Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

REPLY OF THE COMPLAINANT FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Robert W. Grant, Q.C.
Anne Levesque
Michael A. Sabet
David P. Taylor

Sébastien Grammond, Ad.E., **University of Ottawa**
Sarah Clarke, **Hensel Barristers**

JURISTES POWER | POWER LAW
Suite 1103 - 130 Albert Street
Ottawa, ON K1P 5G4
Tel.: (613) 702-5568 Fax: 1 (888) 404-2227

Counsel for the First Nations Child and Family Caring Society

TO: Terry McCormick / Ainslie Harvey AG
Jonathan Tarlton
Melissa Chan
Patricia McPhee
Justice Canada
Atlantic Regional office
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3
Phone : (902) 426-5959
Fax : (902) 426-8796

Counsel for the Respondent, the Attorney General of Canada

AND TO: Stuart Wuttke
David Nahwegahbow
Assembly of First Nations
473 Albert Street, 9th Floor
Ottawa, ON K1R 5B4
Phone: (613) 241-6789
Fax: (613) 241-5808

Counsel for the Complainant,
the Assembly of First Nations

AND TO: Daniel Poulin / Sarah Pentney
Philippe Dufresne / Samar Musallam
Canadian Human Rights Commission
Litigation Services Division
344 Slater Street, 8th Floor
Ottawa, ON K1A 1E1
Phone: (613) 947-6399
Fax: (613) 943-3089

Counsel for the Canadian Human Rights Commission

AND TO: Michael W. Sherry
Barrister & Solicitor
1203 Mississauga Road
Mississauga, ON L5H 2J1
Phone: (905) 278-4658
Fax: (905) 278-8522

Counsel for the Interested Party,
the Chiefs of Ontario

AND TO: Justin Safayeni
Stockwoods LLP Barristers

TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, Ontario M5K 1H1
Phone: (416) 593-3494
Fax: (416) 593-9345

Counsel for the Interested Party,
Amnesty International

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PART I - ARGUMENT

1. In its closing submissions, the Respondent offers an impoverished vision of the case, that does not accurately reflect the applicable law nor the evidence heard by the Tribunal, and that does not seriously answer the case put forward by the Commission and the Complainants. Sadly, in these submissions, the Respondent appears to be more concerned with the best interests of government than with the best interests of children.

2. With respect to the evidence, the Caring Society has noted that the Respondent's submissions contain a considerable number of inaccurate or incomplete statements and references to isolated pieces of evidence without proper contextualization. Particularly noteworthy are statements to the effect that certain policies were developed in consultation with provinces and First Nations, while the Respondent's witnesses admitted that they were not aware of such consultation;[1] a statement to the effect that the full EPFA envelope is adjusted yearly, while the evidence is to the effect that salaries are not adjusted;[2] and statements to the effect that the funding formulae under EPFA and Directive 20-1 are entirely different, while the documentary evidence shows that they are linked in many respects.[3] Given the number of such instances, the Caring Society believes it is more helpful to set out its position in tabular form, in the Appendix to this Reply. This Appendix is not meant to be exhaustive. The Caring Society's position with respect to the law, the burden of proof, the evidence and the remedies is set out below.

APPLICABLE LAW

3. The Respondent argues that the Tribunal should disregard principles of Aboriginal law as they would be a body of rules entirely separate from the *Canadian Human Rights Act* ("CHRA"), which alone the Tribunal must apply. However, as noted in the Caring Society's submissions, the honour of the Crown in its dealings with First Nations is an underlying constitutional principle.[4] Like other such principles, the honour of the Crown impregnates the whole legal system[5] and it

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1 See Appendix, comments pertaining to paras 37 and 96.

2 See Appendix, comments pertaining to para 39.

3 See Appendix, comments pertaining to paras 42 and 155.

4 Caring Society's closing submissions, paras 30-41.

5 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 54.

provides useful guidelines for the interpretation of legislation that must be applied to First Nations. In *Haida Nation*, the Supreme Court highlighted the fact that "The honour of the Crown is always at stake in its dealings with Aboriginal peoples."[6] This means that no area of the law is immune from the need to uphold the honour of the Crown. Hence, it is an error to view the CHRA and the basic principles of Aboriginal law as isolated silos. Moreover, the FNCFS program is specifically directed towards the First Nations and its design and application certainly involve the honour of the Crown.

4. The Respondent states that under the CHRA, "interjurisdictional comparisons" are not allowed. This position is extremely difficult to reconcile with the honour of the Crown. In effect, the Respondent is saying that First Nations can never use the CHRA to challenge discrimination regarding the level of services provided to them by the federal government. In other words, the federal government could consciously provide lesser services to a clearly vulnerable and disadvantaged group, and the Commission and Tribunal would be powerless to address that situation. First Nations would find themselves in a situation like the plaintiffs in *Vriend*:[7] a vulnerable group singled out and practically excluded from the ambit of antidiscrimination law. As noted by Mactavish J., this would be an unreasonable outcome and would be difficult to reconcile with the intention of Parliament in repealing section 67 of the CHRA.[8] No outcome could be more inimical to reconciliation between the Crown and the First Nations, which, it must be remembered, is the cardinal goal of Aboriginal law and the raison d'être of the honour of the Crown. The Caring Society has set out clearly why the constitutional and legislative context allows for interjurisdictional comparisons.[9] The Respondent provides no principled answer to those submissions and merely refers to the practical difficulty of comparing across jurisdictions.[10]

5. A variation on this theme is the Respondent's insistence that comparisons be made only with services offered to the same clientele by the same service provider. In her reasons, Mactavish

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6 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 16 [emphasis added].

7 *Vriend v Alberta*, [1998] 1 SCR 493.

8 *Canadian (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 (CanLII) at paras 332-347 [*MacTavish J's Reasons*].

9 Caring Society's closing submissions, paras 54-85.

10 Respondent's closing submissions, para 111.

J. demonstrates that there is no such requirement in human rights law.[11] Again, in a context where Canada's constitutional structure has the effect of singling out a group identified by "race" or national or ethnic origin and ascribing responsibility for the provision of public services to that group, and to that group only, to the federal government, such a requirement would effectively deprive First Nations of the benefit of the CHRA. Indeed, the Respondent itself, in designing the FNCFS program, has identified the relevant comparator as being the services offered to non-Aboriginal Canadians by provincial authorities.

6. Moreover, the Respondent gives unwarranted interpretations to the CHRA, especially with respect to the burden of proof, which would have the effect of setting impossible burdens for claimants. It bears recalling that the burden of proof under the CHRA is one of *prima facie* discrimination. There is no requirement of specific forms of evidence in order to discharge that burden. In substance, the Respondent asks for the dismissal of the complaint simply because the Commission and Complainants chose to rely on certain categories of facts and not on others. There is no legal basis for such arguments. This is especially so in a case of systemic discrimination: it would make such cases impossible to prove if specific evidentiary requirements were to be imposed.

7. Nowhere in the CHRA is there any requirement that the complainant prove the precise extent of the consequences of the discrimination alleged. In other words, there is no requirement of global quantitative comparison. How could it be otherwise, given that there is no need to identify any comparator group?[12] Yet, the Respondent insists that the complaint must be dismissed for lack of global figures concerning the expenses of the FNCFS program and those of similar provincial programs.[13] But this is irrelevant. The test, as recently exemplified in *Moore*,[14] is whether a person is differentiated adversely ("*défavorisée*") because of membership in a group delineated by a prohibited ground. The real issue is whether membership in such a group is a

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11 *MacTavish J's Reasons* supra note 5 at paras 255-266.

12 *Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 (CanLII) at para 16 [*FNCFCSC – FCA*].

13 Respondent's closing submissions, paras 142-146.

14 *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360.

factor explaining that an individual receives lesser services. There are many ways of proving this. *Moore* was decided without resort to quantitative comparisons.

8. It is a well-established principle that a finding of discrimination does not depend on proof of intention. Hence, it is not necessary to show that the Respondent has based decisions on stereotypes or prejudice against the protected group.[15] The only requirement is that the adverse differentiation results from membership in the protected group.

9. In applying the CHRA, the Tribunal is not concerned with the Respondent's internal organization or policies. Discrimination must be assessed from the perspective of First Nations children receiving the service. It is no excuse to say that changes to the FNCFS program must be approved by Cabinet, that its budget must be approved by Treasury Board, and so forth.[16] There is no exemption in the CHRA for discrimination that results from programs approved by Cabinet. Nothing in the CHRA supports the Respondent's suggestion that such programs ought to be shielded from this quasi-constitutional legislation. First Nations children should not be concerned with the bureaucratic internal steps that the Respondent must take in order to change its programs. No defence of undue hardship is raised by the Respondent in this case.

10. The Respondent is attempting to portray its role as that of a "mere funder" that does not offer any service directly to First Nations children.[17] According to that view, child and family services would be provided by FNCFS agencies or provinces. This view of the ambit of the CHRA is clearly incorrect. The fact that the Respondent is relying on third parties to implement its program does not shield it from review under the CHRA.[18] Moreover, the evidence establishes clearly that the Respondent is much more than a mere funder, and that the terms and conditions of the FNCFS program have the effect of constraining the services actually offered to First Nations children.[19]

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15 Contrary to Respondent's closing submissions, para 128. See, for instance, *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 325.

16 See e.g. Respondent's closing submissions, paras 11, 95.

17 Respondent's closing submissions, paras 21, 135-138.

18 *Arnold v Canada (Human Rights Commission)*, [1997] 1 FC 582 (FC).

19 Caring Society's closing submissions, paras 123-148.

11. For example, *Ardoch Algonquin First Nation v Canada*[20] dealt with a federal skills development program for the benefit of Aboriginal peoples. The program was delivered through agreements with recognized representative Aboriginal organizations and, with respect to non-status and urban people, through contracted organizations. Although the service was ultimately offered to all Aboriginal individuals, it was held that the way in which the federal government chose the service delivery organization could lead to discrimination against Aboriginal *individuals*: urban and non-status Aboriginal persons were deprived of the benefit of self-government which was afforded to on-reserve First Nations, Métis and Inuit. Thus, agreements between the federal government and service providers may very well produce discrimination against the "clients" of the service providers, in spite of the doctrine of privity of contract invoked by the Respondent.[21] This is precisely what took place in the present case.

12. In that connection, the suggestion to the effect that if there is any discrimination it results from the actions of the provinces[22] is ironic. Such an allegation would likely be met by the defence that the province is simply applying the federal funding policy. This would result in both the provinces and the federal government denying that they are responsible under their respective human rights regimes, paralleling the jurisdictional disputes over responsibility for services that Jordan's Principle is meant to address. In this regard, it is incorrect to suggest that child and family services for First Nations is primarily an area of provincial jurisdiction.[23] For the reasons stated by the Caring Society, child welfare for First Nations members is a federal jurisdiction.[24] In a situation where both levels of government act cooperatively, each government has distinct human rights obligations and, in turn, must be responsible for its own actions. In this case, the discriminatory consequences of the design of the FNCFS program must be fully borne by the Respondent.

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20 2003 FCA 473, [2004] 2 FCR 108 (CA).

21 Respondent's closing submissions, para 134.

22 Respondent's closing submissions, paras 127, 135.

23 Respondent's closing submissions, para 127.

24 Caring Society's closing submissions, paras 63-74.

13. The Respondent suggests that First Nations children off-reserve may also suffer from discrimination or disadvantage.[25] This is irrelevant. It is well-established that discrimination occurs even though the complaint targets only part of a disadvantaged group.[26] Again, the only question is whether First Nations children are adversely affected by the application of the FNCFS program; the complaint does not pertain to services offered by provincial agencies to off-reserve First Nation children.

14. To the extent that the assessment of the complaint requires a comparison, such comparison should be drawn with services afforded to non-Aboriginal Canadians outside reserves in general. The group victim of discrimination in this case is mainly defined by its "race" or national or ethnic origin: membership in a First Nation. If one seeks a comparator group, it is that characteristic that should be reversed. Thus, comparisons, where appropriate, should be drawn with non-Aboriginal Canadians.

15. With respect to those aspects of the complaint that do not call for a comparison, for example the lack of culturally appropriate services, it is only confusing to draw the attention of the Tribunal to the situation of off-reserve First Nations children. The fact that such children also suffer from discrimination does not in any way negate the discrimination that is the object of the complaint.

FACTS AND EVIDENCE

16. In a nutshell, the Caring Society alleges that the FNCFS program breaches section 5 of the CHRA because:

(a) The financing formulae used by the Respondent adversely affect First Nations children by providing FNCFS Agencies with less funding than agencies serving non-First Nations children and by using a funding methodology which induces agencies to remove children from their families;

(b) The FNCFS program adversely affects First Nations children by failing to take into consideration their special needs arising from the history of assimilationist policies, most importantly the residential schools, that were applied to First Nations by the Respondent; those

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[25] Respondent's closing submissions, paras 5, 182.

[26] *Brooks v Canada Safeway Ltd.*, [1989] 1 SCR 1219; Caring Society's closing submissions, paras 178-180.

needs are, sadly, a defining characteristic of a group delineated by the grounds of prohibited discrimination and must be taken into account when designing programs aimed at First Nations children in a way that realizes substantive equality;

(c) The Respondent adversely affects First Nations children by failing to make serious efforts to provide services that are adapted to their culture and by prescribing conditions of the FNCFS program that hamper any such adaptation;

(d) The Respondent adversely affects First Nations children by failing to provide an effective mechanism to solve jurisdictional conflicts that negatively affect the delivery of the FNCFS program (i.e., Jordan's Principle).

17. In many cases, the lack of funding will result in the actual denial of a particular service to a First Nations child, thus engaging section 5(*a*) of the CHRA in addition to section 5(*b*).

18. Section 50(3)(*c*) of the Act specifically states that the rules of evidence do not strictly apply. The Tribunal may accept any reliable evidence that tends to prove the presence of *prima facie* discrimination. Where the complaint pertains to systemic discrimination, the Tribunal should be sensitive to the inherent impossibility of proving every individual instance of discrimination. It should be content with evidence that shows patterns of conduct that adversely affect members of a protected group. Moreover, where other fact-finding bodies have scrutinized the conduct that is the object of a complaint, the Tribunal may give considerable weight to the conclusions of those bodies, whether or not their reports could be put in evidence in a court of law. In cases where the government possesses all the relevant information, the expertise and the litigation resources, the Tribunal should not place unbearable evidentiary requirements on the shoulders of complainants. In any event, the Commission and the Complainants have presented ample evidence of adverse treatment, including the testimony of witnesses employed by provincial governments.

19. As mentioned above, there is no specific requirement as to the nature of the evidence needed to substantiate a complaint of discrimination.[27] In spite of this, the Respondent submits that the complaint should be dismissed for the sole reason that there is no evidence regarding the provincial child welfare budgets compared to the budget of the FNCFS program nor any evidence from provincial witnesses. This is not true: the Respondent's own internal reports have been filed

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[27] See eg *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 (CanLII) at para 27.

in evidence and they provide detailed evidence concerning the underfunding of FNCFS in several provinces.[28] The NPR and *Wen:de* reports contain detailed data and analysis and the Respondent declined to file expert evidence to contradict the findings of those reports.[29] In its submissions, the Respondent asserts that it "requests all child welfare costing variables from the province."[30] It is difficult to believe that the Respondent is unable to compare its program with provincial programs or that it does not know how provincial programs are funded. Moreover, provincial witnesses have been heard[31] and several letters outlining the position of high-ranking provincial officials, including Ministers, have been filed in evidence.

20. But even if such evidence was actually lacking, this would not negate the complaint. The Commission and Complainants could legitimately identify other markers of systemic discrimination, including:[32]

(a) Several components of the Respondent's policies which have the effect of denying funding to certain activities or services that are funded provincially (e.g., corporate legal costs; band representatives);

(b) Failing to provide adjustments to reflect inflation, true travel costs, building costs, etc., which results in First Nations agencies having less resources to offer the same service;

(c) Employing a funding formula that creates incentives for the removal of First Nation children from their families, thus reinforcing the dislocation of First Nation communities – and this is true irrespective of any comparison;

(d) Providing provincial governments which directly provide child welfare services to certain First Nations with far greater funding than what is offered to FNCFS agencies, thus incentivizing the provision of non-culturally-specific services.

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28 Caring Society's closing submissions, paras 227, 231.

29 CBD, Tabs 3-6.

30 Respondent's closing submissions, para 35.

31 Ms Judith Mildred Levi; Mr Sylvain Plouffe.

32 Commission's closing submissions, paras 410-612; Caring Society's closing submissions, paras 200-250.

21. These facts are enough to prove *prima facie* systemic discrimination. The Complainants were not required to prove that these facts had further, more global or general consequences. Specifically, the Complainants were not required to prove:

(a) That the FNCFS program increased the over-representation of First Nations children in the child welfare system;[33]

(b) That the FNCFS program worsened the disadvantaged position of First Nations children in Canadian society generally;

(c) The precise amount by which the overall budget allocated to the FNCFS program is less than what would be expended by the provinces to serve on-reserve First Nations children.

22. If the Respondent was of the view that a discussion of those issues could somehow negate the findings of discrimination flowing from the facts mentioned earlier, it was open to the Respondent to bring evidence to that effect. It did not do so. The Respondent cannot now say that a variety of socio-economic factors outside its control may affect First Nations child welfare outcomes,[34] while at the same time taking great pains to outline the whole suite of programs and services that it deploys precisely to address those socio-economic factors.[35] More specifically, the Respondent could have brought expert evidence offering a global comparison between the costs of the FNCFS program and the costs of provincial programs. It chose not to do so. It is too late for the Respondent to be heard to complain about the lack of such evidence. Moreover, an adverse inference may be drawn from the fact that the Respondent did not bring any evidence to contradict the concurrent findings of the NPR, *Wen:de*, the Auditor General and the United Nations Committee on the Rights of the Child.

23. Most importantly, the Respondent's insistence that the complaint be dismissed for the sole reason that there is no comparative evidence is impossible to reconcile with the decision of the Federal Court of Appeal in earlier proceedings in this case. The Court said: "an interpretation

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33 Respondent's closing submissions, paras 182-184. Note, however, that the Respondent's own documents admit this link, stating for instance that "[a] fundamental change in the funding approach of First Nations Child and Family Service Agencies to child welfare is required in order to reverse the growth rate of children coming into care and in order for the agencies to meet their mandated responsibilities." INAC, *Fact Sheet: First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).

34 Respondent's closing submissions, paras 183-184.

35 Respondent's closing submissions, paras 70-89.

requiring the complainants to point to a similarly situated comparator group in order to succeed [is] outside the range of acceptability and defensibility and, thus, [is] unreasonable."[36] The Tribunal must at least engage with the non-comparative aspects of the claim; and there is nothing in the Court of Appeal's reasons that lends credence to the Respondent's theory to the effect that interjurisdictional comparisons are illegitimate.

24. With respect to the aspects of the complaint that are not comparative, the alleged lack of evidence with respect to services offered by the provinces is irrelevant. Substantive equality requires that services be responsive to the particular needs and circumstances of a group identified by a prohibited ground of distinction. For example, in cases involving persons with disabilities (such as *Eldridge*[37] or *Moore*), discrimination results from the fact that those persons were treated as if they had no disability: their distinctiveness was ignored. These cases did not depend on proof of how non-disabled persons were treated. Likewise, in this case, the lack of culturally appropriate services, the lack of taking into consideration of the historic trauma associated with residential schools and the lack of proper implementation of Jordan's principle are breaches of substantive equality that do not depend on any comparison.

25. In fact, the Respondent does not directly answer the Caring Society's submissions concerning the non-comparative aspects of the complaint. Nothing in the Respondent's submissions negates the fact that the FNCFS program does nothing to address the specific needs of First Nations children, in particular with respect to specific historical disadvantage resulting from the residential schools experience and with respect to specific cultural needs.

26. The Respondent repeatedly asserts that it has no expertise concerning what services might be culturally appropriate for First Nations children and that FNCFS agencies are not prevented from adapting their services to First Nations cultures.[38] However, these simplistic assertions overlook two basic realities.

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36 *FNCFCSC – FCA* supra note 9 at para 16.

37 *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

38 Respondent's closing submissions, paras 21, 27, 135.

27. First, the development and provision of culturally appropriate services costs money. In most cases, a lack of federal funding means that no service will be provided. The theoretical possibility that a FNCFS agency could implement culturally sensitive programs is meaningless if there is no funding. For example, recent treaties grant several Yukon First Nations the power to "legislate" with respect to child welfare;[39] but this remains a hollow promise if funding does not follow, and as a matter of fact there are no FNCFS agencies in the Yukon because of Directive 20-1. To compare with the *Eldridge* case again, this would be tantamount to saying, in defence to the claim, that deaf persons are not prevented from obtaining interpretation services on their own.

28. Second, the Respondent requires FNCFS agencies to comply with provincial legislation and standards that are often not culturally sensitive. The requirement to follow such provincial norms is, in and of itself, a discriminatory act inasmuch as it prevents adaptations that are needed to achieve substantive equality.

29. More generally, if the Respondent lacks the cultural knowledge required to ensure the adaptation of the FNCFS program, it must either acquire that knowledge, or ensure that such knowledge is integrated in the provision of the services through other means. By way of comparison, if an employer is faced with a claim of religious discrimination by adverse effect and that some accommodation is required, the employer cannot simply reply that it has "no role in determining what is [...] appropriate"[40] given the requirements of the religion in question. It must, possibly through discussions with the complainant, acquire such knowledge or make such a determination.

30. The Respondent likens the parts of the complaint which do not rely on comparison to a broad-ranging inquiry that merely aims at obtaining "better" services for First Nations children.[41] This would be a pure policy issue that is beyond the jurisdiction of the Tribunal.[42] Again, this is a fundamental mischaracterization of the complaint. What is at stake is the lack of the adaptations required to achieve substantive equality. The plaintiffs in *Eldridge* and *Moore* were not merely

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39 *Yukon First Nations Self-Government Act*, SC 1994, c 35, s 11(1)(*b*) and sch III, part II, ss 4, 6 and 7.

40 Respondent's closing submissions, para 27.

41 Respondent's closing submissions, para 176.

42 Respondent's closing submissions, paras 177-178.

asking for "better" services – they were challenging the lack or termination of services needed by reason of their particular condition. So are the Complainants in this case: they are challenging the absence of culturally appropriate services, the absence of services addressing the historic disadvantage caused by residential schools and the lack of proper implementation of Jordan's Principle.

31. An admission is usually considered to be the best form of evidence. Before this Tribunal, this is so irrespective of the technical rules of evidence that may relate to admissions. In this regard, it is almost unbelievable that the Respondent is asking this Tribunal to simply disregard the Respondent's numerous internal documents, and even statements made to the public, indicating that the FNCFS program does not offer reasonably comparable services.[43] These admissions include:

(a) The Respondent stating on its own website that FNCFS agencies are "unable to deliver the full continuum of services offered by the provinces and territories to other Canadians";[44]

(b) Internal assessments of FNCFS spending in several provinces, performed in 2010 and 2012, which conclude that there is underfunding of services; for example, with respect to Quebec, "comparable prevention services have not been accessible to on-reserve clients due to funding levels and the current funding mechanism";[45]

(c) A series of 2012 power point presentations that conclude, among other things, that FNCFS would be much more costly if the services were provided by the provinces according to provincial standards.[46]

32. The Respondent now asserts that these documents represent only the "personal views of employees."[47] However, the Respondent failed to bring any evidence to the effect that those "views" were rejected or that there were any inaccuracies or errors in the facts contained in those documents.

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43 Respondent's closing submissions, para 164.

44 Caring Society's closing submissions, para 226.

45 Caring Society's closing submissions, paras 227, 231.

46 Caring Society's closing submissions, paras 228-230.

47 Respondent's closing submissions, para 164.

33. The same applies to the Auditor General reports as well as to reports jointly commissioned by the Respondent, such as the National Policy Review and *Wen:de*. It is entirely unreasonable to suggest that "[t]hese reports are not probative of the facts in issue and do not help the Tribunal,"[48] when the Respondent has specifically accepted the finding of those reports.[49] The Respondent's approval of those reports transforms them into admissions. Indeed, the Respondent has never disputed those findings until the present proceedings. The Tribunal simply cannot turn a blind eye to the tide of evidence, prepared by federal bodies, that attests to the discriminatory effects of the FNCFS program. It should also be noted that the Auditor General or her employees are not competent nor compellable witnesses.[50]

34. The Caring Society notices that the Respondent describes at length a number of programs, other than the FNCFS program, that are intended to benefit members of First Nations. The Respondent, however, does not make clear how the existence of such programs has any bearing on the questions that the Tribunal must determine, either by negating a finding of discrimination or establishing a defence to discrimination. Indeed, if the FNCFS program is delivered in a discriminatory manner, it is difficult to understand how the existence of other programs would affect such a finding. The Respondent has brought no evidence showing that those other programs are designed to mitigate the discriminatory effects of the FNCFS program.

35. Moreover, if the Tribunal wishes to take into consideration the existence of those other programs, it should be made aware that those programs are also funded on a basis that does not allow the Respondent to provide First Nations members with services that are comparable to those received by non-Aboriginal Canadians. The record in this case contains evidence describing such underfunding. A 2013 presentation created by the Respondent noted that "Federal funding for on reserve programs and services has not kept pace with federal transfers to provinces and

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48 Respondent's closing submissions, para 166.

49 See for instance Minister Nault lauding the quality of the NPR report (Hon. Robert D Nault, *Letter Regarding the Final NPR Report* (CBD, Vol 6, Tab 76, p 1)); Respondent agreeing with all recommendations in the Auditor General's 2008 Report (Office of the Auditor General, *Report of the Auditor General to the House of Commons – Chapter 4 – First Nations Child and Family Services Program – Indian and Northern Affairs Canada*, May 2008 (CBD, Vol 3, Tab 11, p 6)); Respondent agreeing with the recommendations in the Auditor General's 2011 Report (Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons – Chapter 4, Programs for First Nations on Reserves*, 2011 (CBD, Vol 5, Tab 53, p 8) (Respondent agreeing with Auditor General's 2011 findings).

50 *Auditor General Act*, RSC 1985, c A-17, s 18.1.

territories for similar programs and services."[51] In 2012, the Respondent similarly noted an "[i]nability to keep up with provincial investments creating a growing gap in investments on versus off-reserve, and consequent quasi-judicial challenges."[52] With respect to First Nations education, the Respondent noted, in a recent internal document, that the outcome gap between Aboriginal and non-Aboriginal students was due, among other factors, to "the lack of stable, predictable and adequate funding."[53] Moreover, to the extent that the Respondent wishes the Tribunal to consider these programs as relevant to this complaint, service gaps or recent reductions in those programs are also relevant.[54] Finally, the Tribunal should also be mindful that certain of those programs are the subject of distinct complaints before the Canadian Human Rights Commission or Tribunal.

JORDAN'S PRINCIPLE

36. To assert that Jordan's Principle would be outside the reach of the complaint because it is "not a child welfare concept"[55] is a spectacular mischaracterization of what is at stake. Likewise, the assertion that Jordan's Principle "sits on top"[56] of existing programs does not assist in the resolution of the case. People who "sit on top" are not somehow exempt from the application of the CHRA.

37. The reality is that jurisdictional conflicts do occur between FNCFS and other federal or provincial programs, and that they adversely affect the child welfare services provided to First Nations children. The Complainants and the Commission have provided many examples which

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51 AANDC, *Cost Drivers and Pressures – the Case for New Escalators*, June 2013 (CBD, Vol 15, Tab 413, p 4).

52 AANDC, *Sustainability of Funding: Options for the Future*, August 2012 (CBD, Vol 13, Tab 291, p 7). See also the 2006 email, disclosed by the Respondent, found at CBD, Vol 15, Tab 477, in which John Dance notes: "Provincial standards not matched. Within the social development programs, there are several areas where INAC funding does not match provincial standards….The cost of matching provincial standards would be at least $200M annually."

53 AANDC, *Sustainability of Programming*, January 2013 (CBD, Vol 15, Tab 414, p 10).

54 Some examples may be found in the evidence before the Tribunal in this case: the termination of the Early Childhood Prevention Intervention Program (ECIP) effective June 30, 2014 (CBD, Vol 15, Tab 408); a reduction in the National Child Benefit Reinvestment Program in 2014 (CBD, Vol 15, Tabs 482 and 483); the identification of numerous service gaps in Health Canada's programs, including the fact that dentists refuse to deal with Health Canada due to payment delays (CBD, Vol 6, Tab 78; CBD, Vol 13, Tab 302, p 12-14).

55 Respondent's closing submissions, paras 216, 222.

56 Respondent's closing submissions, paras 97, 217.

indicate that First Nations children are being denied services or are experiencing delays in receiving services regularly available off-reserve. The Respondent specifically admits that "Jordan's Principle may involve a child in care."[57] Therefore, inasmuch as Jordan's Principle does apply to the FNCFS program (as well as to other programs), it clearly falls within the scope of the complaint.

38. As mentioned in the Caring Society's submissions, Jordan's Principle is an application of the right to substantive equality, in a context where the federal and provincial governments are unable to agree as to the precise boundaries of their respective jurisdictions concerning First Nations.[58] Persons identified by their "race" or national or ethnic origin (namely, First Nations) are faced with jurisdictional conflicts that non-Aboriginal persons do not encounter. That is adverse differentiation on the basis of a prohibited ground of distinction.

39. Because the narrow definition and lack of implementation of Jordan's Principle affect the way in which FNCFS are actually delivered, it matters little that Jordan's Principle is described by the Respondent as "not a program,"[59] that it does not "change the authorities of the implicated programs,"[60] or that a change to the definition of Jordan's Principle would require Cabinet approval.[61] These are all limitations internal to the Respondent and, for the reasons mentioned above, they are irrelevant to the analysis of a complaint under the CHRA. What is important is how the services are delivered from the perspective of the children receiving them.

40. What is relevant to section 5 of the CHRA is that jurisdictional conflicts occur because First Nations fall under federal jurisdiction and / or because the federal government has distributed its responsibilities with respect to First Nations among various departments, leading to conflicts that do not affect non-Aboriginal people. Thus, First Nations children are adversely affected because of their race or national or ethnic origin.

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57 Respondent's closing submissions, para 98.

58 Caring Society's closing submissions, paras 86-89, 450-456.

59 Respondent's closing submissions, paras 97, 217.

60 Respondent's closing submissions, paras 98, 218.

61 Respondent's closing submissions, paras 93, 95.

41. The Tribunal should be made aware of the fact that the Respondent withdrew its appeal of the decision of the Federal Court in *Pictou Landing*, after the Caring Society and Amnesty International were granted leave to intervene.[62] To assert that in *Pictou Landing*, "the child welfare system was not at issue" is to take a narrow vision of the case. The Federal Court expressly considered the placement of the child as one option[63] and Stratas J.A., when dealing with the motion to intervene, characterized the case as dealing with "the responsibility for the welfare of aboriginal children."[64]

REMEDIES

42. A constant theme in the Respondent's submissions is the idea that the complaint involves issues described as relating to "policy" and that the Tribunal would be powerless to consider such issues. This is particularly evident with respect to remedies. The Respondent opens its submissions on the topic with the statement, "The Complainants cannot dictate policy and funding decisions."[65]

43. The Caring Society recognizes the role of the government in defining policies. This is why it proposes a collaborative remedy that involves all interested parties and that is aimed at better identifying and removing the discriminatory aspects of the FNCFS. The Caring Society is not seeking to "dictate" anything.

44. However, there is no "policy defence" in the CHRA. The CHRA empowers the Tribunal to issue orders to "cease the discriminatory practice." Where that practice flows from a "policy," it is inevitable that policies will be affected, and even prescribed to a certain extent, by the remedies ordered by the Tribunal.

45. The remedies sought by the Caring Society are admittedly complex and novel. The case itself is complex and novel. In crafting a remedy, the Tribunal should adopt a "generous and expansive interpretive approach" that ensures the effectiveness of remedies, particularly in cases

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62 *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21.

63 *Pictou Landing First Nation v Canada (Attorney General)*, 2013 FC 342 at para 110.

64 *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 at para 28.

65 Respondent's closing submissions, heading before para 229; see also para 233.

of government inaction in the implementation of human rights.[66] The Tribunal took such a principled and pragmatic step in *Action travail des femmes*, and was upheld by the Supreme Court. The technical objections raised by the Respondent should not prevail.

46. In the end, this is a case where the wise words of Lord Denning bear repetition:

> What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.[67]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 14, 2014

FOR Robert W. Grant / Sébastien Grammond
Anne Levesque / Sarah Clarke
Michael A. Sabet / David Taylor

Counsel, First Nations Child and Family Caring Society of Canada

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66 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at paras 24, 25 and 39.

67 *Packer v Packer*, [1954] P 15 at 22, (1953) 2 All ER 127 at 129.

PART II - LIST OF AUTHORITIES

Legislation

Auditor General Act, RSC 1985, c A-17.

Yukon First Nations Self-Government Act, SC 1994, c 35.

Jurisprudence

Ardoch Algonquin First Nation v Canada, 2003 FCA 473, [2004] 2 FCR 108 (CA).

Arnold v Canada (Human Rights Commission), [1997] 1 FC 582 (FC).

Brooks v Canada Safeway Ltd., [1989] 1 SCR 1219.

Canada (Attorney General) v Canadian Human Rights Commission, 2013 FCA 75 (CanLII).

Canada (Attorney General) v Pictou Landing First Nation, 2014 FCA 21.

Canadian Human Rights Commission v Canada (Attorney General), 2012 FC 445.

Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 SCR 3.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624.

Haida Nation v British Columbia (Minister of Forests), [2004] 3 SCR 511.

Moore v British Columbia (Education), 2012 SCC 61, [2012] 3 SCR 360.

Morris v. Canada (Canadian Armed Forces), 2005 FCA 154 (CanLII).

Packer v Packer, [1954] P 15 at 22, (1953) 2 All ER 127.

Pictou Landing First Nation v Canada (Attorney General), 2013 FC 342.

Quebec (Attorney General) v A, 2013 SCC 5, [2013] 1 SCR 61.

Reference re Secession of Quebec, [1998] 2 SCR 217.

Vriend v Alberta, [1998] 1 SCR 493.

PART III - APPENDIX: CLARIFICATION OF FACTUAL STATEMENTS IN RESPONDENT'S FINAL WRITTEN SUBMISSIONS

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
3	The statement that "[n]o provincial or territorial witnesses were called by the Complainants to substantiate their allegation that the federal government funds child welfare services on reserve in a discriminatory manner as compared to the rest of the country" is incorrect.	Ms. Levi is employed by the Department of Social Development, Child and Youth Services, Province of New Brunswick (CBD, Vol 9, Tab 142, p 1). Mr. Plouffe is the Director General of Centre Jeunesse de l'Abitibi-Témiscamingue (Testimony of Sylvain Plouffe, Transcript vol 37, p 4).
7	The statement that "[t]he only province that entered into such an agreement was the province of Ontario" requires clarification.	The Province of British Columbia has been receiving reimbursement of maintenance costs from the Respondent since 1962 (CBD, Vol 14, Tab 366, p 1).
12	The statement that "[f]unding for child welfare services on-reserve is provided through the First Nations Child and Family Program ("the FNCFS Program"). The purpose of the program is to fund FNCFS Agencies and programs that deliver child welfare services to First Nation children and families on reserve" requires clarification.	The statements in the Respondent's written submissions are taken from Ms. D'Amico's testimony. Ms. D'Amico testified (Testimony of Barbara D'Amico, Transcript vol 51, p 3) that she contributed to the child and family service portions of the 2012 National Social Program Manual that reads 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/territory of residence and in a manner that is

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities" (CBD, Vol 13, Tab 272, p 30). See also clarification to para 21.
22	The statement that "[t]he Respondent is not involved with and does not control decisions on what programs or services are offered by the FNCFS Agencies for child welfare on reserve" requires clarification.	According to the Respondent's program authorities: "[s]tudies by the First Nations Child and Family Caring Society of Canada in 2005 and the National Policy Review in 2000 concluded that the current funding methodology and program authorities tend to skew the provision of services toward what is usually considered a last resort measure, namely, placing children in care outside the parental home…DIAND is proposing new and updated authorities, which will enable delivery of services comparable to those of the P/T's to ensure that nationally, children and families on reserve have access to services comparable to those provided off-reserve to other children" (CBD, Vol 13, Tab 324, p 2 of pdf). Ms. Murphy testified that AANDC remains engaged in discussions with First Nations child and family service agencies in British Columbia even though there is no new funding for EPFA: "MR. CHAMP: Right. 7 But as you say, Ms Murphy, it's 8 not just about funding --

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		9 MS MURPHY: That's right." (Testimony of Sheilagh Murphy, Transcript vol 55, p 250)
23	The statement that "[i]n 2012/2013, the Respondent provided 627 million in funding to the FNCFCS Program" is incorrect.	The Respondent relies on R-13, Tab 18, p 12 to support this statement. This chart sets out AANDC FNCFS expenditures (in thousands of dollars) by region for fiscal years 2006/2007 to 2011/2012. It also notes planned expenditures for fiscal years 2012/2013 to 2014/2015 inclusive. For fiscal year 2012/2013 the chart notes the planned expenditure amount of $625,640,100. The amount referenced by the Respondent appears to be the planned (not actual) expenditure for 2013/2014 at $627,140,100.
29	The Respondent's statement that "[m]aintenance is the basic reimbursement of the actual money spent by the FNCFCS Agency on maintaining children in care out of the family home. The categories of expenses in maintenance are defined in the National Policy Manual" requires clarification.	The Respondent cites the National Social Program Manual developed in 2012 to support its statement. The 2012 National Program Manual (CBD, Vol 13, Tab 272,p 31) describes maintenance as "[m]aintenance to cover costs related to maintaining a child in alternate care out of the parental home, within AANDC authorities. Full costs of foster, group and institutional care are reimbursed in accordance with provincial rate structures up to a maximum daily amount as set by AANDC authorities", thus making it clear that maintenance reimbursement must be within AANDC authorities. The Respondent's First Nations Child and Family Services National Program Manual effective 2005-2012 defines maintenance as "[m]aintenance costs are those that are directly related to maintenance as

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		a child in Alternate Care out of the parental home. Costs are reimbursed to Recipients on the basis of actual expense made in accordance with provincially established rates and as verified by monthly reconciliations conducted by regional offices or according to a FFOM agreement" (CBD, Vol 3, Tab 29, p 15). The Respondent's categories of eligible expenses for maintenance can be found at p 15-18 of this Manual.
31	The Respondent relies on the 1995 version of Directive 20-1, (R-13, Tab 2) and Ms. D'Amico's testimony to support the following statement: "[t]he operations stream under Directive 20-1 is calculated through a formula that assigns fixed amounts for each organization, each member band and each child in the 0-18 population on-reserve, as well as other various fixed costs. The final number from these calculations is how much the FNCFCS Agency is funded for the operations stream. Operations is meant to cover the administrative and staffing expenses of running an agency, which includes expenses such as salaries and overhead. Under Directive 20-1, funding for prevention programs is also included in operations." This requires further clarification.	The Respondent fails to clarify that the 1995 version of the Directive 20-1 appearing at R-13, Tab 2 was updated in 2005 (CBD, Vol 13, Tab 273). Ms. D'Amico admitted before the Tribunal that she was unaware that Directive 20-1 had undergone revision in 2005 (Testimony of Barbara D'Amico, Transcript vol 52, p 187). The differences between the 1995 and 2005 versions of Directive 20-1 can be found at CBD, Vol 7, Tab 96. The range of costs the Respondent anticipated as being covered under operations when the formula was developed in 1989 can be found at CBD, Vol 14, Tab 381.

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
34	With regard to Tripartite Accountability Frameworks, the Respondent claims that "[a]lthough it is not signed, the Respondent seeks and obtains the endorsement of the provinces and participating First Nations through Band Council resolutions or letters of endorsement" requires clarification.	The Respondent relies on the testimony of Ms. D'Amico and cites no documentary evidence to support its claims. The lack of documentary citations was addressed by Ms. D'Amico. Ms. D'Amico confirmed before the Tribunal that it was typical for the Respondent to not take notes of tripartite meetings including Tripartite Accountability Framework discussions and costing framework discussions (Testimony of Barbara D'Amico, Transcript vol 52, 140-142).
35	The statement that "[o]nce the framework is in place, the costing discussions take place. Prior to the costing discussions, the FNCFS Program requests all child welfare costing variables from the province" requires clarification.	The clarification relevant to para 36 is also relevant here.
36	The Respondent's statement that "[t]he costing variables from the provinces are worked into the operations and prevention formulas in order to meet the policy objective of providing funding for "reasonably comparable services" to what is available off reserve communities" requires clarification.	The Respondent strictly relies on Ms. D'Amico's testimony to support this contention despite her being unable to produce any documentary evidence of the costing variable amounts (Testimony of Barbara D'Amico, Transcript vol 52, p 140-142). The Respondent is thus unable to support this claim with documentary evidence as it did not take notes of the discussions with the provinces.
37	The Respondent's statement that "[t]he funding under the EPFA is different than the funding under Directive 20-1. While Directive 20-1 was developed by the federal	Ms. D'Amico confirmed that the EPFA costing framework (see R13, Tab 10) was developed by AANDC employees Vince Donoghue and Steven Singer (Testimony of Barbara D'Amico, Transcript vol 53, p 23-24)

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
	government, the EPFA is developed in a tripartite setting that results in a formula tailored to each jurisdiction" requires clarification.	and she was not aware if Mr. Singer or Mr. Donoghue consulted any experts in the development of the costing framework (Testimony of Barbara D'Amico, Transcript vol 53, p 32-33). Ms. Murphy was also unaware of any experts consulted in the development of the costing model (Testimony of Barbara D'Amico, Transcript vol 55, p 151).
38	The Respondent's statements that "[u]nder Directive 20-1, funding for prevention services is included in the operations stream" and that "[t]he only caveat is that money must be spent on child welfare expenses" require clarification.	Relevant to the first statement, the Joint National Policy Review indicates that the amount for prevention in Directive 20-1 includes $46,000 per annum for prevention workers and $10,000 per annum for prevention worker travel assuming a child population of 1000 or 1,250 (CBD, Vol 1, Tab 3, p 83-84 and CBD, Vol 13, Tab 381). Relevant to the Respondent's claim that the "only caveat is that money must be spent on child welfare", the Respondent requires that agencies meet the Respondent's definition of "eligible expenditures" (CBD, Vol 14, Tab 324, p 12).
39.	The Respondent's statement that "… the full EPFA envelope […] is adjusted yearly" requires clarification.	The EPFA formula is adjusted annually for maintenance and child population but according to Ms. Murphy items such as salaries are not adjusted annually (Testimony of Barbara Murphy, Transcript vol 54, p 122). The Respondent's audit of Mi'kmaw Family and Children's Services which transitioned to EPFA in 2009 (CBD, Vol 5, Tab 51) notes that fixed funding levels contributed to a significant deficit for the agency (p 11) with "real and perceived

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		shortfalls in financial and human resources…" (p 1).
40	The Respondent's statement that "[t]he only restriction on the FNCFS Agency's use of surplus money is that it is to be used for child welfare services; it cannot be used to cover expenses covered by another federal program" requires clarification.	The Respondent requires that agencies meet the Respondent's definition of "eligible expenditures" (CBD, Vol 13, Tab 324, p 12). See also the Respondent's 2012 policy manual (CBD, Vol 13, Tab 272, p 34, 35 -37).
41	The Respondent's statement regarding agency deficits, that "[i]f there is no surplus the FNCFCS program will pay for the increased expenses" requires clarification.	The Respondent relies on Ms. D'Amico's testimony to support this statement. Ms. D'Amico also confirms that the Respondent has no written policy on how to address shortfalls in agency budgets. She agrees that the process is "ad hoc" (Testimony of Barbara D'Amico, Transcript vol 52, p 124-125).
42	The Respondent's statement that "[a]lthough maintenance funding has essentially remained the same, the formula for calculating operations funding under EPFA has changed from the formula used under Directive 20-1. In the EPFA formula, funding is determined through various "line items," which are specific operations expenditures, such as funding for protection workers or travel costs. Each line item is assigned an amount" requires clarification.	While there are some additional cost lines in EPFA, Directive 20-1 also uses a line item costing method for the operations component of the formula. This line costing includes lines for prevention workers and travel (CBD, Vol 1, Tab 3, p 83). Furthermore, the Respondent's 2012 National Social Programs Manual, section 4.1 explains that "[o]nce EPFA is implemented, development, operations and maintenance expenditures outlined under Directive 20-1 remain the same under EPFA" (CBD, Vol 13,Tab 272, p 37) Section 4.1 of the same manual notes that EPFA "eligible expenses for maintenance and operations under the Enhanced Prevention Focussed Approach are outlined in Section 3.4 (Eligible Maintenance Expenditure-

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		Directive 20-1) and 3.5 (Eligible Operations Expenditure- Directive 20-1)" (p. 38).
43	The Respondent's statement "[are] assigned funding amounts based on provincial salary grids and provincial rations of social workers to children" requires clarification.	In testimony before the Tribunal, Ms. D'Amico confirmed that the Respondent did not take notes detailing the amounts provided by the provinces on the costing variables detailed in R-13, Tab 10 (Testimony of Barbara D'Amico, Transcript vol 52, p 140-142). Thus there is no documentary evidence to support the Respondent's suggestion that amounts provided by the province were used as a basis for prevention costing.
44.	The Respondent's statement "[t]he calculation of funding for the line items in operations and prevention under EPFA comes directly from discussions with the province on how they fund child welfare services off reserve. This provincial data is then incorporated into the formula in order to provide "reasonably comparable" funding" requires clarification.	In testimony before the Tribunal, Ms. D'Amico confirmed that the Respondent did not take notes detailing the amounts provided by the provinces on the costing variables detailed in R-13, Tab 10 (Testimony of Barbara d'Amico, Transcript vol 52, p 140-142). Thus there is no documentary evidence to support the Respondent's suggestion that amounts provided by the province were used as a basis for operations and prevention costing or that these amounts provide for "reasonably comparable" funding.
49	The following statement, for which the Respondent provides no citation, requires clarification: "some provinces that are still under Directive 20-1 have received additional funding in excess of what is provided under the Directive 20-1 formula."	Ms. D'Amico clarifies that in BC region, the Respondent did not provide any extra money under what Ms. D'Amico calls the "Directive 20-1 plus" regime. They simply did not reduce money when they transitioned to actuals reimbursement of maintenance in BC (Testimony of Barbara D'Amico,

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		Transcript vol 53, p 105), and similarly in New Brunswick (p 106).
50	The statement that "[i]n BC, the FNCFCS Agencies are receiving funding beyond what is provided in Directive 20-1. This transitional funding is an interim measure until EPFA is implemented in BC and results from the "shift to actuals" in funding maintenance" requires clarification.	Taking into account the clarification provided in regards to paragraph 49, AANDC also provides transitional funding to the Province of British Columbia as well as an inflation increase (CBD, Vol 14, Tab 399, p 7). While Directive 20-1 includes a provision for an inflation increase for agencies, which the Respondent discontinued as of 1995 (CBD, Vol 1, Tab 3, p 114), Ms. D'Amico confirms that agencies in BC are not receiving an inflation adjustment (Testimony of Barbara D'Amico, Transcript vol 53, p 110).
54	The statement "[c]urrently, all of the FNCFCS Agencies in BC receive the full amount of transitional funding. This is in addition to the funding received under Directive 20-1" requires clarification.	Clarifications relevant to paras 49 and 50 also apply here.
55	The Respondent's statement "[B]oth Head Start and In Home Care are precursors to the implementation of EPFA and this funding is effectively used for prevention services. Decision on how to use this funding are made by FNCFS Agencies" requires clarification.	See clarification relevant to Para 49 which also applies here. In addition, Ms. Levi stated that the funding base for Head Start in New Brunswick has not changed since 1983 (Testimony of Judith Mildred Levi, Transcript vol 30, p 116). While Ms. Levi confirms the Head Start program provides a benefit to First Nations children, it existed well before EPFA was developed in 2007 and thus was not created to be a "precursor" to the implementation of EPFA.
57	The Respondent's statement "[B]oth Head Start and In Home Care are precursors to	Clarification relevant to paragraph 55 also applies here.

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
	the implementation of EPFA and this funding is effectively used for prevention services. Decision on how to use this funding are made by FNCFS Agencies" requires the same clarification as set out in response to para 55.	
62	The Respondent's statement "[t]here is no overall cap in expenditures under the 1965 Agreement" requires clarification.	The Respondent's Terms and Conditions stipulate that "the maximum contribution for a federal / provincial cost-sharing arrangement to provide provincial welfare programs and services to Indians on reserves in Ontario is $300 million per year, of which approximately $100 million is for FNCFS." (CBD, Vol 11, Tab 236, p 13)
95	The Respondent's statement that "[t]he definition of Jordan's Principle cannot be expanded or altered without obtaining Cabinet approval and receiving new policy authority" requires clarification.	Despite the critiques of the Respondent's definition of Jordan's Principle, Ms. Baggley testified that she never requested a modification of the Federal definition of Jordan's Principle (Testimony of Corinne Baggley, Transcript vol 58, p.126); thus it follows that Cabinet did not have an alternative definition to consider.
96	The statement that "[w]ith the input of the provinces, Jordan's Principle has been implemented across Canada, although the implementation varies in each jurisdiction" requires clarification.	Ms. Baggley testified that provinces or First Nations did not have input into defining the Federal government's approach to Jordan's Principle. According to Ms. Baggley, the provinces were approached only after the Federal approach was developed and there were no changes made to the approach since the Federal government contacted the provinces (Testimony of Corinne Baggley, Transcript vol 58, p 9-10).

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
97	The statement that "Jordan's Principle is not a program and does not have funding attached to it" requires clarification.	According to Ms. Baggley, Health Canada established a Jordan's Principle fund in the amount of 11 million dollars between 2009-2012 but it was discontinued (Testimony of Corinne Baggley, Transcript vol 57, p 123). Ms. Baggley believes it was discontinued as there were no cases that met the Respondent's definition to Jordan's Principle (p 124).
101	The statement that "[c]ase conferencing is not limited to cases that meet the criteria for Jordan's Principle. All cases that potentially raise a jurisdictional dispute are looked at and case conferencing is conducted in order to try and resolve the underlying issues. Through the application of this approach, solutions have been found for many cases, even though they do not meet the federal definition of Jordan's Principle" requires clarification.	In citation 191, the Respondent references the JP Tracking Tool Preliminary Findings Chart (R-14, tab 53). Ms. Baggley testified that some cases in this document were closed because a child aged out of care or died, reasons that are not related to a resolution achieved via the Respondent's case conferencing process. She went on to confirm that a case outlined in CBD, Vol 15, Tab 420, p 8 was resolved because a third party bought the hospital bed for the child (p 8), not because the dispute was resolved by governments (Testimony of Corinne Baggley, Transcript Vol 58, p 70-72).
130	The Respondent's statement that "[f]irst, funding for FNCFS Agencies is not something "customarily available to the general public" as required by Section 5 of the Act" requires clarification.	The Respondent's terms and conditions document confirms that the beneficiaries of the service are First Nations children and families and states "[t]he objective of the FNCFS program is to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families, in accordance with the legislation and standards of the

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		province/territory of residence. The expected result is a more secure and stable family environment for children on reserve…Ultimately, the expected results of this program are safe and healthy First Nations children and youth, and First Nations children and families receiving quality services similar to those offered to other Canadians in similar circumstances" (CBD, Vol 13, Tab 324, under heading Objectives and Results, no page number).
134	The Respondent's statement that "[t]he funding at issue is provided on a government to government or government to agency basis and follows a process of discussion and implementation. Individual First Nations children and their families are not invited or expected to participate in the creation of these funding arrangements" requires clarification.	Clarification relevant to paragraph 130 also applies here.
135	The statement that "[A]s a result, the funding itself is not being held out as a service to the public. Rather the benefit that is being held out as a service and offered to the public are provincially mandated child prevention and protection services that the agencies (and not the Respondent) directly provide to individual First Nations children and their families. The delivery of services reflects the requirements of	Clarifications relevant to paragraphs 130 and 137 also apply here. It would be incorrect to suggest that the manner in which the program is funded has no impact on the services actually offered to the public. That link is acknowledged by the Respondent's Deputy Minister: "The Deputy Minister 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

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
	the applicable provincial child welfare schemes and the particular cultural context of the communities that the FNCFS Agency serves" requires clarification	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." (Standing Committee on Public Accounts report, CBD, Vol 3, Tab 15, p 8). Regarding the Respondent's contention that "[t]he delivery of services reflects the requirements of applicable provincial child welfare schemes…" letters sent by the provinces pointing to First Nations child and family service agencies being unable to fulfill mandated responsibilities are relevant (see for example CBD, Tabs 69, 356, 357, 362, 367, 370, 371, 372, 373, 374, and 416).
136	The statement that "[C]ontrary to the arguments of the Complainants, the Respondent does not "control" the services and programs delivered by the FNCFS Agencies. Control over issues such as whether FNCFS Agency receives delegated authority or is in compliance with the statutory and regulatory requirements for delivery of child welfare services, rests with the provinces. The decisions on which services and programs to provide and the way in which they will be provided, is within the control of the FNCFS Agency, under the supervision of the	Clarifications relevant to paras 130 and 135 also apply here.

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
	province/Yukon" requires clarification.	
137	The Respondent's statement that "[t]he role of the Respondent is limited to providing funding for child welfare on reserve and being accountable for the spending of those funds" requires clarification.	In testimony before the Tribunal, Ms. Murphy characterizes the Respondent's role as "we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nations Agencies are delivering the program according to the legislation and regulation that they have the capacity to do that, we are getting outcomes. So we are not a passive player." (Testimony of Sheilagh Murphy, Transcript vol 54, p 51-52).
141	The Respondent's statement that "[t]here is no evidence to support an allegation that child and family services are denied to First Nations children on reserve. While the Complainants allege that First Nations children living on reserve are "precluded from accessing, or have limited access to, child and family services", no specific examples or references to evidence were given to support this assertion. Disagreement with the sufficiency or quality of service does not equate with denial of service. This aspect of the claim should be dismissed as unfounded" requires clarification.	The Respondent offers an example of denial of services in their book of documents (R-13, Tab 85). The document is an EPFA Framework agreement and model prepared by the Respondent in discussions with the Province of British Columbia and some First Nations agencies. On p. 17 the following paragraph of the document states "[c]urrent status: Over the past 10 years, MCFD has initiative many improvements for off reserve residents. First Nations Child and Family Service Agencies are struggling to provide the same level of services for on reserve children and families." The document goes on to describe services that are not always available to families on reserve. Mr. McArthur testified that this list was from the "eyes of the province" (Testimony of William McCarthur, Transcript vol 64, p 114). Nonetheless Mr. McArthur sent the entire document to AANDC headquarters to inform efforts to

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		obtain EPFA for BC region in the 2014 budget (Testimony of William McCarthur, Transcript vol 64, p 118). The Respondent identifies another example of service denial in their closing submissions at para 90 noting "Jordan reached a point in his case where he could have been transferred to a medical foster home in Winnipeg but there was a dispute between the federal and provincial governments regarding which government was responsible for paying for the supports required in the medical foster home. Before the dispute was resolved, Jordan passed away in hospital." Additionally, Ms. Baggley confirmed that a dispute between the Respondent and Health Canada resulted in a terminally ill child being denied a hospital bed required to prevent respiratory distress for at least half a year to three-quarters of a year (Testimony of Corinne Baggley, Transcript vol 58, p 117-118). See also the AANDC Fact Sheet on First Nations Child and Family Services which notes "First Nations Child and Family Service Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians" (CBD, Vol 4, Tab 38, p 2). Mr. Digby offers another example in his testimony indicating that some First Nations in Ontario receive no prevention services (Testimony of Phil Digby, Transcript vol 60, p 117-118, 134-135). Further evidence of denial of services in Ontario can be found at CBD, Vol 14, Tab 362 where

Respondent's Paragraph	Respondent's statement	Clarification/ Correction with Evidentiary Reference
		the Province of Ontario expresses concern regarding AANDC discontinuing funding for the band representatives required by the *Child and Family Services Act*.
144	The statement that "[t]he Complainants failed to produce even one witness from a province or Yukon who was in a position to provide authoritative and reliable evidence as to how provincial / Yukon governments fund child welfare and how much funding is provided. Moreover, they provided no reliable documentary evidence addressing this issue" requires clarification.	Recalling the clarification relevant to Respondent's paragraph 3, that Ms. Levi was a provincial employee of the Government of New Brunswick at the time of her testimony (CBD, Vol 9, Tab 142, p 1) and Mr. Plouffe was an employee of Centre Jeunesse de l'Abitibi-Témiscamingue (Testimony of Sylvain Plouffe, Transcript vol 37, p 4), records confirming the Respondent provides a higher level of funding to the Governments of British Columbia and Alberta than to First Nations agencies for the delivery of child and family services are relevant (CBD, Vol 6, Tab 64, p 2; CBD, Vol 14, Tab 399, and CBD, Vol 12, Tab 248, p 16). Even though the Respondent provides a higher level of funding to the Province of British Columbia than FNCFSA in BC providing the same service, the Province (MCFD) states that AANDC payments are insufficient to cover actual program costs. For instance, BC (MCFD) states that it costs 42 million per annum to provide child welfare services to the First Nations not served by an agency (CBD, Vol 14, Tab 399, p 13) versus the 29.1 million per annum that the Respondent provides (CBD, Vol 14, Tab 399, p 11). In the same agreement, the Respondent agrees that "7.6 AANDC acknowledges the results of the

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		MCFD costing exercise using 2010-2011 MCFD Costs for delivering child protection, family supports, special needs and CIC services on reserve (attached at Appendix B). AANDC and MCFD have agreed to continue to collaborate on the articulation of costs" (CBD, Vol 14, Tab 399, p 7). Referring to the BC Government (MCFD), Mr. McArthur offers the following testimony relevant to this point: "MR. McArthur: Their point is, is based on their statistics, based on their analysis, financial and otherwise, that this is what it costs to provide services to Aboriginal children" (Testimony of William McArthur, Transcript vol 64, p 75).
147	The statement that "[n]o such adverse inference should be drawn against the Respondent" requires clarification.	The Respondent planned to call Mr. Paul Ross, KPMG as an expert witness. Mr. Ross prepared an expert report for the Respondent (CBD, Vol 12, Tab 249) that reviewed the *Wen: de the Journey Continues* report (CBD, Vol 1, Tab 6). Mr. Ross's expert report noted that "[w]e have noted a number of calculation errors in the Wen:de report. However, the impact of those errors appears relatively small" (CBD, Vol 12, Tab 249, p 4). The Commission's expert witness and co-author of the *Wen:de the Journey Continues* report, Dr. Loxley, testified that the calculations in Mr. Ross's report came within .12% of the calculations in *Wen:de: the Journey Continues* (Testimony of John Loxley, Transcript vol 27, p 78). The

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		Respondent chose not to call Mr. Ross as an expert witness.
150	The statement that " [a]s an example, Derald Dubois, the Executive Director for Touchwood Child and Family Services, asserted that the province of Saskatchewan funded programs, which were unavailable to the First Nations families in his community. However, on cross-examination, he admitted that the same type of programs, tailored to his community needs, were in fact, offered by Touchwood" requires clarification.	The audited Financial Statements for Touchwood Child and Family Services for the year ending March 31, 2012 (CBD, Vol 7, Tab 99) showed a surplus in the amount of $19,939 for maintenance (p 10) and a $217,410 deficit in the prevention service funding (p 11) provided by the Respondent for First Nations child and family services.
151	The statement that "[s]ome of the Complainant's witnesses also testified about issues related to getting funding from the FNCFCS Program for expenses such as mobility devices, mental health services and orthodontics.225 However, the evidence also revealed that funding for such medical expenses is available through programs offered by Health Canada" requires clarification.	CBD, Vol 13, Tab 302 is relevant to the Respondent's claim. This document was prepared by Health Canada and INAC officials in Manitoba region and identifies a series of "service disparities"(p 12) which the Respondent attributes to "differences between what services are provided or funded by the Federal government for residents on-reserve and what services are provided or funded by the Provincial government to residents off reserve" (p 12). The document goes on to identity several examples of service disparities to the provision of mobility devices, transportation to access health care, physiotherapy, physical therapy and speech language support to children (p 13-14). The document notes that for children with multiple disabilities and complex medical needs the

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		service disparities can be funded if the child, who is facing no child protection issues, is placed into child welfare care (p 14). To the extent that the Respondent wants the Tribunal to consider Health Canada programs, this evidence is relevant. The Respondent's document entitled "INAC and Health Canada First Nations Programs- Gaps in Service Delivery to First Nations Children and Families in BC Region" the document lists a number of service gaps identified from the "first-hand experience by BC Region INAC officials" and FNCFCS agency directors (p 1). It contains this passage: "[t]he 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." (CBD, Vol 6, Tab 78, p 1). See also Ms. Baggley's testimony confirming that a dispute between the Respondent and Health Canada resulted in a terminally ill child being denied a hospital bed required to prevent respiratory distress for at least half a year to three-quarters of a year (Testimony of Corinne Baggley, Transcript vol 58, p 117-118).
152	The Respondent's statement that "[m]oreover the evidence revealed that expenses for children in care that are not covered by other federal	The Respondent's document at CBD, Vol 6, Tab 78 contains the following paragraph at p 1: "[t]he work of the two departments on Jordan's Principle has highlighted what all of

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	programs are paid for by the FNCFS Program, even if they do not fall strictly within FNCFCS Program authorities" requires clarification.	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 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." The document goes on to cite 13 different examples of service gaps. See also CBD, Vol 13, Tab 302, noting at p 14 that "[c]onsequently, children who are placed under voluntary conditions, although there are no protection issues, are able to access funding for disability services that may otherwise not be funded unless the child comes into care."
153	The Respondent's statement that "[i]n any event, the experience of a few FNCFS Agencies does not inform the analysis of whether there is differential treatment. Some FNCFS Agencies are more successful than others for a wide range of reasons. Further the differences between the level of services and programs offered might have little to do with funding and more to do with choices made by the FNCFS Agency about the type of services and programs they want to provide and other administrative issues affective the overall budget" requires clarification.	The only evidence cited by the Respondent to support these sweeping statements relates to a single agency (the operational review of Mi'kmaw Family Services at R-13, Tab 14). However, a financial audit of that agency, performed by KPMG on behalf of the Respondent, came to the conclusion that fixed funding levels contributed to a significant deficit for the agency (p 11) with "real and perceived shortfalls in financial and human resources…" (CBD, Vol 5, Tab 51, p 1). Moreover, Ms. D'Amico asserted that: "[w]e don't want to tell agencies how to run their business that is not- that makes us very uncomfortable because it is not our role" (Testimony of Barbara D'Amico, Transcript vol

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		52, p 100), which suggests that the Respondent does not have the expertise to criticise the agencies' internal management.
155	The Respondent's statement that "[l]astly, the allegation that funding under the EPFA is essentially the same as under Directive 20-1 is inaccurate. The Respondent's evidence demonstrated that operations funding under EPFA and Directive 20-1 are calculated in a completely different manner with different funding formulas" requires clarification.	The Respondent's National Social Programs Manual (2012) explains "Once EPFA is implemented, development, operations and maintenance expenditures outlined under Directive 20-1 remain the same under EPFA." (CBD, Vol 13, Tab 272, p 37) and "eligible expenditures for maintenance and operations are outlined in Section 3.4 (Eligible Maintenance Expenditure- Directive 20-1) and 3.5 (Eligible Operations Expenditure- Directive 20-1) (p 38). Moreover, while finding EPFA provided more funding under operations than Directive 20-1, the Auditor General of Canada in 2008 noted that the EPFA formula incorporated some of the same flaws as Directive 20-1 resulting in inequities (CBD, Vol 3, Tab 11, p 23).
156	The Respondent's statement that "[g]iven the national context of this complaint, evidence from each jurisdiction was required to establish discrimination in funding levels. Without this evidence there can be no reliable comparison of federal and provincial/Yukon government funding and thus no basis to conclude the existence of adverse differentiation" requires clarification.	Internal AANDC documents put into evidence admit the existence of discrimination in funding and show that the Respondent possesses the data necessary to make a reliable comparison. In the presentation prepared by Ms. Johnston for ADM Francois Ducrois dated August 29, 2012 (CBD, Vol 12, Tab 238) the slide on p 15 sets out the amounts to transition to EPFA per the Respondent's 2007 authorities in British Columbia, Yukon, Ontario, New Brunswick, and Newfoundland/Labrador, and p 16

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		sets out the Respondent's costs associated with correcting problems with the EPFA formula and rolling it out across the country. Option 3 (transferring the program to the provinces) appears on p 17. The pros of Option 3 include "fully funded-comparability issue would be resolved." And cons to Option 3 include the "potential for dramatic increase in costs." The presentation prepared by Ms. Murphy dated November 2, 2012 is also illustrative of the national scope of the Respondent's discrimination (CBD, Vol 13, Tab 289). P 8 of the document entitled "Impacts of No New investments on Program Reform" notes that "Canada's defence on the 2007 First Nations Child and Family Caring Society and the Assembly of First Nations Human Rights Complaint could be weakened; [T]he Government of Canada will not be able to sustain reasonable provincial comparability..."
157	The Respondent's statement that "[t]his Service Agreement cannot be considered credible evidence of how the province funds the off reserve population, as there is a lack of evidentiary support for how these expenses are calculated" requires clarification.	The Respondent relies on the testimony of Mr. McArthur to support this statement. Mr. McArthur also testified that nowhere in the Service Agreement does AANDC note that it disagrees with the BC Government's costing exercise in Appendix B of the Service Agreement between AANDC and BC at CBD, Vol 14, Tab 457, p 5 (Testimony of William McArthur, Transcript vol 64, p 86-87). AANDC also provides transitional funding to

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		the Province of British Columbia as well as an inflation increase (CBD, Vol 14, Tab 399, p 7). While Directive 20-1 includes a provision for an inflation increase for agencies, which the Respondent discontinued as of 1995 (CBD, Vol 1, Tab 3, p 114), Ms. D'Amico confirms that agencies in BC are not receiving an inflation adjustment (Testimony of Barbara D'Amico, Transcript vol 53, p 110).
158	The Respondent's statement that "[h]owever, this ignores the evidence that the FNCFCS Agencies are not funded for specific programs but can instead use the overall amount of funding to offer the programs they determine are relevant and culturally appropriate for their population" Requires clarification.	Ms. Schimanke indicated that if all the Delegated First Nations Agencies in Alberta closed and those services were provided by the Province of Alberta the costs for the Respondent would go up (Testimony of Carol Schimanke, Transcript vol 62, p 78-79). In addition, CBD, Vol 13, Tab 330, p 2 offers this relevant quote: "Program Expenditures - If current social programs were to be administered by provinces, this would result in a significant increase in costs for INAC. For example, in Alberta, a joint 18 month review of Kasohkowew Child Wellness Society, indicates that based on the current Federal / Provincial agreement, if services are reverted back to the province of Alberta, it would cost INAC an additional $2.2M beyond what INAC currently funds the First Nation Child and Family Services agency."
159	The Respondent's statement that "[a]ny suggested differences in how the Respondent funds FNCFS Agencies as compared to the	Noting that the Respondent provides no evidentiary citations for its claims, the clarifications relevant to paras 157 and 158 apply here. In addition, CBD, Vol 14, Tab 353, p 4, bullet 2,

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	provincial agencies are a reflection of this difference and do not demonstrate that less funding is provided to the FNCFCS Agencies" requires clarification.	sub-bullet 2 contains this relevant statement: "Should provinces take over the delivery of child and family services on reserve, the federal government will end up paying more than it does currently." See also the Respondent's document "Preliminary Comparisons of Manitoba, British Columbia and Alberta, INAC Child and Family Services Expenditures per Child in Care out of the Parental Home" showing the Respondent provides less funding per child in care than the Provinces (CBD, Vol 14, Tab 383).
160	The Respondent's statement that "[t]he Respondent's policy objective of "reasonable comparability" is to ensure funding for child welfare services allows children on reserve to receive services in a comparable manner to services available off reserve, while recognizing the inherent differences in organizational structure between provinces and the federal government" requires clarification.	The Respondent relies on Ms. Murphy's testimony to support its statement. The term "reasonable comparability" is not specifically defined in the Respondent's 2012 National Social Program Manual (CBD, Vol 13, Tab 272); however, the manual does describe it under the heading "Objective" on p 30 as such: "[t]hese 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." The manual does not reference "recognizing inherent differences in organizational structure between provinces and the federal government."
161	The Respondent's statement that "[i]t does not mean,	The Respondent provides no citation for this assertion. However,

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	however, that First Nations children on reserve are not receiving these (reasonably comparable services). Rather it means they are receiving services through a different organizational structure than those used by the provinces and Yukon" requires clarification.	numerous documents authored by the Respondent indicate that First Nations children on reserve are not receiving services that are reasonably comparable. See for example, CBD Tabs 248 and 289, and R 13, Tab 85.
162	The Respondent's statement that "[a]n additional roadblock in measuring the comparability of federal funding to provincial funding is the role of First Nations communities, who receive the funding and make choices based on their priorities for how that money should be spent" requires clarification.	The Respondent relies on the testimony of Ms. Murphy to support its claim. However, as noted in the Respondent's National Program Manual (CHRC BOD, Tab 272, p. 30) all expenditures have to be "within AANDC authorities." As Dr. Blackstock testified, agencies have little choice on how the money is spent as Agency operation is dictated by the Respondent's funding formula (Testimony of Dr. Blackstock, Transcript Vol 49, p 225).
164	Referring to documents identified in paragraph 163, the following statement by the Respondent requires clarification: "[t]he information in these documents are not admissions. At best, they reflect the personal views of employees of the department at particular points in time. While these documents have been admitted into evidence, the Tribunal should access (sic) their weight contextually with reference to the Respondent's viva voce	The Respondent fails to provide an evidentiary citation to distinguish what documents are being referred to and what evidence supports the Respondent's contention that they were prepared as documents reflecting "personal views."

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	evidence regarding their proper interpretation."	
166	The Respondent's statement that "[f]urther the Complainants' reliance on statements and views expressed in the federal and provincial Auditor General reports and the provincial Children's Advocates' reports should be given minimal weight, if any. The authors of the documents have not been called to substantiate the documents or provide the context for the statements or opinions. These reports are not probative of the facts in issue and do not help the Tribunal decide if a claim of discrimination is founded" requires clarification.	The Respondent agrees with the recommendations of the Auditor General of Canada in the 2008 report (CBD, Vol 3, Tab 11, p 6) and in the 2011 report (CBD, Vol 5, Tab 53, p 8).
167	The Respondent's statement that "[c]ertain other third party reports relied upon by the Complainants, such as the Blue Hills report and the Wen: de reports, suggest a discrepancy between the levels of federal and provincial funding provided for child welfare. However, the authors of the Blue Hills report were not called to testify and the report itself includes several caveats as to its limitations. Accordingly, the underlying methodology and credibility of the conclusions drawn in this	The Blue Hills report (CBD, Vol 6, Tab 66) was prepared to inform the Joint National Policy Review on First Nations Child and Family Services which was commissioned and overseen by the Respondent and the Assembly of First Nations (CBD, Vol 1, Tab 3). Several witnesses appeared who served on the advisory committee of the NPR such as Jonathan Thompson, Cindy Blackstock, Derald Dubois, Elsie Flette, and Judy Levi. Pursuant to the Respondent's document at CBD, Vol 14, Tab 382 the Respondent agreed with the 17 recommendations in the NPR (p 2). This same document reviews the Blue Hills method in determining that the Respondent's

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	report cannot be assessed" requires clarification.	"per capita per child in care expenditure …is 22% lower than the average of selected provinces" (CBD, Vol 1, Tab 3, p 94). Irrespective of the challenges the Respondent identifies later on (CBD, Vol 14, Tab 382, p 3) the Respondent finds the shortfall to be 34.6% less. With regard to the Wen: de reports which were commissioned by the Respondent, the Respondent retained KPMG to do a review of the Wen: de the journey continues report (CBD, Vol 12, Tab 249). KPMG notes its findings on p 8: "[w]e prepared an alternate calculation taking into consideration our comments and concerns noted above, resulting in total costs calculated of $12, 007, 421. We note that this is a relatively insignificant difference from the $12,042,092 calculated in the Wen:de report."
168	The statement "[a]lthough some contributors to the Wen:de reports were called as witnesses, none were able to give substantive detailed evidence about the level of provincial funding compared to federal funding" requires clarification.	The clarification relevant to para 167 also applies here.