an essential part of the analysis under human rights legislation. It submits that no evidence was advanced by the Complainants regarding how the provincial or territorial funding models work or what their respective child welfare budgets are as compared to the federal government. In this regard, AANDC argues that the Tribunal should draw a negative inference from the fact that the Complainants did not call provincial and territorial witnesses to testify.

[317] According to AANDC, the Complainants’ case lacks substantive evidence about the level of provincial funding compared to federal funding, including addressing the nature and extent of any research thereon. Moreover, no provincial or territorial witnesses were called to support the allegation that there is a difference in child welfare funding or service levels on or off reserve. Given that comparison between federal and provincial funding was at the heart of their case, AANDC submits the Complainants had to demonstrate how much funding is provided by the federal government and each provincial/territorial government for child welfare services. Only if the amount of funding for both was reliably established, could the Tribunal determine if there is a difference and whether that difference amounts to adverse differentiation or a denial of services. According to AANDC, perceived differences in services on and off reserve are not sufficient to substantiate the Complainants’ claims.

[318] In any event, AANDC argues that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*.

[319] AANDC’s argument regarding the need for comparative evidence, and that comparing the federal and provincial/territorial funding systems is not valid under the *CHRA*, has already been rejected by the Federal Court, the Federal Court of Appeal and this Tribunal. In setting aside the Tribunal’s decision on AANDC’s jurisdictional motion (2011 CHRT 4), which advanced this same argument, the Federal Court in *Caring Society FC* found at paragraph 251:

the Tribunal erred in concluding that the ordinary meaning of the term “differentiate adversely” in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.

[320] The Federal Court explained some of the patently absurd results of requiring a comparator group in every case:

[256] On the Tribunal’s analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.

[257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.

[...]

[259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.

(*Caring Society FC* at paras. 256-257, 259)

[321] After examining the role of comparator groups in a discrimination analysis and the Supreme Court's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (*Withler*), the Federal Court made the following statements with regard to the use of comparator groups in analyzing alleged discrimination against Aboriginal peoples:

[332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure.

[...]

[337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.

[...]

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

(*Caring Society FC* at paras. 332, 337, 340)

[322] On appeal, the Federal Court of Appeal accepted the Federal Court's reasoning regarding the use of comparator groups in a discrimination analysis. In fact, it noted that cases postdating the Federal Court's decision confirmed the reduced role of comparator groups in the analysis:

In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] Code is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).

In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that “a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply”: *Withler*, *supra* at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative role was given to the existence of a comparator group – similar to what the Tribunal did here.

(*Caring Society FCA* at para. 18)

[323] The Panel agrees with the Federal Court and Federal Court of Appeal’s reasoning on the role of comparator groups in a discrimination analysis. AANDC’s argument regarding the need for comparative evidence in this case is inconsistent with the *Caring Society FC* and *Caring Society FCA* decisions. Furthermore, there is no authority for its proposition that interjurisdictional comparisons are not valid under the *CHRA*.

[324] While the Supreme Court has previously stated that equality is a comparative concept, it has also recognized that “...every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality” (*Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at p. 164 [*Andrews*]). With regard to this last statement, the Supreme Court in *Withler*, at paragraph 2, stated that equality is about substance, not formalism:

In our view, the central issue in this and others. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law’s real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the “proper” comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[325] As noted by the Federal Court of Appeal in *Caring Society FCA*, the decisions in *Moore* and *Quebec (Attorney General) v. A.*, 2013 SCC 5 (A), echo the approach to comparator groups enunciated in *Withler*. That is, while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue. In fact, as the Supreme Court noted in *Withler*, at paragraph 59: “finding a mirror group may be impossible, as the essence of an individual’s or group’s equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison”.

[326] Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered (see *Withler* at para. 2). As the Federal Court of Appeal noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paragraph 27 (*Morris*), the legal definition of a *prima facie* case does not require a complainant to adduce any particular type of evidence to prove the existence of a discriminatory practice under the *CHRA*. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove a discriminatory practice. The Federal Court of Appeal in *Morris*, at paragraph 28, concluded that:

A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms.

[327] In this vein, the Panel notes the present Complaint was brought under both subsections 5(a) and (b) of the *CHRA*. The interpretation of the wording of subsection 5(b), “to differentiate adversely”, has largely been the basis for arguing the need for comparative evidence. That is, “to differentiate” is to treat someone differently in comparison to others. Aside from the French version of subsection 5(b) not having the same comparative connotation, as it simply uses the term “défavoriser”, subsection 5(a) also does not use wording implying a comparison. It speaks only of being denied a good or a service. As the Federal Court noted in *Caring Society FC*, requiring comparator evidence under 5(b), but not under 5(a), would create an internal incoherence between the subsections by establishing different legal and evidentiary requirements in order to establish discrimination under each provision (see *Caring Society FC* at paras. 276-279).

[328] Similarly, AANDC’s argument that there can be no cross-jurisdictional comparisons or comparisons between different service providers is not supported by anything found in the *CHRA* or in the jurisprudence regarding comparator evidence outlined in the preceding paragraphs. In fact, section 50(3)(c) of the *CHRA* allows the Panel to receive and accept any evidence and information that is seen fit, as long as it is not privileged information [s. 50(4)] or the testimony of a conciliator appointed to settle the complaint [s. 50(5)]. Furthermore, reasonable comparability with provincial/territorial standards is part of AANDC’s own objective in implementing the FNCFS Program and negotiating the other provincial/territorial agreements. While AANDC argues “reasonable comparability” is an administrative term and not a legal term requiring mirror services are provided on and off reserve, that argument has no bearing on the Complainants’ ability to bring evidence related thereto. AANDC undertook to ensure First Nations on reserve receive reasonably comparable child and family services to those provided off reserve in similar circumstances. It is unreasonable and unfounded to argue the Complainants should not be able to bring evidence related thereto.

[329] While there is no obligation to bring forward comparative evidence to substantiate a discrimination complaint, there was some comparative evidence brought forward in this case demonstrating a difference between child and family services funding and service levels provided on and off reserve. First, the FNCFS Agencies still under Directive 20-1 receive less funding than those who have transitioned to the EPFA. As indicated in the *2011 Status Report of the Auditor General of Canada*, funding for operations and prevention services increased between 50 and 100% in each of the provinces that transitioned to EPFA (see at p. 25, s. 4.54). Furthermore, as indicated above, AANDC has estimated the difference in annual funding to transfer the remaining jurisdictions to the EPFA as \$21 million for British Columbia; \$2 million for the Yukon; \$5 million for Ontario; \$2 million for New Brunswick; and, \$2 million for Newfoundland and Labrador (see *Way Forward presentation* at p. 15). As Ms. D’Amico stated at the hearing:

MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the shortcomings in the funding formulas], there isn’t comparability yet; this is something you are trying to attain?

MS. D’AMICO: In six jurisdictions, I can tell you that there is comparability. In the other jurisdictions, because we haven’t moved to EPFA, the amounts that they are receiving are more than 20-1, but I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the remaining jurisdictions and they would receive more under EPFA based on all of those ratios.

(*Transcript Vol. 51 at pp. 179-180*)

[330] Second, AANDC has identified that increases in funding are even necessary in EPFA jurisdictions to ensure reasonable comparability with the provinces. Again, in the *Way Forward presentation*, it states the “EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies” (at p. 15). To address this, the presentation presents the option of adjusting the EPFA costing model with increased investments to address cost drivers:

“EPFA Plus”. To implement this increased investment in the jurisdictions that do not function under the EPFA, the *Way Forward presentation* estimates the cost to be \$65.03 million. To top-up the existing EPFA jurisdictions, EPFA Plus is estimated to cost \$43.10 million. According to the *Way Forward presentation*, EPFA Plus “[e]nsures funding remains reasonably comparable with provinces and territories...” (at p. 16). While AANDC witnesses testified that the amounts in the *Way Forward presentation* are rough estimates that err on the size of magnitude, the Panel still finds they are indicative of the type of investments required to provide more meaningful services to First Nations children and families on reserve and in the Yukon.

[331] Moreover, these amounts are similar to those recommended in *Wen:De Report Three* (see at p. 33). *Wen:De Report Three* also cautioned against implementing its recommendations in a piecemeal fashion as doing so would undermine the overall efficacy of its proposed changes (see at p. 15). However, by not addressing all the shortcomings of Directive 20-1 in implementing the EPFA, the overall efficacy of the EPFA model is now undermined as indicated in the *Way Forward presentation*.

[332] A third comparison also arises from the *Way Forward presentation*. To resolve comparability, the presentation recommends AANDC transfer child welfare services on reserve to the provinces/territory. It recognizes that the provinces and territories have expertise in child welfare and that there would be better oversight and compliance of child and family services on reserve if they are given the full range of responsibilities, including the responsibility for funding. However, the presentation notes that this option has the “[p]otential for dramatic increases in costs” for AANDC (*Way Forward presentation* at p. 17).

[333] In this same vein, another useful comparison in this case is the difference between the delivery of child and family services through the FNCFS Program against the delivery of those services through the *Alberta Reform Agreement*, *BC MOU* and *BC Service Agreement*. AANDC argues these agreements are not evidence of how the province funds the off reserve population or evidence that AANDC underfunds FNCFS Agencies. However, these arguments do not address the fact that FNCFS Agencies are funded in a different manner than the reimbursements provided by AANDC to the provinces. The funding provided to Alberta and British Columbia under these agreements is not based on population levels or assumptions about children in care and families in need. Rather, those provinces are reimbursed for the actual costs or an agreed upon share of the costs for providing child and family services. They receive adjustments for inflation and increases in the costs of services, whereas FNCFS Agencies do not. Most importantly, because of the payment of actuals and adjustments thereof annually, there is a more direct connection between the child and family services standards of those provinces and the delivery of those services to the First Nation communities they serve.

[334] By comparison, neither Directive 20-1 nor the EPFA provide adjustments for the cost of living or for changes in provincial legislation and standards. Both types of adjustments were identified by *Wen:De Report Two* as major flaws in Directives 20-1 and, despite these findings, the EPFA model incorporated these same flaws. As *Wen:De Report Two* specified, not adjusting funding for increases in the cost of living leads to both under-funding of services and to distortion in the services funded (see at p. 45). Furthermore, by not providing adjustments for changing provincial legislation and standards, the FNCFS Program still contains no mechanism to ensure child and family services provided on reserve are reasonably comparable to those provided to children in similar circumstances off reserve (see *Wen:De Report Two* at p. 50).

[335] AANDC’s argument about the Complainants’ lack of comparative evidence also ignores the fact that the *NPR*, *Wen:De reports*, Auditor General and Standing Committee reports have all identified a need for AANDC to do this analysis and recommended they do so. Moreover, in response to the Auditor General and Standing Committee reports recommending AANDC perform a comparative analysis of

child welfare services provided on and off reserve, AANDC indicated that it has not done so because of inherent difficulties in doing so. Despite said difficulties, “reasonable comparability” remains AANDC’s standard for the FNCFS Program.

[336] The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see *Comparability of Provincial and INAC Social Programs Funding* at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services.

[337] Ms. D’Amico also testified about the difficulty in comparing services provided by FNCFS Agencies to those provided by the provinces:

MS CHAN: [...] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?

MS D’AMICO: I don’t believe that we can.

[...]

Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn’t actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.

(Transcript Vol. 51 at p. 183)

[338] Because of these difficulties, Ms. D’Amico indicated that AANDC’s funding is not premised on comparability of service levels between on and off reserve child and family services, but simply on maintaining comparable funding levels with the province:

MS D’AMICO: Because in the case of EPFA we have -- we are currently funding at the same salaries and staffing ratios as the province, and that is the only comparable variables that we could find. So it has nothing to do with the service delivery, it has to do with the funding, and that -- and so we have found comparable variables that the province how the province funds is how we fund.

(Transcript Vol. 51 at p. 103)

[339] However, as indicated above, even salaries are fixed when the EPFA is implemented and in Alberta, for example, they are still using 2006 salary rates in 2014. Furthermore, as indicated in the *Comparability of Provincial and INAC Social Programs Funding* document, an approach to comparability based on funding and not service levels does not recognize the higher levels of need for services for First Nations or that the services or placement options they require may be at a substantially higher cost.

[340] This last point allows the Panel to make an effective comparison between the child and family services offered on and off reserve based on the principle of the best interest of the child.

#### **iv. Best interest of the child and Jordan's Principle**

[341] There is a focus on service levels and the needs of children and families off reserve, namely an emphasis on least disruptive/intrusive measures. On the other hand, under the federal FNCFS Program, there is a focus on funding levels and the application of funding formulas, where funds for prevention/least disruptive measures are fixed and funds to bring a child into care are covered at cost.

[342] Provincial child welfare legislation and standards focus on prevention and least disruptive measures (see for example Ontario's *Child and Family Services Act* at s. 1; Alberta's *Child, Youth and Family Enhancement Act* at s. 2; *The Child and Family Services Act* in Manitoba at Declaration of Principles and s. 2; *The Child and Family Services Act* in Saskatchewan at ss. 3-5; Nova Scotia's *Children and Family Services Act* at Preamble and ss. 2, 13, 20; British Columbia's *Child, Family and Community Service Act* at ss.2-4, 30; and, Quebec's *Loi sur la Protection de la Jeunesse* at ss. 1-4). These statutes recognize that removing a child from his or her family, home or community should only be done when all other least disruptive measures have been exhausted and there is no other alternative.

[343] This focus on least disruptive measures recognizes the significant effect of separating a family. The Supreme Court, in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at paragraph 78, outlined the effects of bringing a child into care:

The most disruptive form of intervention is a court order giving the agency temporary or permanent guardianship of a child. Particularly in the case of a permanent order, this may sever legal ties between parent and child forever. To make such an order, a court must find that the child is in need of protection within the meaning of the applicable statute. In addition, the court must find that the "best interests of the child" dictate a temporary or permanent transfer of guardianship. As Lamer C.J. observed in *G. (J.)*, *supra*, at para. 76: **"Few state actions can have a more profound effect on the lives of both parent and child."**

**(Emphasis added)**

[344] As indicated above, the provinces' legislation and standards dictate that all alternatives measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets for prevention, AANDC's funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for

FNCFS Agencies to keep pace with provincial operational requirements that may include, along with the items just mentioned, costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards.

[345] AANDC officials working in the FNCFS Program have indicated that they are not experts in the field of child welfare and, instead, rely on provincial legislation and standards to dictate the level of funding that should be provided on reserves. Yet, they apply a formula to fund FNCFS Agencies that does not take into account the standards for least disruptive measures set by provincial legislation. Tellingly, in funding child and family services, the provinces do not apply a funding formula:

MS CHAN: In terms of funding, have you seen provincial funding formulas to calculate child welfare payment that is made by the province?

MS D'AMICO: Not to date.

MS CHAN: What difficulties does this cause for the Program, if any, in determining how you are going to fund?

MS D'AMICO: So this has been our primary challenge, to try and figure out how to fund equitably or comparably because we have consistently asked the province, give us a funding formula for an Agency or for a regional office in your jurisdiction and show us what that is and we will see if we can replicate it, then we would be assured that, you know, infamous provincial comparability.

[...]

The provinces don't have that, they have a chart of accounts, they fund based on a variety of different things. You know, an example would be British Columbia, they have five different regional offices; those five different regional offices have different salary grids, they have different operational budgets that are not based on any particular formula.

So it has been incredibly challenging to find those comparable pieces so that we can ensure comparability. It has just been -- it's literally apples and oranges.

So, like I said, it's those variables [...] that we have been able to find with the province to be able to inject in our formula so that at least we could have, first of all, a consistent formula across the country, but one that is tailored to every single jurisdiction based on provincial comparability, provincial variables.

So it's not absolute in terms of service. If a service is provided in one community, it's not necessarily being provided in another community even off-Reserve. It's very difficult and the services vary, there is so many different things that child protection and other community partners provide in the vast spectrum of the social safety net.

(*Transcript* Vol. 51 at pp. 184-186)

[346] A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:



[L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

(Bala, Nicholas, “The Best Interests of the Child in the Post-Modernist Era: A Central but Illusive and Limited Concept”, in *Special Lectures of the Law Society of Upper Canada 2000: Family Law* (Toronto: LSUC, 1999) at p. 3.1)

[347] With regard to the FNCFS Program, there is discordance between on one hand, its objectives of providing culturally relevant child and family services on reserve, that are reasonably comparable to those provided off reserve, and that are in accordance with the best interest of the child and keeping families together; and, on the other hand, the actual application of the program through Directive 20-1 and the EPFA. Again, while maintenance expenditures are covered at cost, prevention and least disruptive measures funding is provided on a fixed cost basis and without consideration of the specific needs of communities or the individual families and children residing therein.

[348] 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*.

[349] The adverse impacts outlined throughout the preceding pages are a result of AANDC’s control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program and *1965 Agreement*. Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner.

[350] In this regard, and in addressing the difference between the allocation of funding by AANDC for First Nations child and family services and that of the provinces, another important consideration brought forward by the Complainants and in the evidence is the application of Jordan’s Principle.

[351] Jordan’s Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.

[352] Jordan’s Principle is in recognition of Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan’s family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan’s foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

[353] On October 31, 2007, Ms. Jean Crowder, the Member of Parliament for Nanaimo-Cowichan, brought forward motion 296 in the House of Commons:

That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was unanimously passed on December 12, 2007 (see Annex, ex. 45).

[354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [2009 MOU on Jordan's Principle]; see also testimony of C. Baggeley, *Transcript* Vol. 57 at pp. 9-13, 23, 40-41, 84-85). In the 2009 MOU on Jordan's Principle, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "...ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (2009 MOU on Jordan's Principle at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see 2009 MOU on Jordan's Principle at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the 2009 MOU on Jordan's Principle provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated \$11 million to fund goods/services while the dispute is being resolved (see 2009 MOU on Jordan's Principle at p. 2). The funds were provided annually, in \$3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggeley, *Transcript* Vol. 57 at pp. 123-125).

[357] According to the 2009 MOU on Jordan's Principle, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "...supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (2009 MOU on Jordan's Principle at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "...crucial to ensuring that funding disputes do not disrupt services provided to a child (2009 MOU on Jordan's Principle at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [2013 MOU on Jordan's Principle]). Again, signed by an Assistant Deputy Minister from each department, the 2013 MOU on Jordan's Principle acknowledges that Health Canada and AANDC "...have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (2013 MOU on Jordan's Principle at p. 1). The 2013 MOU on Jordan's Principle now provides that during the

resolution of a Jordan's Principle case, the federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggeley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the *2012 National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

[362] In the Panel's view, while not strictly a child welfare concept, Jordan's Principle is relevant and often intertwined with the provision of child and family services to First Nations, including under the FNCFS Program. *Wen:De Report Three* specifically recommended the implementation of Jordan Principle on the following basis, at page 16:

Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children [...] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSAs in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.

(Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.

[...]

4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.

4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. For example, it took nine months for a First Nations agency to receive confirmation that an \$11,000 piece of equipment for a child in care would be paid for by INAC.

(Emphasis added)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (see Annex, ex. 49 [Intake Form]; see also Annex, ex. 50; and, testimony of C. Baggle, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was

discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks “[p]lease provide details on the barriers experienced to access the required services” it states at page 8:

Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said “absolutely not”.

AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.

Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.

Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.

Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line “Jordan’s Principle: Parallel work with HC”, the document represents the views of AANDC’s British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

The work of the two departments on Jordan’s Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC’s Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program.

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms; where to send the forms and who to call for questions given the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.

4.73 In our view, 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.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

**Approach A:** Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.

**Approach B:** Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to play in improving outcomes for

children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.

**Approach C:** In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the 2010 *AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that “[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services” (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

[376] Jordan's Principle was also considered by the Federal Court in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Pictou Landing Band Council (the PLBC) applied for judicial review of an AANDC decision not to reimburse them for in-home health care to one of its members. The PLBC indicated that Jordan's Principle was at issue. However, after case conferencing with the provincial government and officials from the PLBC, AANDC and Health Canada determined there was no jurisdictional dispute in the matter as both levels of government agreed that the funding requested was above what would be provided to a child living off reserve.

[377] The Federal Court found AANDC's interpretation of Jordan's Principle to be narrow and the finding that it was not engaged to be unreasonable:

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the [*Social Assistance Act*] and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[378] In determining that AANDC and Health Canada did not properly assess the PLBC request for funding to meet its member's needs, the Federal Court concluded that:

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The [Social Assistance Act] and Regulations require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

[...]

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC's position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the \$11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggeley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

## **v. Summary of findings**

[383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services that are meant to be in accordance with provincial/territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. 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.



[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. 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. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given 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. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[390] Notwithstanding budget surpluses for some agencies, additional funding or reallocations from other programs, the evidence still indicates funding is insufficient. The Panel finds AANDC's argument suggesting otherwise is unreasonable given the preponderance of evidence outlined above. In addition, the reallocation of funds from other AANDC programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program has been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve. Again, recommendations by the Auditor General and Standing Committee on Public Accounts on this point have largely gone unanswered by AANDC.

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps, delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.

[392] While seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. For instance, given the agreement has not been updated for quite some time, it does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act*. The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. 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*.

[393] Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements. These findings are consistent with those of the *NPR*, *Wen:De* reports, Auditor General of Canada reports and Standing Committee on Public Accounts reports. Again, the Panel accepts the findings in those reports and has relied on them to make its own findings. Those findings are also corroborated by the other testimonial and documentary evidence outlined above, including the internal documents emanating from AANDC.

[394] As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.

### **C. Race and/or national or ethnic origin is a factor in the adverse impacts or denials**

[395] As mentioned above, there is no dispute in this case that First Nations possess the characteristics of race and/or national or ethnic origin. Discrimination claims regarding Aboriginal peoples have been founded on both grounds (see for example *The Queen v. Drybones*, 1969 CanLII 1 (SCC), [1970] SCR 282; *Bear v. Canada (Attorney General)*, 2003 FCA 40; *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3; and *Commission des droits de la personne et des droits de la jeunesse c. Blais*, 2007 QCTDP 11).

[396] The provision of child and family services under the FNCFS Program and the other provincial agreements are specifically aimed at First Nations living on reserve. Under the *Yukon Agreement*, the services are aimed at all First Nations living in the territory. That is, the determination of the public to which the services are offered is based uniquely on the race and/or ethnic origin of the service recipients. Pursuant to the application of the FNCFS Program, corresponding funding formulas and the other provincial/territorial agreements, First Nations people living on reserve and in the Yukon are *prima facie* adversely differentiated and/or denied services because of their race and/or national or ethnic origin in the provision of child and family services.

[397] AANDC argues there is no evidence that any changes to the FNCFS Program and corresponding funding formulas or the other related provincial/territorial agreements would lead to better outcomes for First Nations children and families. Therefore, it argues the Complainants have failed to establish a *prima facie* case of discrimination. In any event, the question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the *CHRA*.

[398] The *prima facie* discrimination analysis is not concerned with proposed outcomes. It is concerned with adverse impacts and whether a prohibited ground is a factor in any adverse impacts. Proposed outcomes only come into play if the complaint is substantiated and an order from the Tribunal is required to rectify the discrimination under section 53(2) of the *CHRA*. The Panel also disagrees that the question of whether funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under the *CHRA*. That question and evidence related thereto informs the ultimate determination to be made in this case: whether First Nations children and families residing on-reserve have an opportunity equal with other individuals in accessing child and family services. That is, it addresses the issue of substantive equality.

#### **i. Substantive equality**

[399] The purpose of the *CHRA* is to give effect to the principle of equality. 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” (*CHRA* at s. 2, **emphasis added**). The equality jurisprudence under section 15 of the *Charter* informs the content of the *CHRA*’s equality statement (see *Caring Society FCA* at para. 19). In this regard, the Supreme Court has consistently held that equality is not necessarily about treating everyone the same. As mentioned above, “identical treatment may frequently produce serious inequality” (*Andrews* at p. 164).

[400] As articulated in *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493 at para. 69, “[i]t is easy to say that everyone who is just like ‘us’ is entitled to equality [...] it is more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy”. In other words, true equality and the accommodation of differences, what is termed ‘substantive equality’,

will frequently require the making of distinctions (see *Andrews* at pp. 168-169). That is, in some cases “discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public” (see *Eldridge* at para. 78).

[401] In *Eldridge*, the issue was whether the failure to provide sign language interpreters for hearing impaired persons as part of a publicly funded scheme for the provision of medical care was in violation of section 15 of the *Charter*. The Supreme Court held that discrimination stemmed from the actions of subordinate authorities, such as hospitals, who acted as agents of the government in providing the medical services set out in legislation. However, the Legislature, in defining its objective as guaranteeing access to a range of medical services, could not evade its obligations under section 15 of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. The medical care system applied equally to the entire population of the province, but the lack of interpreters prevented hearing impaired persons from benefitting from the system to the same extent as hearing persons. The legislation was discriminatory because it had the effect of denying someone the equal protection or benefit of the law.

[402] In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner “...taking into account the full social, political and legal context of the claim” (see *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, 1989 CanLII 98 (SCC), [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, 2000 SCC 37 (CanLII), [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433 at para. 60).

[403] In providing the benefit of the FNCFS Program and the other related provincial/territorial agreements, AANDC is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. If AANDC’s conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory (see *A* at para. 332; and, *Eldridge* at para. 73).

[404] The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC’s FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

## **ii. Impact of the Residential Schools system**

[405] **Please note** that the information below contains graphic facts about Residential Schools. If this information causes distress, especially for survivors and their families, a 24-hour Indian Residential Schools Crisis Line has been set up to provide support, including emotional and crisis referral services:

**1-866-925-4419**

### **a. History of Residential Schools**

[406] Dr. John Milloy, a historian and author of *A National Crime, The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 2006) [*A National Crime*]), was qualified as an expert on the history of Residential Schools before the Tribunal. His evidence was uncontroverted and supported by official archives and other documents referenced in his book. As such, the Panel accepts Dr. Milloy’s evidence as fact.

[407] During the Residential Schools era, Aboriginal children were removed from their homes, often forcibly, and brought to residential schools to be “civilized”. Living conditions in many cases were appalling, giving place to disease, hunger, stress, and despair. Children were often cold, overworked,

shamed and could not speak their native language for fear of severe punishment, including some students who had needles inserted into their tongues. Many children were verbally, sexually and/or physically abused. There were instances where students were forced to eat their own vomit. Some children were locked in closets, cages, and basements. Others managed to run away, but some of those who did so during the winter months died in the cold weather. Many children committed suicide as a result of attending a Residential School.

[408] Overall, a large number of Aboriginal children under the supervision of the Residential Schools system died while “in-care” (see *A National Crime* at p. 51). Many of those who managed to survive the ordeal are psychologically scarred as a result. In addition to the impacts on individuals, Dr. Milloy also explained how the Residential Schools affected First Nations communities as a whole. In losing future generations to the Residential Schools, the culture, language and the very survival of many First Nations communities was put in jeopardy.

[409] Elder Robert Joseph, from the Kwakwaka’wakw community, gave a very moving and detailed account of his personal experience in the Residential Schools system. According to Elder Joseph, abuse, strip searches, withholding gifts and visits from family members, and public shaming were very commonplace. In his view, some of the strip searches were actually veiled instances of sexual assault. In one instance, as a form of punishment, he recounted being stripped naked in front of the boys’ division of the school and told to bend over. He also spoke of children being locked in closets and cages and the prevalence of racist remarks.

[410] Elder Joseph’s experience gave him a deep sense of loneliness and he turned to alcohol to cope with the despair. He has since turned his life around and is now an advocate for reconciliation and healing for Aboriginal people.

[411] The Government of Canada has recognized the impacts and consequences of the Residential Schools system. In a 2008 Statement of Apology to former students of Residential Schools (see Annex, ex. 52), former Prime Minister Stephen Harper stated:

The treatment of children in Indian Residential Schools is a sad chapter in our history.

For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

[...]

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

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

[...]

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

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

[412] In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day.

#### **b. Transformation of Residential Schools into an aspect of the child welfare system**

[413] Residential Schools operated as a “school system” from the 1880’s until the 1960’s, when it became a marked component of the child welfare system. In about 1969, the Church’s involvement in the Residential Schools system ceased, and the federal government took over sole management of the institutions. At around the same time, new regulations came into effect outlining who could attend Residential Schools, placing an emphasis on orphans and “neglected” children. The primary role of many Residential Schools changed from a focus on “education” to a focus on “child welfare”. Despite this, many children were not sent home, because their parents were assessed as not being able to assume the responsibility for the care of their children (see *A National Crime* at pp. 211-212; and, testimony of Dr. Milloy, *Transcript* Vol. 34 at pp. 19-20).

[414] Over a 50-year period, between the 1930’s to the 1980’s, the number of schools declined steadily from 78 schools in 1930 down to 12 schools in 1980. The last school closed in 1986. The FNCFS Program is then implemented in 1990.

#### **c. Intergenerational trauma of Residential Schools**

[415] Dr. Amy Bombay, Ph.D. in neuroscience and M.Sc. in psychology, was qualified as an expert on the psychological effects and transmission of stress and trauma on wellbeing. She spoke about the intergenerational transmission of trauma among the offspring of Residential School survivors. The Panel finds Dr. Bombay’s evidence reliable and helpful in understanding the impacts of the individual and collective trauma experienced by Aboriginal peoples and finds her evidence highly relevant to the case at hand.

[416] Dr. Bombay explained how Residential Schools fits into the larger traumatic history that Aboriginal peoples have been exposed to:

...for indigenous groups in Canada and worldwide, colonialism has comprised multiple collective traumas [...] these include things like military conquest, epidemic diseases and forced relocation.

So Indian residential schools is really just one example of one collective trauma which is part of a larger traumatic history that aboriginal peoples have already been exposed to.

(*Transcript* Vol. 40 at p. 94)

[417] According to Dr. Bombay, these collective traumas have had a cumulative effect over time, namely on individual and community health (see *Transcript* Vol. 40 at p. 83). In her words: “these collective effects are greater than the sum of the individual effects” (*Transcript* Vol. 40 at p. 82). Similar effects have been shown in other populations and in other groups who have undergone similar collective traumas, such as Holocaust survivors, Japanese Americans subjected to internment during World War II, and survivors of the Turkish genocide of Armenians (see *Transcript* Vol. 40 at pp. 111-112). To measure and describe the fact that some groups have undergone this chronic exposure to collective traumas, Dr. Maria Yellow Horse Brave Heart of the University of New Mexico coined the term “historical trauma”, which is defined as “...the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma” (see testimony of Dr. Bombay, *Transcript* Vol. 40 at pp. 94-95).

[418] For Residential School survivors, Dr. Bombay indicated that they are more likely to suffer from various physical and mental health problems compared to Aboriginal adults who did not attend. For example, Residential School survivors report higher levels of psychological distress compared to those who did not attend, and they are also more likely to be diagnosed with a chronic physical health condition (see *Transcript* Vol. 40 at pp. 109-110).

[419] With respect to social outcomes, Dr. Bombay explained some of the intergenerational impacts of Residential Schools as follows:

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

(*Transcript* Vol. 40 at p. 110)

[420] Generationally, the above noted impacts could descend from the Residential School survivor, to their children and then to their grandchildren. In this regard, Dr. Bombay indicated, relying on the 2002-2003 Regional Health Survey, that 43% of First Nations adults on-reserve perceived that their parents' attendance at Residential School negatively affected the parenting that they received while growing up; 73.4% believed that their grandparents' attendance at Residential School negatively affected the parenting that their parents received; 37.2% of First Nations adults whose parents attended Residential School had contemplated suicide in their life versus 25.7% whose parents did not; and, the grandchildren of survivors were also at an increased risk for suicide as 28.4% had attempted suicide versus only 13.1% of those whose grandparents did not attend Residential School (see *Transcript* at Vol. 40 pp. 110-11, 114-115).

[421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on- reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[423] AANDC submits that in determining what services to provide and how to deliver them, the FNCFS Agencies decide what is "culturally appropriate" for their community. The definition of what is culturally appropriate depends on the specific culture of each First Nation community. According to AANDC, this is best left to the discretion of the FNCFS Agencies or First Nations leadership.

[424] However, in the *2008 Report of the Auditor General of Canada*, the Auditor General indicated that "[t]o deliver this program as the policy requires, we expected that the Department would, at a minimum know what "culturally appropriate services" means" (at s. 4.18, p. 12). That is, AANDC had no assurances that the FNCFS Program funds child welfare services that are culturally appropriate. In response, AANDC developed a guiding principle for what it understands culturally appropriate services to be:

the Government of Canada provides funding, as a matter of social policy, to **support the delivery of culturally appropriate services** among First Nation communities that **acknowledge and respect values, beliefs and unique circumstances** being served. As such, culturally appropriate services encourage activities such as kinship care options where a child is placed with an extended family member so that cultural identity and traditions may be maintained.

(see *AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*, **emphasis added**)

[425] Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless. A glaring example of this is the denial of funding for Band Representatives under the *1965 Agreement* in Ontario. Another is the assumptions built into Directive 20-1 and the EPFA. If funding does not correspond to the actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[426] Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the



eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.

[427] In this regard, it should be noted again that the federal government is in a fiduciary relationship with Aboriginal peoples and has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, more has to be done to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children. This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples.

### **iii. Canada's international commitments to children and Indigenous peoples**

[428] As stated earlier, Amnesty International was granted "Interested Party" status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. Amnesty International argues that the interpretation and application of the *CHRA*, and in particular of section 5, must respect Canada's international obligations as enunciated in various international United Nations instruments, such as the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Elimination of all Forms of Discrimination*, the *Universal Declaration on Human Rights* and the *Declaration on the Rights of Indigenous Peoples*.

[429] Amnesty International also refers to the views of treaty bodies, such as the United Nations Human Rights Committee (UNHRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC) in support of its argument that when a treatment discriminates both on the basis of First Nations identity and because of residency, it constitutes multiple violations of the prohibition of discrimination, which is a peremptory norm of international law. Specifically, Amnesty International points to these bodies' recommendations that special attention must be given to the prohibition of discrimination against children.

[430] In AANDC's view, the international law concepts and arguments advanced by Amnesty International do not assist the Tribunal in interpreting and applying the *CHRA* to the facts of this Complaint. Rather, they see Amnesty International's arguments as a claim that the Government of Canada is in violation of its international obligations, which is beyond the purview of the Complaint.

[431] In order to form part of Canadian law, international treaties need national legislative implementation, unless they codify norms of customary international law that are already found in Canadian domestic law. However, when a country becomes party to a treaty or a covenant, it clearly indicates its adherence to the contents of such a treaty or covenant and therefore makes a commitment to implement its principles in its national legislation. This public engagement is solemn and binding in international law. It is a declaration from the country that its national legislation will reflect its international commitments. Therefore, international law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313.

[432] The basic principle, which is not limited to *Charter* interpretation, is that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 at p. 1056). That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).

[433] This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).

[434] In recent years, the Supreme Court has been willing to expand the relevance of international law and to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.

[435] Indeed, since the foundation of the United Nations (the UN), Canada has been actively involved in the promotion of human rights on the international scene. This began with the participation of the Canadian Director of the UN Secretariat's Division for Human Rights, Mr. John Humphrey, in writing the preliminary draft of the *Universal Declaration of Human Rights* (the *Universal Declaration*), in 1947. Today, Canada still voices itself as a strong supporter of human rights at the international level.

[436] Canada's international human rights obligations with respect to equality and non-discrimination stem from various legal instruments. Similarities can be seen in the wording of both domestic and international human rights instruments and in the scope and content of their provisions. The close relationship between Canadian and international human rights law can also be seen both in the periodic reports submitted by Canada to various international treaty monitoring bodies on the steps taken domestically to give effect to the obligations flowing from the treaties and in the monitoring bodies' recommendations to Canada.

[437] Developments in human rights at the national level followed the *Universal Declaration* at the international level. Adopted by the United Nations General Assembly by resolution 217A at its 3rd session in Paris on 10 December 1948, article 2 of the *Universal Declaration* sets out the principle of equality and non-discrimination in the enjoyment of human rights. Article 7 proclaims equality before the law and equal protection of the law. As indicated above, these equality principles are now ingrained in section 15 of the *Charter* and in the purpose of the *CHRA*.

[438] Initially, the *Universal Declaration* was intended as a guide for governments in their efforts to guarantee human rights domestically. It was also meant to enunciate human rights principles that would be further developed into a legally binding convention. This eventually led to the adoption of two covenants and two optional protocols that, along with the *Universal Declaration*, are considered to form the International Bill of Rights.

[439] The first of those two covenants was the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (the *ICCPR*), entered into force by Canada on August 19, 1976. At the same time, Canada recognized the jurisdiction of the UNHRC to hear individual complaints by ratifying the *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302. Articles 2 and 26 of the *ICCPR* guarantee equality and prohibit discrimination in terms that are similar to those of the *Universal Declaration*.

[440] In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the *ICCPR* should be understood to imply:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The UNHRC went on to state that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures (see at paras. 5, 8, and 12-13).

[441] The second of the two covenants that stem directly from the *Universal Declaration* is the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*), which Canada entered into force on August 19, 1976. Article 2(2) guarantees the exercise of the rights protected without discrimination. Article 10 provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

[442] The *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the *ICESCR* (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by “...paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations” (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person’s place of residence (see at para. 34).

[443] In a report to the CESCR outlining key measures it adopted for the period of January 2005 to December 2009 to enhance its implementation of the *ICESCR*, Canada reported on the FNCFS Program and declared that “[t]he anticipated result is a more secure and stable family environment and improved outcomes for Indian children ordinarily resident on reserve” (see *Canada’s Sixth Report on the United Nations’ International Covenant on Economic, Social and Cultural Rights* (Minister of Public Works and Government Services, 2013) at para. 103). Canada also reported that it had begun transitioning the FNCFS Program to a more prevention based model, the EPFA, “...on a jurisdiction-by-jurisdiction basis with ready and willing First Nations and provincial/territorial partners [...] with the goal to have all jurisdictions on board by 2013” (at paras. 105-106). While the Government of Canada made this undertaking, the evidence is clear that this goal was not met.

[444] In addition to the covenants that protect human rights in general, Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.

[445] The monitoring body of the *ICERD*, the CERD, has discussed the meaning and scope of special measures in the *ICERD*. It has expressed a similar understanding of substantive equality as Canadian courts (see CERD, General Recommendation No. 32, September 24, 2009 (CERD/C/GC/32) at para. 8). In addition, it recognized that “special measures” that may be called for in order to achieve effective equality “...include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus...” (at para. 13).

[446] In 2011, Canada reported to the CERD on the measures taken domestically to implement the ICERD. The CERD made several recommendations, including: “[d]iscontinuing the removal of Aboriginal children from their families and providing family and child care services on reserves with sufficient funding” [see *Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the CERD*, 9 March 2012 (CERD/C/CAN/CO/19-20) at para. 19(f)].

[447] Although AANDC argues that the federal government is merely funding child welfare services on-reserve as a matter of social policy, budgetary measures in and of themselves are an important component of the steps to be taken in order to achieve substantive equality for First Nations children. The recommendation of the CERD, read with the views it expressed in General Recommendation No. 32, indicate that the CERD sees insufficient funding of child care services on reserve as inhibiting substantive equality for First Nations in the provision of child and family services.

[448] Another important international instrument aiming at the protection of a specific group of persons that is relevant to the present case is the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the *CRC*), entered into force by Canada on January 12, 1992. Children have the same human rights as adults. However, they are more vulnerable and in need of protection that addresses their special needs. Consequently, the *CRC* focuses on giving them the special care, assistance and legal protection that they need (see in particular articles 2, 3, 5, 7.1, 8.1, 9, 9.1, 18.1, 20, 25 and 30). Furthermore, when it ratified the *CRC*, Canada made a Statement of Understanding expressing its view that, in assessing what measures are appropriate to implementing the rights recognized in the *CRC*, the rights of Aboriginal children to enjoy their own culture, to profess and practice their own religion and to use their own language must not be denied (Convention on the Rights of the Child, Declarations and Reservations, Canada, online: United Nations <<http://www.treaties.un.org>>).

[449] The *CRC*’s monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25). With respect to childcare and support services, Canada reported that “[t]he Government of Canada plays a supporting role by providing a range of child and family benefits and transferring funds to other governments in Canada based on shared goals and objectives” (*Canada’s Third and Fourth Reports on the Convention on the Rights of the Child*, 20 November 2009 at para. 49). Canada also reported, as it did to the CESCR, that it is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach and that it expected that all agencies would be using the prevention-focused approach by 2013 (see at para. 98).

[450] In response to Canada, the CRC Committee expressed deep concern “...at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability” (*Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, 6 December 2012 (CRC/C/CAN/CO/3-4) at para. 55). Among other things, the CRC Committee recommended that Canada intensify cooperation with communities and community leaders to find suitable alternative care solutions for children in these communities [see at para. 56(f)]. It further recommended that Canada “[e]nsure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs” [see at para. 68(c)].

[451] Again, the recommendations of the CRC Committee reinforce the need for adequate funding, linked to the needs of First Nations children and families, in order to achieve substantive equality in the provision of child and family services on-reserve.

[452] Finally, the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*), which was adopted by the United Nations General Assembly on September 13, 2007, was endorsed by Canada on November 12, 2010. Article 2 provides that Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular rights based on their indigenous origin or identity. Although this international instrument is, at the time being, a declaration and not a treaty or a covenant, and is not legally binding except to the extent that some of its provisions reflect customary international law, when Canada endorsed it, it reaffirmed its commitment to “...improve the well-being of Aboriginal Canadians” (*Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, November 12, 2010, online: Indigenous and Northern Affairs Canada <<http://www.aadnc-aandc.gc.ca>>).

[453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.

[454] The concerns expressed by international monitoring bodies mirror many of the issues raised in this Complaint. The declarations made by Canada in its periodic reports to the various monitoring bodies clearly show that the federal government is aware of the steps to be taken domestically to address these issues. Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

[455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

## **VI. Complaint substantiated**

[456] In light of the above, the Panel finds the Complainants have presented sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *CHRA*. Specifically, they *prima facie* established that First Nations children and families living on reserve and in the Yukon are denied [s. 5(a)] equal child and family services and/or differentiated adversely [s. 5(b)] in the provision of child and family services.

[457] Through the FNCFS Program and other related provincial/territorial agreements, AANDC provides a service intended to “ensure”, “arrange”, “support” and/or “make available” child and family services to First Nations on reserve. With specific regard to the FNCFS Program, the objective is to ensure culturally appropriate child and family services to First Nations children and families on reserve and in the Yukon that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case demonstrates that AANDC does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve.

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.
- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.
- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;
- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.
- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

[460] AANDC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds AANDC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, AANDC did not raise a statutory exception under sections 15 or 16 of the *CHRA*.

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family

services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

[467] The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.

## **VII. Order**

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[470] The Complainants, Commission and Interested Parties request a variety of remedies to address the findings in this Complaint, including declaratory orders; orders to cease the discriminatory practice and take measures to redress or prevent it from reoccurring; and, compensation under sections 53(2)(e) and 53(3) of the *CHRA*.

[471] Furthermore, unrelated to the remedies requested under section 53(2), the Panel is also seized of a previous motion from the Complainants for costs related to the allegation that AANDC abused the Tribunal's process through its late disclosure of documents.

#### **A. Findings of discrimination**

[472] The Caring Society requests several declarations be made by the Tribunal in order to clarify which aspects of the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements are discriminatory. According to the Caring Society, this Tribunal routinely provides declaratory relief in the form of findings of discrimination.

[473] Indeed, throughout this decision, and generally at paragraph 458 above, the Panel has outlined the main adverse impacts it has found in relation to the FNCFS Program and other related provincial/territorial agreements. As race and/or national or ethnic origin is a factor in those adverse impacts, the Panel concluded First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and family services by AANDC. The Panel believes these findings address the Caring Society's request for declaratory relief.

#### **B. Cease the discriminatory practice and take measures to redress and prevent it**

[474] Section 53(2)(a) of the *CHRA* allows the Tribunal to order that the person found to be engaging in the discriminatory practice "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". Furthermore, section 53(2)(b) allows the Tribunal to order that the person "...make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice".

[475] Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve.

[476] The Caring Society has provided a detailed methodology of how this reform can be achieved. It proposes a three-step process to redesign the FNCFS Program: (1) reconvene the National Advisory Committee to identify discriminatory elements in the provision of funding to FNCFS Agencies and make recommendations thereon; (2) fund tri-partite regional tables to negotiate the implementation of



equitable and culturally based funding mechanisms and policies for each region; and, (3) develop an independent expert structure with the authority and mandate to ensure AANDC maintains non-discriminatory and culturally appropriate First Nations child and family services.

[477] Relatedly, the Caring Society also requests the public posting of information regarding the FNCFS Program, Jordan's Principle and children in care to educate FNCFS Agencies and the public about AANDC's child welfare policies, practices and directives and to help prevent future discrimination. Furthermore, it asks that AANDC staff be trained on First Nations culture, historic disadvantage, human rights and social work.

[478] The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted.

[479] Consistent with Canada's international obligations, Amnesty International stresses the need for a timely and effective remedy to achieve substantive equality for First Nations children and families on reserve, including increased funding, systemic structural changes to the way AANDC provides funding and a comprehensive and systematic monitoring mechanism for assuring non-repetition of breaches of the rights of First Nations children.

[480] AANDC submits that, while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted. According to AANDC, this is particularly appropriate in this case where the policy at issue is a complex scheme that takes into account competing priorities and must fit within broader governmental policy approaches. Such decisions are entitled to some considerable degree of deference and margin of reasonableness. Furthermore, AANDC argues the proposed remedy would intrude into the executive branch of government's role to establish public policy and direct the spending of public funds in accordance with fiscal priorities. AANDC is also concerned that some of the proposed reform measures are over-broad and beyond the scope of the Complaint. As such, it views aspects of the methodology proposed by the Complainants to be beyond the power of the Tribunal or any other court to order.

[481] 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 AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[482] More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve 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" (*CHRA* at s. 2).

[483] That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. 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.

[484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.

### **C. Compensation**

[485] Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in wilfully or recklessly. Awards of compensation under each of those sections cannot exceed \$20,000.

[486] The Caring Society asks the Panel to award compensation under section 53(3) for AANDC's wilful and reckless discriminatory conduct with respect to each First Nations child taken into care since February 2006 to the date of the award. In the Caring Society's view, as early as the 2000 findings of the NPR, AANDC voluntarily and egregiously omitted to rectify discrimination against First Nations children. It also notes that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. As a result, it believes the maximum amount of \$20,000 should be awarded per child. The Caring Society requests the compensation be placed in an independent trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.

[487] The AFN also requests compensation. It asks for an order that it, AANDC, the Caring Society and the Commission form an expert panel to establish appropriate individual compensation for children, parents and siblings impacted by the child welfare practices on reserve between 2006 and the date of the Tribunal's order.

[488] Amnesty International submits any compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.

[489] AANDC submits there is insufficient evidence before the Tribunal to award the requested compensation. It argues the Caring Society's request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of AANDC's funding practices. According to AANDC, the Caring Society's assertions overlook the complex nature of factors that lead to a child being removed from his or her home and, given the absence of individual evidence thereon, it is impossible for the Tribunal to assess compensation on an individual basis. Furthermore, AANDC submits the Complainants' authority to receive and distribute funds on behalf of "victims" has not been established.

[490] Similar to its comments above, the Panel has outstanding questions regarding the Complainants' request for compensation under sections 53(2)(e) and 53(3) of the CHRA. Again, within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered.

### **D. Costs for obstruction of process**

[491] As part of a motion for disclosure decided in ruling 2013 CHRT 16, the Complainants requested costs from AANDC with respect to its alleged obstruction of the Tribunal's process. At that time, the Panel took the costs request under reserve and indicated the issue would be the subject of a subsequent ruling. The Complainants have reiterated their request for costs as part of their closing submissions on this Complaint. In response, AANDC reaffirmed its assertion that the Tribunal does not have the authority to award such costs.

[492] The Panel continues to reserve its ruling on the Complainants' request for costs in relation to the motion for disclosure decided in ruling 2013 CHRT 16. A ruling on the issue will be provided in due course.

### **E. Retention of jurisdiction**

[493] The Complainants, Commission and Interested Parties request the Panel retain jurisdiction over this matter until any orders are fully implemented.

[494] As indicated above, the Panel has outstanding questions on the remedies being sought by the Complainants and Commission. A determination on those remedies is still to be made. As such, the Panel will maintain jurisdiction over this matter pending the determination of those outstanding remedies. Any further retention of jurisdiction will be re-evaluated when those determinations are made.

Signed by

**Sophie Marchildon**

Panel Chairperson

**Edward P. Lustig**

Tribunal Member

Ottawa, Ontario

January 26, 2016

### **VIII. Annex: exhibit references**

1. **Exhibit HR-6, Tab 74:** *Glossary of Social Work Terms*, prepared for the Canadian Human Rights Commission by Michelle Sturtridge (February 2013)
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7. **Exhibit HR-13, Tab 275:** *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve*, between the Province of British Columbia and Her Majesty the Queen in right of Canada (March 30, 2012)
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26. **Exhibit HR-11, Tab 222:** Letter from Laurel Broten, Minister of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario, to John Duncan, Minister of Indian and Northern Affairs Canada (March 25, 2011)
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## Canadian Human Rights Tribunal

### Parties of Record

**Tribunal File:** T1340/7008

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

**Decision of the Tribunal Dated:** January 26, 2016

**Dates and Place of Hearing:** February 25, 26, 27 and 28, 2013;

March 1, 2013;

April 2, 3, 4, 8 and 9, 2013;

May 13, 14, 21 and 22, 2013;

July 15, 16, 17, 19, 22 and 24, 2013;

August 7, 12, 28, 29 and 30, 2013;

September 3, 4, 5, 6, 11, 12, 23, 24, 25 and 26, 2013;

October 28, 29 and 30, 2013;

November 6, 2013;

December 5, 9 and 10, 2013;

January 9, 10, 13, 14 and 15, 2014;

February 10, 11, 12 and 13, 2014;

March 17, 18, 19 and 20, 2014;

April 2, 3, 4 and 30, 2014;

May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;

October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

**Appearances:**

Sébastien Grammond, Robert Grant, David Taylor, Anne Levesque, Sarah Clarke, Michael Sabet, Paul Champ and Yavar Hameed, 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, Philippe Dufresne, Sarah Pentney and Samar Musallam, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

TAB 13



# First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2016-04-26

File number: T1340/7008

Other citation: 83 CHRR 266

## Citation:

**First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 10 (CanLII),**  
**<<https://canlii.ca/t/gppjk>>, retrieved on 2026-01-02**

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Tribunal  
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Canadian Human  
Rights Tribunal  
droits de  
la  
personne

Citation: 2016 CHRT 10

Date: April 26, 2016

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 Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

## Ruling

Members: Sophie Marchildon and Edward Lustig

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### **I. Continuation of remedial order**

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*).

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[3] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

[5] Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

## **II. Progress to date**

[6] INAC accepts the *Decision* and has not sought judicial review of its findings or general orders. It is committed to working with child and family services agencies; front-line service providers; First Nations organizations, leadership, and communities; the Complainants; and the provinces and territories, on steps towards program reform and meaningful change for children and families. It has also specifically committed to the following:

- A full-scale reform of its child welfare program.
- Review of the *1965 Agreement*.
- Not to reduce or restrict funding to the FNCFS Program
- To immediately re-establish the National Advisory Committee.
- And, it supports the new iteration of the Canadian Incidence Study.

[7] INAC's submissions also indicated that immediate relief in response to the *Decision* would include increased funding for the FNCFS Program. The 2016 federal budget allocated \$634.8 million over five years for the FNCFS Program. According to INAC, \$71.1 million is to be provided in 2016-2017 for the following:

- \$54.2 million for:
  - o immediate adjustments to Operations and Prevention through additional investments to update existing funding agreements;
  - o increases to the per child service purchase amounts (including for prevention services);
  - o funding for intake and investigation services;
  - o upward adjustments for agencies with more than 6% of children in care; and,
  - o investments for providing federal support to expand provincial case management systems on reserve.
- \$16.2 million for prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon at nationally-consistent levels across all jurisdictions.
- \$700,000 to INAC resources for outreach, engagement and effective allocation of funding to service providers.

[8] In addition to the funding identified in the 2016 budget, INAC also commits to provide additional funding for:

- maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements, as they arise; and
- support for an engagement process going forward in conjunction with the National Advisory Committee and Regional Tables to work on medium and long-term reform.

[9] The Panel acknowledges the commitments made by the Federal government so far and is encouraged by its efforts to implement the Tribunal's orders.

### **III. Updated order**

[10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.

[11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [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*]). In line with this special status, the *CHRA* must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).

[12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect 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...

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 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."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 1989 CanLII 9428 (FCA), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 1989 CanLII 9014 (CHRT), 11 CHRR D/194 (CHRT) at paras. 15 and 21).

[18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).

[19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.

#### **A. The FNCFS Program**

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely

manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. 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. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given 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. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on

certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief.

[22] Again, while it appreciates the Federal government's commitments and efforts to date, the Panel requires more clarity from INAC moving forward to ensure its orders are effectively and meaningfully implemented. As the Assembly of First Nations stated in its submissions; "[a]n order for immediate relief to the FNCFS Program should be meaningful but temporary until such time that the FNCFS Program can be completely overhauled." The Panel agrees with this statement. To address this, the Panel believes the best course of action is for INAC to provide ongoing reporting to the Tribunal. That is, the Panel will supervise the implementation of its orders by way of regular detailed reports created by INAC, to which the parties will have an opportunity to provide submissions.

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

[24] INAC is directed to provide this report within four weeks of this ruling. Following reception of the report, and given the length of time that has elapsed since the *Decision*, an in-person case management meeting will then occur to provide an opportunity for the parties and Panel to discuss the report, ask questions, and make submissions, if any. Thereafter, the Panel will issue a further ruling if necessary. The Tribunal will canvass the parties for dates for this case management meeting in the days following the release of this ruling.

[25] The Panel recognizes that INAC provided additional information regarding its 2016 budget allocation for the FNCFS Program following the close of submissions for this ruling and invited the parties to meet to discuss the issue. The Complainants raised concerns with the timing and manner in which this information was sent to the Tribunal. Neither is interested in another round of submissions on the issue at this time. The Panel did not consider INAC's additional information regarding the 2016 budget as part of this ruling. However, in a much more detailed fashion, this information will presumably form part of the material to be included in the report to follow and the other parties will have an opportunity to provide submissions thereon.

## **B. The 1965 Agreement**

[26] The Panel's main finding with regard to the *1965 Agreement* was that it had not been updated to ensure on-reserve communities in Ontario could fully comply with the *Child and Family Services Act*, including the provision of Band Representatives and mental health services (see the *Decision* at paras. 217-246 and 458).

[27] The Federal government has indicated that it has met with the Government of Ontario and expressed a need to review the *1965 Agreement*. It submits these preliminary meetings have set the stage for more substantive discussions that will take place with First Nations.

[28] Furthermore, following the *Decision* and while submissions were being filed in advance of this ruling, the Nishnawbe Aski Nation (NAN) filed a motion seeking interested party status. NAN seeks to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario.

[29] Notwithstanding NAN's motion, the Panel made a commitment to the parties to rule upon immediate relief items expeditiously and wanted to rule upon as many of those items as possible in this ruling. However, given the Panel will rule upon NAN's motion shortly following the release of this ruling and that there may be further submissions to consider on the *1965 Agreement*, the Panel believes it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* after receiving those further submissions from the parties.

### **C. Jordan's Principle**

[30] In the *Decision*, the Panel found the Federal government's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, that delays were inherently built into the Federal government's process for dealing with potential Jordan's Principle cases and that it was unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children and not just those with multiple disabilities (see the *Decision* at paras. 379-382 and 458).

[31] According to the Federal government, INAC and Health Canada have begun discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. Over the next two to three months, it will begin engaging First Nations and the provinces and territories in these discussions. It anticipates options for changes to Jordan's Principle could be developed within twelve months.

[32] However, the Panel's order specifically indicated that INAC was to "...immediately implement the full meaning and scope of Jordan's principle" (the *Decision* at para. 481). While it understands a period of time may have been needed to meet with partners and stakeholders and put a framework in place, the Panel did not foresee this order would take more than three months to implement. The order is to "immediately implement", not immediately start discussions to review the definition in the long-term. There is already a workable definition of Jordan's Principle that has been adopted by the House of Commons. While review of this definition and the Federal government's framework for implementing it may benefit from further long-term review, the Panel sees no reason why the current definition cannot be implemented now.

[33] Therefore, the Panel orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[34] INAC will report to the Panel within two weeks of this ruling to confirm this order has been implemented.

### **D. Other issues**

[35] The Complainants made various other submissions with respect to implementing the Panel's orders in the short term. While some were addressed by INAC, others were not (see for example para. 16 of the First Nations Child and Family Caring Society's submissions dated March 31, 2016; and paras. 12-15 of the Assembly of First Nations' submissions dated March 3, 2016). It would be helpful to the Panel and the parties if INAC could respond to those additional immediate relief items as part of its report on the



FNCFS Program ordered above. Therefore, in its FNCFS Program report, the Panel directs INAC to address the immediate relief items sought by the Complainants that have not been addressed in INAC's submissions to date.

#### **E. Retention of jurisdiction**

[36] Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33).

[37] Given the ongoing nature of the orders above, and given the Panel still needs to rule upon other outstanding remedial requests, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following the further reporting by INAC and the Panel's ruling on the other outstanding remedies.

#### **IV. Concluding remarks by Panel Chairperson**

[38] I wish to share some concluding remarks with the parties. Member Lustig has read and supports these remarks.

[39] The hearings in this matter were held in a spirit of reconciliation, with an overarching goal of maintaining an atmosphere of peace and respect. Respect for all involved was paramount and, given the nature of the case, respect for Aboriginal peoples not only participating in the proceedings, but also following the proceedings in person and on the Aboriginal Peoples Television Network. Fostering this atmosphere of peace and respect is of paramount importance considering the Tribunal's key role in determining fundamental human rights and in safeguarding the public's confidence in the administration of justice, especially for Aboriginal peoples.

[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.

[41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the *Decision* are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change. The time is now.**

[42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term.

Signed by

**Sophie Marchildon**

Panel Chairperson

**Edward P. Lustig**

Tribunal Member

Ottawa, Ontario

April 26, 2016

TAB 14

# First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs), 2016 CHRT 16 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2016-09-14

File number: T1340/7008

Other citation: 84 CHRR 111

## Citation:

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**Most recent  
unfavourable  
mention**

Tribunal  
canadien  
Canadian Humandes  
Rights Tribunal  
droits de  
la  
personne

Citation: 2016 CHRT 16

Date: September 14, 2016

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 Aboriginal Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

### **Ruling**

Members: Sophie Marchildon and Edward Lustig

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#### **I. Update to remedial order**

[1] This Panel continues to supervise Indigenous and Northern Affairs Canada's (INAC's) implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the CHRA) [see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*)].

[2] Generally, INAC was ordered to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario* (the 1965 Agreement) to reflect the Panel's findings in the *Decision*. INAC was also ordered to cease applying a narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle. The order and findings in the *Decision* are the main reference points from which the Panel bases any further orders.

[3] Following up on the general order in the *Decision*, in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10, the Panel reiterated and emphasized certain findings and adverse impacts from the *Decision* and ordered INAC to take measures to address those findings and adverse impacts immediately. To assist the Panel in assessing the implementation of the *Decision* and subsequent order, INAC was directed to provide a comprehensive report indicating how the findings in the *Decision* were being addressed to provide immediate relief for First Nations children.

[4] In response to INAC's reporting requirements and following further submissions from the parties thereon, this ruling updates the Panel's order in addressing the findings of the *Decision* in the short term. Other short, mid and long-term reforms of the FNCFS Program and the *1965 Agreement*, along with other requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*, will be dealt with at a later point.

[5] In general, the Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN), along with the Commission and the Interested Parties participating at this stage of the proceedings, the Chiefs of Ontario (the COO) and the Nishnawbe Aski Nation (the NAN), are in agreement about the orders requested of the Panel to address the findings of the *Decision* in the short-term. Their submissions and requested orders are collectively referred to as those of the 'Complainants, Commission and Interested Parties' or 'CCI Parties' in this ruling. Where the submissions of the Complainants, Commission or Interested Parties may differ, those submissions are specifically outlined.

## **II. Preliminary remarks**

[6] The Panel thanks the parties and interested parties for their most recent submissions. It has carefully considered them and found them to be very helpful. The Panel recognizes the time, effort and resources dedicated by the parties to complete them. Generally, the Panel is supportive of the majority of the orders requested made by the CCI Parties.

[7] The Panel is pleased to learn that the federal government has accepted to do a number of important things in response to the *Decision* and has made some progress in implementing the findings and orders from the *Decision*. Overall, the Panel believes the federal government is working towards reforming its approach to First Nations child and family services and implementing meaningful change for First Nations children and families.

[8] That said, and as addressed in this ruling, more progress still needs to be made in the immediate and long-term to ensure the discrimination identified in the *Decision* is remedied. In this regard, as emphasized in its last ruling (2016 CHRT 10), the Panel believes the dissemination of relevant and timely information continues to be of the utmost importance in rebuilding trust between the parties and avoiding conflicts and delays going forward.

[9] Generally, the Panel fails to understand why much of the information provided in INAC's most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS Program back in March 2016. INAC ought to have known this information was and remains important in responding to the Panel's information requests and reporting orders. Indeed, the Panel and the CCI Parties have been requesting this type of information for months now. It rests on INAC and the federal government to implement the Panel's findings and orders, and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation, ensures the Panel and the parties that this is indeed the case.

[10] INAC has also recognized the CCI Parties as partners in the reform process and identified a need to consult Indigenous peoples across Canada to obtain their input on reforms. While this is necessary and consistent with the federal government's duty to consult Indigenous peoples, again, improved

communication surrounding such endeavours would greatly assist the Panel in understanding INAC's strategy to address the *Decision* and would help build the trust necessary to establish a partnership between the parties. It is also unclear if or who has been consulted among the Indigenous community at this point, including if any social workers or other experts in the field of child welfare have been consulted. On this last point, INAC has previously acknowledged that it does not have expertise in the provision of child and family services to First Nations. Therefore, the need to consult with experts in the field, including the Caring Society, should be a priority.

[11] Likewise, the Panel has made a number of comments since the *Decision* on the importance of the parties meeting to discuss reform of the FNCFS Program and the *1965 Agreement* in the immediate and long term. In this regard, the Panel notes the Caring Society, the AFN and INAC did not even acknowledge until their most recent submissions that they had met several times to discuss reforms and the reestablishment of the National Advisory Committee (the NAC). This is important information because the ability of the parties to work together at this immediate relief stage is a good way to test if the reinstatement of the NAC will yield success in reforming the provision of First Nations child and family services in the long term. INAC needs to improve its communication and information sharing with the other parties and the Panel, while continuing to build the partnership it has acknowledged. In addition, the Panel requests that it be kept informed of any relevant memorandums of understanding and/or agreements reached between the parties and/or important meetings discussing the subject matter of this case.

[12] As always, the Panel continues to encourage the parties to communicate effectively and work together. It also remains willing to assist the parties in reaching that goal. While the Panel is committed to eradicating discrimination and seeing the provision of First Nations child and family services reformed, and will continue to supervise the implementation of its orders in this regard; it also steadfastly believes that collaboration amongst the parties outside the four walls of the Tribunal is the best way to ensure reconciliation and effective reforms now and into the future. All parties are clearly dedicated to reconciliation and should continue to attempt to work together towards that goal.

[13] That said, the Panel will make further orders if need be to ensure discrimination is eliminated. In this vein, the Panel will rule on some immediate relief measures in this ruling and will leave others to be discussed at a future in-person case management meeting. The Panel appreciates that some parties wish this remedial process would proceed more quickly. While the Panel shares this sentiment, remedying the discrimination found in the *Decision* is a complex matter and depends greatly on the way in which information is provided to the Panel. In fact, some CCI Parties have cautioned the Panel to be careful in how it crafts its orders in terms of adequacy and impacts. Consequently, the Panel wishes to ensure all parties have a full and ample opportunity to present their points of view and that it has all necessary information to make informed orders. Nonetheless, the Panel hopes to see change materialize at the earliest opportunity. It believes some of that change can happen immediately while INAC's First Nations child welfare system is being reformed through consultations with Indigenous peoples and the parties involved in this case. The Panel makes the following ruling in this regard.

### **III. The FNCFS Program**

[14] INAC's report in response to the Panel's ruling in 2016 CHRT 10 provided some information on how it is immediately dealing with the shortcomings of the FNCFS Program identified in the *Decision*. INAC submits that it is addressing these shortcomings through new financial investments in the FNCFS Program, along with modifications to its existing funding formulas, until a full reform of the FNCFS Program can be completed. Hence, INAC is of the view that many of the immediate relief measures proposed by the CCI Parties need to be addressed as part of mid to long-term reform of the FNCFS Program, after thorough engagement with key partners.



[15] In its most recent report, INAC outlines the new financial investments in the FNCFS Program allocated by the federal government in Budget 2016 over the next five years, along with the budget allocation of each FNCFS agency for this fiscal year and the funding models used to generate those budgets.

[16] Generally, the CCI Parties submit that INAC has not shown whether or how new investments in the FNCFS Program will be sufficient to address the findings in the *Decision*, especially in the short term.

[17] For the reasons that follow, the Panel is of the view that further orders, including additional information and reporting by INAC, are required to ensure the findings in the *Decision* with respect to the FNCFS Program have been or will be addressed in the short term.

#### **A. Adjustments to funding formula assumptions and flaws**

[18] One of the main findings in the *Decision* is that INAC's FNCFS Program, which flows funding through formulas, Directive 20-1 and the Enhanced Prevention Focused Approach (EPFA), provides funding based on flawed assumptions about the number of children in care, the number of families in need of services, and population levels that do not accurately reflect the real service needs of many on-reserve communities. This results in inadequate fixed funding for operation costs (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services. Most importantly, inadequate funding for operation and prevention costs provides an incentive to bring children into care because eligible maintenance expenditures to maintain a child in care are reimbursable at cost (see the *Decision* at paras. 384-389 and 458).

[19] In 2016 CHRT 10, the Panel ordered INAC to immediately take measures to address the assumptions and flaws in its funding formulas, including all the underlined items at paragraphs 20 and 23 of that ruling. INAC was to provide a comprehensive report explaining how those flaws and assumptions are being addressed in the short term to provide immediate relief to First Nations on reserve. The Panel's order also required INAC to provide detailed information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision* (see 2016 CHRT 10 at paras. 20-25).

[20] Since 2016 CHRT 10, INAC submits Canada's immediate relief investments will address and help to remediate the discrimination identified by the Tribunal and will improve outcomes for First Nations children and families. The investments will provide greater prevention services to families and support critically needed FNCFS Program stability, while ensuring that no disruption of services occurs during work to reform the FNCFS Program.

[21] Through increased investment in the FNCFS Program, INAC submits it is eliminating the use of Directive 20-1. Where Directive 20-1 applies, FNCFS Agencies will be provided funding through existing mechanisms this fiscal year, but with increased funding levels determined using the more updated EPFA costing model. In 2016-17, INAC is investing \$17.5 million for prevention services and programs as immediate relief for FNCFS Agencies still under the Directive 20-1 regime.

[22] For jurisdictions under the EPFA funding model, INAC indicates that updates include: additional funding to address population increases; allowing upward adjustments to be made for 26 agencies with more than 6% of children in care; adjustments to staff salaries to ensure comparability with provincial rates; updates to reflect changes in provincial standards (e.g. caseload ratios for social workers or other front line workers) and to support intake and investigation services; updates to service delivery

standards, such as increasing the percentage used to calculate off-hour emergency services and increased funding for staff travel; increased funding for agency audit, insurance and legal services; and, increased amounts for the service purchase per child (i.e. service providers will receive \$175 per 0-18 child served, regardless of jurisdiction).

[23] INAC submits that Budget 2016 amounts to address the flaws in Directive 20-1 and the EPFA are higher than what was identified by INAC in its 2012 *Way Forward Presentation* (see the *Decision* at paras. 295-298). Over five years, the *Way Forward Presentation* estimated \$108 million to, among other things, expand the EPFA to the jurisdictions still under Directive 20-1, while topping-up existing EPFA jurisdictions. While the CCI Parties focus on Budget 2016's year 1 investment in stating that new funding falls short of the estimated five-year totals in the *Way Forward Presentation*, INAC submits the proper comparison is Budget 2016's year 5 investments. That is, Budget 2016 proposes \$176.8 million in year 5 to, among other things, expand prevention based services in Directive 20-1 jurisdictions and top-up jurisdictions operating under the EPFA.

[24] With regard to small FNCFS Agencies, INAC indicates that agencies with less than 800 children in care will still be subject to scaling with respect to their core funding (expenses for Board of Directors, employee salaries, benefits, training and travel, funding for agency evaluations, audits, insurance, legal fees and administrative overhead). However, this does not decrease the funding provided to an agency for protection or prevention services. According to INAC, future approaches to funding small agencies will be part of longer term engagement with First Nations and provincial partners.

[25] The CCI Parties submit that the true measure of the impact of INAC's immediate relief measures is the extent to which the incentive to remove First Nations children from their homes has been reduced. They contend that INAC's compliance report is bereft of assurances that the incentives to bring children into care identified in the *Decision* will be reduced by its immediate relief investments and changes to its funding formulas; they also submit that INAC has not shown that additional program investments will allow FNCFS Agencies to provide services on par with those provided by the provinces.

[26] While upwards adjustments are being made for agencies serving more than 6% of children in care, the CCI Parties are unclear about the extent to which the actual percentage of children in care is being funded. Furthermore, there appears to be no upwards adjustments for agencies serving more than 20% of families in need. For small agencies, the CCI Parties submit that INAC was not given the option of deferring the problems caused by scaling core funding based on population levels.

[27] The CCI Parties request an order that INAC immediately make adjustments to its funding formulas to ensure operations budgets for FNCFS Agencies approximate actual costs. They suggest various modifications to INAC's funding formulas, including:

- increases to the base amounts in the formula, including for the child purchase amount;
- that FNCFS Agencies, serving a population where the percentage of children in care and percentage of families receiving services exceeds 6% and 20% respectively, be provided with an upward adjustment for their operations and prevention budgets in proportion to the excess percentages;
- that no downwards adjustments be applied to FNCFS Agencies with fewer than 6% of children in care and/or serving fewer than 20% of families;
- that adjustments to the fixed amount in the funding formula for population levels be increased; and
- that the fixed amount in the funding formula for all FNCFS Agencies serving fewer than 251 Registered Indian children be the same amount provided to agencies serving at least 251 Registered Indian children.

[28] The Panel recognizes the efforts made so far by INAC and its desire to improve the lives of First Nations children through negotiations with key partners. The Panel also finds INAC's explanation outlined in paragraph 23 above to be reasonable in terms of the amount of funding being higher than the amount in the 2012 *Way Forward Presentation*. Aside from the overall amount of additional funding being invested in the FNCFS Program, the Panel was pleased to learn that new funding (approximately \$28.4 million) was actually provided to FNCFS Agencies on July 1, 2016, with other additional funds coming before the end of this fiscal year, in part to address some of the flawed assumptions in INAC's funding formulas.

[29] However, 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 programming (see *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? The fact that key items, such as determining funding for remote and small agencies, were deferred to later 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.

[30] The emphasis on discussions with key partners at tripartite tables is also something this Panel has seen in the evidence and heard from INAC many times throughout these proceedings (see *Decision* at paras. 138, 139, 191-197, 201 and 213-215). One main example of this in the evidence is the situations in Quebec and British Columbia. Despite many consultations, discussions and joint studies in the past, and even with ready and willing partners prepared to transition those provinces from Directive 20-1 to the EPFA, that transition has yet to occur or was significantly delayed (see *Decision* at paras. 73-77 and 314).

[31] While the Panel understands meaningful long-term reform and change will be accomplished in consultation with key partners, such as Indigenous peoples across Canada and the provinces, the purpose of immediate relief has been and still is to eliminate as many adverse impacts as possible at this time with the information that we have, the findings in the *Decision* and with the assistance of experts, FNCFS Agencies and the parties. Immediate relief is a temporary measure to remove as many adverse impacts as possible with the understanding that consultation, studies and data collection will translate into a more comprehensive and effective change of the FNCFS Program.

[32] Comprehensive reform will take some time. The Panel understands this and believes a complete reform will happen. However, immediate relief should be treated as such and not transformed into a long term remedy. While additional funding may address the most discriminatory aspects of INAC's funding formulas in the short term, the Panel is not currently in a position to determine if this is the case. The Panel acknowledges and appreciates much of the additional information INAC provided in response to its ruling in 2016 CHRT 10; however, even with this additional information, the rationale and/or methodology for allocating the additional funding is not fully explained and the supporting data and/or documentation, including the cost driver study and trend analysis on which INAC claims Budget 2016 investments in the FNCFS Program were developed is incomplete.

[33] That is, the Panel analyzing is not concerned with the specific amount of funding per se, but rather the way in which it is determined. It is the way in which the FNCFS Program is delivered and funding is determined that results in discriminatory effects for First Nations children and families.

The Panel's focus is on whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and their communities. While other key factors come into play in determining whether the amount of funding provided to FNCFS Agencies is adequate to address the needs of the communities they serve, such as remoteness and the extent of travel to meet children and families (which will be addressed later in this ruling), the assumptions about the number of children in care, the number of families in need of services and population levels are the starting point for addressing the discriminatory impacts of INAC's funding formulas.

[34] Therefore, leaving some of the assumptions and flaws in the funding formulas for long term reform to ensure everyone is consulted may be problematic. As said in the *Decision*, a piecemeal approach to reform is not an effective way to proceed (see *Decision* at paras. 185 and 331). While the Panel understands that INAC is determined to reform the entire FNCFS Program and believes it intends to do so, it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFS Program has fostered for the past 15 years. Over that time, despite well documented problems with the program and consultations with its partners and at tripartite tables, INAC's system has failed to adapt to the needs of First Nations children and families (for example, see *Decision* at paras. 134, 138-141, 203, 311, 314-315, 383-394 and 456-467). The Panel understands this is no easy task and that the FNCFS Program cannot be reformed in an instant. However, this does not mean that effective measures cannot be implemented in the meantime. The Panel also agrees with the parties that a one-size-fits-all type of approach is not to be used; this was also addressed in the *Decision* (see para. 315).

[35] Throughout the *Decision*, the Panel highlighted the dichotomy between the objectives of the FNCFS Program and INAC's flawed methods for achieving those objectives (see for example para. 312). Many of those flaws can be corrected at this time, without the need for additional large scale consultation and study. Again, the purpose is to eliminate as many adverse impacts as possible while the system is being reviewed and reformed. Indeed, as indicated by the CCI Parties, INAC was not given the option to defer addressing the assumptions and flaws in its funding formulas to address them solely in the long term. As the service provider, funder and FNCFS Program manager, INAC was given some flexibility in the manner in which to address the findings in the *Decision*. However, in 2016 CHRT 10, the Panel was clear that the immediate measures underlined and identified in that ruling had to be undertaken now while further long-term reform was being contemplated.

[36] 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.

[37] With specific regard to remote agencies, the Panel expects INAC to develop a strategy that takes into account such things as the additional costs associated with travel distances between service centers in terms of similarity to provincial statutory response times and managing impacts on service providers and the children and families they serve; the availability of surrounding services or lack thereof; and, the higher costs and cost of living in northern and/or isolated areas. Remoteness can affect each item in a FNCFS Agency's budget. The Panel will return to the issue of remoteness below.

[38] Again, the objectives of the FNCFS Program can only be met if INAC's funding methodology is focused on service levels and the real needs of First Nations children and families, which may vary from one child, family or Nation to another. A focus on the overall amount of funding, through the continued application of flawed funding formulas, does little, if anything, to correct the discrimination found in the *Decision*. Therefore, the Panel orders INAC to immediately establish the funding assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC has indicated that, even where the number of children in care is below 6%, it will not reduce the amount of funding to such agencies. INAC is ordered to apply the same standard for the assumption of 20% of families in need of services. That is, it will not reduce the amount of funding for FNCFS Agencies that serve less than 20% of families in need of services.

[39] For agencies that have more than 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services. While INAC has indicated that it is allowing upward adjustments to be made for 26 FNCFS Agencies with more than 6% of children in care, there is insufficient information that those upward adjustments are based on an assessment of the actual levels of children in care. Furthermore, INAC has not indicated how it is addressing agencies serving more than 20% of families. As indicated below in its order at the end of this ruling, INAC will be required to report back to the Tribunal confirming that it has implemented this order and clearly demonstrate how it has done so. Again, this order is only meant to provide short-term relief given that a full reform of the FNCFS Program will occur in the long term following further consultation with Indigenous peoples, partners and experts from across Canada.

[40] For the assumptions in the funding formulas based on population levels, INAC is ordered to immediately stop formulaically reducing funding based on arbitrary population thresholds. Again, funding must be provided based on an assessment of the actual service level needs of FNCFS Agencies. As above, INAC will be required to report back to the Tribunal confirming that it has implemented this order and clearly demonstrate how it has done so.

[41] Relatedly, and as addressed in more detail below, the Panel needs more information on how INAC determined its five-year plan for investing in the FNCFS Program and in determining budgets for each FNCFS Agency. The Panel notes that there are already some costing model template documents filed in evidence with the Tribunal and in INAC's most recent submissions which provide some of this additional information. However, this information still needs to be further detailed to clearly explain how the children's and families' needs are being addressed in response to the Panel's findings and orders.

[42] Furthermore, given INAC's emphasis on consultation in response to many of the items in this ruling, it would be helpful to the Panel and the other parties if INAC could provide a list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far in response to the findings in the *Decision*, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions.

**B. Funding for legal fees, capital infrastructure, culturally appropriate services, child service purchase amount and the receipt, assessment and investigation of child protection reports**

[43] According to INAC, the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services will be addressed as part of future reform discussions. Addressing some of these issues may require engagement and discussion with First Nations, FNCFS Agencies and provincial/territorial governments. According to INAC, unilateral action in addressing these important issues would be contrary to the federal government's commitment to renew the relationship between Canada and Indigenous peoples. INAC adds that immediate relief investments could be utilized by FNCFS Agencies to respond to individual community needs for culturally based programming and activities.

[44] With respect to the child service purchase amount, INAC indicates that it has increased it from \$100 to \$175 per child. On the receipt, assessment and investigation of child protection reports, INAC submits that Budget 2016 investments will provide approximately \$45 million over the next five years in additional funding to support intake and investigation services, which include activities such as the receipt, assessment and investigation of child reports.

[45] For their part, the CCI Parties do not understand why the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services cannot be addressed at this stage. There are actions that can be taken now to alleviate discrimination that fall entirely within federal jurisdiction and do not depend on corresponding provincial action, including simply adopting and adequately funding applicable provincial/territorial standards regarding these issues. Specifically, the CCI Parties request:

- Each FNCFS Agency be provided \$75,000 in fiscal year 2016/2017 to develop and/or update a culturally based vision for safe and healthy children and families, and to begin to develop and/or update culturally based child and family service standards, programs and evaluation mechanisms;
- Legal fees related to children in care, and child welfare investigations and inquiries, be fully reimbursable according to the tariff employed by the federal government for the remuneration of outside counsel; and
- The costs of building repairs, where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations, be fully reimbursable.

[46] For the child service purchase amount, the CCI Parties request that it be increased to \$200 per child. For costs related to the receipt, assessment and investigation of child protection reports, the CCI Parties submit that they should be fully reimbursable.

[47] As stated above in the previous section of this ruling, the Panel is not concerned with the specific amount of funding per se, but with the way in which it is determined: that it is based on an evaluation of the distinct needs and circumstances of each individual FNCFS Agency. Pursuant to this reasoning, the Panel has insufficient information at this time to make an order with respect to the request for a specific amount of funding for the development and/or update of culturally based child and family service standards, programs and evaluation mechanisms. The Panel recognizes that leaving it to FNCFS Agencies to use immediate relief investments to address this item does not ensure this need is met, especially in the case of a small agency and/or remote community. However, the Panel will address this request at the upcoming in-person case management meeting.

[48] For legal fees, as indicated in 2016 CHRT 10 and reiterated at paragraph 36 above, the Panel expects INAC to address this issue as part of immediate relief measures while a longer-term solution is being developed. While the Panel understands the benefit of having discussions on funding for legal fees in the long term, this issue should also be addressed immediately. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is addressing this issue. This will form part of the upcoming in-person case management meeting.

[49] On the issue of building repairs, the Panel fails to understand why INAC cannot address it now, especially where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations. Again, while the Panel understands the benefit of having discussions on capital infrastructure in the long term, this urgent issue should also be addressed immediately. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is addressing this issue. This will form part of the upcoming in-person case management meeting.

[50] Finally, with regard to the issues of the child service purchase amount and the costs related to the receipt, assessment and investigation of child protection reports, again, the Panel requires further information on how INAC's funding allotment for this item meets the needs of individual FNCFS Agencies. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it determined funding for such costs. This will form part of the upcoming in-person case management meeting.

### **C. Adjustments for inflation**

[51] Another significant finding in the *Decision* was INAC's failure to adjust Directive 20-1 funding levels since 1995, along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living.

[52] INAC indicates that the investments in Budget 2016 include an annual adjustment to address future cost drivers and growth. The cost drivers that account for average yearly growth include: maintenance growth, agency operating costs (e.g. rent, transportation, supplies and equipment), salaries and increases in ratios of children in care. According to INAC, the annual amount for growth and cost drivers was calculated at approximately 3% of program investments and it is providing \$159 million in additional funding over the next five years to address these issues.

[53] The CCI Parties submit that INAC has failed to detail how much it is allocating for each "growth and future cost driver" and does not clearly detail how it arrived at corresponding allocations. Moreover, not all of the future cost drivers identified are linked to inflation. Indeed, the CCI Parties submit some of these cost drivers are linked to the FNCFS Program's legacy of discrimination (for instance, child maintenance costs). Additionally, they argue the annual adjustment for growth and future cost drivers does nothing to address the systemic disadvantage perpetuated by a lack of inflation adjustments over the last two decades.

[54] The CCI Parties request increased funding to restore lost purchasing power related to the failure to provide a compounded annual inflation adjustment pursuant to the Consumer Price Index. For fiscal years 2016-17 and forward, they request annual adjustments in funding for FNCFS Agencies according to the increase in the Consumer Price Index.

[55] INAC is ordered to detail how much it is allocating for each "growth and future cost driver" and to detail how it arrived at its corresponding allocations. Given the Panel has questions for INAC, the request for increased funding to restore lost purchasing power will be addressed during the upcoming in-person case management meeting.

### **D. Cost overruns and the reallocation of funds from other INAC programs**

[56] The *Decision* also addressed evidence that where there were cost overruns for maintenance expenses, and before providing any additional funding, INAC required FNCFS Agencies to recover those overruns from their prevention or operations funding streams first. Relatedly, in the event maintenance costs exceeded the FNCFS Program budget, funds were reallocated from other INAC programs, such as housing and infrastructure, to meet those maintenance costs. This was described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve.

[57] Again, INAC submits that Budget 2016 investments took into account cost drivers and growth considerations, including those impacting maintenance expenditures. If pressures exceed the allocated budget, additional resources can be secured. Funds will be allocated to agencies on an as-needed basis to respond to increases in maintenance expenses, provincial salary changes and any increases to the ratio of children in care.

[58] Furthermore, INAC submits that Budget 2016 investments will contribute to a more stable and predictable funding environment within INAC, thus reducing the need for reallocations from other critical programs such as infrastructure and housing. However, INAC notes that any commitment relating to funding for programs other than the FNCFS Program is beyond the scope of this complaint.

[59] The CCI Parties submit that only \$51,830,765.38 will be conferred to FNCFS Agencies to cover cost overruns in 2016-17. Therefore, they request that INAC be ordered to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and operations funding streams. Moreover, the CCI Parties request an order that INAC cease its practice of reallocating funding from other First Nations programs to address shortfalls in the FNCFS Program.

[60] The Panel orders INAC to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and operations funding streams. Again, this ensures FNCFS budgets are in a better position to meet the actual needs of the children and families they serve.

[61] While the reallocation of funding from other First Nations programs to address shortfalls in the FNCFS Program may be outside the four corners of this complaint, the Panel made findings about the adverse impacts of this practice in the *Decision* (see for example paras. 373 and 390). Therefore, the Panel urges INAC to eliminate this practice.

#### **E. Additional information requests**

[62] The CCI Parties request further detail on the budget allocations for the FNCFS Program and FNCFS Agencies. Specifically, they note that INAC's compliance report states that much of the additional funding will be provided "at full implementation" and "over the next five years." In the CCI Parties' view, INAC has not provided an explanation as to why there is a five-year delay in taking action and requests INAC be ordered to cease its incremental approach to remedying discrimination. The CCI Parties are also unclear as to when exactly "full implementation" will be reached or when "over the next five years" many of INAC's proposed measures will come into effect.

[63] Furthermore, while INAC has provided the funding models that generated its budgets, the CCI Parties also request that it provide the raw data relied upon to calculate any funding increases, including how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba, and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services.

[64] According to INAC, 'full implementation' of Budget 2016 will be reached in Year 4 and again in Year 5 of its five-year plan. The financial projections for 2017-18 to 2020-21 were calculated by scaling the full annual investment of Years 4 and 5. Funding will be provided to agencies incrementally because, according to INAC, past experience and discussions with funding recipients have shown that incremental funding allows agencies enough time to hire, train and retain staff, based on the availability of qualified social workers and other staff, and to expand their prevention programming. INAC submits that this approach in no way means that Canada presumes that agencies lack the capacity to implement immediate relief measures, but recognizes that it takes time to grow any organization and this is a mechanism to ensure funding does not lapse.

[65] INAC adds that the revised funding formulas used to support Budget 2016 investments were updated through a process undertaken over several years, and which include a comprehensive cost driver study and trend analysis based on the most current data available by jurisdiction. With specific regard to staff benefit packages, INAC states that the amount was calculated based on 20.45% of total salaries. This was the methodology agreed upon when EPFA was established. As part of longer-term reform to the FNCFS Program, INAC is open to further discussions with respect to changing the way in which future staff benefits allocations are calculated.



[66] Much of the information in INAC's most recent submissions, including information on its methods for determining the amount of new funding and the rationale for rolling it out incrementally, should have been provided months ago, especially given that INAC submits its cost study and trend analysis has been developed over several years. This information would have been helpful in moving forward with immediate relief measures more expeditiously. While the incremental funding approach may be following the past EPFA roll-out, the Panel requests the information above from INAC rather than be left with hypotheses. INAC is directed to disclose to the Panel and the CCI Parties, its cost study and trend analysis documentation on which it based its calculations for allocating Budget 2016 funding. . Furthermore, INAC is ordered to provide its rationale, data and any other relevant information in order to assist this Panel in understanding INAC's Budget 2016 investments and how they address the findings in the *Decision*, including how it arrived at financial projections beyond fiscal year 2016-2017; any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates; the information used to determine the caseload ratios in Quebec and Manitoba; and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance, and legal services.

#### **IV. The 1965 Agreement in Ontario**

[67] With respect to the *1965 Agreement* in Ontario, the *Decision* found that, while it was seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. The *Agreement* has not been updated for quite some time and does not account for changes made over the years to the Ontario's *Child and Family Services Act* for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under the Ontario's *Child and Family Services Act*. The *Decision* also found that the lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. Finally, the *Decision* indicated there is discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families, for example, through the appointment of a Band Representative and INAC's lack of funding thereof (see *Decisions* at paras. 223-246).

[68] Again, for the reasons that follow, the Panel is of the view that further orders, including additional information and reporting by INAC, are required to ensure the findings in the *Decision* with respect to the *1965 Agreement* have been or will be addressed in the short term.

#### **A. Updating the 1965 Agreement**

[69] The CCI Parties request that the schedules of the *1965 Agreement* be updated to reflect the current version of Ontario's *Child and Family Services Act*. They also ask for an order ensuring funding for the full range of statutory services, including Band Representatives and children's mental health services, provided by the Ontario's child welfare legislation.

[70] On this issue, INAC has indicated that it will actively work with the province of Ontario and stakeholders, such as First Nations organizations, leadership, communities, agencies and front-line service providers, to achieve necessary reforms to the *1965 Agreement*. A meeting was held between officials at INAC and the Ontario Ministry of Aboriginal Affairs to discuss issues, including child welfare in Ontario. Subsequently, on March 11, 2016, the Minister of INAC met with the Ontario Minister of Aboriginal Affairs to discuss key priority areas, including FNCFS in Ontario and the need to review the *1965 Agreement*. According to Canada, these meetings have set the stage for further and more substantive discussions that will take place with First Nations, including the COO and other Interested Parties.

[71] Furthermore, on May 10, 2016, INAC's Ontario regional office sent a letter to Ontario Regional Chief Isadore Day and provincial Deputy Minister Deborah Richardson, advising them of immediate relief investments coming to Ontario for child and family services. This letter states that funding for Band Representatives will be considered as part of the FNCFS Program reform process.

[72] In terms of mental health services, INAC submits that \$69 million will be invested over the next three years to provide immediate support for Indigenous mental wellness across Canada. This funding is in addition to the close to \$300 million provided annually for community-based mental health and addictions programming on-reserve and in the territories. According to INAC, this new funding will support various measures, including some that are specific to Ontario.

[73] The Panel is pleased to learn about the significant new investments mentioned above. While it may address some of the adverse impacts highlighted in the *Decision*, again, the Panel is not in a position to assess the extent that it does so whether in the short or longer-term. INAC is ordered to provide its rationale, data and other relevant information to assist this Panel in understanding INAC's Budget 2016 investments and how they are responsive to the needs of the First Nations children and how it addresses the findings in the *Decision*, in the short term, especially in terms of mental health services and Band Representatives.

[74] In this regard, the Panel is aware that, as opposed to provincial service delivery and the Ontario's *Child and Family Services Act*, federal health and social services to First Nations children are delivered through different departments. Nevertheless, the Panel made findings with the evidence before it in relation to the gaps and adverse impacts caused by the Federal government's involvement in health and social services to First Nations children in Ontario (for example, see the *Decision* at paras. 364-373 and 391-392). Overall, the Panel found the situation in Ontario fell short of the objective of the 1965 Agreement "...to make available to the Indians in the Province the full range of provincial welfare programs" (see *Decision* at para. 246). Again, the Panel wants to know how those findings are being addressed in the short term while the *Agreement* is being reformed.

## **B. Remoteness Quotient**

[75] The NAN submits that a new remoteness quotient needs to be developed to ensure funding to remote northern communities reflects the high costs of living and the extraordinary costs of providing services in those communities. The new remoteness quotient should take into account cost of living; demographics of northern communities where children and youth form a significantly higher percentage of the population than the rest of Canada; the high rates of child deaths; and, high youth suicide rates.

[76] According to the NAN, the *Barnes Report* (Exhibit HR-11, Tab 219: David Barnes and Vijay Shankar, *Northern Remoteness, Study and Analysis of Child Welfare Funding Model Implications on Two First Nations Agencies, Tikinagan Child and Family Services and Payukotayno: James Bay and Hudson Bay Family Services* (Barnes Management Group Inc., 2006) provides a good example of what its proposed remoteness quotient could look like, and what a remoteness quotient could accomplish. However, the *Barnes Report* is specific to Ontario, identified several data gaps and was authored in 2006. As such, the NAN requests that an update to the *Barnes Report* be funded by the Federal government. The NAN further proposes that experts be engaged to develop a new remoteness quotient based on the *Barnes Report* and that the selection of the experts be by joint-agreement between the NAN and the Federal government. If no agreement is reached within a reasonable but short timeframe, it requests the Panel select the appropriate experts.

[77] While a robust, empirically-based remoteness Quotient is being developed, the NAN submits adjustments reflecting northern remoteness realities can be undertaken in the immediate term and looks forward to working collaboratively with the parties on the mechanics of these adjustments.

[78] Whereas the NAN's submissions were mainly focused on the application of a robust remoteness quotient to determine funding for its own communities in Ontario, the AFN submits that the application of remoteness factors ought to be considered across Canada. Similarly, the Caring Society submits remoteness issues should not be dealt with through an "update" of the *Barnes Report* but rather as part of a comprehensive special study for Ontario and as part of the NAC process. The COO also expects the NAC process and the Ontario Special Study to yield data to inform a remoteness quotient, which in turn will inform programming and funding models.

[79] For its part, INAC states that it will engage on undertaking and providing support for research on this topic, building on the research contained in the *Barnes Report*, to analyze a possible remoteness quotient.

[80] The Panel agrees with the NAN that a remoteness quotient needs to be developed as part of medium to long term relief and that data needs to be appropriately collected. The Panel is also pleased to learn that INAC will engage on undertaking and providing support for research on this topic and to discuss a possible remoteness quotient. The Caring Society and the COO have provided interesting suggestions on how to develop a remoteness quotient. This topic will form part of the upcoming in-person case management meeting.

[81] The Panel again agrees with the NAN that while a robust, empirically-based remoteness quotient is being developed, adjustments reflecting northern remoteness realities can be undertaken in the immediate term. The Panel also agrees with the AFN that this should not only apply to Ontario but, rather, the application of remoteness factors ought to be considered across Canada. As indicated above at paragraph 36, in 2016 CHRT 10 the Panel ordered INAC to immediately address how it determines funding for remote FNCFS Agencies. That determination should account for such things as travel to provide or access services; the higher cost of living and service delivery in remote communities; the ability of remote FNCFS Agencies to recruit and retain staff; and, the compounded effect of reducing core funding for remote agencies that may also be small agencies (for example, see *Decision* at paras. 213-233 and 291). A standardized, one-size-fits-all approach to determining funding for remote agencies affects their overall ability to provide services and results in adverse impacts for many First Nations children and families. The Panel orders INAC to provide detailed information in its compliance report 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. This will form part of the upcoming in-person case management meeting.

### **C. Allocation of immediate relief funding**

[82] INAC has indicated that Budget 2016 will provide new investments in Ontario of approximately \$5.8 million in 2016-17. By 2019-20, the total annual allocation for prevention services in Ontario First Nations will be approximately \$1,160 per child: an increase of approximately \$560 per child from the current amount of funding.

[83] In order to provide immediate relief to children in Ontario, the CCI Parties submit that the funding should be distributed to Ontario First Nations regardless of the provincial government's concurrence. The CCI Parties further requests that a deadline be set for the distribution of those funds. According to the COO, it is in the process of arranging meetings with INAC and the Province of Ontario to discuss how the budgeted amount of funding for Ontario was determined and how it can be distributed. As such, it requests that INAC provide further information to assess the sufficiency of funding and ongoing reporting to ensure compliance with its commitments.

[84] The CCI Parties also submit that Budget 2016 investments do not address inflation. Therefore, they request INAC pay an amount of \$5 million, adjusted for the compound rate of inflation from 2012 values pursuant to the Consumer Price Index, to be divided among FNCFS Agencies in Ontario.

[85] INAC submits that it cannot flow funds to Ontario via the *1965 Agreement* without the Province's concurrence. At this time, Ontario has not agreed to allow immediate relief funding to be flowed through the *1965 Agreement*. Rather, according to INAC, Ontario has proposed that an alternative approach be found to create an interim arrangement outside of the *1965 Agreement* for INAC to flow funds for immediate relief. INAC states that it is actively working with the Province to find a means to provide immediate relief funding as soon as possible and is prepared to immediately flow the funding for on-reserve preventative services within Budget 2016 commitments. However, before any options are finalized, INAC will seek support from First Nations leadership. As work on the allocation of immediate relief funding in Ontario is ongoing, INAC requests the Tribunal not impose a deadline and instead allow the parties to work collaboratively to address this issue.

[86] With regard to the additional amount for inflation, INAC submits that its Budget 2016 investments account for cost drivers and yearly growth, for a five year investment of \$70.5 million in additional program funding for service providers in Ontario.

[87] The Panel acknowledges INAC's investments and explanation. As work on the allocation of immediate relief funding in Ontario is ongoing, the Tribunal will not impose a deadline and instead will allow the parties to work collaboratively to address this issue. This is with the understanding that it will be addressed immediately and not delayed further. However, the Panel expects an update from INAC on this issue as part of its compliance report, and asks that it disclose the correspondence with the Province of Ontario referred to in its submissions. This will also be addressed during the upcoming in-person case management meeting.

[88] Similarly, for the same reasons mentioned in paragraph 55 above, the Panel needs additional information on the request for additional funding to address inflation. There is no doubt that inflation is a key factor which impacts overall service delivery and agency capacity to deliver those services. This was addressed in the *Decision* at paragraphs 311, 387 and 458. However, given the lack of detailed information regarding the determination of funding for future "cost drivers and yearly growth" the Panel is unable to assess if in fact INAC's investments are responsive to the needs of Ontario FNCFS Agencies. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it has determined funding to account for future "cost drivers and yearly growth" and will discuss this issue at the upcoming in-person case management meeting.

#### **D. Expanding the definition of 'prevention services'**

[89] The CCI Parties request an order that the definition of 'prevention services' in the *1965 Agreement* be expanded to include special needs rehabilitative and support services and respite care. The CCI Parties submit that if special needs supports and respite care are provided as a form of prevention services, this may lead to a reduction of children in care. Families will no longer have to make the decision between keeping their families together and having a child's special needs unassessed or supported or breaking families apart by placing a child in care with an increased opportunity that the child will have better access to supports.

[90] Relatedly, the CCI Parties submit that children with special needs are at a significantly higher-than-normal risk of being apprehended due to their inability to travel to get access to the care and services they require. That is, children perceived to be in a position where they are not being provided with required care by their families may be viewed as children in need of protection. Funding for travel to access special needs services and assessments is not provided for under the *1965 Agreement*. Therefore, the CCI Parties request that the definition of 'prevention services' under the *1965 Agreement* include funding for travel to access all physician-prescribed health services, including special needs assessments and services.

[91] Finally, the CCI Parties request that the definition of ‘prevention services’ under the *1965 Agreement* be expanded to include the supports for families in crisis identified under Ontario’s recently announced Family Well-Being Program; and that Canada match the Ontario Government’s financial commitment of \$80 million over three years to serve families in crisis under the Family Well-Being Program.

[92] In response, INAC states that it looks forward to participating in discussions on the Province of Ontario’s definition of ‘prevention services’ and is committed to working with other federal partners, as well as Ontario and First Nations partners, to discuss the supports needed to reduce or prevent First Nations children from coming into care. However, it argues the request for a unilateral order expanding the definition of ‘prevention services’ under the *1965 Agreement* is not appropriate. That is, the *1965 Agreement* is between the Federal government and the Province of Ontario and will require joint provincial and federal agreement to undertake changes.

[93] The COO suggests that any order for an expanded definition of ‘prevention services’ be considered in the medium to long term relief stage, to allow for planning and consultation with First Nations, child welfare agencies or other proposed service providers; and to ensure that the appropriate service provider can be identified, has the required mandate, and is willing and able to provide such services.

[94] The Panel made findings in the *Decision* with regard to the services covered by the *1965 Agreement*, along with the difficulties faced by some First Nations children and families in accessing services in remote Ontario communities (see paras 223-244). However, the Panel agrees with the COO’s suggestion above that expanding the definition of ‘prevention services’ in the *1965 Agreement* should be considered in the medium to long term. That said, as part of INAC’s immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, and until an expanded definition of prevention services can be considered, INAC should consider reimbursing costs for travel to access physician-prescribed special needs services and assessments, special needs rehabilitative and support services and respite care, and support for families in crisis. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

#### **E. Reinstate cost-sharing of capital expenditures**

[95] The CCI Parties request an order that INAC reinstate the cost-sharing of capital expenditures under the *1965 Agreement* at the same allocation of 90%, as provided for in clause 4 of the *Agreement*.

[96] In response, INAC states that it will engage on the broader issue of infrastructure needs for the FNCFS Program as part of long-term reform efforts.

[97] As noted in the *Decision*, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 and, as a result, many FNCFS Agencies in Ontario lack funding to establish infrastructure necessary to deliver statutory child protection services (see paras. 244-245). Therefore, as part of INAC’s immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, and until the broader issue of infrastructure needs under the *1965 Agreement* can be fully reviewed, INAC should develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

#### **F. Eligibility**

[98] According to the CCI Parties, in order to be eligible for federal funding under the cost-sharing formula of the *1965 Agreement*, children and youth must be: 1) registered Indians; and, 2) resident on reserve, Crown land, or off reserve less than 12 months. They submit that this residency and status requirement under the *1965 Agreement* has a significantly negative impact on children and youth who are entitled to be registered, but for a variety of reasons, have not been. In this regard, the CCI Parties suggest that the documentation requirements for registering a child at birth or while still young present

a serious challenge. Therefore, they request that the *1965 Agreement*'s residency and registered status requirements be amended to ensure that not only children and youth who are registered are eligible for services, but also children and youth who are entitled to be registered.

[99] According to INAC, residency and registered status is a national issue that will require the development of a comprehensive approach in collaboration with key partners. INAC states that it will pursue discussions on this issue as part of long-term reform efforts.

[100] Although eligibility under the *1965 Agreement* is not discussed per se in the *Decision*, the need for review and update of the *Agreement* was discussed in detail (see for example paras. 223-228). The Panel agrees that a comprehensive approach to eligibility needs to be developed in collaboration with key partners and that it is best addressed at the long term stage when the *1965 Agreement* is reformed. However, as part of INAC's immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, INAC should also consider addressing access to services for First Nations children 'entitled to be registered'. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

### **G. Special study**

[101] The CCI Parties request that, within one year, a special study be performed of the application of the *1965 Agreement* in Ontario. The study would be conducted by experts and through a mechanism developed through the agreement of the parties, and with accompanying funding that allows for the meaningful participation of FNCFS Agencies, First Nations governments, INAC and the Province of Ontario. According to the CCI Parties, the study would determine the adequacy of the *1965 Agreement* in achieving comparability of services; culturally appropriate services that account for historical disadvantage; and, ensuring the best interest of the child are paramount. Ultimately, the results of the study would inform medium to long term reforms to the *1965 Agreement*.

[102] The NAN agrees with the proposed study, but submits that it should specifically include a component that thoroughly reviews and addresses the effect of the *1965 Agreement* on northern remote communities. Also, it submits the study should include a comprehensive data collection component and the data be made available publicly.

[103] As noted in the *Decision*, the *1965 Agreement* has never undergone a formal review by INAC. The Panel agrees with the CCI Parties that a study would greatly assist in determining the adequacy of the *1965 Agreement* in achieving comparability of services; culturally appropriate services that account for historical disadvantage; and, ensuring the best interest of the child are paramount (see *Decision* at paras. 223-227). A study would also inform long-term reform to the *1965 Agreement* by identifying concrete measures INAC can take to redress the discrimination found in the *Decision* with respect to the *1965 Agreement*. While INAC has generally indicated that it is open to reviewing the *1965 Agreement*, its submissions did not specifically address the CCI Parties' request for a special study.

[104] Therefore, the Panel will reserve making an order with respect to the special study in Ontario pending a specific response from INAC on the issue. The Panel expects a detailed response from INAC on this issue prior to the upcoming in-person case management meeting and will further discuss the issue with the parties at that time.

### **H. One-time contingency fund**

[105] The NAN requests an order for a one-time contingency fund to alleviate funding shortfalls for agencies serving remote and northern communities. According to the NAN, ameliorating the effects of existing deficits and debts will give more room and flexibility for such agencies to address the live, pressing and complex needs of children and families using child welfare services in remote and northern communities.

[106] This request was provided in the NAN's reply and therefore was not commented upon by the other parties. This request will form part of the upcoming in-person case management discussions.

### **V. Jordan's Principle**

[107] In the *Decision*, the Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, delays were inherently built into the Federal government's process for dealing with potential Jordan's Principle cases. It was also unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (see the *Decision* at paras. 379-382 and 458).

[108] In 2016 CHRT 10, the Panel ordered INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). It added that, pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[109] In response to that ruling, INAC indicated that it took the following steps to implement the Panel's order:

- A. It expanded Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- B. It expanded Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- C. Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- D. Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[110] In order to implement this new approach to Jordan's Principle, Canada has indicated that it will invest up to \$382 million in new funding over three years. It will also engage with First Nations, the provinces and the Yukon on a long-term strategy over that time. Furthermore, Canada has indicated that it will provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC has also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case. Further, it is assessing whether an off-business hour mechanism needs to be put in place.

[111] Moving forward, INAC states engagement will be a key component of its new approach to Jordan's Principle. It adds that Health Canada and INAC have written jointly to provinces and territories to initiate discussions related to Jordan's Principle. First Nations leaders will also be engaged on the design, management and delivery of the new approach to Jordan's Principle as well as longer-term policy and program reform. Moreover, INAC and Health Canada senior officials will meet with the AFN to discuss next steps and to develop specific details on implementation of a child-first approach. At the same time, headquarters and regional executives will engage their First Nations partners on the proposed approach.

[112] The CCI Parties request INAC provide further information and reporting on its implementation of the order and commitments above. They specifically ask for the following:

- Details of how Canada will consult with the parties, First Nations and FNCFS Agencies regarding all matters related to Jordan's Principle;
- Details as to what action INAC has taken to comply with the "government of first contact" provision in the order;
- Confirmation that INAC is applying Jordan's Principle to all jurisdictional disputes;
- Confirmation that INAC is applying Jordan's Principle to all First Nations children;
- Clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order; and
- Clarification as to how Canada will ensure that First Nations and FNCFS Agencies are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle.

[113] The CCI Parties further request that INAC post and keep up-to-date information regarding its implementation of Jordan's Principle, including its definition of Jordan's Principle, assessment criteria and process, remediation and appeal mechanism. Furthermore, on an annual basis, the CCI Parties request that INAC post non-identifying data on the number of Jordan's Principle referrals made, the disposition of those cases and the time frame for disposition, as well as the result of independent appeals. Finally, the CCI Parties request that INAC provide all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and FNCFS Agencies in question of any changes of such.

[114] The Panel is pleased with Canada's stated changes and investments in enacting the full meaning and scope of Jordan's Principle, but shares many of the same questions with respect to consultation and implementation as the CCI Parties. First, it would be helpful to the Panel and the other parties for INAC to provide a list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far with regard to Jordan's Principle, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions.

[115] INAC has also indicated that an interim guidance document was issued to regional Jordan's Principle focal points directing regional staff to "ensure that needed services for children will not be delayed due to case conferencing or policy review." However, Canada's submissions are unclear on the process that is being followed in dealing with a Jordan's Principle case. Canada's submissions state:

- Health Canada and INAC will provide further direction to their staff to initiate the implementation of this approach, as well as support the resolution of disputes or service gaps over the next three years based on provincial normative standards;
- Senior officials will engage with First Nations at the national and regional levels to plan the design and the implementation of the Service Coordination function and develop an effective approach to organize services for First Nations children on-reserve with disabilities;
- Further management of any such case will be done in a manner that will ensure the appropriate service or suite of services is being implemented in a timely manner;
- Additional training and orientation of focal points to the new definition and expanded scope of Jordan's Principle will begin immediately;
- A governance structure will be established to deal with Jordan's Principle cases when they arise; and



- Appeals will be heard in an expeditious way to ensure children with disabilities receive services in a timely manner.

[116] With regard to INAC's submissions above, the Panel is unclear as to what the current process is for dealing with Jordan's Principle cases and/or who is involved in processing these cases (INAC employees, social workers, health professionals, etc.). The Panel directs INAC to provide the following information:

- Details as to what action INAC has taken to comply with the "government of first contact" provision in the order;
- Clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order;
- Clarification as to how Canada will ensure that First Nations, FNCFS Agencies and the CCI Parties are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle; and
- Provide all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and FNCFS Agencies in question of any changes of such.

[117] On the issue of the breadth of INAC's new formulation of Jordan's Principle, the Panel notes that the motion unanimously passed by the House of Commons did not restrict the application of the principle solely to First Nations children on reserve, but to all First Nations children: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children" (see *Decision* at para. 353, emphasis added). INAC's formulation of Jordan's Principle is also not in line with the eligibility requirements for its own FNCFS Program, which applies to First Nations "resident on reserve or Ordinarily Resident On Reserve" (see ss. 1.3.2 and 1.3.7 of the *2005 FNCFS National Program Manual* and s. 1.1 of the *2012 National Social Programs Manual* at paras. 52-53 of the *Decision*). That is, the application of Jordan's Principle only to First Nations children living on reserve is more restrictive than the definition included in INAC's FNCFS Program. This type of restriction will likely create gaps for First Nations children and is not in line with the *Decision* (see paras. 362, 364-382 and 391).

[118] The Panel notes that, in responding to the findings in the *Decision* on Jordan's Principle, INAC's rationale for its new formulation of Jordan's Principle was in reference to two paragraphs of the *Decision* (see *Respondent's Further Reply Submissions Re Immediate Relief*, Justice Canada, July 6, 2016 at pp. 22-23), which it narrowly interpreted as indicating that Jordan's Principle should only apply to First Nations children on reserve. This type of narrow analysis is to be discouraged moving forward as it can lead to discrimination as found in the *Decision*. Rather, consistent with the motion unanimously adopted by the House of Commons, the Panel orders INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve.

[119] INAC's new formulation of Jordan's Principle also appears to narrow its application to only those First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." Without additional information, this formulation of Jordan's Principle once again appears to be more restrictive than formulated by the House of Commons. The Panel requests that INAC explain in its compliance report why it formulated its definition of Jordan's Principle as such so that it can assess its full impact. This will also form part of the discussions at the upcoming in-person case management meeting.

[120] Finally, the Panel is satisfied that INAC has confirmed it is applying Jordan's Principle to all jurisdictional disputes. The Panel will assess this application through ongoing reporting.

## **VI. Other requested orders**

### **A. No reductions in funding**

[121] The CCI Parties request that INAC be ordered not to decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle.

[122] INAC agrees not to decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle.

[123] The Panel acknowledges INAC's undertaking above and will incorporate it in its order below.

### **B. Adoption of the principle that children and youth living in residential care must live as close as possible to their home communities**

[124] The CCI Parties request an order that Canada adopt the principle that children and youth living in residential care must live as close as possible to their home communities and that necessary funding and resources be provided to ensure this fundamental principle is met.

[125] INAC submits that the decision on placement of a child brought into care is at the service providers' discretion. However, as part of the reform to the FNCFS Program, INAC states it will engage service providers, the provinces/territory and any other relevant partner, including First Nations leadership and organizations, to facilitate opportunities for children placed in care outside of their communities to maintain a connection to their communities and cultures.

[126] This request will form part of the upcoming in-person case management discussions.

### **C. National Advisory Committee**

[127] INAC has committed to the reestablishment of the NAC, and discussions with the AFN and the Caring Society on the formation of the committee are underway.

[128] The NAN requests an order that it be granted representation at the NAC and regional roundtables. Further, the NAN requests that the NAC include a northern remoteness subcommittee with representation from the NAN. Alternatively, if the Panel finds that the NAN's proposal is premature, it requests that a deadline or schedule be set, by which the NAC, subcommittees and regional tables should be struck.

[129] INAC is supportive of the NAN's proposal to have a northern remoteness subcommittee included as part of the work of the NAC and states that it will raise this with the committee.

[130] The AFN submits that it would be premature to incorporate the NAC or its composition into an order. The parties envision the NAC as being a mechanism to address medium to long-term reforms of the FNCFS Program and the parties are focused on immediate relief at this stage.

[131] The Panel will address this issue at the upcoming in-person case management.

### **D. Canadian Incidence Study of Child Abuse and Neglect**

[132] The CCI Parties request that INAC be ordered to immediately fund a new iteration of the Canadian Incidence Study of Reported Child Abuse and Neglect, including data collection specific to remote and northern First Nations communities.

[133] According to INAC, it is currently in the process of working with the Public Health Agency of Canada to provide funding for the Aboriginal component of the Canadian Incidence Study.

[134] The Panel believes a new iteration of the Canadian Incidence Study would be a useful tool in further informing reform to the FNCFS Program and the *1965 Agreement*. The Panel also acknowledges INAC's willingness to fund the Aboriginal component of the study as indicated above. The Panel expects INAC to indicate in its report if indeed it is providing funding for the Aboriginal component of the Canadian Incidence Study, including whether that component of the study will include data collection specific to remote and northern First Nations communities.

#### **E. Updating policies, procedures and agreements**

[135] The CCI Parties request that INAC be ordered to update its policies, procedures (including FNCFS Agency reporting procedures) and contribution agreements to comply with the Panel's order and communicate such reforms in detail and in writing to First Nations, FNCFS Agencies and the public.

[136] According to INAC, reform of the FNCFS Program will involve a redesign of its funding models, policies and procedures. However, such work will require significant analysis and collaboration with all relevant key partners and is therefore a longer-term process. In the interim, INAC submits that using existing funding mechanisms and procedures will ensure children and families continue receiving services and will prevent any disruption to services. It states that it will work with its partners to update and adjust processes as needed for next fiscal year.

[137] In the Panel's view, the request to update policies, procedures and agreements is captured by its general order to reform the FNCFS Program and *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*. The Panel understands this reform will be achieved in the longer term, with certain interim measures being put in place until that time as addressed in this ruling. Considering the central importance of this matter and the need for a process along with interim measures to be put in place, this request will also form part of the upcoming in-person case management meeting.

#### **F. Training and performance metrics for federal public servants**

[138] The CCI Parties request INAC be ordered to ensure that its executives and staff receive 15 hours of mandatory training on: the Truth and Reconciliation Commission's final report (December 2015); the FNCFS Program (including formula development, assumptions, and program reviews); the *Decision*; and on the full meaning and scope of Jordan's Principle. It requests this training occur before August 31, 2016 and in a manner approved by the Commission and the Complainants.

[139] Relatedly, the CCI Parties also request that the annual performance evaluations of federal public servants who provide services to Aboriginal Peoples, or who assign work related thereto, include metrics designed to demonstrate how each individual has contributed to closing the socio-economic gap with respect to Aboriginal Peoples. It further requests that Canada develop mandatory intercultural competency programming for these employees.

[140] In response, INAC indicates that it looks forward to further discussions on improving the cultural sensitivity of its employees. However, it submits that the request that staff undertake specific training is beyond the scope of the complaint and seeking to have all staff trained is overly broad. Further, it submits the performance evaluations of specific federal public servants was not at issue in the complaint, nor were allegations made against specific employees. In INAC's view, the performance metrics request goes beyond the scope of the complaint, including any mandatory programming related thereto.

[141] Given that INAC is open to further discussions on this issue, the Panel will address this issue at the upcoming in-person case management meeting.

### **G. Funding for the Aboriginal Peoples Television Network**

[142] The hearings in this matter were recorded and broadcasted by the Aboriginal Peoples Television Network (the APTN) pursuant to operating guidelines for coverage approved by the Panel (see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 18; and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 23). One of those guidelines required APTN to retain the recordings of the hearing for three years.

[143] As the three-year period will be coming to an end shortly, and given the legal, social, moral and political importance of this case, the CCI Parties request that INAC be ordered to immediately provide \$30,000 to the APTN to transfer the tapes of the Tribunal hearings onto a publicly accessible format and provide sufficient funds to the National Centre for Truth and Reconciliation to store and manage public access to the tapes.

[144] In response, INAC submits that the APTN was not a party to the complaint and, as such, the Tribunal should not grant it relief as part of the remedies. However, it is willing to further consider this undertaking.

[145] The Panel supports and believes in APTN's work and mission. It was very pleased with their involvement in filming the hearings in this matter. However, the Panel will not make the order requested. The Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 (CanLII), at para. 37). The APTN is not a party to this complaint, nor is it a victim of the discriminatory practices at issue. While there is no doubt that this case has a legal, social, moral and political importance that merited public broadcasting, this public interest is not linked to any findings of discrimination.

[146] Although the Panel will not make the order requested, it notes INAC is favorable to fund the transfer of the recordings. Given the recordings are of great importance and public interest, the Panel encourages INAC to do so.

### **H. Review decisions with respect to funding new agencies**

[147] The CCI Parties request that INAC be ordered to review decisions to deny funding to support the development and operation of FNCFS Agencies, particularly with regard to the applications for new agencies by the Okanagan Nation Alliance and the Carcross First Nation.

[148] INAC believes this to be an important topic to be addressed through partner engagement on the FNCFS Program reform. Given the provincial/territorial legislative authority, this will require engagement and agreement with provincial and territorial governments, as well as with First Nations partners.

[149] Before contemplating an order, the Panel believes this request would benefit from further discussion as part of the upcoming in-person case management meeting.

### **I. Funding for research, scholarships and conferences**

[150] The CCI Parties request that, for a minimum of ten years, INAC fully fund research and scholarships in relation to measuring the provision of child welfare services for First Nations children, along with issues such as control over and access to education, the revitalization of Indigenous legal orders, access to the economy and control over lands and resources. Further, they submit that such research and scholarship funding should be managed by an independent scholar-based oversight body. Thereafter, the CCI Parties request INAC fund annual conferences for the presentation of the research findings emanating from the above and that federal public servants involved in the provision of services to Aboriginal Peoples be required to attend.

[151] While INAC is open to further discussions on supporting research, it argues this specific request falls outside the scope of the FNCFS Program.

[152] Given that INAC is open to further discussion, this request will form part of the upcoming in-person case management meeting.

**J. Appoint the Commission to engage all parties and create a draft order**

[153] The AFN requests that INAC be ordered to engage in consultations with the Commission on immediate measures to redress the discrimination identified in the *Decision*. It asks that the Commission be appointed to engage all parties in a discussion on immediate relief and thereafter create a draft order, including specific dates for INAC to implement all of the elements of immediate relief. The Commission would then be required to submit the draft order, agreed upon by all parties, within 60 days of the date of this ruling.

[154] Furthermore, the AFN submits that the Panel should order INAC, or direct the Commission, to address the issue of resourcing the parties to ensure their meaningful participation in the process.

[155] INAC submits that it has already addressed a number of immediate relief measures, such as providing increased funding to FNCFS Agencies through an updated and improved funding formula. It would like to move forward with addressing medium and long-term reform through engagement with key partners. According to INAC, all work to reform the FNCFS Program will include engagement with key partners such as FNCFS Agencies, First Nations communities and leadership, the provinces, the Yukon Territory and the parties to this complaint.

[156] The AFN's request above was submitted in reply and the other CCI Parties did not have an opportunity to respond thereto. Therefore, this request could form part of discussions at the upcoming in-person case management meeting. INAC has also indicated it is open to providing funds for the CCI Parties' participation in meetings. Therefore, the Panel would like to know if INAC is agreeable to provide funds for the CCI Parties' participation in the upcoming in-person case management meeting and any subsequent meetings.

**VII. Order**

[157] In the *Decision*, INAC was ordered to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the Panel's findings and to cease applying its narrow definition of Jordan's Principle and take measures to immediately implement the full meaning and scope of Jordan's Principle (see at para. 481). As mentioned above, the CCI Parties' request to update policies, procedures and agreements is captured by this general order to reform the FNCFS Program and the *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*.

[158] In addition, to address this general order in the short term, INAC was subsequently ordered to immediately take measures to address a number of items. As indicated in 2016 CHRT 10 and reiterated in this ruling, those items were to be addressed immediately. Again, those items include addressing the adverse impacts related to the assumptions about the number of children in care, families in need of services and population levels; remote and/or small FNCFS agencies; inflation/cost of living; changing service standards; salaries and benefits; training; legal costs; insurance premiums; travel; multiple offices; capital infrastructure; culturally appropriate programs and services; and, least disruptive measures. INAC was then ordered to report back to the Panel to explain how those items are being addressed in the short term to provide immediate relief to First Nations children on reserve (see 2016 CHRT 10 at paras. 20 and 23).

[159] INAC was also ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the Panel also indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at para. 33).

[160] In addition to the orders in the *Decision* and in 2016 CHRT 10, and pursuant to the ruling above, the Panel orders as follows.

#### **A. Additional Immediate measures to be taken**

1. INAC will not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle (see paras. 121-123 above);
2. INAC will determine budgets for each individual FNCFS Agency based on an evaluation of its distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the FNCFS Agency's ability to provide services (see paras. 33, 37, 40 and 47 above);
3. In determining funding for FNCFS Agencies, INAC is to establish the assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC will not reduce funding to FNCFS Agencies because the number of children in care they serve is below 6% or where the number of families in need of services is below 20% (see para. 38 above);
4. In determining funding for FNCFS Agencies that have more than 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services (see para. 39 above);
5. In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above);
6. INAC is to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and/or operations funding streams (see paras. 56-61 above); and
7. INAC is to immediately apply Jordan's Principle to all First Nations children (not only to those resident on reserve) (see paras. 117-118 above).

#### **B. Reporting**

1. By October 31, 2016, INAC is to provide a detailed compliance report indicating:
  - a. How it has complied with the immediate measures ordered above in section A of this order;
  - b. How it is immediately addressing funding for legal fees (see para. 48 above);
  - c. How it is immediately addressing the costs of building repairs where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations (see para. 49 above);
  - d. How it determined funding for each FNCFS Agency for the child service purchase amount and the receipt, assessment and investigation of child protection reports (see para. 50 above);

- e. How much it is allocating for each “growth and future cost driver” and to detail how it arrived at its corresponding allocations for each FNCFS Agency, including for Ontario (see paras. 51-55 above);
- f. How new funding is immediately addressing the adverse effects identified with respect to the *1965 Agreement*, especially in terms of mental health services and Band Representatives (see paras. 69-74 above);
- g. How it determined funding for remote FNCFS Agencies that allows them to meet the actual needs of the communities they serve, taking into account such things as travel to provide or access services, the higher cost of living and service delivery in remote communities and the ability of remote FNCFS Agencies to recruit and retain staff (see paras. 75-81 above);
- h. How immediate relief funding is being distributed in Ontario (see paras. 82-88 above);
- i. How it has complied with the order to immediately implement the full meaning and scope of Jordan’s Principle (see paras. 107-120 above), including:
  - i. confirmation that it is applying the principle to all First Nations children (not just to those resident on reserve);
  - ii. an explanation as to why it formulated the application of the principle to children with “disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports”;
  - iii. details as to what action it has taken to comply with the “government of first contact” provision in the order;
  - iv. clarification as to what process will be followed to manage Jordan’s Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order;
  - v. clarification as to how it will ensure that First Nations, CCI Parties and FNCFS Agencies are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan’s Principle;
  - vi. providing all First Nations and FNCFS Agencies with the names and contact information of the Jordan’s Principle focal points in all regions and informing them of any changes of such; and
- j. If it is providing funding for the Aboriginal component of the Canadian Incidence Study, including whether that component of the study will include data collection specific to remote and northern First Nations communities (see paras. 132-134 above).

### **C. Additional information to be provided**

#### **1. By September 30, 2016, INAC is directed to serve and file:**

- a. The rationale, data and any other relevant information it states it used to determine its five-year plan for investing in the FNCFS Program and in determining budgets for each FNCFS Agency, including its cost driver study and trend analysis documentation, how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services; and
- b. The correspondence with the Province of Ontario referred to in its submissions (see paras. 85-87).

**2. By October 31, 2016, INAC is directed to serve and file:**

- a. A list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far in response to the findings in the *Decision* and Jordan's Principle, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions (see paras. 42 and 114 above);
- b. A response indicating its views on the request that it reimburse costs for travel to access physician-prescribed special needs services and assessments, special needs rehabilitative and support services and respite care, and support for families in crisis as part of immediate relief investments in Ontario (see para. 94 above);
- c. A response indicating its views on dealing with the infrastructure needs of FNCFS Agencies as part of immediate relief investments in Ontario (see para. 97 above);
- d. A response indicating its views on the request to expand the eligibility requirements of the *1965 Agreement* as part of immediate relief investments in Ontario (see para. 100 above);
- e. A response indicating its views on the request that it conduct a special study on the application of the *1965 Agreement* in Ontario (see paras. 103-104 above); and
- f. A response indicating if it is agreeable to providing funds for the CCI Parties' participation in the upcoming in-person case management meeting and any subsequent meetings (see para. 156 above).

**D. Retention of jurisdiction**

[161] Given the ongoing nature of the Panel's orders, and given the Panel still needs to rule upon other outstanding remedial requests (see para. 4 above), the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by INAC, the upcoming in-person case management meeting and any ruling on the other outstanding remedies.

**VIII. In-person case management meeting**

[162] The Tribunal will be in contact with the parties shortly to schedule an in-person case management meeting between the Panel and the parties. Subject to the availability of those involved, the intention is to have the meeting as soon as is possible. As indicated throughout this ruling, there will be many items up for discussion. Any other outstanding issues can also be discussed at the meeting.

[163] With the additional information and reporting requested as part of this ruling, the Panel's hope is that all outstanding short-term remedial requests can be resolved by the end of the meeting as to not delay immediate action any further. The Panel also hopes the meeting can be used to begin discussions on mid to long-term orders, including compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Therefore, the parties should anticipate several days for this meeting.

Signed by

**Sophie Marchildon**

Panel Chairperson

**Edward P. Lustig**

Tribunal Member

Ottawa, Ontario



September 14, 2016

TAB 15

# First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 7 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2017-03-29

File number: T1340/7008

## **Citation:**

**First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 7 (CanLII), <<https://canlii.ca/t/h3cmq>>, retrieved on 2026-01-02**

**Most recent  
unfavourable  
mention**

Tribunal  
canadien  
Canadian Human  
Rights Tribunal  
droits de  
la  
personne

Citation: 2017 CHRT 7

Date: March 29, 2017

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 Lustig

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### **I. Nishnawbe Aski Nation's motion for immediate relief orders**

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada)*, 2016 CHRT 2 ("the *Decision*"), this Panel found that First Nations children and families living on reserve and in the Yukon are denied equal child and family services and/or differentiated adversely in the provision of child and family services contrary to the *Canadian Human Rights Act* ("the *Act*"). More specifically, that Indigenous Affairs and Northern Affairs Canada's ("INAC") design, management and control of the First Nations Child and Family Services Program ("the FNCFS Program"), along with its corresponding funding formulas and other related provincial/territorial agreements, results in denials of services and creates numerous adverse impacts for many First Nations children and families living on reserve. Among other things, 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.

[2] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that First Nations children and families suffer the adverse impacts in the provision of child and family services enumerated in the *Decision*. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Indigenous peoples, in particular as a result of the Residential Schools system.

[3] INAC was ordered to reform the FNCFS Program and *Memorandum of Agreement Respecting Welfare Programs for Indians* (“the 1965 Agreement”) to reflect the findings in the *Decision*. It was also ordered to cease applying its narrow definition of Jordan’s Principle and to take measures to immediately implement the full meaning and scope of Jordan’s Principle.

[4] The Nishnawbe Aski Nation (“NAN”) seeks various immediate relief orders arising out of the *Decision* and two subsequent rulings (see 2016 CHRT 10 and 2016 CHRT 16).

[5] In sum, NAN seeks orders with respect to the provision of mental health services to First Nations in Ontario, the development of a remoteness quotient to be applied to funding for NAN child welfare agencies, and other agency-specific relief.

[6] The First Nations Child and Family Caring Society of Canada, the Assembly of First Nations, the Chiefs of Ontario and the Commission also filed separate motions seeking orders of immediate relief. Along with the motions of the other parties, NAN’s motion was heard from March 22-24, 2017 in Ottawa.

[7] During the hearing, the Panel was encouraged to learn that NAN and INAC, were able to reach a resolution on certain aspects of NAN’s motion. The following ruling incorporates those resolutions into an order of this Panel. The other orders requested by NAN that are not covered in this ruling shall be dealt with in a separate ruling.

#### **A. Adjournment of request for “Choose Life” order**

[8] In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation (“Wapekeka”), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[9] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an “awkward time in the federal funding cycle” (see affidavit of Dr. Michael Kirlaw, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused.

[10] Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5).

**[11] The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances.**

[12] In its *Decision*, the Panel made findings about the gaps in mental health services for First Nations children and youth. In particular, the Panel identified jurisdictional issues between INAC and Health Canada in the provision of these services that created adverse impacts and denials of services for First Nations children and families. With specific regard to Ontario, mental health services are not covered by the 1965 Agreement despite the fact that they are legislated in Ontario’s *Child and Family Services Act* (see paras. 217-223, 239-242, 246, 364-373 and 391-392, and para. 458 of the *Decision*).

[13] In a subsequent order following the *Decision* and dealing specifically with the *1965 Agreement*, INAC was ordered to provide a rationale, data and other relevant information to assist this Panel in understanding how Budget 2016 investments are responsive to the needs of First Nations children and how it addresses, in the short term, the findings in the *Decision* with respect to mental health services (see 2016 CHRT 16, at para. 73).

[14] In response, INAC indicated it was reviewing the provision of additional services under the *1965 Agreement*, such as mental health services, as part of a longer-term engagement and reform process involving national and regional discussions.

[15] Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch, provided affidavit evidence and was cross-examined on the Wapekeka tragedy. She had no response as to why the Wapekeka proposal was left unanswered. However, according to Ms. Buckland, the gap in mental health services, created by the *1965 Agreement*, "could rightly be considered a Jordan's Principle case."

[16] It is in this context that the NAN seeks 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.

[17] On March 22, 2017, Health Canada committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative (Jordan's Principle) funding (see Annex "A"). 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.

[18] The Panel grants NAN's request to adjourn its motion for a "Choose Life" order and is really encouraged by the Choose Life Working Group initiative. In writing, by September 6, 2017, NAN shall report back to the Panel with respect to the Choose Life Working Group and indicate whether or not it continues to seek an adjournment of its request for a "Choose Life" order.

## **B. Agreement on the development and implementation of a remoteness quotient**

[19] 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 reflects the high costs of living and the extraordinary costs of providing services in those communities.

[20] Indeed, 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).

[21] INAC and NAN have now 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 are attached as Annex "A" of this ruling. The Panel adopts those terms as set out in the order below and pursuant to section 53(2)(a) of the *Act*.

[22] Again, the Panel is pleased by this agreement between INAC and NAN. The other parties are also supportive of this agreement, but await the final development and implementation of the remoteness quotient in NAN communities before taking a position on its application across the country. As such, the Tribunal will reserve its jurisdiction to return to the issue of the remoteness quotient to modify or clarify its order in the future. As with the “Choose Life” order, NAN proposed to report back to the Panel with respect to the development and implementation of the remoteness quotient by September 6, 2017.

[23] The Panel also notes that its acceptance of INAC and NAN’s agreement does not affect the other immediate relief measures requested by the parties. As mentioned above, the motions and measures requested by the other parties, along with the other measures requested by NAN that are not addressed in this ruling, shall be dealt with in a separate ruling. Finally, the Panel’s acceptance of INAC and NAN’s agreement should not be construed to modify or change any immediate relief measures already ordered by the Panel.

## **II. Order**

[24] Having heard from the parties and upon considering their written submissions on NAN’s motion for immediate relief and the subsequent resolutions reached with INAC, the Tribunal orders as follows:

1. NAN’s motion for a “Choose Life” order is adjourned sine die. NAN shall 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;
2. INAC and NAN will work to develop and implement an immediate relief funding formula for the three FNCFC Agencies that serve NAN communities, in accordance with the Terms of Reference attached to this order as Annex “B”;
3. INAC will provide to NAN, within 30 days of this order, funding of \$77,931.02, inclusive of HST, for Phase 1 as set out in the expert proposal provided by NAN to INAC in accordance with the Terms of Reference;
4. INAC will provide NAN with the available empirical data agreed upon by NAN and INAC for Phase 1 by April 15, 2017;
5. The results of Phase 1 will be made available by NAN to INAC by July 15, 2017;
6. In accordance with paragraph 4 of the Terms of Reference, INAC will commit to a further update to the Barnes Report using data from the 2016 Census and any other relevant available data that NAN and INAC agree upon; and
7. By September 6, 2017, INAC and NAN will provide an update to the Tribunal 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.

[25] The Panel retains jurisdiction over the above orders should it need to modify or clarify them in the future.

## **III. Concluding remarks**

[26] At the outset of the March 22-24, 2017 hearing, the Panel Chairperson stated the following:

I have a few words to bring hope, since people can perish without vision and hope. Truth always needs to be said, even when it's hard. It is a component of justice. This does not mean we cannot bring hope; we have to foster hope.

Hope is the heartbeat of a nation. It gives people the strength to overcome obstacles that seem insurmountable. It brings people together to work towards a common goal and drives them forward even in the midst of adversity. I would like to say to everyone that you are all precious and that there is always hope.

[27] The Panel believes the agreements achieved between NAN and INAC to be carriers of hope.

Signed by

**Sophie Marchildon**

Panel Chairperson

**Edward P. Lustig**

Tribunal Member

Ottawa, Ontario

March 29, 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:** March 29, 2017

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

#### **Appearances:**

David Taylor, Anne Levesque, Sarah Clarke, 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 N. 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

#### **“Annex A”**

Wednesday, March 22, 2017

Grand Chief Alvin Fiddler



Nishnawbe Aski Nation

200-100 Back Street

Thunder Bay, Ontario P7J 1L2

Dear Grand Chief Fiddler:

I am writing to confirm Health Canada's commitment to establish a Choose Life Working Group with Nishnawbe Aski Nation (NAN) aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative (CFI) funding that will address the needs of First Nations children at risk of suicide.

Health Canada commits to completing this work by April 10 as laid out in the draft Implementation Plan attached in Annex A.

The Choose Life application process will be grounded in criteria proposed by NAN in the proposal template submitted to Health Canada on March 21, 2017. It will serve as a pilot that could be broadened to other communities depending on feedback received from First Nations.

The Choose Life Working Group is not meant to displace the work of the Joint Action Table. It is intended to provide an interim measure for communities who have identified and assessed

unmet needs of First Nations children in mental health that have resulted due to the lack of

availability of services and supports requested in the community, or where a dispute over coverage of the requested services and supports is in question between federal departments or the provincial government.

Health Canada will also ensure that the Choose Life application process is consistent with the national Jordan's Principle approval process so that it enhances and does not create a more onerous approach for NAN communities, families and children to access Child First Initiative funding.

#### **"Annex A"**

Thank you for your consideration and openness to working through these issues.

Welalin,

Valerie Gideon

Assistant Deputy Minister

Regional Operations

c. Sol Mamakwa, NAN

Travis Boissoneau, NAN

Julian Falconer, Falconers LLP

Paula Isaak, INAC

Margaret Buist, INAC

#### **Annex "A"**

March 22, 2017

Valerie Gideon

Assistant Deputy Minister

Regional Operations

First Nations and Inuit Health Branch

Health Canada

Ottawa, ON

Via email. Valerie.gideon@hc-sc.gc.ca

Dear Assistant Deputy Minister Gideon,

**Re: Choose Life Pilot Working Group**

Thank you for the letter dated March 22, 2017.

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordans Principle funds.

While we continue to mourn the loss of all of our children including Jolynn Winter and Chantell Fox of Wapekeka First Nation, an expedited Choose Life Application process that would be the product of a collaborative exercise between Canada and NAN (finalized by April 10, 2017), creates the very real prospect of a profound legacy as a memorial to our lost youth.

I look forward to getting the Working Group underway and protecting our greatest gift, our youth.

Sincerely,

**NISHNAWBE ASKI NATION**

Grand Chief Alvin Fiddler

*cc NAN Executive Council*

*Travis Boissoneau, Chief Administrative Officer, NAN*

*Bobby Narcisse, Director of Social Services, NAN*

*Sol Mamakwa, Health Advisor, NAN*

*Julian Falconer, Falconers LLP*

*Paula Isaak, INAC*

*Margaret Buist, INAC*

**"Annex B"**

Docket: T1340/7008

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**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, AMNESTY INTERNATIONAL CANADA and**

**NISHNAWBE ASKI NATION**

**Interested Parties**

**ORDER RE NAN MOTION**

**RESPECTING A REMOTENESS QUOTIENT**

**THIS MOTION**, brought by the Interested Party, Nishnawbe Aski Nation ("NAN"), for an Order seeking immediate relief in respect of this Tribunal's decision dated January 26, 2016, was heard in Ottawa, Ontario.

**UPON** reading the materials filed in the herein proceedings, including the Terms of Reference attached to this Order as Schedule "A" ("the Terms of Reference") which were executed in

response to the Tribunal's January 26, 2016 decision and its accompanying September 14, 2016 ruling ordering that INAC report on how it is addressing the remoteness issue in Ontario;

**AND UPON** receiving the consent of NAN and INAC to this Order, and

**AND UPON** hearing the parties' oral submissions:

1. **THIS TRIBUNAL ORDERS** that INAC and NAN will work to develop and implement an immediate relief funding formula for the three First Nation Child and Family Services agencies that serve NAN communities, in accordance with the Terms of Reference attached to this Order as Schedule "A";

2. **THIS TRIBUNAL FURTHER ORDERS** that INAC provide to NAN, within 30 days of this Order, funding of \$77,931.02, inclusive of HST, for Phase 1 as set out in the expert proposal provided by NAN to INAC in accordance with the Terms of Reference;
3. **THIS TRIBUNAL FURTHER ORDERS** that INAC will provide NAN with the available empirical data agreed upon by NAN and INAC for Phase 1 by April 15, 2017;
4. **THIS TRIBUNAL FURTHER ORDERS** that the results of Phase 1 will be made available by NAN to INAC by July 15, 2017;
5. **THIS TRIBUNAL FURTHER ORDERS** that, in accordance with paragraph 4 of the Terms of Reference, INAC will commit to a further update to the Barnes Report using data from the 2016 Census and any other relevant available data that NAN and INAC agree upon; and
6. **THIS TRIBUNAL FURTHER ORDERS** that INAC and NAN provide updates to the Tribunal concerning the progress of data collection and analysis in relation to the Terms of Reference every six months from the date of this Order as long as the Tribunal remains seized of this matter.

**ORDER** signed this \_\_\_\_ day of \_\_\_\_\_, 2017 \_\_\_\_\_

### **“Annex B”**

#### **Terms of Reference for Remoteness Quotient Table**

*Canadian Human Rights Tribunal: "The [First Nations Child and Family Service] FNCFS Program, corresponding funding and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting cultural/y appropriate child and family services that are meant to be in accordance with provincial territorial legislation and standards and be provided in*

*a reasonably comparable manner to those provided off-reserve in similar circumstances. However, the evidence above indicates that AANDC is far from meeting*

*these intended goals and, in fact, that First Nations are adverse/y impacted and, in*

*some cases, denied adequate child welfare services by the application of the FNCFS*

*Program and other funding methods." [1] <sup>1</sup>*

#### **1. Context**

Nishnawbe Aski Nation ("**NAN**") and the Government of Canada ("**Canada**") jointly acknowledge the decision of the Canadian Human Rights Tribunal ("CHRT") in *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada et al*, 2016 CHRT 2 ("*Caring Society*").

NAN and Canada jointly recognize the "legacy of stereotyping and prejudice through colonialism, displacement and residential schools." [2] <sup>2</sup>

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1. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 383.

2. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 402

NAN and Canada jointly recognize that a "standardized, one-size-fits-all approach to determining funding for remote agencies affects their overall ability to provide services and results in adverse impacts for many First Nations children and families." [3] <sup>3</sup>

NAN and Canada jointly recognize the unique challenges and "added time and expense" [4] <sup>4</sup> of delivering child welfare services to remote access communities in the North.

NAN and Canada jointly recognize that the effects of remoteness on Indigenous child welfare agencies in Northern Ontario are exacerbated by "extraordinary infrastructure deficits" [5] <sup>5</sup> and "distinct differences" [6] <sup>6</sup> between Indigenous and non-Indigenous child welfare agencies. NAN and Canada jointly recognize that "INAC does not currently provide funding for remoteness in [Ontario], as the Department did not have sufficient data and information on which to base calculations for funding." [7] <sup>7</sup>

### **"Annex B"**

NAN and Canada jointly recognize the "denials of service and adverse effects" [8] <sup>8</sup> caused for First Nation families by the absence of an equitable and sustainable funding model for culturally appropriate Indigenous child welfare services and the need for First Nations and the federal and provincial governments to work together to develop such a model.

## **2. Guiding Principles**

The guiding principles at the foundation of the partnership between NAN and Canada include:

- The importance of collaboration and transparency to ensure open and informed lines of communication;
- The primacy of the best interest of the child;
- The need for an equitable and evidence-based child welfare funding model that is responsive to geographic remoteness, community needs and infrastructure, and cultural traditions; and
- The need for a sound empirical basis for funding calculations.

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3. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 16 at para 81

4. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at paras 231- 233.

5. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 244.

6. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 234.

7. INAC compliance report, October 31, 2016.

8. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 392.

### 3. **Mandate**

This Table 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 CHRT for implementation in the remedy phase of the Caring Society proceedings in accordance with the herein terms of reference and the attached Schedule A being correspondence from NAN to Canada of January 19, 2017.

NAN and Canada will discuss the needs of NAN communities relating to remoteness in the context of the CHRT's order that Canada "cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings" of its decision. [9]<sup>9</sup>

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.

### 4. **Scope**

#### **"Annex B"**

NAN and Canada will engage in collaborative discussions with respect to the child welfare funding deficiencies identified by the CHRT regarding remoteness as they impact NAN. Any additional child welfare issues that are jointly identified by NAN and Canada and agreed to may be addressed.

Specific topics that are within the scope of the Table include:

- Collection and analysis of empirical data from all relevant sources to inform remoteness funding for Indigenous child welfare;

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9. *First Nations Child and Family Caring Society of Canada et al v Canada*, 2016 CHRT 2 at para 481.

- An immediate update to the Barnes Report using data from the 2006 census and 2011 national household survey;
- A further update to the Barnes Report using data from the 2016 census;
- The design and implementation of a direct survey of First Nations in northern Ontario with respect to community needs and infrastructure as it relates to child welfare;
- Development and implementation of a new funding formula to address geographical remoteness;
- The unique history, culture, and socioeconomic circumstances of NAN communities;
- The unique challenges faced by Indigenous child welfare agencies in the North, including infrastructure and human resources deficits;
- Implementation of evidence-driven measures to ensure stable and equitable remoteness funding for Indigenous child welfare in the short, medium, and long term;
- Ongoing monitoring and evaluation of remoteness funding models to measure effectiveness; and
- Any other issues related to remoteness funding, the findings of the CHRT, and as agreed upon by NAN and Canada.

## 5. Membership

The Parties to the Table are NAN and Canada, as represented by the delegates chosen by each Party. Where appropriate, NAN and/or Canada may consult with other parties outside of this Table, on a confidential and without prejudice basis, regarding issues discussed at the Table.

## 6. Procedure

**Term:** These terms of reference remain in effect until March 31, 2017 unless otherwise agreed upon by NAN and Canada.

**Meetings:** The Table shall aim to meet at least once per week. Meeting locations shall alternate to meet the needs of both Parties to the extent possible.

**Levels of Negotiation:** The Table shall meet either as a Political Table or a Technical Table. Political Table meetings shall include appropriate representatives of both Parties who are prepared to discuss all issues on the agenda and possess general decision-

## “Annex B”

making authority. Technical Table meetings shall include delegates with child welfare, economic, legal, or other appropriate expertise who are prepared to collaboratively

develop the substantive materials for discussion by the Political Table. Certain delegates from both Parties may attend both Political and Technical Table meetings to ensure consistent and productive dialogue.

**Quorum:** Full attendance is encouraged but meetings may proceed as long as both Parties are represented.

**Agenda:** The Parties will rotate the responsibility of preparing an agenda for each meeting, in consultation with the other Party. The agenda and all other materials are to be circulated as soon as possible before each meeting, and in any event at least 24 hours in advance.

**Minutes:** Meeting minutes and action items are to be shared following each meeting.

**Resourcing:** Canada shall provide for the reasonable and adequate resourcing of Table meetings and supporting technical work.

**Member Responsibilities:**

- Attend and actively participate at meetings;
- Work within the terms of reference;
- Raise and respond to relevant issues in discussion;
- Consider the needs of both Parties, work towards common goals, and
- negotiate collaboratively in good faith;
- Share relevant information to facilitate evidence-driven discussion;
- Undertake necessary preparatory or follow-up action;
- Seek approvals within their organization as appropriate and necessary;
- Explore all options to obtain consensus and resolve opposing viewpoints;
- Maintain confidentiality of discussions.

Further to the member responsibilities set out above, members are permitted to reference the existence of the Table but the substance of all discussions and these terms of reference will be confidential unless both NAN and Canada agree otherwise. These terms of reference and the proceedings of the Table are not to be used for any purpose except as expressly stated herein.

Dated this 10th day of March, 2017



Alvin Fiddler The Honourable Carolyn Bennett

Grand Chief, Nishnawbe Aski Nation Minister, Indigenous and Northern

Affairs Canada

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TAB 16

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

Source: Canadian Human Rights Tribunal

Date: 2017-05-26

File number: T1340/7008

## **Citation:**

**First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 14 (CanLII), <<https://canlii.ca/t/h4nqt>>, retrieved on 2026-01-02**

**Most recent unfavourable mention**

Tribunal  
canadien  
Canadian Human  
Rights Tribunal  
droits de  
la  
personne

Citation: 2017 CHRT 14

Date: May 26, 2017

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 Lustig

### **Outline**

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### **I. Motions for immediate relief related to Jordan's Principle**

[1] Jordan River Anderson of the Norway House Cree Nation was born with a serious medical condition. Because of a lack of available medical services in his community, Jordan's family turned to provincial child welfare care in order for him to get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to a specialized foster home close to his medical

facilities in Winnipeg. However, for two years, Indigenous and Northern Affairs Canada (“INAC”), Health Canada and the Province of Manitoba argued over who should pay for Jordan’s foster home costs. Ultimately, Jordan remained in hospital until he passed away, at the age of five, having spent his entire life in hospital.

[2] In recognition of Jordan, Jordan’s Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service. It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan’s Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[3] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada’s implementation of Jordan’s Principle in relation to this Panel’s decision and orders in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (“the *Decision*”). Canada and the Commission filed submissions in response to the motions. The motions were heard from March 22 to 24, 2017 in Ottawa. As with the hearing on the merits, the hearing of these motions was broadcasted on the Aboriginal Peoples Television Network.

[4] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to Jordan’s Principle. Other aspects of the parties’ motions not dealt with in this ruling will be determined as part of a separate ruling.

## **II. Findings and orders with respect to Jordan’s Principle to date**

[5] In the *Decision*, this Panel found Canada’s definition and implementation of Jordan’s Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan’s Principle cases. Furthermore, the Canada’s approach to Jordan’s Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan’s Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[6] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan’s Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan’s Principle.

[7] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan’s Principle, not immediately start discussions to review the definition in the long-term. We noted there was already a workable definition of Jordan’s Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan’s Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[8] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[9] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[10] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In 2016 CHRT 16, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC was ordered to provide all First Nations and First Nations Child and Family Services Agencies ("FNCFS Agencies") with the names and contact information of the Jordan's Principle focal points in all regions.

[11] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

### **III. Canada's further actions in relation to Jordan's Principle**

[12] In response to the present motions, Canada states that its definition of Jordan's Principle now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve. It also applies to all jurisdictional disputes, including those between federal government departments.

[13] According to Canada, its revised interpretation of Jordan's Principle aims to ensure that anytime a need for a publicly-funded health, education or social care service or support for a First Nations child is identified, it will be met. Any jurisdictional issues that might arise will be dealt with after ensuring the need is met. New processes have been created so that the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review. Urgent cases are addressed within 12 hours; other cases within 5 business days; and, complex cases which require follow-up or consultation with others within 7 business days.

[14] Canada states it has also taken the necessary steps to ensure the requisite funding and human resources are available to implement the expanded definition of Jordan's Principle. In this regard, it has undertaken new policy initiatives to improve health and social service needs for First Nations children. According to Canada, the Child-First Initiative (the "CFI") supports the expanded application of Jordan's Principle by providing mechanisms for Canada to prevent or resolve jurisdictional disputes and gaps, before they occur. Canada submits the CFI identifies First Nations children at risk, through enhanced service coordination, and provides a source of funds to meet children's needs in cases where those needs cannot be met through existing publically available programs. Canada also points to the 2016/17 First Nations and Inuit Health Branch regional operation plan as supporting the correct interpretation of the application of Jordan's Principle. That plan calls for \$64 million for First Nations mental health programs and services in Ontario, in addition to regular mental health programs.

[15] In addition, Canada submits that it is also focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available and given an opportunity to get involved and share their views.

[16] Finally, Canada states that while Jordan's Principle cannot fund everything, firm lines regarding what is recoverable are not being drawn. Any publicly-funded service that is available to other Canadian children is eligible under Jordan's Principle and has been covered when brought forward.

#### **IV. Analysis**

[17] The Complainants and the Interested Parties believe Canada has failed to comply with the Panel's orders to date, or certain aspects of those orders. Generally, each of their respective submissions focused on a different aspect of the complaint and made requests for immediate relief orders related to that focus. Based on statements made in their submissions and at the hearing, the Complainants and the Interested Parties are generally supportive of each other's positions and requested orders.

[18] The Commission believes that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with this Panel's orders and, therefore, it is open to the Panel to provide additional clarification and/or guidance with respect to its orders.

[19] With respect to Jordan's Principle, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Commission request that additional orders be made in relation to the definition of the principle, the dissemination of that definition to the public and stakeholders, and the process for dealing with Jordan's Principle cases and the tracking of those cases.

[20] The Assembly of First Nations (the "AFN") was originally concerned about its lack of involvement in Health Canada's Jordan's Principle activities given it has an Engagement Protocol with the First Nations and Inuit Health Branch. Health Canada has since invited the AFN to co-chair a working group on Jordan's Principle, which the AFN accepted. The AFN's submissions echo many of the concerns raised by the Caring Society and the Commission in terms of the definition and process surrounding Jordan's Principle.

[21] The Chiefs of Ontario's (the "COO") and the Nishnawbe Aski Nation's (the "NAN") submissions with respect to Jordan's Principle focus mainly on the provision of mental health services under the *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the 1965 Agreement") in Ontario. While this ruling will deal with Jordan's Principle generally, specific issues with respect to the 1965 Agreement, along with other requests, will be dealt with in a separate ruling.

[22] In addition, the Panel highlights that NAN's motion had also sought a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal identifying children and youth at risk of suicide. Health Canada has since committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. As such, and at NAN's request, the Panel adjourned the request for a "Choose Life" order (see 2017 CHRT 7).

## **A. Legal arguments**

### **(i) Burden of proof and compliance**

[23] In general, and in deciding all aspects of the motions now before the Panel, the Caring Society and the AFN submit that Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. Canada is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. Furthermore, it would be unjust, having proved that Canada has discriminated against First Nations children and their families in a systemic way, to bear a “burden of proof” to show that discrimination is continuing in the absence of further orders.

[24] In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Complainants and the Interested Parties have, among other things, asked the Tribunal to find that Canada continues to discriminate, that it has not complied with the Panel’s orders to date, and, in some cases, asked that the Tribunal issue an order declaring Canada non-compliant.

[25] The Commission submits that, where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to: (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In its view, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal’s rulings regarding Jordan’s Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

[26] Canada submits that there is no established legal test governing a motion for non-compliance before this Tribunal. The test to be met on this motion must accordingly be derived from the general principles that guide human rights law. According to Canada, the law is clear that the moving parties have the legal burden to prove their allegations on a balance of probabilities: in this case, allegations of non-compliance. In Canada’s view, the moving parties have not met their burden and, therefore, their motions should be dismissed. In any event, Canada states it has complied with the Tribunal’s orders.

[27] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* [“the Act”]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, aff’d 2011 FCA 202 [“Walden”]). In determining the present motions, this is the situation in which the Panel finds itself.

[28] In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal’s determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified.

[29] Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the



Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36).

[30] It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 (“*Chopra*”), “[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding.” While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, 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.

[31] In the same vein, the Panel’s role in ruling upon the present motions is not to make declarations of compliance or non-compliance *per se*. Rather, in line with the remedial principles outlined above, the Panel’s purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation 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 programming is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel’s orders and it may make findings as to whether those actions are or are not in compliance with those orders.

[32] As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 32, “[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal.” This statement is in line with the Panel’s approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada’s implementation of its orders and, through its subsequent rulings, provided additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*.

[33] While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada’s assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders.

[34] This is the context in which the present motions have been filed. The Tribunal’s remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada’s approach to compliance with respect to the Panel’s orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties.

## **(ii) Separation of powers**

[35] In crafting further orders, Canada urges the Tribunal to bear in mind general principles regarding the appropriate separation of powers. That is, the Tribunal should leave the precise method of remedying the breach to the body charged with responsibility for implementing the order. According to Canada, the Tribunal would exceed its authority if it were to make orders resulting in it taking over the detailed management and coordination of the reform currently being undertaken.

[36] Canada submits deference must be afforded to allow it to exercise its role in the development and implementation of policy and the spending of public funds. Absent statutory authority or a challenge on constitutional grounds, courts and tribunals do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy. To the extent the Tribunal is being asked to make additional remedial orders that would require it to dictate policies or authorize the spending of public funds, Canada contends those requests should be denied as they would exceed the Tribunal's jurisdiction.

[37] Canada's separation of powers argument lacks specificity. Aside from one specific order requested by the Caring Society, which the Panel will address in a separate ruling, Canada has not pointed to any other orders requested by the other parties to which this argument would apply. For the purposes of this ruling, it has not identified any requested orders related to Jordan's Principle that may offend the separation of powers. In any event, as explained in the reasons below, any further orders made by the Panel are based on the findings and orders in the *Decision* and subsequent rulings, which Canada has accepted; the evidence presented on these motions; and, the Panel's powers under section 53(2) of the *Act*. In performing this analysis, Canada's generalized separation of powers argument is not particularly helpful.

## **B. Further orders requested**

### **(i) Definition of Jordan's Principle**

[38] Despite Canada's assurances that its definition of Jordan's Principle now applies to all First Nations children, regardless of their condition or place of residency, the Caring Society submits that government officials have been promulgating a restrictive definition of Jordan's Principle that still focuses on children with disabilities or with a critical short-term condition requiring health or social services. The Caring Society adds that INAC has yet to undertake a review of past Jordan's Principle cases where services were denied. While Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied, the Caring Society and the AFN are unclear about the number of years into the past this process is considering.

[39] Moreover, the Caring Society is concerned that the definition of Jordan's Principle is limited to children as defined by provincial legislation. In some provinces, a child is defined as being under the age of 16. Such an approach is unacceptable to the Caring Society because Jordan's Principle is not restricted to services provided under a province's child and family services legislation. Similarly, the Caring Society submits that Jordan's Principle requires an outcome-based, and not process-based, approach to access to services. That is, the provincial/territorial normative standard of care is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children.

[40] The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the *Decision*. Considering the rulings already made by the Panel to date, the Commission suggested certain key principles that any definition of Jordan's Principle must include.

[41] While Canada has done some work to implement Jordan's Principle since the *Decision*, it still has not implemented its full meaning and scope. As mentioned above, in 2016 CHRT 16, the Panel indicated that a definition of Jordan's Principle that applies to First Nations children with "disabilities and those

who present with a discrete, short-term issue for which there is a critical need for health and social supports” appeared to be more restrictive than formulated by Parliament. Following the Panel’s request for further information, and pursuant to the evidence presented in the course of these motions, the Panel can now confirm that Canada has indeed been applying a narrow definition of Jordan’s Principle that is not in compliance with the Panel’s previous orders.

[42] Canada put forward three witnesses in response to the motions of the Complainants and the Interested Parties:

- Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada’s First Nations and Inuit Health Branch;
- Ms. Cassandra Lang, Director, Children and Families, in the Children and Families Branch at INAC; and,
- Ms. Lee Cranton, Director, Northern Operations in Ontario Region within Health Canada’s First Nations and Inuit Health Branch.

[43] Each of these three witnesses swore an affidavit and was cross-examined thereon by the other parties, all of which was put before the Panel in the context of these motions. Generally, the three witnesses presented similar testimonial evidence in support of Canada’s position. However, as the Panel will explain in the pages that follow and with a primary focus on the evidence of Ms. Buckland, their testimony in relation to Jordan’s Principle was not corroborated by the bulk of the documentary evidence emanating from Canada and dated over the last year since the *Decision*.

[44] Ms. Buckland is the federal government official responsible for implementing Jordan’s Principle. She has been involved in doing so since the *Decision*’s release (see Gillespie Reporting Services, transcript of Cross-Examination of Robin Buckland, Ottawa, Vol. I at p. 15, lines 21-23 [*Transcript of Cross-Examination of Ms. Buckland*]).

[45] In her affidavit, Ms. Buckland states that the previous restrictions found in the definition of Jordan’s Principle have now been eliminated, including the requirement that First Nations children must have multiple disabilities that require multiple service providers or that they must reside on reserve. Despite this, she states that families are often not coming forward to request support. In this regard, she indicates proactive efforts in partnership with service delivery organizations on the ground will need to continue and that Canada has commenced various engagement activities to help facilitate the broader application of Jordan’s Principle (see *affidavit of Ms. Robin Buckland*, January 25, 2017, at paras. 3, 16-17).

[46] Ms. Buckland further explained that the current definition of Jordan’s Principle, which applies to First Nations children with “disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports”, was to focus efforts on the most vulnerable children:

[I]t’s more about looking for the highest area of need and, and trying to focus our efforts.

*Transcript of Cross-Examination of Ms. Buckland* at p. 17, lines 12-13.

[A] child living on reserve with an interim, a condition or short-term condition or a disability affecting their activities of daily living was a focus of our efforts, was and is a focus of our efforts in terms of Jordan’s Principle.

*Transcript of Cross-Examination of Ms. Buckland* at p. 39 lines, 17-21.

Whenever you're working on a complex health issue, you always take a multi-modal approach to it. There's always different angles from which you need to be able to address the problem if you are going to make a difference. The focus on First Nations children on reserve with a disability or a short-term condition with -- that affects their activities of daily living is an effort, is our effort to try to get at a segment of the population, a subset of the population where we feel there is an opportunity to make -- where we feel there is the greatest need and where we feel there is an opportunity to make the greatest difference.

So I think as I said earlier, we were -- it was unfortunate that our communications in the beginning did not -- were not properly prefaced, indicating that Jordan's Principle applies to all First Nations children.

*Transcript of Cross-Examination of Ms. Buckland at p. 40, lines 10-25.*

We're trying to focus, we're trying to start somewhere and trying to -- where are we likely to find the greatest number of jurisdictional disputes.

*Transcript of Cross-Examination of Ms. Buckland at p. 41, lines 4-6.*

Children with disability or critical interim need is, is a particular focus. Jordan's Principle, as I mentioned just moments ago, applies to all first nations kids and who have an unmet need in terms of health and social needs.

*Transcript of Cross-Examination of Ms. Buckland at p. 275, lines 19-23.*

[47] As the Caring Society points out at paragraph 24 of its December 16, 2016 submissions, the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision*, entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373).

[48] As the Panel also highlighted in the *Decision*, the Federal Court likewise found Health Canada and INAC's focused approach to Jordan's Principle to be narrow and the finding that the principle was not engaged with respect to Jeremy Meawasige, a teenager with multiple disabilities and high care needs, to be unreasonable (see *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ["*Pictou Landing*"]).

[49] The justification advanced by Ms. Buckland for the focused approach to Jordan's Principle is the same one advanced by Canada in the past and underscored by the Panel in the *Decision* (see paras. 359 and 368-369). Specifically, in a Health Canada PowerPoint presentation from 2011, entitled *Update on Jordan's Principle: The Federal Government Response* (Exhibit R-14, Tab 39 at p. 6), Canada indicated:

This slide presents an overview of the federal response to Jordan's Principle. We acknowledge that there are differing views regarding Jordan's Principle. The federal response endeavors to ensure that the needs of the most vulnerable children at risk of having services disrupted as a result of jurisdictional disputes are met.

[...]

The Government of Canada’s focus is on children with multiple disabilities requiring services from multiple service providers whose quality of life will be negatively impacted by jurisdictional disputes. These are children who are the most vulnerable – children like Jordan.

[50] Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan’s Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan’s Principle. Those new definitions and their implications are found in a document entitled *The Way Forward for the Federal Response to Jordan’s Principle – Proposed Definitions*, dated February 11, 2016 (*Exhibits to the Cross-Examination of Ms. Cassandra Lang on her affidavit dated January 25, 2017*, February 7-8, 2017, at tab 4):

| Proposed Definition Options | Key Elements and Considerations |
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| <p><b>Option One:</b></p> <p>Jordan's Principle is a child-first approach to address the needs of First Nation children assessed as having disabilities/special needs by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.</p> | <p><b>Key Elements</b></p> <p>Similar to the criteria and scope as original JP response but broader than original definition (which was limited to "children with multiple disabilities requiring services from multiple service providers), this approach maintains a focus on children with special needs.</p> <p>Broadens the definition of jurisdictional dispute to include intergovernmental disputes (not just federal/provincial) this responds</p> <p><b>Considerations:</b></p> <ul style="list-style-type: none"> <li>• May draw criticism due the continued focus on special needs (while broader) as the original JP response.</li> <li>• Maintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services.</li> <li>• The focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services.</li> </ul> |
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| <p><b>Option Two:</b></p> <p>Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.</p> | <p><b>Key Elements:</b></p> <p>Similar to Option One with the exception of broadening the scope to include all First Nation children on reserve rather than limited to special needs.</p> <p>Maintains original focus on:</p> <ul style="list-style-type: none"> <li>• jurisdictional disputes</li> <li>• normative standards set by province (with a modification to move away from specific reference to geographical comparability)</li> </ul> <p><b>Considerations:</b></p> <ul style="list-style-type: none"> <li>• Responds to the key direction of the Tribunal by broadening the scope beyond children with special needs. However, the broader scope may also dilute the focus on some of the most vulnerable children.</li> <li>• May have significant resources implications and may go beyond current policy authorities and/or program mandates.</li> </ul> |
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| <p><b>Option Three:</b></p> <p>Jordan's Principle is a child-first approach to address the assessed needs of First Nation c children by ensuring cross jurisdictional issues to not disrupt delay or prevent a child from accessing services. In the event that there is a dispute over payment of services between or within governments, First Nation children will receive required social and health supports. The agency of first contact will pay for the services until there is a resolution.</p> | <p><b>Key Elements:</b></p> <ul style="list-style-type: none"> <li>• Broader scope – does not limit the response to First Nation children living on reserve.</li> <li>• A dispute between governments or within government is still required in order to trigger JP.</li> </ul> <p><b>Considerations:</b></p> <ul style="list-style-type: none"> <li>• The inclusion of all First Nation children may have far reaching resource implications and will require additional policy and program mandates.</li> <li>• The continued focus on instances where there is a dispute may limit the ability for JP to respond to gaps in service (where no jurisdiction is providing the required service).</li> </ul> |
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| <p><b>Option Four:</b></p> <p>Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, First Nation children will receive required social and health supports. The issue of payment will be resolved by the government involved, the agency of first contact will pay for the services until there is a resolution.</p> | <p><b>Key Elements:</b></p> <p>A very broad application of the principle that includes all First Nation children and does not require an identified jurisdictional dispute in order to trigger JP.</p> <p><b>Considerations:</b></p> <ul style="list-style-type: none"> <li>• Considerable resource and policy and program implications</li> <li>• Goes beyond the Tribunal recommendations and has implications for federal mandate given that there are gaps in services that are not currently funded by any level of government.</li> <li>• Provinces may react to federal definition as it may put additional financial pressures on partners involved</li> </ul> |
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[51] The Panel finds *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document relevant and reliable. Not only is it an internal government document filed into evidence but, similar to the August 2012 presentation entitled *First Nations Child and Family Services Program (FNCFS) The Way Forward* discussed in the *Decision* (see at paras. 292-302), it presents options that inform government decision making. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document specifies:

The definitions and/or principles described above represent a menu of possible options (not mutually exclusive) that the federal government could draw from to meet the Tribunal's order to cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope.

[52] Ultimately, it was “option one” that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan’s Principle – Proposed Definitions* document considers to not be fully responsive to the Tribunal’s order. As the Caring Society and the Commission highlight in their submissions and the Panel confirmed in its review of the documents on record, including those referenced at pages 59-60 of the Caring Society’s February 28, 2017 submissions, this definition and approach to Jordan’s Principle was recently presented internally and externally to a number of organizations and First Nations in the following terms:

- First Nations children living on reserve with a disability or a short-term condition.
- First Nations children living on reserve with a disability or a short-term condition requiring health or social services.
- First Nations children with a disability or a critical short-term health or social service need living on reserve, or who ordinarily reside on reserve.
- First Nation child with a disability or a discrete condition that requires services or supports that cannot be addressed within existing authorities.
- First Nation children living on reserve with an ongoing disability affecting their activities of daily living, as well as those who have a short term issue for which there is a critical need for health or social supports.
- First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition affecting their activities of daily living have access to health and social services comparable to children living off reserve.
- First Nations children with a disability or interim critical condition living on reserve have access to needed health and social services within the normative standard of care in their province/territory of residence.

[53] These iterations of Jordan’s Principle do not capture all First Nations children. Instead, as stated by the Caring Society at paragraph 15 of its December 16, 2016 submissions, they capture “...varying subsets of First Nations children with disabilities or short-term conditions.” Notwithstanding the above, Ms. Buckland indicates that Canada still meant for Jordan’s Principle to apply to all First Nations children and that the fact the definition does not reflect all First Nations children is a communications issue and not a narrow application of the principle.

[54] The Panel does not accept this explanation. Ms. Buckland’s assertion is not supported by the preponderance of evidence presented on this motion, which includes various charts, communication documents, and even extracts from INAC’s website.

[55] A significant example is *The Way Forward for the Federal Response to Jordan’s Principle – Proposed Definitions* document referred to above. The consideration of each of the four options indicates that the definition of Jordan’s Principle adopted by Canada was a calculated, analyzed and informed policy choice based on financial impacts and potential risks rather than on the needs or the best interests of First Nations children, which Jordan’s Principle is meant to protect and should be the goal of Canada’s programming (see *Decision* at para. 482).

[56] Another example is a letter dated January 19, 2017, addressed to Ontario First Nation Chiefs and Council Members, entitled *Attention: Ontario First Nation Chiefs and Council Members, Subject: Update-Jordan’s Principle- Responding to the needs of First Nations children (Answers to requests of Lee Cranton*, March 7, 2017, at tab 13). In the letter, the Ontario Regional Executive for the First Nations and Inuit Health Branch announces the implementation of a new initiative designed to address the health and social needs of First Nations children with “...an ongoing disability affecting their daily

living, or for those with a short-term issue where there is a critical need for health or social services.” The letter comes almost a year after the *Decision*, nearly 9 months after the April 2016 ruling and, more significantly, after the Panel indicated in its September 2016 ruling that Health Canada and INAC’s definition of Jordan’s Principle appeared to be overly narrow and not in line with the Panel’s previous findings and orders.

[57] A Health Canada presentation entitled *Jordan’s Principle – Child First Initiative* presented on September 15, 2016 to the Non-Insured Health Benefits Committee, and on October 6, 2016 to the Innu Round Table, indicates that the new approach to Jordan’s Principle, restricted to children with disabilities or critical interim conditions living on reserve, will continue up to 2019 (see September 15, 2016 presentation at *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at pp. 4-5; and, October 6, 2016 presentation at *Affidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at pp. 4-5). At page 5, the presentation provides a “Then and Now” table comparing Canada’s approach to Jordan’s Principle from 2008-2016 to that in 2016-2019:

| 2008-2016                                                                                                                         | 2016-2019                                                                                                                      |
|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| Dispute-based, triggered after declaration of a dispute over payment for services within Canada, or between Canada and a province | <i>Needs-based</i> , child-first approach to ensure access to services without delay or disruption due to jurisdictional gaps. |
| First Nations child living on reserve or ordinarily resident on reserve                                                           | Still First Nations child on reserve or ordinarily resident on reserve                                                         |
|                                                                                                                                   | Are within the age range of “children” as defined in their province/territory of residence                                     |

|                                                                                                                                               |                                                                                                                                                                                                                                                                         |
|-----------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Child assessed with:</p> <ul style="list-style-type: none"> <li>multiple disabilities requiring multiple providers</li> </ul>              | <p>Children assessed with needing health and/or social supports because of:</p> <ul style="list-style-type: none"> <li>a disability affecting activities of daily living;<br/>OR</li> <li>an interim critical condition affecting activities of daily living</li> </ul> |
| <p>Child required services comparable to provincial normative standards of care for children off-reserve in a similar geographic location</p> | <p>Child requires services comparable to provincial normative standards of care, AND requests BEYOND the normative standard will be considered on a case-by-case basis</p>                                                                                              |

[58] The *Jordan's Principle – Child First Initiative* presentation specifies that the goal of the new approach to Jordan's Principle is "...to help ensure that children living on reserve with a disability or interim critical condition have equitable access to health and social services comparable to children living off reserve" (at p. 6). At page 8, the October 6, 2016 presentation goes on to provide a "JP Fund – Eligibility Determination Checklist" which asks questions such as: is the request for a child as defined by provincial law? Does the child live on reserve or ordinarily lives on reserve? Does the child have a disability that impacts his/her activities of daily living at home, school or within the community, or has an interim critical condition requiring health or social services or supports? Does the request fall within the normative standard of care of the province or territory of residence?

[59] These presentations are meant to inform and guide individuals on how Canada is implementing Jordan's Principle. In another similar example, in a letter dated August 8, 2016, addressed to all First Nations and Inuit Health Branch and Band employed nurses in Alberta, with the subject line "Government of Canada's New Approach to Implementing Jordan's Principle" (see *Affidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I at p.2), the Director of Nursing for the First Nations and Inuit Health Branch, Alberta Region, writes:

- Please read the information below/attached to orientate yourself to the new approach.
- There will be further details coming to help guide your assistance with these clients.
- As part of your regular work, if you see or are approached about a First Nations child with disabilities (short-term or long term) that may not be receiving the needed health or social services normally provided to a child off-reserve please contact FNIHB-AB.

[60] The letter attaches a guide illustrating the process to be followed in assessing a potential Jordan's Principle case. Despite the case-by-case analysis stated in other presentations for situations falling outside the eligibility criteria, the process indicated in the chart for nurses steers those cases away from the application of Jordan's Principle. The first question in the chart is: "Does the child have needs related to a disability or a short term health issue that are not being met?" If the answer is 'no', the chart indicates that the "Client/Family should access regular programming." If the answer to this first question is 'yes', then the next question is: "Are there programs on reserve, or easily accessed off reserve, that could meet those needs?" If the answer to this second question is 'no', the chart directs the nurses to: "Gather the related information and send to the JP focal point (JPFP) (See Contacts)." If the answer to the second question is 'yes', the nurse can "...make these referrals as they normally would i.e. Home Care, NIHB, PCN services."

[61] At the time of Ms. Buckland's cross-examination, in February 2017, INAC's website continued to espouse the narrow definition of Jordan's Principle:

The Government of Canada's new approach to Jordan's Principle is a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition.

"Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children", Government of Canada (February 4, 2017), *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 7; see also *Transcript of Cross-Examination of Ms. Buckland* at pp.43-45.

[62] Canada submits that it has now removed any restrictions in its definition of Jordan's Principle. However, only one document submitted prior to Ms. Buckland's cross-examination supports this point. A November 2016 presentation to the "ADM Oversight Steering Committee" states: "Jordan's Principle (JP) reflects a commitment to ensure all First Nations children receive access to services available to other Canadian children, in a timely manner" [Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at p. 2)]. It goes on to indicate that Health Canada and INAC are implementing a child-first approach, "addressing specific needs of children on a case-by-case basis." When compared to other presentations submitted into evidence, as outlined above, it does not appear that this presentation was widely communicated, within or outside government. It is also unclear that the principles enunciated therein have been implemented.

[63] Two other documents could be said to support Canada's assertion that it has now removed any restrictions in its definition of Jordan's Principle. Both those documents were submitted following Ms. Buckland's cross-examination and in answer to requests from the other parties.

[64] The first document is another presentation, dated December 21, 2016. It indicates, among other things, that Jordan's Principle applies to all First Nations children, that the Government of Canada recognizes that First Nations on reserve face greater difficulty in accessing Federal/Provincial/Territorial supports, and, that Canada is focused on the most vulnerable children – those with a disability or critical short-term condition (see Health Canada, *Improving Access to Health and Social*

*Services for First Nations Children*, presentation dated December 21, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, tab 3B, at pp. 2 and 5). The presentation does not specify who it was presented to and, again, when compared to other presentations submitted into evidence, it does not appear to have been widely distributed or communicated, if at all.

[65] The other document contains notes from a “February 10” meeting with regional executives (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A). It states:

Update on JP

- applies to all FN children, not just on reserve
- JP not limited to short term needs and disabilities
- all FN children, all disputes, all needs
- each order from CHRT has clarified our responsibilities
- focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes
- comms tools and key messages – getting these out
- will be asked to go back to all stakeholders and clarify our directions

[...]

Next Steps

- will follow up with written lines which will say:
  - o all FN children, on and off reserve
  - o all jurisdictional disputes e.g. between departments
  - o not limited to children with disabilities or short term critical needs

[66] Based on the wording of the notes, it is clear that they came from a meeting in February 2017: “applies to all FN children, not just on reserve” (this requirement was clarified in September 2016 in 2016 CHRT 16); “each order from CHRT has clarified our responsibilities” (only one order in February 2016); and, “focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes” (this more detailed “focus” characterization only arises following Ms. Buckland’s cross-examination). Again, when compared to the other evidence, the definition of Jordan’s Principle discussed at this meeting does not appear to have been widely distributed or communicated, if at all, and it is also unclear that the principles enunciated therein have now been implemented.

[67] Accordingly, the Panel finds the evidence presented on this motion establishes that Canada’s definition of Jordan’s Principle does not fully address the findings in the *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan’s Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

[68] Presumably, while Canada could have implemented the actual definition of Jordan's Principle, as ordered by the Panel, and at the same time implemented a method to focus on the urgent needs of certain children, that was not the course of action taken by Canada. Having a broad definition does not exclude the possibility of having a process to deal with some children on a more urgent basis. However, there is a distinction between, on the one hand, having an inclusive definition and then attributing priorities in terms of urgencies and, on the other hand, limiting the definition with the result of excluding individuals for the sake of focusing on more vulnerable cases.

[69] Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services (see *Decision* at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see *Decision* at paras. 399-427).

[70] In this regard, the normative standard of care in a particular province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. For example, in the hearing on the merits, the Panel heard that Health Canada will only pay for one medical device out of three and, if it is a wheelchair, it is paid for once every five years. The normative standard of care generally provides for all three devices to be paid for (see *Decision* at para. 366 and *Jordan's Principle Dispute Resolution Preliminary Report* (Terms of Reference Officials Working Group, May 2009), Exhibit HR-13, tab 302). This example highlights the gap and flawed rationale contributing to Health Canada's policy, which does not take into account a child's growth over five years.

[71] However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

[72] This potential gap in services was highlighted in the *Pictou Landing* case mentioned above and in the *Decision*. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the *Decision* at paragraphs 421-422:

[421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty

and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[73] Therefore, the fact that it is considered an “exception” to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan’s Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

[74] Canada’s narrow interpretation of Jordan’s Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (as will be discussed in the next section), along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

[75] Overall, the Panel finds that Canada is not in full compliance with the previous Jordan’s Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan’s Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan’s Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan’s Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

[76] On this last point, the evidence indicates and the Panel wishes to highlight that any funding set aside to address Jordan’s Principle cases that is not spent in a given year cannot be carried over into the next year. It is set and has to be spent on Jordan’s Principle cases or it is returned to the consolidated revenue fund of Canada. In this regard, from July 2016 to February 2017, only approximately \$12 million or a little over 15% of the \$76.6 million budgeted for Jordan’s Principle in 2016-2017 had been spent, \$8 million of which was for respite care services in Manitoba [see “Jordan’s Principle - Child First initiative”, presentation to the Non-Insured Health Benefits Committee, September 15, 2016 (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at p. 10); “Jordan’s Principle, Health Canada and INAC 2016-17 Dashboard, Service Access Resolution Funding”, valid as of January 11, 2017 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit A); “Memorandum to Senior Assistant Deputy Minister, Requests for Funding for Respite Care and Allied Services under Jordan’s Principle”, October 3, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); “Memorandum to Senior Assistant Deputy Minister, Request for Funding in Manitoba Region for Specialized Therapy Services Under Jordan’s Principle”, December 9, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); and, “2016-17 JP-CFI Allocation by Region” (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 9)].



[77] Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated \$11 million to fund Jordan's Principle. The funds were provided annually, in \$3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).

[78] Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356). In this sense, the evidence shows that Canada's funding of \$382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. Similar to Canada's past practice, it is a yearly pool of funding that expires if not accessed. Also, it is tailored to be responsive to the narrow definition Canada selected and, as specifically mentioned in Canada's own documents, this fund only covers First Nations children on reserve. Now, with a broadening of the definition of Jordan's Principle and the expiration of some of the funding, resources to address Jordan's Principle may become scarce [see "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A)].

[79] Again, the Panel recognizes that Canada made some efforts to implement Jordan's Principle and had a short time frame within which to do so following this Panel's ruling in April 2016. However, the same cannot be said for the numerous months following the April ruling, especially following the September 2016 ruling and up to the time of the hearing of these motions in March 2017. That said, the Panel believes Canada wants to comply with the *Decision* and related orders and has communicated as much [for example, see "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", May 18, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, at tab 5, p. 1)].

[80] Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada. In this regard, to redress Canada's previous discriminatory practices, the Panel notes that there are no restrictions that it is aware of that would stop individuals who were previously denied funding under Jordan's Principle, or who would now be considered to fall within the application of Jordan's Principle, from now coming forward and submitting or resubmitting their request. In fact, as highlighted by the Caring Society, considering Canada's previously narrow application of Jordan's Principle from at least 2009 to present, it would be appropriate and reasonable for Canada to review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, to ensure compliance with the correct application of Jordan's Principle ordered in this ruling.

[81] All the Panel's orders with respect to the implementation of the full meaning and scope of Jordan's Principle are detailed in the "Order" section below, under "Definition of Jordan's Principle."

## **(ii) Changes to the processing and tracking of Jordan's Principle cases**

[82] Canada believes its new processes ensure any Jordan's Principle case is not delayed due to case conferencing or policy review. As mentioned above, it alleges urgent cases are addressed within 12 hours, while other cases are addressed within 5 business days, and complex cases which require follow-up or consultation with others are addressed within 7 business days.

[83] The Caring Society submits that Canada's revised processes for dealing with Jordan's Principle cases still impose delays. The AFN shares the Caring Society's view that the arm of government first contacted still does not address the matter directly by funding the service and seeking reimbursement afterwards as is required by Jordan's Principle. In this regard, Canada's service standards relate to the lapse of time for a decision to be made and not the time it takes for the services to be actually provided to a child. Therefore, Canada should be required to confirm to the Tribunal that its process has been modified so that the government organization that is first contacted pays for the service without the need for policy review or case conferencing before funding is provided.

[84] Also, the Caring Society points out that Canada lacks a transparent and independent mechanism for a family or service provider to appeal a Jordan's Principle case. While a family of a child can request an appeal, there are no appeal procedures described or provided, no timelines for the appeal process and no assurance that written reasons will be provided.

[85] Furthermore, the Caring Society submits that Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress. It is also not measuring its performance against its stated timelines for resolving Jordan's Principle cases. In this regard, the AFN highlights that Jordan's Principle is meant to cover gaps in federal funding to First Nations children; however, Canada has not yet developed an internal understanding of what those gaps are.

[86] The Commission agrees with the Caring Society's request that Canada immediately: (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases. However, there are arguably multiple different methods of compliance. Therefore, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

[87] Aside from some answers from its witnesses, Canada did not specifically address the submissions with respect to the first contact principle, appeal mechanisms or tracking.

[88] As highlighted in the Panel's last ruling in this matter (2017 CHRT 7), in January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[89] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see *affidavit of Dr. Michael Kirlew*, January 27, 2017, at para. 16).

[90] While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle.

[91] Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In

the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see *Transcript of Cross-Examination of Ms. Buckland* at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16).

[92] If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, at p. 3); see also *Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 1-12].

[93] More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process.

[94] The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision*. According to Ms. Buckland, a Jordan's Principle case comes to Canada's attention through the local Jordan's Principle focal point, which receives the intake form and then sends it to headquarters. The case is then evaluated by staff at headquarters, who first evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service requested. It is unclear how long this intake and initial evaluation can take.

[95] For example, the Panel was provided with an exchange of emails between Health Canada and a First Nations mother looking for assistance in busing her son with severe cerebral palsy to an off-reserve service centre with a program for special needs children (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 12). Following the initial request and an exchange of further information on January 19 and 20, 2017, Health Canada provided an update to the mother on January 27, 2017 indicating that it is working with INAC to determine if their education program could address the request. The mother wrote to Health Canada on February 3, 2017 requesting a further update from Health Canada because she had yet to hear back for them. Two weeks after receiving the initial request, Canada was still trying to navigate between its own services and programs. When presented with this case under cross-examination, Ms. Buckland indicated "So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that" (*Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 10-12).

[96] Where an existing program cannot resolve the service need, headquarters staff will then determine whether the case can be determined at the staff level, the Executive Director level, or the Assistant Deputy Minister level. It is only at this point that Canada's timelines come into play (urgent cases addressed within 12 hours, other cases within 5 business days, and complex cases within 7 business days). Even then, the evidence indicates these timelines were not fully implemented at the time of Ms. Buckland's cross-examination. A draft flow chart entitled "Jordan's Principle Approval Process", dated February 20, 2017, and provided following Ms. Buckland's cross-examination, is marked as being in draft format (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 11). As Ms. Buckland indicated in her cross-examination, the process is still being refined (see *Transcript of Cross-Examination of Ms. Buckland* at p. 119, lines 13-19).

[97] The evidence indicates, and Ms. Buckland testified as much, that access to Jordan's Principle funding is a last resort (see *Transcript of Cross-Examination of Ms. Buckland* at p. 51, lines 3-9; pp. 65-67; p. 72, lines 6-21; and, pp. 76-78). The new Jordan's Principle process outlined above is very similar to the one used in the past, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families. Ultimately, this process factored into the Panel's findings of discrimination (see *Decision* at paras. 356-358, 365, 379-382, and 391).

[98] The new process still imposes delays due to exchanges among federal government departments, whether it is called case conferencing, policy review or service navigation. As the Panel found in the *Decision*, this added layer of administration is counterintuitive to a principle designed to address exactly those issues, which result in delays, disruptions and/or denials of goods or services for First Nations children. Pursuant to Jordan's Principle, once a service need is determined to exist, the government should pay for the service and determine reimbursement afterwards. In practical terms, this means that the delay in the process to evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service should be eliminated. This administrative hurdle or delay, and the clear lack of coordination amongst federal programming to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.

[99] Jordan's Principle requires that there be a direct evaluation of need at the focal point or headquarters stage and that a decision be made expeditiously. Access to Jordan's Principle funding should be a priority, not a last resort. In this regard, no specific explanation was provided for why most cases will take an average of 5 business days to process. Given urgent cases can be processed within 12 hours, it is reasonable to assume that Canada can process most Jordan's Principle cases within a similar timeframe and shall be ordered to do so.

[100] For appeals, there is no formal process. In her affidavit, Ms. Buckland indicated that "Canada is implementing an approval and appeal process to review all requests in a timely manner" (*Affidavit of Robin Buckland*, January 25, 2017, at para. 11). Under cross-examination, she indicated that the appeals process is still being refined but currently consists of a family notifying the local Jordan's Principle focal point of the desire to appeal and that, thereafter, the case is referred to her for review at the Assistant Deputy Minister level (see *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, lines 3-19).

[101] In another draft flow chart entitled "Jordan's Principle Appeal Process", again in draft format and subject to further refinement, dated February 20, 2017 and provided following Ms. Buckland's cross-examination, a few additional details regarding the appeals process are elaborated upon (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 11; and, *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, line 19). Under "Guiding Principles" it mentions, among other things, that "[d]ecisions are consistently applied, and based on impartial judgement", that the "[p]rocess is open, available to the public, and easily understandable", and that "[d]ecisions are made within a reasonable time period, without delay, and in keeping with established service standards of Jordan's Principle."

[102] However, it is unclear how these principles are incorporated into the actual appeals process. All that is described in the flow chart is that the regional Jordan's Principle focal point receives the request to appeal; the focal point then sends the request with any new or additional information for review to Health Canada's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch and/or INAC's Assistant Deputy Minister, Education and Social Development Programs and Partnership. If the appeal is denied, the client is provided a rationale. No timelines are mentioned in the chart and no other information on the appeals process is found in the documentary record.

[103] In terms of the Jordan's Principle process overall, the Panel finds there is a clear need for improvement to ensure the principle is meeting the needs of First Nations children and addressing the discrimination found in the *Decision*. Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada

to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

[104] In terms of tracking Jordan's Principle cases, there was little evidence to suggest Canada is formally doing so beyond a very basic level. As Ms. Buckland put it, tracking "...definitely needs to be augmented to further track with better detail" (*Transcript of Cross-Examination of Ms. Buckland* at p. 96, line 25, to p. 97, line; see also p. 72, line 22, to p. 73, line 22; p. 92, lines 12-15; and, p. 97, line 10, to p. 98, line 2). A November 2016 presentation to the Assistant Deputy Minister Oversight Steering Committee, entitled "Jordan's Principle: Engaging with partners to design long-term approach" (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H), indicates under "Activities & Timelines" at page 6 that from Fall 2016 to Winter 2017 a data collection tool will be rolled out for use by INAC and Health Canada Service Coordinators and Jordan's Principle focal points. However, in light of the narrow definition of Jordan's Principle that was being used by Canada, as discussed above, it is likely that any current tracking of cases may not capture all potential Jordan's Principle case, gaps in services and all First Nations children.

[105] With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the *Jordan's Principle – Child First Initiative* presentation, presented to the Innu Round Table on October 6, 2016 (*Affidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, *Jordan's Principle – Child First Initiative*, presentation dated October 12, 2016 (*Affidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at p. 12).

[106] There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions.

[107] Therefore, the Panel orders Canada to track and collect data on Jordan's Principle cases pursuant to the definition of Jordan's Principle ordered in this ruling. In order to ensure Jordan's Principle is being implemented correctly by Canada, the Panel agrees with the Caring Society that Canada should be formally tracking the number of Jordan's Principle cases that are approved, denied or in progress. Additionally, performance measures should be tracked in terms of stated timelines for resolving Jordan's Principle cases and in providing approved services. Consequently, pursuant to section 53(2)(a) of the *Act*, the Panel makes the remaining orders detailed in the "Order" section below, under "Processing and tracking of Jordan's Principle cases."

### **(iii) Publicizing the compliant definition and approach to Jordan's Principle**

[108] Given Canada has disseminated a narrow definition of Jordan's Principle, the Caring Society requests that Canada be required to proactively, and in writing, correct the record with any person, organization or government who received, or could be in receipt of flawed material on Jordan's Principle. Relatedly, the Caring Society asks that Canada revisit any funding agreements or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle.

[109] The Caring Society is also concerned that Canada has failed to take any formal measures to ensure that all staff are aware, understand and have the tools and resources necessary to implement the findings in the *Decision* related to Jordan's Principle, along with the subsequent rulings and orders issued by the Panel in this regard.

[110] The Commission agrees that it would be appropriate for the Tribunal to supplement its initial order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, FNCFS Agencies and the general public about its compliant approach to Jordan's Principle. It adds that the Caring Society and the other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children. Therefore, the Commission asks that it, the Caring Society, the AFN and the Interested Parties be consulted by Canada on the distribution of any public education materials.

[111] Canada submits it is focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available to support First Nations children, and given an opportunity to get involved and share their views. It adds that, with Canada's initial work to reform its approach to Jordan's Principle complete, there is now greater room for engagement with the parties to this matter and other stakeholders regarding the impact of Canada's changes. According to Canada, reform is an evolving process, and one that it acknowledges will benefit from engagement moving forward.

[112] In light of the evidence and findings with respect to the definition and processing of Jordan's Principle cases, the Panel finds there is a clear need for Canada to go back to its employees, the organizations it works with and its First Nation partners to inform them of the correct definition and processes surrounding Jordan's Principle. As stated previously, the multiple presentations made by Canada to date included a restricted definition of Jordan's Principle and its processes surrounding the principle have recently been changed and will continue to be changed following this ruling. Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children. A corrected definition and process surrounding Jordan's Principle warrants new publicity and education to public, employees, applicable organizations and all First Nation partners. INAC and Health Canada's websites would be a prominent and reasonable place to begin this publicity. Also, given the hearing of this complaint and the present motions was broadcasted on APTN, the Panel's believes this would also be an important and reasonable place to publicize the corrected definition and process surrounding Jordan's Principle.

[113] In doing so, there is no doubt that the Commission should be consulted. It has been actively involved in pursuing this case for over a decade and played a central role in leading the majority of the evidence at the hearing of the merits of the complaint. Furthermore, section 53(2)(a) of the *Act* specifically provides that the Panel can order that "...the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures..." (emphasis added).

[114] However, aside from the Commission, the *Act* and applicable case law suggest the Tribunal does not have the power to order consultation with other parties (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 164-169 [*Johnstone*]). Nevertheless, in the circumstances of this case, the Panel agrees that the Caring Society and other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public, especially First Nations peoples, about Jordan's Principle.

[115] A number of important considerations lead to this conclusion. Primarily, the *Act* must be interpreted in light of its purpose, which is to give effect to the principle that:

[A]ll 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.

[116] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children. This was not the situation in *Johnstone*. As canvassed in the *Decision*, the relationship between Canada and Aboriginal peoples is trust-like, rather than adversarial, and the contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship (see *Decision* at para. 93, citing *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075, at page 1108). It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Decision* at para. 89, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16). This requires Canada to treat Aboriginal peoples fairly and honourably, and there is a special fiduciary relationship between the Crown and Aboriginal peoples (see *Decision* at paras. 91-95). The Crown also has a constitutional duty to consult Indigenous peoples on decisions that affect them and those consultations must be meaningful (see 2016 CHRT 16 at para. 10). The unique position that Aboriginal peoples occupy in Canada is recognized in section 35 of the *Constitution Act, 1982* and section 25 of the *Canadian Charter of Rights and Freedoms*. With respect to the *Act*, when section 67 was repealed in 2008, Parliament confirmed in section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, that:

For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

[117] This case is about the provision of child welfare services to First Nations children and families. This is an area that directly affects the fundamental rights of First Nations children, families and communities and is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [*Baker*]). As stated in the *Decision* at paragraph 346, in reference to Professor Nicholas Bala:

[L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved in making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

[118] To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials.

[119] This consultation is also reasonable based on Canada's submissions and actions in this matter. Canada has stressed consultation with First Nations peoples and organizations since the *Decision* (see for example *Respondent's Factum*, March 14, 2017, at paras. 36 and 39). It has also recognized the AFN and the Caring Society as key partners in the reform of its policies and programs. The AFN has been participating in the Executive Oversight Committee since July 2016. Dr. Cindy Blackstock, the Executive Director of the Caring Society, was also invited by the Minister of Health to participate in the Executive Oversight Committee [see *Affidavit of Robin Buckland*, January 25, 2017, at paras. 17-18; "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, p. 2); Letter from The Honourable Jane Philpott, Minister of Health, to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (December 22, 2016) (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit G); Health

Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at pp. 3-7); "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", September 14, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, tab 5, p. 2)].

[120] Canada is committed to working with child and family services agencies, front-line service providers, First Nations organizations, leadership and communities, the Complainants, and the provinces and territories, on steps towards program reform and meaningful change for children and families (see 2016 CHRT 10 at para. 6). The Panel supports this commitment and an order to consult with the Complainants and the Interested Parties on how best to educate the public, especially First Nations peoples, about Jordan's Principle essentially reinforces what is already partially occurring in this matter. The Panel wants to ensure this commitment to partnership continues and is improved in a meaningful way by formalizing it in an order. Therefore, pursuant to section 53(2)(a) of the *Act*, the Panel makes the orders detailed in the "Order" section below, under "Publicizing the compliant definition and approach to Jordan's Principle."

#### **(iv) Future reporting**

[121] The Caring Society requests that, moving forward, Canada produce its compliance reports in the form of an affidavit and that a timeline be established very early on in the process to allow for cross-examination of the affiants, followed by the filing of written arguments and oral submissions. Exchanging evidence and having the opportunity to cross-examine makes the remedial process more transparent. The AFN is supportive of the Caring Society's request for future reporting, while the COO has made a similar request with respect to the orders it is requesting.

[122] The Commission takes no position on this request, other than to suggest that if such an order is to be granted, the Tribunal should 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.

[123] The Caring Society's proposed process for future reporting is similar to the process employed to hear and determine the present motions. The Panel found this process efficient and found the use of affidavit evidence, and having that evidence tested under cross-examination, was of great assistance to the Panel in determining the issues put before it.

[124] However, moving forward, the Panel would prefer that the cross-examination of affiants occur in a hearing before the Panel and be governed by the Tribunal process. In the present motions, the cross-examination occurred outside the Tribunal process, without the Panel present, and with a transcript of the evidence presented to the Panel afterwards for its consideration. This resulted in two issues. First, a dispute arose as to whether a party has an obligation, in the context of a cross-examination on an affidavit, to give undertakings to make inquiries and provide answers to which the affiant does not know the answers. Second, the Panel did not have the ability to ask its own questions to the witnesses.

[125] On the first issue, the NAN made requests for undertakings regarding Canada's refusal to fund the Wapekeka proposal for a mental health service team based within the community. Canada refused to provide undertakings because, in its view, the affiant answered the NAN's questions to the best of her ability, while other questions sought information that fell outside the scope of her employment. Furthermore, Canada states there is no legal obligation to provide undertakings during a cross-examination on an affidavit. The NAN submitted arguments and case law to the contrary and requested that the witness appear before the Panel to complete her evidence.



[126] The Panel refused this request because it was more akin to a discovery request in a civil action than to a cross-examination of a witness during a Tribunal hearing. While section 48.9(2) of the *Act* empowers the Chairperson to make rules governing discovery proceedings before the Tribunal, no such rules have been made thus far. Rather, parties before the Tribunal have an obligation to disclose and produce arguably relevant documents throughout the Tribunal's proceedings [see Rules 6(1)(d) and (e); and, Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*]. The purpose of disclosure is to divulge the case a party intends to make, which in turn allows each party to effectively prepare and present its respective case. The question is whether the information sought is arguably relevant and necessary for the party to prepare its case before the Tribunal.

[127] While the information sought by the NAN is arguably relevant to the issues raised in its amended motion, and is highly important for the families and communities who lost their children, it did not prevent the NAN from making its case on its motion.

[128] The information was also not determinative for the Panel in order to make findings on the NAN's motion. The Tribunal was able to draw inferences from the affiant's inability to answer the NAN's questions. That is, with respect to the issues raised in the NAN's motion, the NAN's questioning was sufficient to shed light on the need for more rigorous processes surrounding access to Jordan's Principle funding to ensure the Wapekeka proposal situation is not repeated.

[129] In all fairness, while the Panel agreed to have the parties cross-examine affiants outside of the Tribunal's hearing process, no process with respect to undertakings was specifically agreed to by the parties or the Panel. Moving forward, if the Panel is present during cross-examinations, it can deal with these types of issues right away, without the need for further submissions or rulings.

[130] On the second issue, the Panel would like the 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.

[131] 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.

[132] Pursuant to the above and to section 53(2)(a) of the *Act*, the Panel retains jurisdiction over the above orders until it is assured that they are fully implemented. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of those orders, pursuant to the process outlined in the "Order" section below, under "Retention of jurisdiction and reporting."

## **V. Orders**

[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.

[134] Specific timelines for the implementation of each of the Panel's orders are indicated below to ensure a clear understanding of the Panel's expectations and to avoid misinterpretation issues that have occurred previously in this matter (such as with the term "immediately").

[135] Pursuant to the above, the Panel's orders are:

## **1. Definition of Jordan's Principle**

**A. As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

**B. As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

- i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.
- ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.
- iii. When a government service is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government;
- iv. When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.
- v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.

**C.** Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

**D.** Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1, 2017**.

## **2. Processing and tracking of Jordan's Principle cases**

**A.** Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:

- i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.

- ii. The initial evaluation and a determination of the request shall be made within 12-48 hours of its receipt.
- iii. Canada shall cease imposing service delays due case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided.
- iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided; and
- v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.

C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including when the service was actually provided.

D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

### **3. Publicizing the compliant definition and approach to Jordan's Principle**

A. By **June 09, 2017** Canada shall post a clear link to information on Jordan's Principle, including the compliant definition, on the home pages of both INAC and Health Canada.

B. By **June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.

C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.

D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

### **4. Retention of jurisdiction and reporting**

A. 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 **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.

B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.

C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

D. Canada may provide a reply, if any, by **December 6, 2017**.

E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

**Sophie Marchildon**

Panel Chairperson

**Edward P. Lustig**

Tribunal Member

Ottawa, Ontario

May 26, 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:** May 26, 2017

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

#### **Appearances:**

David Taylor, Anne Levesque, Sarah Clarke, 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 Wenté 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

TAB 17

# First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2017-11-02

File number: T1340/7008

## Citation:

**First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2017 CHRT 35 (CanLII), <<https://canlii.ca/t/hrrkh>>, retrieved on 2026-01-02**

**Most recent unfavourable mention**

Tribunal  
canadien  
Canadian Human  
Rights Tribunal  
droits de la  
personne

Citation: 2017 CHRT 35

Date: November 2, 2017

**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 Lustig

[1] On May 26, 2017, the Panel rendered its ruling on immediate relief concerning Jordan's Principle, cited as 2017 CHRT 14 ("the May 26th Orders").

[2] On June 23, 2017, Canada filed an application for judicial review of certain aspects of the May 26th Orders, seeking to quash paragraphs thereof prohibiting Canada from engaging in case conferencing and requiring Canada to complete the initial evaluation and determination of requests within 12-48 hours of receipt.

[3] The Caring Society, the AFN, Health Canada and INAC officials reached an agreement in October 2017. This agreement was based on the following principles:

- a. Where professionals with clinical expertise have recommended a service for a First Nations child, it is the recommended service that should be considered for approval, and not an alternate service;
- b. Case conferencing:
  - i. There is a legitimate role for clinical case conferencing (discussions related to a service recipient's needs with professionals with relevant expertise involved in his or her case), where more information is reasonably necessary to understanding a First Nations child's clinical needs;
  - ii. Where clinical case conferencing is reasonably necessary to understand a First Nation's child's clinical needs, and where professionals with relevant expertise are already involved in the First Nations child's case, those are the professionals that must be consulted;
  - iii. When clinical case conferencing takes place, the determination of the service request will be made within 12 hours of obtaining all necessary information in urgent individual cases and within 48 hours of obtaining all necessary information in non-urgent individual cases;
  - iv. Administrative case conferencing (intragovernmental or intergovernmental discussions related to the mechanics of service delivery) must not delay the receipt of services by a First Nations child;



- v. In cases where a service is available, Canada can consult, within the specified timeline for the type of case involved, with a First Nation's child's family, with a First Nation community, or with service providers, in order to fund the service;
  - vi. In cases where a recommended service that is approved is unavailable, Canada will make every reasonable effort to ensure funding is provided as close to the specified timeline for the type of case involved.
- c. Timelines:
- i. In certain cases, making service determinations within 48 hours, when a First Nations child's service needs are unclear, may not be in that child's best interest;
  - ii. In urgent cases where irremediable harm is reasonably foreseeable, immediate action should be taken to put crisis intervention supports in place until an extended response can be developed and implemented;
  - iii. Group cases (which address service gaps affecting large numbers of children) should be treated distinctly from individual cases and it is reasonable for group determinations to be made within one week in non-urgent cases, and within 48-hours urgent cases in which irremediable harm is not reasonably foreseeable;
  - d. Service delays arising due to a lack of information regarding a First Nation's child's clinical needs should be tracked and reported on as part of the Tribunal reporting process;

[4] On October 31, 2017, the Caring Society made a motion in writing for an order varying certain provisions of the May 26th Orders, as proposed in Exhibit "A" to the Affidavit of Doreen Navarro, ("the Proposed Amendments"). The Proposed Amendments give effect to an agreement reached between the Complainant Caring Society, the Complainant Assembly of First Nations, and the Respondent Canada in this regard. The Caring Society's motion materials assert that the Proposed Amendments would resolve the questions that are before the Federal Court in Canada's application for judicial review.

[5] The Respondent Canada, the Assembly of First Nations, the Commission, the Chiefs of Ontario, the Nishnawbe Aski Nation and Amnesty international have all confirmed in writing that they consent to the relief sought in the Caring Society's motion.

[6] According to the motion materials, the Proposed Amendments would help ensure that Canada is able to comply with the May 26th Orders that would address Canada's concerns in a way that would ensure substantive equality for First Nations children, bearing in mind the need to provide culturally appropriate services to First Nations children and to safeguard the best interests of First Nations children.

[7] Upon consideration of the motion materials, and the consents filed by the AFN, Canada, the Commission, the COO, the NAN and Amnesty International, the Panel has decided to vary the May 26th Orders in accordance with the Proposed Amendments. In paragraph 4A of the May 26th Orders, the Panel retained jurisdiction to ensure that the terms thereof are effectively and meaningfully implemented and to further refine or clarify them if necessary. The Panel finds that the Proposed Amendments serve to refine or clarify the May 26th Order, and as such fall within the scope of its retained jurisdiction.

[8] The Panel is encouraged to learn that all parties and Interested Parties involved in this case consent to the relief sought in the motion, and that they arrived to a resolution in the hopes of moving forward collaboratively without the need for judicial review proceedings. The present ruling incorporates that resolution and the agreed upon wording variations contained in the Proposed Amendments to the May 26th Orders of this Panel. The Panel adopts the Proposed Amendments as set out in the order below,

and pursuant to section 53(2)(a) of the *Act*. The amendments to the May 26th Orders are indicated below in struck out text and underlined text. For ease of reference, a clean copy of the amended May 26th Orders is appended to this ruling.

[9] Finally, the Panel wishes to clearly state that its acceptance of the parties' Proposed Amendments to the May 26th Orders should not be construed as otherwise modifying or changing any of the remedial measures previously ordered by the Panel.

## **ORDER**

[10] For the reasons given above the Panel hereby amends its Orders issued on May 26, 2017, contained in its ruling on immediate relief concerning Jordan's Principle (2017 CHRT 14), by replacing paragraph 135 of the ruling with the following :

[135] Pursuant to the above, the Panel's orders are:

### **1. Definition of Jordan's Principle**

- A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10 , 2016 CHRT 16 and in this ruling.
- B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:
  - i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.
  - ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.
  - iii. When a government service, **including a service assessment**, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in ~~administrative case conferring~~ **conferencing**, policy review, service navigation or any other similar administrative procedure before **the recommended service is approved and funding is provided**. **Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available.** ~~Once~~ **After** the **recommended** service is **approved and funding is provided**, the government department of first contact can seek reimbursement from another department/government;

- iv. When a government service, **including a service assessment**, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in **administrative case conferencing**, policy review, service navigation or any other similar administrative procedure before **the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. Once After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government.**
- v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.
- C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).
- D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1, 2017**.

## **2. Processing and tracking of Jordan's Principle cases**

- A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by June 28, 2017:
  - i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.
  - ii. The initial evaluation and a determination of the request **requests by individuals** shall be made within 42-48 hours of its receipt **the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii). For non-urgent cases in which this information cannot be obtained within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain the needed information so that the determination can be made as close to the**

**48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.**

**ii.1 The initial evaluation and determination of requests for groups shall be made within one week of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent group cases, the evaluation and determination of the request shall be made within 48 hours.**

- iii. Canada shall cease imposing service delays due to **administrative case conferring conferencing**, policy review, service navigation or any other similar administrative procedure before **the recommended service is approved and** funding is provided. **Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii).**
- iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in **administrative case conferring conferencing**, policy review, service navigation or any other similar administrative procedure before funding is provided; and
- v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.
- B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.
- C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including **the time required for the Government of Canada to ask for and receive additional information necessary to understand the requestor's clinical needs, and a statement of** when the service was actually provided.
- D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

### **3. Publicizing the compliant definition and approach to Jordan's Principle**

- A. By **June 09, 2017** Canada shall post a clear link to information on Jordan's Principle, including the compliant definition, on the home pages of both INAC and Health Canada.
- B. By **June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.
- C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.
- D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination

Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

- E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

#### **4. Retention of jurisdiction and reporting**

- A. 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 **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.
- B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.
- C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.
- D. Canada may provide a reply, if any, by **December 6, 2017**.
- E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

November 2, 2017

#### **Annex**

[135] Pursuant to the above, the Panel's orders are:

##### **1. Definition of Jordan's Principle**

- A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.
- B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key principles:

- i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.
  - ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.
  - iii. When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;
  - iv. When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government.
  - v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.
- C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).
  - D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1, 2009**, to ensure compliance with the

above principles. Canada shall complete this review by **November 1, 2017**.

## **2. Processing and tracking of Jordan's Principle cases**

- A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:
  - i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.
  - ii. The initial evaluation and a determination of requests by individuals shall be made within 48 hours of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent cases, the evaluation and determination of the request shall be made within 12 hours of the initial contact for a service request. Where more information is reasonably necessary to the determination of a request by an individual, clinical case conferencing may be undertaken for the purpose described in paragraph 135(1)(B)(iii). For non-urgent cases in which this information cannot be obtained within the 48-hour time frame, representatives from the Government of Canada will work with the requestor in order to obtain the needed information so that the determination can be made as close to the 48-hour time frame as possible. In any event, once representatives from the Government of Canada have obtained the necessary information, a determination will be made within 12 hours for urgent cases, and 48 hours for non-urgent cases.
    - ii.1 The initial evaluation and determination of requests for groups shall be made within one week of the initial contact for a service request. In a situation where irremediable harm is reasonably foreseeable, Canada will make all reasonable efforts to provide immediate crisis intervention supports until an extended response can be developed and implemented. In all other urgent group cases, the evaluation and determination of the request shall be made within 48 hours.
  - iii. Canada shall cease imposing service delays due to administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada will only engage in clinical case conferencing for the purpose described in paragraph 135(1)(B)(iii).
  - iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before funding is provided; and
  - v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.
- B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.
- C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including the time required for the Government of Canada to

ask for and receive additional information necessary to understand the requestor's clinical needs, and a statement of when the service was actually provided.

- D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

### **3. Publicizing the compliant definition and approach to Jordan's Principle**

- A. By **June 09, 2017** Canada shall post a clear link to information on Jordan's Principle, including the compliant definition, on the home pages of both INAC and Health Canada.
- B. By **June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.
- C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.
- D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.
- E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

### **4. Retention of jurisdiction and reporting**

- A. 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 **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.
- B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.
- C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.
- D. Canada may provide a reply, if any, by **December 6, 2017**.
- E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

## **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:** November 2, 2017

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

David Taylor, Anne Levesque, Sarah Clarke, 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, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Patricia MacPhee and Robert Frater, counsel for the Respondent, Attorney General of Canada

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

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

Justin Safayeni, counsel for Amnesty International

TAB 18

# First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2018 CHRT 4 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2018-02-01

File number: T1340/7008

Other citation: 90 CHRR 1

## Citation:

**First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2018 CHRT 4 (CanLII), <<https://canlii.ca/t/hrgnd>>, retrieved on 2026-01-02**

**Most recent  
unfavourable  
mention**

Tribunal  
canadien  
des  
Canadian Human  
Rights Tribunal  
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**

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## **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 (FNCFCF) 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 programming 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, 1998 CanLII 29849 (ON HRT), 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 CanLII 73 (SCC), [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 CanLII 27 (SCC), [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 CanLII 48 (SCC), [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 CanLII 109 (SCC), [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), 1994 CanLII 18487 (FC), 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 CanLII 67 (SCC), [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 CanLII 73 (SCC), [1987] 2 SCR 84 at para. 13 [Robichaud], *CN v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [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 SCC 12 (CanLII), [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 CanLII 699 (SCC), [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 and 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 Shangreux, 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 programming (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? The fact that key items, such as determining funding for remote and small agencies, were deferred to later 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 **giant 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 has the capacity to manage the application of those resources if they are provided in a timely manner.

[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 Columbia, (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 all 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 NIHB 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 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 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 policies 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.

### **III. 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

## **Schedule A**

### **Annex to Ruling 2018 CHRT 4**

#### **Amendments to the Ontario specific orders for clarity and implementation flexibility**

##### **1. Context**

On December 18, 2017, the Tribunal sent the parties a confidential copy of a draft ruling with its reasons and orders for discussion and potential suggestions for clarity and flexibility in the implementation phase and, in the hope this exercise would generate meaningful discussions and collaboration between the parties moving forward. The parties had to provide their suggested changes no later than January 30, 2018 given that the anticipated date for the public release of the ruling was February 1, 2018. The intent was to consider the suggested changes and if accepted by the Panel, to make the changes and release a final version of the ruling on February 1, 2018. On January 30, the Chiefs of Ontario (COO) provided some suggested changes and the Nishnawbe Aski Nation (NAN) provided some suggested changes on February 6, 2018 after the ruling's release. For clarity, the suggested changes were not included in the parties' requested orders at the time of the hearing. Given that the Ontario specific deadlines fall on February 15, 2018, the Panel had little time to address the amendment requests while considering all submissions from the parties involved. Therefore, the parties had until February 12, 2018 to indicate if they consented to the suggested amendments sought by the COO and the NAN, if they took no position or, if they objected to the amendments.

The Tribunal received submissions from all the parties in regards to the COO's suggested changes and it received submissions from all the parties except the AFN in regards to the NAN's suggested changes. The COO, the NAN and Canada have all indicated that their discussions are ongoing. This being said, the importance of the parties working together and making progress towards implementation of the orders outweighs any administrative issues arising from this process. Finally, none of the suggested changes aim to modify the spirit or the substance of the Tribunal's orders.

This Schedule A is the Panel's choice to respond to amendment requests in a clear and expeditious manner. The Panel intends to use this format in the future should there be additional amendment requests.

Upon consideration, The Panel agrees with the suggested changes and amends its orders as indicated below.

## **2. Mental Health Orders (Ontario)**

### **Original order in paras. 306 and 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 retroactive to January 26, 2016 by February 15, 2018.

### **Amended order in paras. 306 and 426:**

The Panel, pursuant to Section 53 2 (a) and (b) of the CHRA, orders Canada to fund actual costs of mental health services to First Nations children and youth from Ontario, including as provided by First Nations, Tribal Councils, First Nations Child and Family Services Agencies, parents/guardians or other representative entities retroactively to January 26, 2016, by February 15, 2018, or within 15 business days after receipt of the documentation of expenses.

## **3. Band Representative Orders (Ontario)**

### **Original order in paras. 336 and 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.

### **Amended order in paras. 336 and 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, Tribal Councils or First Nations Child and Family Services Agencies at the actual cost of providing those services, retroactively to January 26, 2016 by February 15, 2018 or within 15 business days after receipt of the documentation of expenses and until such time as studies have been completed or until a further order of the Panel.

The Panel agrees with the Caring Society and the Commission's comments on the appropriate interpretation of the words "documentation of expenses". The Panel directs that the words "documentation of expenses", should not be applied in a legalistic and narrow manner stripping the order of its significance. Therefore, it should also include where invoices/receipts are unobtainable and the service provider is not able to provide documentation that the service was rendered, Canada is prepared to reimburse expenses incurred between January 26, 2016 and February 1, 2018 where the requestor declares that the expenses were incurred and the invoice/receipt is unobtainable.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal Member

Ottawa, Ontario

February 13, 2018

## **Schedule B**

### **Annex to Ruling 2018 CHRT 4**

The Tribunal received submissions from the parties in regard to a number of suggested changes to its **2018 CHRT 4** orders (see Schedule A).

This **Schedule B** is the Panel's choice to respond to amendment requests in a clear and expeditious manner (see also Schedule A). The Panel intends to use this format in the future should there be additional amendment requests.

**Upon consideration, the suggested changes below do not aim to modify the spirit or the substance of the Tribunal's orders. Therefore, the Panel agrees with the suggested changes and amends its orders as indicated underneath.**

#### **Original orders in paras.408 and 409:**

[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**.

#### **Amended orders in paras. 408 and 409:**

[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 analyze the needs assessments completed by the First Nations agencies, identify gaps in data and report to Tribunal by **May 3, 2018**, and to complete this analysis by **November 15, 2018**.

#### **Original order in para.411:**

[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.

**Amended order in para. 411:**

[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 within 15 business days after receipt of documentation of expenses. FNCFS agencies must submit documentation of expenses for retroactive payments to Canada no later than **March 31, 2019**. This order complements the order above.

**Original order in para.417:**

[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.

**Amended order in para.417:**

[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 within 15 business days after receipt of documentation of expenses. FNCFS agencies must submit documentation of expenses for retroactive payments to Canada no later than **March 31, 2019**. This order complements the order above.

**Original order in para.419:**

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

**Amended order in para. 419:**

[419] Canada is ordered to analyze the needs assessments completed by First Nations agencies, identify gaps in data and report to the Tribunal by **May 3, 2018**, and to complete this analysis by **November 15, 2018**.

**Original order in para.421:**

[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.

**Amended order in para.421:**

[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 within 15 business days after receipt of documentation of expenses. FNCFS agencies must submit documentation of expenses for retroactive payments to Canada no later than **March 31, 2019**. 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, to be supplemented by Canada's April 9, 2018 submission, 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.

**Original order in para. 444:**

[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.

**Amended order in para. 444:**

[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 **March 31, 2019** 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.

**Schedule C**

**In 2022 CHRT 8, the Tribunal amended ruling 2018 CHRT 4.**

**Pursuant to section 53(2) of the CHRA, the Tribunal issues the Amended order in 2018 CHRT 4:**

The Tribunal, pursuant to paragraph 413(3) of 2018 CHRT 4, is adding the following paragraph to the Tribunal's order in 2018 CHRT 4:

[421.1]: In amendment to paragraphs 410, 411, 420 and 421 Canada shall, as of April 1, 2022, fund prevention/least disruptive measures at \$2500 per person resident on reserve and in the Yukon in total prevention funding in advance of the complete reform of the FNCFS Program funding formulas, policies, procedures and agreements. Canada shall fund the \$2500 on an ongoing basis adjusted annually based on inflation and population until the reformed FNCFS Program is fully implemented. This amount will provide a baseline for the prevention element in the reformed FNCFS Program pursuant to paragraph 1 of the Consent Order. Flexibility will be provided on the implementation for First Nations governments and FNCFS agencies not ready on the start date, which will require more time due to exceptional circumstances that will be further defined with the parties. Funds will be directed to the First Nations and/or First Nations child and family service providers(s) responsible for the delivery of prevention services.

These funds shall be eligible to be carried forward by the First Nation and/or First Nations child and family service providers(s).



TAB 19

# First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 7 (CanLII)

Source: Canadian Human Rights Tribunal

Date: 2019-02-21

File number: T1340/7008

## Citation:

**First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada), 2019 CHRT 7 (CanLII), <<https://canlii.ca/t/j16fw>>, retrieved on 2026-01-02**

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Citation: 2019 CHRT 7

Date: February 21, 2019

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**

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### **I. Context**

[1] The Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN) have filed a human rights complaint alleging that the inequitable funding of child welfare services on First Nations reserves amounts to discrimination on the basis of race and national ethnic origin, contrary to section 5 of the *Canadian Human Rights Act*, RCS 1985, c H-6 (the *CHRA*).

[2] In a decision dated March 14, 2011 (see 2011 CHRT 4), the Tribunal granted a motion brought by the Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada) (INAC), for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[3] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (Caring Society FC), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (Caring Society FCA).

[4] In July 2012, a new Panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[5] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA*.

[6] In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[7] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[8] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. The Panel noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[9] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[10] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[11] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In the 2016 CHRT 16 ruling, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC was ordered to provide all First Nations and First Nations Child and Family Services Agencies ("FNCFS Agencies") with the names and contact information of the Jordan's Principle focal points in all regions.

[12] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports". The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

[13] In May 2017, the Panel made additional findings in light of the new evidence before it and has partially reproduced some of them below for ease of reference:

Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the Decision and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the Decision and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children. (see 2017 CHRT 14, at para.67).

Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the Decision with respect to substantive equality and the need for culturally appropriate services (see Decision at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see Decision at paras. 399-427), (see 2017 CHRT 14, at para.69).

However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services." (see 2017 CHRT 14, at para.71).

This potential gap in services was highlighted in the *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 case and in the Decision. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the Decision (see 2017 CHRT 14, at para.72):

In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also Transcript Vol. 40 at pp. 69, 71). (see 2016 CHRT 2 at para. 421).

Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate. (see 2016 CHRT 2 at para. 422).

[14] Also, in the 2017 CHRT 14 ruling the panel made additional findings that are relevant to the questions before us as part of this ruling:

Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the Decision. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination. (see 2017 CHRT 14, at para.73, emphasis added).

Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (...) along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed. (see 2017 CHRT 14, at para.74).

Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs. (see 2017 CHRT 14, at para.75).

[15] Further in the ruling, the Panel wrote:

Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356) (...) (see 2017 CHRT 14, at para.78).

Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada (...), (see 2017 CHRT 14, at para.80).

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. (see 2017 CHRT 14 at para.133).

[16] The above will also inform some of the reasons in this ruling.

[17] The Tribunal's May 26, 2017 order (2017 CHRT 14) required Canada to base its definition and application of Jordan's Principle on key principles, one of which was that Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve.

[18] Canada challenged some aspects of the 2017 CHRT 14 ruling by way of a judicial review which was subsequently discontinued following a consent order from this Tribunal essentially amending some aspects of the orders on consent of the parties and pertaining to timelines and clinical case conferencing. No part of this judicial review questioned or challenged the Tribunal's order that Canada's definition and application of Jordan's Principle must apply equally to all First Nations children, whether resident on or off reserve.

[19] In 2017 CHRT 35, the Tribunal amended its orders to reflect the changes suggested by the parties. The Jordan's Principle definition ordered by the Panel and accepted by the parties is reproduced in bold below:

- i. **Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily**

- living.
- ii. **Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.**
  - iii. **When a government service, including a service assessment, is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is approved and funding is provided, the government department of first contact can seek reimbursement from another department/government;**
  - iv. **When a government service, including a service assessment, is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in administrative case conferencing, policy review, service navigation or any other similar administrative procedure before the recommended service is approved and funding is provided. Clinical case conferencing may be undertaken only for the purpose described in paragraph 135(1)(B)(iii). Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified in paragraphs 135(2)(A)(ii) and 135(2)(A)(ii.1) where the service is available, and will make every reasonable effort to ensure funding is provided as close to those timeframes where the service is not available. After the recommended service is provided, the government department of first contact can seek reimbursement from another department/government.**
  - v. **While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.**
- C. **Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).**



[20] While it is accurate to say the Tribunal did not provide a definition of a “First Nation child” in its orders, it is also true to say that none of the parties including Canada sought clarification on this point until now. To be fair, on this issue, the Panel believes that it should focus on ensuring its remedies are efficient in light of the evidence before it and, in the best interests of children, more than on Canada’s compliance.

[21] The parties who have been discussing the issue outside the Tribunal process have not yet reached a consensus on this issue. Therefore, the adjudication of the compliance with this Tribunal’s orders of Canada’s definition of “First Nations child” for the purposes of implementing Jordan’s Principle is now being requested by the Caring Society.

[22] Upon consideration, the Panel believes the issue of a “First Nations child” definition is best addressed by way of a full hearing. The Panel Chair has requested the parties to make arguments on international law including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the recent UN Human Rights Committee’s (“UNHRC”) *McIvor Decision* findings that sex discrimination continues in the *Indian Act*, Aboriginal law, human rights and substantive equality, constitutional law and other aspects, in order to allow the panel to make an informed decision on the issue of the “First Nation child” definition following the upcoming hearing. Doing this analysis through a multi faceted lens is paramount given the probable incompatibilities between the UNDRIP and the *Indian Act*. Additionally, if the current version of the *Indian Act* discriminates and excludes segments of women and children, it is possible that but for the sex discrimination, the children excluded would be considered eligible to be registered under the *Indian Act*. In those circumstances the child would be considered by Canada under Canada’s Jordan’s Principle eligibility for registration criteria for First Nations children who are not ordinarily resident on-reserve and, who do not have *Indian Act* status. While this should not be read as a final determination on Canada’s current policy under Jordan’s Principle, the Panel also wants to ensure to craft effective remedies that eliminate discrimination and prevent it from reoccurring. Needless to say, it cannot condone a different form of discrimination while it makes its orders for remedies. Hence, the need for a full and complete hearing on this issue where the above will be addressed by all parties.

[23] During the January 9, 2019 motion hearing, Panel Chair Marchildon, expressed the Panel’s desire to respect Indigenous Peoples’ inherent rights of self-determination and self-governance including their right to determine citizenship in crafting all its remedies. Another important point is that the panel not only recognizes these rights as inherent to Indigenous Peoples, they are also human rights of paramount importance. The Panel in its *Decision* and subsequent rulings, has recognized the racist, oppressive and colonial practices exerted by Canada over Indigenous Peoples and entrenched in Canada’s programs and systems (see for example 2016 CHRT 2 at para.402). Therefore, it is mindful that any remedy ordered by the Panel must take this into account. In fact, in 2018 CHRT 4, the Panel crafted a creative and innovative order to ensure it provided effective immediate relief remedies to First Nations children while respecting the principles in the UNDRIP, the Nation-to-Nation relationship, the Indigenous rights of self-governance and the rights of Indigenous rights holders. It requested comments from the parties and no suggestions or comments were made by the parties on those specific orders. The Panel has always stressed the need to ensure the best interests of children is respected in its remedies and the need to eliminate discrimination and prevent it from reoccurring.

[24] This Panel continues to supervise Indigenous and Northern Affairs Canada now, Indigenous Services Canada’s, implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *CHRA* [see 2016 CHRT 2 (the *Decision*)].

[25] At the October 30-31, 2019 hearing (October hearing), Canada’ witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal’s May 2017 CHRT 14 ruling

and orders on Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, **over 165 000 Jordan's Principle approved services** have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel. In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that Jordan's Principle is not a program, it is considered a legal rule by Canada. This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

**No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle (...) There cannot be any break in Canada's response to the full implementation of Jordan's Principle.**

[26] The Panel is delighted to hear that thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope. **We would like to honor Jordan River Anderson and his family for their legacy.** We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children.

## **II. Motion for relief**

[27] The Caring Society, makes a motion for further relief to ensure that this Tribunal's Orders of January 26, 2016 (2016 CHRT 2), April 26, 2016 (2016 CHRT 10), September 14, 2016 (2016 CHRT 16) and May 26, 2017 (2017 CHRT 14) are effective, specifically regarding the definition of "First Nations Child" in those orders. This motion is made under Rule 3 of the Canadian Human Rights Tribunal Rules of Procedure, pursuant to Rules 1(6), 3(1), 3(2), and 5(2), and pursuant to the Canadian Human Rights Tribunal's continuing jurisdiction in this matter. The proposed motion will be heard orally. The Caring Society submits that the motion is for:

An order that, pending the adjudication of the compliance with this Tribunal's orders of Canada's definition of "First Nations Child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent service needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent service needs, pursuant to Jordan's Principle.

[28] The Tribunal heard the parties' submissions on the motion for relief on January 9, 2019 and took the matter under reserve.

### **A. Summary of the parties' positions**

[29] In sum, the Caring Society contends that Canada's failure to seek direction from the Tribunal or to take measures to address urgent requests from First Nations children who do not have *Indian Act* status and who are not ordinarily resident on-reserve risks undermining the effectiveness of the Tribunal's orders by risking irremediable harm to these children.

[30] In November 2018, the Caring Society intervened to pay for medical transportation for a young First Nations child without *Indian Act* status who required a medical diagnostic service to address a life-threatening condition because Canada would not pay due to the child's off-reserve residence and lack of *Indian Act* status.

[31] The AFN submits, the Caring Society's motion raises questions of "First Nations children" that are entitled to benefit from Jordan's Principle and whether that includes non-status Indians. This in turn raises the issue of First Nations citizenship. The issues of First Nations children and citizenship go to the heart of First Nations jurisdiction and self-determination. The AFN takes these issues very seriously, as demonstrated by the AFN Resolutions attached as exhibits to the Affidavit of Cindy Blackstock affirmed December 5, 2018, and filed in support of the Caring Society's motion.

[32] The AFN takes the position that the questions raised in this interim motion deserve a full hearing before the Tribunal prior to any decisions are made that have the potential for far-reaching implications on First Nations and their jurisdictions.

[33] Nevertheless, the AFN is mindful of the concerns raised by the Caring Society's motion, particularly in that irreparable harm could be caused to innocent children who might be denied the benefits of Jordan's Principle. Accordingly, the AFN does agree, in part, with the Caring Society's motion for interim relief. The AFN suggested interim solutions with possible parameters should the Tribunal decide to grant the Caring Society's motion. This will be discussed later.

[34] Moreover, the AFN notes that the Panel indicated awareness of and sensitivity to the issue of First Nation self-determination in its previous Decisions. The AFN respectfully requests that the Panel continue to exercise caution in issuing orders that have implications for First Nations, particularly with respect to their autonomy, self-determination and self-government. This should be taken into account in a ruling on the Caring Society's interim motion.

[35] The Commission takes no position on this point except for highlighting the fact that no party has disputed the Tribunal's jurisdiction to make an order as the one sought by the Caring Society.

[36] The COO and the NAN take no position on the motion. NAN added it does not object to the AFN's letter dated January 7, 2019 which includes the AFN's submissions on the Caring Society's motion.

[37] In sum, Canada objects to the motion and submits it is premature and requests that the Tribunal exercise its discretion to refuse to hear the motion for relief at this interlocutory stage. Canada asks that the motion be dismissed.

[38] Canada is having ongoing discussions on the issue of "First Nation child" with the parties in this case and nations across Canada. Canada argues that Indigenous identity is a complex question (see Dr. Valerie Gideon's affidavit, dated December 21, 2018, at paragraphs 40-41). It is defined in the *Indian Act* and that definition is being used and implemented in all Government of Canada programming, including Jordan's Principle. The definition of a "First Nations child" for the purposes of Jordan's Principle is an issue that Canada hopes to continue working on through consultation with First Nations leadership outside the Tribunal process.

[39] In any event, Canada argues the Caring Society has not demonstrated a strong prima facie case as per the Supreme Court decision in *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, (CBC) and, that the test for serious issue when a mandatory injunction is sought, is higher and more difficult to meet. Canada submits that Brown J. held that the moving party “must demonstrate a strong prima facie case that it will succeed at trial.” The moving party must show a “strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations ...” and this should apply regardless of this case being a human rights case. Furthermore, Canada contends that the Caring Society has not brought an actual case that shows irreparable harm. The evidence before the Tribunal concerns a child who was seeking transportation costs to participate in a case study designed to approve a molecule for future use in a diagnostic procedure. Canada further submits, there is no evidence that the child faced irreparable harm if the transportation costs were not paid. In any event, the costs were paid by the Caring Society and there is no evidence that irreparable harm would occur in the future if the remedy is not granted. Canada adds that irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured by the time a final decision is made (see *RJR MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311).

[40] On the balance of convenience, Canada argues it is not in the interests of justice to grant an order that is too vague to be properly implemented or enforced. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Canada argues that the Caring Society must demonstrate the public interest benefits that flow from the granting of the relief sought and failed to do so. Additionally, Canada submits that the public interest is better served by a continuation of the use of the current definition of “First Nations child” for the purposes of Jordan’s Principle. It allows for the application of consistent, objective parameters regarding eligibility for Jordan’s Principle.

[41] Furthermore, according to the AGC, Canada has given direction and training to its employees based on the July 5, 2018 definition described in Dr. Gideon’s affidavit. She has explained that it will be difficult to address the needs of children in a consistent and fair manner without a clear definition of “First Nation child”. Also, the Caring Society’s proposed definition is open ended and not clearly defined. Granting the requested relief and ordering the government to apply such a definition will introduce confusion and uncertainty in Canada’s attempt to implement Jordan’s Principle in a fair and consistent manner.

[42] According to Canada, it has set up a process to verify if a child and/or the family/guardian is registered or is eligible for status by working directly with the Office of Indian Registry. When a request is submitted on behalf of a non-status child, the Jordan’s Principle Focal Point works with the requestor to understand if the child would be eligible for registration by learning about the parents’ status, potential status under Bill S-3, as well as with the Office of the Indian Registrar. If there is uncertainty as to the eligibility of the child, the Focal Point can err on the side of caution and approve the request within the domain of “best interests of the child”, particularly where there are concerns about meeting the ordered timeframes (see Dr. Valerie Gideon’s affidavit, dated December 21, 2018, at paras 35-39).

[43] The Caring Society disagrees with Canada that it needs to demonstrate a strong prima facie case since we are in the context of a human rights case. Rather, it argues that the appropriate criteria is found in the *Manitoba (A.G.) v. Metropolitan Stores Ltd.* 1987 CanLII 79 (SCC), [1987] 1 SCR 110 (Metropolitan) case and that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. In this case, the Caring Society contends it meets this condition.

[44] The Caring Society also submits that children’s emergencies can’t wait for hearing dates to have their needs met in life threatening situations such as exemplified by S.J.’s case. S.J.’s case will be discussed further below. According to the Caring Society, the balance of convenience favours the non-status off-reserve children who encounter urgent/life threatening situations.

## **B. Law analysis**

[45] The Panel understands why the parties brought the interlocutory injunctions principles and case law into this process given the nature of the Caring Society's request. However, none of the parties have presented arguments addressing the Tribunal's jurisdiction to deal with interlocutory injunctions except from stating that the Tribunal has this power under the *Act*. The fact that no one disputes the Tribunal's jurisdiction to deal with the order sought does not answer the question. In any event, the Panel does not view this request as it is characterized by the parties. Rather, it views it as a clarification and refinement of previous orders to ensure that the Tribunal's remedies are effective. Since crafting remedies in this case is an intricate task, the Tribunal ordered Canada to report on its progress every 6 months (see 2017 CHRT 14 at para. 135 (2) D) and invited the parties to come back to the Tribunal should they want to cross-examine Canada's affiants and make submissions on Canada's implementation or if they experienced difficulties in the implementation stage. The Panel finds this is what the Caring Society did here. The Caring Society also proposed a two-step process to address the matter. Because this is no simple question, a full hearing is required on the issue of defining a "First Nation child" and, interim orders are requested to prevent harm to non-status off-reserve children in urgent situations, while the Tribunal adjudicates the definition issue.

[46] This case is unlike many cases involving interlocutory injunctions requests where the Courts have not yet heard the matter on its merits and consequently, risk making orders in the interim that may end up not to be appropriate after a full hearing on the merits.

[47] In this case, it is very different as the Tribunal has heard the merits of the case extensively and made findings and orders. It retained jurisdiction given the complexity of the remedies and the immediate, mid-term and long-term relief remedies and the necessity to assess if remedies are effective and implemented. This necessarily requires some back and forth between the parties and the Tribunal unless, all parties agree and propose consent orders, to the Tribunal. Moreover, the parties have previously established there is a lack of data and a need for data collection to inform the crafting of appropriate long-term remedies. For ease of reference to the reader, we have reproduced some paragraphs of recent Tribunal decisions on Jordan's Principle and on further remedies that support our reasons:

Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the Act"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, *aff'd* 2011 FCA 202 ["Walden"]). In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 at para. 27).

In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified. (see 2017 CHRT 14 at para. 28).

Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36). (see 2017 CHRT 14 at para. 29).

It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 (“Chopra”), “[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding.” While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, 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. (see 2017 CHRT 14 at para. 30).

In the same vein, the Panel’s role in ruling upon the present motions is not to make declarations of compliance or non-compliance per se. Rather, in line with the remedial principles outlined above, the Panel’s purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation 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 programming is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel’s orders and it may make findings as to whether those actions are or are not in compliance with those orders. (see 2017 CHRT 14 at para. 31).

As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 1994 CanLII 18487 (FC), 24 CHRR D/390 (FC) at para. 32, “[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal.” This statement is in line with the Panel’s approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada’s implementation of its orders and, through its subsequent rulings, provided additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*. (see 2017 CHRT 14 at para.32).

While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada’s assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders. (see 2017 CHRT 14 at para. 33).

This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties. (see 2017 CHRT 14 at para. 34).

[48] In its February 1, 2018 ruling, the Tribunal citing the Supreme Court of Canada wrote:

"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 (...), ("see "2018 CHRT 4" at para. "52")."

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 SCC 12 (CanLII), [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 (see 2018 CHRT 4 at para. 66).

[49] The Panel previously addressed the appropriate approach to remedies in this case:

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. (see 2018 CHRT 4 at para. 168).

Until such time as one of the options below occur (...) 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. (see 2018 CHRT 4 at para. 413 (4)).

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. (see 2018 CHRT 4 at para. 237).

[50] All the above support our interpretation of what the Tribunal's approach to remedies is in this nation-wide multi-faceted and complex case.

[51] Additionally, the Panel notes that no one made submissions on the *Canada (Human Rights Commission) v. Canadian Liberty Net (T.D.) (Liberty Net)* Federal Court decision. *Liberty Net* is cited in the CBC case. The AGC relied upon the CBC case. In *Liberty Net*, the Canadian Human Rights Commission sought an interlocutory order from the Federal Court and not the Tribunal regarding an ongoing issue of hate speech. The complaints were before the Tribunal and had not yet been heard on their merits. The Federal Court decided it had jurisdiction to make such an order akin to the powers of Provincial Superior Courts. It also clarified that it did not have a final "cease and desist" power and stated the Tribunal had this power at the end of an inquiry, once the case was heard on its merits.

[52] In our view, the "cease the discriminatory practice" remedy found at section 53 (2) a of the *CHRA* is an "injunction like" power and becomes available to the Tribunal once discrimination has been found. In fact, section 53 (2) of the *CHRA* reads as follows: *If at the conclusion of the inquiry the member or*

*panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate (...).* This is the case here. The case was heard on its merits, discrimination was found and the Jordan Principle orders are meant to eliminate discrimination, *redress the discriminatory practice and to prevent the same or a similar practice from occurring in future* (see section 53 (2) a of the *CHRA*). The Tribunal remained seized of the case and assesses the implementation of its orders to ensure they are efficient. Given this finding, it is not necessary here to analyse if the Tribunal has jurisdiction to order interlocutory injunctions when a case has not yet been heard on its merits.

[53] The fact that another hearing will take place before the Tribunal to deal with compliance to its orders and with the definition of a “First Nation child” does not change the nature of the proceedings in this case. In any event, this case is quite different given that the Tribunal has heard the case on its merits and has issued orders in 9 different rulings and, monitors the implementation of its orders, to assess if they are effective, in the best interests of children. In sum, the Panel finds the Tribunal’s powers to make interim orders flow from section 53 (2) of the *CHRA* and the Panel’s previous orders and retention of jurisdiction.

[54] Furthermore, while the specific issue of a “First Nation child” has not yet been resolved, the Tribunal has great appreciation for Jordan’s Principle matters and is in a position to make findings and further orders in light of the new evidence and the motion materials.

[55] Additionally, the Supreme Court in *CBC* refers to the “chambers judge” which may suggest the request was made before an applications Judge. In an interlocutory stage, the parties are able to access the Court rapidly to deal with emergencies. Superior Courts are frequently asked to rule on interlocutory injunctions requests and consequently have a process to access Judges very quickly should someone require to do so. The Tribunal, while it has a mandate to deal with complaints expeditiously, does not have the same process. The Panel worries that if an urgent situation occurs concerning a child it may not be able to hear the case the same day or in the next few days. Canada’s suggestion that the Tribunal should only rule on an emergency case at the time it is brought forward before it is impractical. This coupled with the analysis of the evidence supports the need for a further order and reinforces the need for a timely and independent appeals mechanism involving health professionals and other professionals, to address such requests under Jordan’s Principle. This will be revisited in the analysis section below.

### **III. Analysis**

[56] For the purposes of this ruling, while the Panel considered all the evidence, the Panel has not focused its reasons and findings on Canada’s “First Nation child” definition since it has decided to hold a full hearing on this issue.

[57] The Caring Society brought new evidence before the Tribunal in support of its motion for further relief. The Caring Society recently intervened to pay for medical transportation for a young First Nations’ child without *Indian Act* status who required a medical diagnostic service, an essential scan, to address a life-threatening condition because Canada would not pay due to the child’s off reserve residence and lack of *Indian Act* status. The Caring Society raised this case with Canada directly on November 29, 2018. Given that the matter has been resolved, the Caring Society has brought S.J.’s case as an illustrative case.

[58] At the time when the events occurred, S.J. was an 18-month-old infant who was diagnosed with hyperinsulinism, a rare, potentially life-threatening, medical condition. According to the Caring Society, S.J.’s medical team at Sick Kids Hospital in Toronto decided that she required a diagnostic scan to determine the scope of further treatment. The Caring Society in its November 29, 2018 letter to the AGC (see affidavit of Dr. Cindy Blackstock dated December 5, 2018) wrote that it: understands that S.J. has



been waiting for this diagnostic scan since birth. As you can appreciate, the waitlist for the scan is quite long, and thus missing the appointment due to inability to fund travel would lead to a lengthy delay in S.J.'s treatment. The time-sensitive nature of the window for S.J.'s diagnostic made this an urgent case.

[59] In support of its position, the Caring Society relies on a letter from S.J.'s physician, Dr. Jennifer Harrington that states as follows:

S is a patient followed in the Endocrine Department at the Hospital for Sick Children. She needs to attend a medical visit at Edmonton Hospital for an essential scan that is only available there. It is important that her parents are available to provide support for her during this visit. Her parents will need leave from work for at least between November 27th to December 2nd for this visit. Thank you for your consideration of this request. Kind regards, Jennifer Harrington, MBBS, PhD Staff Physician Endocrine Division, The Hospital for Sick Children. (see Affidavit of Dr. Cindy Blackstock, dated December 5, 2018, at, Exhibit G).

[60] The Caring Society provided an email exchange between the Chiefs of Ontario contact person, Ms. Castro and Ms. Jacque Surges from the Caring Society, providing an overview of S.J.'s situation as it is understood by Ms. Castro (see email from Miryan Castro dated November 22, 2018 to Jacque Surges with the subject: Jordan's Principle - Med Trans - J):

(...) On Friday, November 9, 2018, I spoke to F J. They reside in Toronto. Her daughter does not have status. Her father is non-indigenous and her mother is of mixed ancestry. She advised that she received status through the grandmother bill. She is not able to pass her status to S J. Her daughter S J has a congenital Hyper Infiliasim (sic) (the Panel believes it should read hyperinsulinism), it is the opposite of diabetes. Her pancreas creates too much insulin which leads to seizure and can cause death due to her sugars being too low. S requires a scan to see if only a certain area of her pancreas is affected or the entire pancreas is affected. The scan is required so that the doctors can do the surgery. There are only 3 places in the world that does the scan, the UK, USA (Philadelphia) and Canada (Edmonton). Her physician is at Sick kids hospital in Toronto, Dr. Jennifer Harrington (...) Sick Kids applied for funding for the scan and therefore the mother does not have to pay. The clinic requires flexibility in order for the blood work to be done, due to the procedure involving a radioactive dye and S has to go under anesthesia. They need to be at the Alberta hospital for a few days. The appointment is on Tuesday, November 27, 2018, and It has been requested that S stay until December 2, 2018. The scan will be conducted at the University of Alberta Children's hospital Nuclear Medicine Department, S will have to be put under, it is similar to a CT Scan. She will need to be injected with a radioactive compound, which only last for 24 hours. The clinic has to make the compound and that is why there is only 3 places in the world that do this type of scan. Within 1 hour of taking the compound the scan must be completed. This will allow the doctors to see which part of the pancreas will need to be removed. Should she require the entire pancreas to be removed S will be dependent on insulin for the rest of her life. On Friday, November 9, 2018, I contacted NIHB Medical Transportation department and spoke to the Southern Ontario Program Officer for Medical Transportation, James Robertson. He advised that he would submit this case to Jordan's principle. I have advised Mr. Robertson of the issue with regarding Ms. J status card having her maiden name not her married name and that her travel documents state her married name. He required their address and telephone number and I provided him with the information and sent him the letters from Sick Kids hospital and the Albert Hospital (Which are attached). Mr. Robertson advises that he will try to see if a response from Jordan's Principle comes in today, Friday, November 9, 2018, or on Tuesday, November 13, 2018, due to the Remembrance Day holiday. On Tuesday, November 13, 2018, I was at a meeting in Ottawa at the NIHB office and followed up with James and he still did not receive a response. In my meeting with NIHB, I was informed that Mr. Robertson was starting a new position. On Wednesday, November 14, 2018, I sent emails to and left voicemail messages for Mr. Robertson following up to see if he received a response from Jordan's Principle. He sends me an email asking for the date of the procedure (which I

provided to him previously on Friday, November 9, 2018. Then, I get another email stating that he is starting a new position on Thursday, November 15, 2018, but he has cc'd his colleague Rexana Stickwood, who is the new Program Officer for Southern Ontario transportation. In his email it was also cc'd to Patricia Villeneuve who is working as a liaison with NIHB and Jordan's Principle. On Friday, November 15, 2018, I sent an email to Julie Caves, Manager, Program Delivery FNHIB. Telephone calls and left voicemail messages with no response. Monday, November 19, 2018, I call Julie Caves and left voicemail message and sent her an email cc' Patricia and Rexana with all the information from the case. I then receive an email being sent to Patricia Villeneuve where I am cc'd and it states the following: Hi Trish, I believe this case went to Jordan's Principle. Can we have an update asap please? On Tuesday, November 20, 2018, I receive the following email from Patricia Villeneuve. I sent your request as soon as I received it yesterday, the case had been escalated to Jordan's Principle HQ for consideration. This case has been denied as the client is not registered and not eligible for registration in future. Up to date I never heard from James Robertson's replacement and Patricia was cc'd in the email from Mr. Robertson stating that he is leaving and that Rexana will be taking over. I contacted Patricia and she stated that there is a process, I asked for the process and then she says that it is not a definite process since Jordan's Principle is new. They needed to work with INAC to see if S was registered and if she would be eligible for status in the future.

[61] Dr. Harrington and Ms. Castro did not testify at the hearing and also were not called by any party to testify. Rather, this email exchange was filed as an exhibit as part of Dr. Blackstock's unchallenged solemnly affirmed affidavit. Therefore, the evidence is considered hearsay which is admissible before the Tribunal who, in turn will weigh the evidence before it. No one has challenged the authenticity of Dr. Harrington's letter. The Tribunal believes that there is no reason to question Dr. Harrington's letter especially that it is an official letter signed under her name and professional title. The Tribunal assessed this alongside the rest of the evidence.

[62] Ms. Castro's email provides specific details in regards to S.J.'s case which is also weighed alongside the rest of the evidence.

[63] On this point, the Caring Society's position is that Canada's refusal to apply Jordan's Principle to S.J.'s case based on her lack of (and ineligibility for) *Indian Act* status is rooted in a deeply colonial ideology and practice, consistent with the "old mindset" the Tribunal has repeatedly identified as problematic during the compliance phase of this complaint. S.J. does not have *Indian Act* status due to Canada's restrictions regarding the descendants of persons, like S.J.'s mother, who have status pursuant to subsection 6(2) of the *Indian Act*. The Caring Society submits that the reason that S.J. is not eligible for *Indian Act* status is due to her father, C.J., not having *Indian Act* status, such that the "second generation cut-off rule" applies. As such, the Caring Society argues that S.J. is facing discrimination on the basis of national or ethnic origin, contrary to the Canadian Human Rights Act (CHRA). She is also facing discrimination based on age, as children of less than 18 months who have one registered First Nations parent are entitled to benefits under the Non-Insured Health Benefits Program.

[64] In sum, Canada also provided an unchallenged sworn affidavit from Dr. Gideon, who is not a medical doctor, has a different view of S.J.'s medical need and characterizes the medical need and procedural history of her case as follows in her affidavit:

The procedure in question is part of a University research study. While I understand that S.J. was receiving the appropriate care by her attending physician, on Page 5 of the Information and Consent Form, it states that the study "cannot guarantee any health benefit to your child" arising from their participating in the study. Attached as Exhibit "E" is a copy of the Information and Consent Form outlining the purpose and focus of the study. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para.27).

On November 9, 2018, the Non-Insured Health Benefits Program (NIHB) forwarded S.J.'s request to the Ontario Jordan's Principle team as they were considering it as a denial since it did not meet the Program's criteria. S.J. was not registered and was over the age of 18 months (up to 18 months, NIHB will consider coverage of an infant under a parents' registration number). The request was for funding to cover transportation, meals and accommodations for S.J. and two escorts from Toronto to Edmonton to participate in a medical study related to the child's medical condition. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para.26).

The attending physician did not request that a scheduled Medivac was required as this was not a medically urgent situation. In speaking to the Director of Health Services at the Ontario Ministry of Health and Long-Term Care on November 23, 2018, I confirmed that the Province of Ontario does not cover these costs for any resident in the province. Attached as Exhibit "F" is a copy of the communications with the Ministry of Health and Long-Term Care. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 28).

Upon receipt of the request from NIHB on November 9, 2018, the Ontario Jordan's Principle team evaluated the request. In accordance with the JPSOP, they worked with the Office of Indian Registry to confirm if S.J. or her parents were registered or eligible for status registration. The child was also determined not be a resident ordinarily on reserve. Attached as Exhibit "G" is a copy of the communications with the Registrar. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 29).

In accordance with the JPSOP, in recommending a denial, the region sent the request that same day for the evaluation and determination by the Assistant Deputy Minister of Regional Operations at the First Nations and Inuit Health Branch. (see affidavit of Dr. Valerie Gideon, December 21, 2018, at para. 30).

On November 13, 2018 the Assistant Deputy Minister of Regional Operations denied the request as S.J. was living off reserve, was not recognized as being ordinarily resident on reserve, and was not be eligible for status registration. The denial was communicated immediately by headquarters to the Jordan's Principle regional team. (see affidavit of Dr. Valerie Gideon, December 21, 2018 at para. 31).

[65] Additionally, Dr. Valerie Gideon provided a copy of a letter titled filed as an exhibit to her affidavit: Participant Information and Consent Form-Parent of child; Title of Study: F-DOPA PET Scan an evaluation of biodistribution and safety. (see Affidavit of Dr. Valerie Gideon, dated December 21, 2018, at Exhibit E). Upon review of the letter, the Panel finds it is a generic letter used to provide explanation to parents of children with different health conditions who have accepted to undergo a scan also part of this study. In fact, the letter says as much:

FDOPA PET/CT Imaging Is a new type of scan which is beneficial to the clinical care of many different types of patients.

If you agree for your child to be in this study, you will first sign this consent form. Your child will then have a small amount of 18F-DOPA injected intravenously (ie. small plastic tube inserted into a vein). After resting quietly for a period of time {generally less than 1.5 hours} a PET/CT scan will be performed either of your child's brain alone, a part of your child's body, or your child's whole body (depending on the reason for the scan). In some cases, two PET scans are performed, one right after the other. The total scan time will range from 20 minutes to 90 minutes depending on the reason for the scan.

[66] Moving on to the issue of the study's health benefits, it is true, as mentioned by Dr. Gideon, that the letter mentions there is no guarantee of any health benefits from the study. The letter also mentions the results of the scan may improve the child's clinical care. It further explains that FJDOPA is a molecule which they can image, with PET scan. Moreover, the letter states that it is useful in managing many diseases.

[67] Having reviewed the letter alongside the evidence, the Panel finds the study is not the primary reason for the scan prescribed by S.J.'s physician. The primary reason is to assist in the clinical care of patients and is useful in managing diseases. The study is a mandatory requirement from Health Canada to ensure the molecule is safe.

[68] Before Dr. Gideon's sworn affidavit was prepared, she had an email exchange with other public servants involved in S.J.'s case attached to her affidavit (See affidavit of Dr. Valerie Gideon, dated December 21, 2018, at exhibit F). This email exchange frames the issue as an essential scan requested by a physician which scan is also part of a study. This supports the Caring's Society's position and corroborates the evidence it presented. Furthermore, the Panel places more weight on Canada's contemporaneous statements through its employees than Dr. Gideon's affidavit crafted in response to the Caring Society's motion:

We have a case that has come to our attention under the above-noted number for a non-status child.

The child is 1 1/2-year-old and lives in Toronto with her parents. She is followed by the Endocrine Department at the Hospital for Sick Children and has been referred by the Endocrine Division to attend an essential scan that is only available at the Edmonton Hospital on November 28th. A physician within the division identified the scan to be essential. The scan is called an 'F-DOPA'\* scan (F-DOPA PET/CT scan) and is a part of a research study. (see email from Gillis, Leila (HC/SC) dated November 22, 2018, to Buckland, Robin (HC/SC) Subject: FW: Case HC-ON-1965N).

[69] The fact that the child is not covered under Jordan's Principle for lack of status is the focus of the refusal:

Hi Melanie and Lynn, See below. Am introducing you electronically to Valerie Gideon, who is the federal Senior Assistant Deputy Minister for Indigenous Services Canada. Issue is an Ontario non-status Indian toddler who needs travel support to go to Edmonton for an endocrine scan. Feds can only provide full coverage if toddler is a status Indian. Is there a way we can support the travel? I am not totally familiar with the ins and outs of what we can cover. Can you please have someone communicate directly with Valerie? She is a valued colleague and very helpful to MOHLTC. (see email from Sharon Lee Smith (MOHLTC), dated November 22, 2018).

On Nov 22, 2018, Gideon, Valerie (HC/SC) wrote:

Hey just wondering if you would have any advice for me on possible options we wouldn't be aware of within provincial system. Toddler is non-status so we can't cover under Jordan's Principle or NIHB but would be great to assist them. The scan is covered. The child was referred by Sick Kids and appointment booked. They need travel support.

[70] After considering all the evidence on S.J.'s case, the Panel prefers the Caring Society's evidence on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para.67, [Bombardier]).

[71] In this case it appears that there is a gap in services for children over 18 months old under NIHB. The fact that the child was waiting for an essential scan since birth and was on a waiting list for all this time does not seem to have been factored in Canada's decision.

[72] This is of great concern. In this case you have a child who is waiting for an essential scan prescribed by a physician in order to assist in determining the appropriate treatment and operation for a rare and serious medical condition of an infant. The waiting list is so long that the child has been waiting for 18 months and no one seems to be considering this in the equation. The provincial waiting list is not a factor that the parents or Canada can control. The appropriate course of action could have been to extend NIHB coverage over 18 months to account for the long waiting period since, according to Dr. Gideon's own affidavit, the NIHB will consider coverage of an infant under a parent's registration number if the child is 18 months or less. S.J.'s mother has status but for the long waiting period, S.J. could have been considered under NIHB. In light of this gap in services and given the seriousness of the health issue and the delay impacts of missing the essential scan, Canada could have "erred on the side of caution" to cover the travel costs under Jordan's Principle.

[73] The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the *Indian Act* and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child as being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at paras. 365-382 and 391). For example, in the *Decision* at para. 366, the Panel found that a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[74] The Province in this case does not pay for the service. Under Jordan's Principle as ordered by this Tribunal and, accepted by the parties, the normative standard of care is not a necessary requirement to cover a service under Jordan's Principle.

[75] The case of S.J. further supports the need for an independent appeal process for Jordan's Principle where some of the decision makers are composed of health professionals who act in concert with other professionals and are independent from the government.

[76] Having said this, the Panel does not believe that making an order worded exactly as requested by the Caring Society will resolve cases such as S.J.'s case since using the term urgent/life threatening is not understood the same way by everyone as demonstrated above. This will be considered in the order.

[77] Also, there is no clear evidence as part of this motion indicating that at the present time, Canada is not addressing urgent needs of non-status off-reserve first nations children as Canada defines them. Dr. Gideon in her affidavit at paras 13-14 explained their approach:

On May 9, 2018, Mr. Sony Perron was cross-examined on his affidavits dated November 15 and December 15, 2017. During his examination, Mr. Perron confirmed that while the definition of a "First Nations child" was being considered, in urgent situations, Canada would act to provide assistance or a solution. (...) As the successor to Mr. Perron as Senior Assistant Deputy Minister, I have pursued the same course. The First Nations Service Coordination

organizations we fund and the regional Focal Points we employ, work diligently to support all families and children including in cases where eligibility under Jordan's Principle may be difficult to determine. I will explain their efforts further in this affidavit.

On June 19, 2018, Canada approved the expanded eligibility of Jordan's Principle to non-status Indigenous children ordinarily resident on reserve. This resolved any temporary uncertainty regarding the definition/eligibility of a "First Nations child" for the purposes of Jordan's Principle. The decision took into consideration the fact that most federal programs are residency based, not status based, and that Canada, as a matter of policy, already provides funding for services on reserve regardless of status. One key exception is the Non-Insured Health Benefits (NIHB) Program for which eligibility is based on registration under the *Indian Act*, or recognition by an Inuit Land Claim Organization. This program however is a supplemental, ameliorative program intended to address gaps in provincial and territorial health insurance coverage.

[78] The Panel reiterates that it is true that the child had been waiting for 18 months for the scan. Also, no medical evacuation was requested by her treating physician that suggested it was an imminent life or death situation, which could have justified doing the scan immediately. Under this narrow lens, the Panel does not find that Canada contradicted what Mr. Perron has said above.

[79] Canada, in using this lens to exercise its discretion, did not adequately consider the child's best interests. There was no evidence presented of any consideration of the health impacts on the child if she missed her essential scan after waiting 18 months and/or on delaying her treatment. S.J. needed to travel with her parents to Edmonton to undergo an essential scan so doctors could determine if only a certain area of her pancreas was affected or the entire pancreas was affected so the doctors could do the surgery. As mentioned above, she has a rare and serious condition that can lead to seizures or even death.

[80] The main reason for refusing access to Jordan's Principle was that S.J. had no Indian status because her mother is registered under 6(2) of the *Indian Act*. Therefore, even in the presence of a gap in services, she could not access those services under Jordan's Principle. The question of using *Indian Act* status or eligibility to *Indian Act* status to apply Jordan's Principle will be examined in a future hearing as mentioned above. The Panel understands the Caring Society's requested relief order to address situations such as S.J.'s until the definition of a "First Nation child" for Jordan's Principle purposes is determined.

[81] The problem is the possibility of different interpretations of what is urgent and life-threatening to a child as is exemplified in S.J.'s case. If due consideration is given to the requests made by the child's treating physician and/or professionals' assessments, this could assist in resolving the issue of different interpretations in a child's needs. This is also consistent with the amendment requests made by the parties including Canada for the inclusion of clinical case conferencing in Jordan's Principle definition as reproduced above (see also 2017 CHRT 35 at para.3).

[82] Also, Canada's argument that it would bring confusion in delivering services under Jordan's Principle to grant the Caring Society's interim relief request for urgent/life threatening cases is not valid when we review Dr. Gideon's affidavit at paras. 24-25. From Canada's affiant's own admission, few requests have been submitted for children who do not have nor are eligible for First Nations status registration. According to the JPSOP, when a request is received by a child who does not have status, the request is to be forwarded to headquarters for the evaluation and determination by PNIHB's Assistant Deputy Minister of Regional Operations. (see affidavit of Dr. Valerie Gideon, dated December 21, 2018, at para.24).

[83] Moreover, from July 1 to November 30, 2018, 17 requests for children without status but are ordinarily resident on reserve were submitted to headquarters for determination. Of the 17 requests, one was urgent and 16 were non-urgent. The expanded eligibility was applied to these requests and seven

were approved, nine were denied, and one was cancelled. The one urgent case approved for dental treatment was for a child without status or a birth certificate but demonstrated that they met the criteria for ordinarily resident on reserve) as described earlier in this affidavit.

[84] In light of what happened in S.J.'s case, we find that Canada's argument on the issue of defining what is an "urgent need/life threatening" to be valid and is considered in the order below.

[85] Furthermore, the Panel believes it would be in the best interests of non-status off-reserve children to make a temporary order with parameters that would apply until the "First Nation child" definition has been resolved, so as to avoid situations like the one that occurred in S.J.'s case. Especially that it may take a few months before the issue is resolved.

[86] Finally, the Panel notes that Canada's Registration requirements as per the *Indian Act* have a direct correlation with whom receives services under Jordan's Principle and therefore support the importance of a full hearing on this issue:

The recognition of Indigenous identity is a complex question. In August 2015, Bill S-3 amended the Indian Act by creating seven new registration categories, in response to the decision in *Descheneaux c. Canada* rendered by the Superior Court of Quebec in August 2015. These provisions came into force in December 2017 and appropriately, Canada **re-reviewed the requests submitted under Jordan's Principle for children who may have been impacted by the decision.** (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.15).

Additional amendments to the definition under the *Indian Act* will be developed subsequent to a period of consultation with First Nations. When part B of Bill S-3 becomes law, Jordan's Principle requests will be processed in compliance with whatever definition affecting eligibility emerges from that process (see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, at para.16).

#### **IV. Order**

[87] The Panel, in light of its findings and reasons, its approach to remedies and its previous orders in this case, above mentioned and, pursuant section 53 (2) a and b of the *CHRA*, orders that, pending the adjudication of the compliance with this Tribunal's orders and of Canada's definition of "First Nations child" for the purposes of implementing Jordan's Principle, and in order to ensure that the Tribunal's orders are effective, Canada shall provide First Nations children living off-reserve who have urgent and/or life-threatening needs, but do not have (and are not eligible for) *Indian Act* status, with the services required to meet those urgent and/or life-threatening service needs, pursuant to Jordan's Principle.

[88] This order will be informed by the following principles:

[89] This interim relief order applies to: 1. First Nations children without *Indian Act* status who live off-reserve but are recognized as members by their Nation, and 2. who have urgent and/or life-threatening needs. In evaluating urgent and/or life-threatening needs due consideration must be given to the seriousness of the child's condition and the evaluation of the child made by a physician, a health professional or other professionals involved in the child's assessment. Canada should ensure that the need to address gaps in services, the need to eliminate all forms of discrimination, the principle of substantive equality and human rights including Indigenous rights, the best interests of the child, the UNDRIP and the Convention on the Rights of the Child guide all decisions concerning First Nations children.

[90] The Panel is not deciding the issue of Jordan's Principle eligibility based on status versus non-status. This issue will be further explored at a full hearing on the merits of this issue.

[91] The Panel stresses the importance of the First Nations' self-determination and citizenship issues, and **this interim relief order or any other orders is not intended to override or prejudice First Nations' rights.**

[92] This interim relief order only applies until a full hearing on the issue of the definition of a "First Nation child" under Jordan's Principle and a final order is issued.

[93] The Panel invites all parties to provide any suggested wording changes to this order by **March 7, 2019.**

ORDER signed this 21 day of February, 2019.

Signed by

Sophie Marchildon

Panel Chairperson

Edward P. Lustig

Tribunal member

Ottawa, Ontario

February 21, 2019

### **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 21, 2019

**Date and Place of Hearing:** January 9, 2019

Ottawa, Ontario

#### **Appearances:**

David Taylor, Sarah Clarke and Barbara McIsaac , counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

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

Brian Smith , counsel for the Canadian Human Rights Commission

Robert Frater, Q.C., Jonathan Tarlton and Patricia MacPhee , counsel for the Respondent

Maggie Wente and Sinéad Dearman, counsel for the Chiefs of Ontario, Interested Party

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