Court File No.

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

RESPONDENTS

AFFIDAVIT OF DEBORAH MAYO

I, Deborah Mayo, of the City of Ottawa in the Province of Ontario, AFFIRM THAT:

1. I am employed by the Department of Justice as a paralegal in the Civil Litigation Section, National Litigation Sector and am assigned to File T1340/7008 before the Canadian Human Rights Tribunal. As such, I have knowledge of the matters deposed to in this affidavit, except where stated to be based upon information and belief, and where so stated, I believe them to be true.

2. I have reviewed the File T1340/7008 (the "File") and have located the following items:

   (a) The letter sent to Mr. Michael Wernick from the Canadian Human Rights Commission attaching the complaint of discrimination from the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada against Indian and Northern Affairs Canada, a copy of which is attached to this affidavit as **Exhibit A**;

(b) The Statement of Particulars of the Canadian Human Rights Commission submitted June 1, 2009, a copy of which is attached to this affidavit as **Exhibit B**;

(c) The Preliminary Disclosure Brief of the complainants, First Nations Child and Family Caring Society of Canada and Assembly of First Nations submitted June 5, 2009, a copy of which is attached to this affidavit as **Exhibit C**; and

(d) The Amended Statement of Particulars of the Canadian Human Rights Commission submitted January 29, 2013, a copy of which is attached to this affidavit as **Exhibit D**.

3. Numerous affidavits were prepared to support the Attorney General's position before the Tribunal on the issue of retention of jurisdiction and from the file I attach the following materials filed before the Canadian Human Rights Tribunal in April 2019:

(a) The affidavit of Valerie Gideon dated April 15, 2019, a copy of which is attached to this affidavit as **Exhibit E**;

(b) The affidavit of Joanne Wilkinson dated April 16, 2019, a copy of which is attached to this affidavit as **Exhibit F**; and

(c) The affidavit of Paul Thoppil dated April 16, 2019, a copy of which is attached to this affidavit as **Exhibit G**.

4. I have reviewed the File and confirm that cross-examination occurred on these affidavits. Valerie Gideon was cross-examined on May 7, 2019, Joanne Wilkinson was cross-examined on May 14, 2019 and June 4, 2019, and Paul Thoppil was cross-examined on May 15, 2019.

5. In addition to the more recent affidavits attached hereto as **Exhibits E, F** and **G**, the

Attorney General filed other affidavit evidence before the Canadian Human Rights Tribunal in 2018. From the File I attach the following:

(a) The affidavit of Valerie Gideon dated May 24, 2018 concerning mental health, a copy of which is attached to this affidavit as **Exhibit H**;

(b) The affidavit of Valerie Gideon dated May 24, 2018 concerning Jordan's Principle, a copy of which is attached to this affidavit as **Exhibit I**;

(c) The affidavit of Paula Isaak dated May 24, 2018 concerning funding systems and Canada's funding of the actual cost of prevention and least disruptive measures, a copy of which is attached to this affidavit as **Exhibit J**;

(d) The Reply affidavit of Valerie Gideon dated June 21, 2018, a copy of which is attached to this affidavit as **Exhibit K**; and

(e) The Reply affidavit of Paula Isaak dated June 21, 2018, a copy of which is attached to this affidavit as **Exhibit L**.

6. I have reviewed the file and confirm that cross-examination occurred on these affidavits. The cross examination of Paula Issak on her affidavits dated May 24, 2018 and June 21, 2018 occurred on October 30, 2018. The cross examination of Valerie Gideon on her two affidavits dated May 24, 2018 and her affidavit dated June 21, 2018 occurred on October 30 and 31, 2018.

7. From the submissions submitted to the Canadian Human Rights Tribunal I attach the following:

(a) The closing submissions of the Canadian Human Rights Commission dated August 25, 2014, a copy of which is attached to this affidavit as **Exhibit M**;

(b) The memorandum of fact and law of the complainant First Nations Child and Family Caring Society dated August 29, 2014, a copy of which is attached to this affidavit as **Exhibit N**.

8. I have reviewed the file and confirm that there are currently four more rulings under reserve by the Tribunal: (i) the definition of First Nations child for the purposes of eligibility under Jordan's Principle; (ii) eligible expenses for major capital funding; (iii) eligible claims for small agencies' expenditures; and (iv) whether Canada can impose a deadline for the submission of claims for reimbursement of First Nations Child and Family Services Band Representative Services actual costs.

Affirmed before me at
the City of Ottawa
in the Province of Ontario
on October 1, 2019.

Deborah Mayo

Commissioner for Taking Affidavits
Hannah Johnson

This is Exhibit "A" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

[redacted]

Si vous désirez obtenir une copie de cette lettre en français veuillez communiquer avec la Commission à l'adresse ou au numéro de téléphone indiqués en bas de page.

PROTECTED **BY HAND** **File no: 2006 1060**

Mr. Michael Wernick
Deputy Minister
Indian and Northern Affairs Canada
Room 2101
10 Wellington Street
Gatineau, Quebec
K1A OH4

Dear Mr. Wernick:

The Canadian Human Rights Commission has received a complaint of discrimination from the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada against Indian and Northern Affairs Canada. A copy of the complaint form is enclosed.

The Commission would like to meet with the parties to discuss how to proceed. You or your representative are asked to contact Mr. Michel Paré, Director, ADRS and Pre-complaint Services, at (613) 943-0138 to arrange this meeting.

We look forward to working with the parties to address this complaint. Please note that the parties are required to preserve any material related to the allegations in the complaint, including information in electronic formats, until the final disposition of the matter.

Yours sincerely,

Richard Tardif
Deputy Secretary General

c.c. Havelin Anand, Director General ✓
Cindy Blackstock
Lawrence Joseph

Encl: Complaint form

Human Rights Commission Complaint Form

Your Name(s):
Regional Chief Lawrence Joseph, Assembly of First Nations
Cindy Blackstock, Executive Director, First Nations Child & Family Caring Society of Canada

Name of Organization that your Complaint is Against:
Indian and Northern Affairs Canada

Summary of Complaint:
On behalf of the Assembly of First Nations and the First Nations Child and Family Caring Society of Canada, we are writing to file a complaint pursuant to the Human Rights Act regarding the inequitable levels of child welfare funding provided to First Nations children and families on reserve pursuant to the Indian and Northern Affairs Canada (INAC) funding formula for First Nations child and family services known as Directive 20-1, Chapter 5 (hereinafter called the Directive). This formula provides funds in two primary envelopes: 1) Maintenance (costs of children in care) and 2) Operations (personnel, office space, prevention services etc.). Maintenance is paid every time a child comes into care whereas operations funding is paid on the basis of exceeding certain population thresholds of status Indian children on reserve. There is also an adjustment in the formula for remoteness. There is substantial evidence spanning over ten years that inequitable levels of funding are contributing to the over representation of Status First Nations children in child welfare care. Moreover, we invite your office to review the Wen:de series of reports which identify the scope and nature of the over representation of First Nations children in care, documents the inequality in funding, and provides a detailed evidence-based solution to redress the inequity which is within the sole jurisdiction of the federal government to implement. Ensuring a basic level of equitable child welfare service for First Nations children on reserve and thus the observance of their human rights pursuant to the Human Rights Act, the Convention on the Rights of the Child, The Covenant on Economic, Social and Cultural Rights and the Charter of Rights and Freedoms would represent an investment of 109 million dollars in year one of the proposed multi-year funding formula. This cost represents less than one percent of the current federal surplus budget estimated at over $13 billion. As the following summary notes, the moral, economic, and social benefits of full and proper implementation of the Wen:de report recommendations are significant.

Status Indian children are drastically over represented in child welfare care. A recent report found that the 0.67% of all non Aboriginal children were in child welfare care as of May of 2005 in three sample provinces as compared to 0.31% of Métis children and 10.23% of Status Indian children. Year End Data collected by INAC (2003) indicates that 9031 status Indian children on reserve[1] were in child welfare care at the close of that year representing a 70% increase since 1995. Unfortunately, there is poor data on the numbers of status First Nations children in care off reserve as provinces/territories collect child welfare data differently but best estimates are that 30-40% of all children in care in Canada are Aboriginal. This represents approximately 23,000- 28,000 Aboriginal children and means that there are three times as many Aboriginal children in state care today than there was at the height of the residential school operations in the late 1940's.

First Nations child and family service agencies (FNCFSAs) have developed over the past 30 years to provide child welfare services to First Nations children on reserve in an effort to stem the mass removals of First Nations children from their communities by provincial child welfare authorities. These agencies, which have been recognized by the United Nations Committee on the Rights of the Child, operate pursuant to provincial child welfare statutes and are funded by INAC using the Directive 20-1[2]. FNCFSAs have long reported concerns about drastic under funding of child welfare services by the federal government particularly with regards to the statutory range of services intended to keep maltreated children safely at home known as least disruptive measures. As Directive 20-1 included an unlimited amount of funds to place children in foster care, many First

[1] Typically this data does not include children in care of First Nations operating under self government agreements
[2] With the exception of First Nations child and family FNCFSAs in Ontario which are funded under a separate funding agreement

Nations felt the lack of investment in least disruptive measures contributed to the over representation of First Nations children in care. Directive 20-1 was studied in a joint review conducted by Indian and Northern Affairs Canada (INAC) and the Assembly of First Nations in 2000. This review, known as the *Joint National Policy Review on First Nations Child and Family Services* (NPR, MacDonald $ Ladd) provides some insight into the reasons why there has been such an increase in the numbers of Registered Indian children entering into care . The review found that INAC provides funding for child welfare services only to Registered Indian children who are deemed to be "eligible children" pursuant to the Directive. An eligible child is normally characterized as a child of parents who are normally resident on reserve. Importantly, the preamble to the Directive indicates that the formula is intended to ensure that First Nations children receive a "comparable level" of service to other children in similar circumstances. Moreover, there was no evidence that the provinces step in to top up federal child welfare funding levels if the federal funding level is insufficient to meet statutory requirements of provincial child welfare legislation or to ensure an equitable level of service. There were, however, occasions where provinces provided management information or training support but there were no cases identified where the province systematically topped up inequitable funding levels created by Directive 20-1. Overall the Directive was found to provide 22% less funding per child to FNCFSAs than the average province. A key area of inadequate funding is a statutory range of services, known as least disruptive measures, that are provided to children and youth at significant risk of child maltreatment so that they can remain safely in their homes. First Nations agencies report that the numbers of children in care could be reduced if adequate and sustained funding for least disruptive measures was provided by INAC (Shangreaux, 2004). The NPR also indicates that although child welfare costs are increasing at over 6% per year there has not been a cost of living increase in the funding formula for FNCFSAs since 1995. Economic analysis conducted last year indicates that the compounded inflation losses to FNCFSAs from 1999-2005 amount to $112 million nationally.

In total, the *Joint National Policy Review on First Nations Child and Family Services* included seventeen recommendations to improve the funding formula. It has been over six years since the completion of NPR and the federal government has failed to implement any of the recommendations which would have directly benefited First Nations children on reserve. As INAC documents obtained through access to information in 2002 demonstrate, the lack of action by the federal government was not due to lack of awareness of the problem or of the solution. Documents sent between senior INAC officials confirm the level of funding in the Directive is insufficient for FNCFSAs to meet their statutory obligations under provincial child welfare laws – particularly with regard to least disruptive measures resulting in higher numbers of First Nations children entering child welfare care (INAC, 2002.)

Despite having apparently been convinced of the merits of the problem and the need for least disruptive measures, INAC maintained that additional evidence was needed to rectify the inequitable levels of funding documented in the NPR. Therefore, the First Nations Child and Family Services National Advisory Committee, co-chaired by the Assembly of First Nations and INAC, commissioned a second research project on the Directive in September of 2004. This three part research project which was completed by the First Nations Child and Family Caring Society of Canada in 2005 involved over 20 researchers representing some of the most respected experts from a variety of disciplines including: economics, law, First Nations child welfare, management information systems, community development, management and sociology. This review is documented in three volumes: 1) *Bridging Econometrics with First Nations Child and Family Service Agency Funding* 2) *Wen:de: We are Coming to the Light of Day* 3) *Wen:de: the Journey Continues,* which are all publicly available on line at www.fncfcs.com.

Findings of the Wen:de series of reports include:

- The primary reason why First Nations children come to the attention of the child welfare system is neglect. When researchers unpack the definition of "neglect", poverty, substance misuse and poor housing are the key factors contributing to the over representation of First Nations children in substantiated child welfare cases.
- The formula drastically under funds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures. These

services are vital to ensuring First Nations children have the same chance to stay safely at home with support services as other children in Canada.

- Additional funding is needed at all levels of FNCFSAs including governance, administration, policy and practice in order to provide a basic level of child welfare services equitable to those provided off reserve by the provinces.
- Overall an additional $109 million is needed in year one to redress existing funding shortfalls - representing approximately a 33% increase in the operations funding (funding not directly related to children in care) currently provided pursuant to the Directive. This represents a minimum investment to provide a basic level of equitable services comparable to those available to other Canadians, meaning that to provide anything short of this funding level is to perpetuate the inequity.
- Jurisdictional disputes between and amongst federal and provincial governments are a substantial problem with 12 FNCFSAs experiencing 393 jurisdictional disputes this past year alone. These disputes result in First Nations children on reserve being denied or delayed receipt of services that are otherwise available to Canadian children. Additionally, these disputes draw from already taxed FNCFSAs human resources as FNCFSAs staff spend an average of 54 hours per incident resolving these disputes. Jordan's Principle, a child-first solution to resolving these disputes, has been developed and endorsed by over 230 individuals and organizations. This solution is cost neutral and would ensure that children's needs are met whilst still allowing for the resolution of the dispute.
- Agencies serving less than 1000 children (and thus receive only a portion of the operations budget depending on populations levels) and agencies in remote communities require upwards adjustments in the funding formula.

INAC recently announced it will provide $25 million per year in additional First Nations child and family service funding for each of five years, which held some promise of relieving some of the cost pressures for FNCFSAs. Unfortunately, instead of targeting those dollars to benefit children, INAC allocated over $15 million per year to fund its own costs arising from increased billings for children in care (due largely to lack of investments in least disruptive measures) and to hire staff. It did allocate an additional $8.6 million per year for inflation relief for FNCFSAs, but this represents only a small portion of what is required to offset inflation losses. INAC has also stated that until it completes an evaluation of maintenance funding (funds to keep children in care) to satisfy a treasury board requirement it will not release the inflation funds for agencies. Upon questioning, INAC audit and evaluation unit was not able to identify a standard upon which it would evaluate the maintenance budget and was clearly not aware that measuring outcomes in child welfare is in the very early stages of development – even in non Aboriginal child welfare in Canada. The idea that child welfare funding to address a glaring inequality should be held back to satisfy such a poorly supported administrative requirement raises significant concerns.

The cost of perpetuating the inequities in child welfare funding are substantial – INAC maintenance costs for children in care continue to climb at over 11% per annum as there are no other options provided to agencies to keep children safely at home. Additionally, as Canada redresses the impacts of residential schools it must take steps to ensure that old funding policies which only supported children being removed from their homes are addressed.

We allege that Directive 20-1 is in contravention of Article 3 of the *Human Rights Act* in that Registered First Nations children and families resident on reserve are provided with inequitable levels of child welfare services because of their race and national ethnic origin as compared to non Aboriginal children. The discrimination is systemic and ongoing. INAC has been aware of this problem for a number of years and was presented with an evidence base of this discrimination in June of 2000 with the two *Wen:de* reports being delivered in August and October of 2005 respectively. These reports were followed by the Canadian Incidence Study Report (Mesnmimk Wasatek) in June of 2006.

Regional Chief Lawrence Joseph
Assembly of First Nations

Guy Lonathild, Vice-Chief

Cindy Blackstock, Executive Director
First Nations Child & Family Caring
Society of Canada

This is Exhibit "B" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

First Nations Child and Family Caring Society of Canada et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

STATEMENT OF PARTICULARS OF THE COMMISSION

CANADIAN HUMAN RIGHTS COMMISSION
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1

Daniel Poulin

Tel.: (613) 947-6399
Fax: (613) 993-3089

OVERVIEW

This is an allegation of discrimination in the provision of a service on the grounds of race and national or ethnic origin. The Complainants (Assembly of First Nations and the First Nations Child and Family Caring Society of Canada) allege that the Respondent, Indian and Northern Affairs Canada (represented herein by the A.G. of Canada), discriminates against Aboriginal children in the provision of a service by inadequately funding child welfare services the whole contrary to s.5 of the *Canadian Human Rights Act*.

The Complainants allege that the funding formula contained in a directive used by the Respondent, a part of the First Nations Child and Family Services National Program Manual, results in the under-funding of services designed to keep families together and over-funds services that put Aboriginal children into state care.

A. MATERIAL FACTS

Subject to the Respondent's disclosure, the Commission will rely on the facts presented by the Complainants.

Complainants

1. The Complainant Assembly of First Nations is the national representative organization of the First Nations in Canada.

2. The Complainant First Nations Child and Family Caring Society of Canada is a national non-profit organization that provides research, policy and professional development, and supports to First Nations child welfare agencies. Its aim is to promote the well being of First Nations children, youth, families and communities with a particular focus on the prevention of, and response to, child mistreatment.

Respondent

3. The Respondent, Indian and Northern Affairs (represented herein by the A.G. of Canada) is one of the federal government departments responsible for meeting the Government of Canada's obligations and commitments to First Nations, Inuit and Métis, and for fulfilling the federal government's constitutional responsibilities in the North. INAC's responsibilities are largely determined by numerous statutes, negotiated agreements and relevant legal decisions.

4. At issue in this complaint is the alleged under-funding of child welfare services to First Nations children on reserve.

5. First Nations child and family service agencies operate on reserve pursuant to provincial jurisdiction. These agencies are funded by INAC according to a national funding formula known as Directive 20-1 (in every province but Ontario where the funding is done under a separate agreement). Where there are no agencies, the provinces provide the service and are reimbursed by INAC.

6. It is alleged that the formula provides unlimited funds to place First Nations children in foster care but almost no resources to keep children at home.

B. ISSUES

The issue which is raised in this case and which the Tribunal must address are as follows:

> Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin.

C. THE LAW AND THEORY OF THE CASE

a) Prima facie case

The initial onus is upon the Complainant to establish a *prima facie* case of discrimination on at least one of the grounds alleged. The threshold for proving such a case is extremely low. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent."[1] That answer or explanation must be believed and not shown to be a pretext.[2] Once a complainant establishes a *prima facie*

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[1] *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears* [1985] 2 S.C.R. 536 at page 558

[2] *Basi* v. *Canadian National Railway (No. 1)* (1988), 9 C.H.R.R. D/5029 (Can. Trib.)

case of discrimination, she is entitled to relief in the absence of justification by the respondent.[3]

Once a *prima facie* case of discrimination is established, the burden of proof shifts to the respondent to demonstrate that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified.

b) Bona fide justification

When the evidence establishes a prima facie case of discrimination, the burden shifts to the respondent to demonstrate that its decision is a bona fide justification under the *CHRA*. To do so, the respondent must, in light of the decisions of the Supreme Court of Canada in British Columbia (Public Service Employee Relations Commission v. BCGSEU ("Meiorin") and British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer), demonstrate on the balance of probabilities that:

a) The respondent adopted the standard for a purpose or goal rationally connected to the function being performed;

b) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

c) The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate individual sharing the characteristics of the complainant without incurring undue hardship.

c) Provision of a service

The Commission will submit that the facts at issue do constitute a "provision of a service" under the *Act*.

C. REMEDIES

The Commission seeks the following remedies:

- An undertaking to work with the Commission to ensure that the discriminatory

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[3] *Ontario Human Rights Commission* v. *Etobicoke* [1982] 1 S.C.R. 202 at page 208

practices and behaviour do not continue by ensuring that the appropriate policies, practices and procedures are in place.

- An Order that the Respondent cease the discriminatory practice.

D. WITNESSES

The Commission will rely on the evidence to be adduced by the Complainants.

DISCLOSURE MATERIALS PROVIDED

The Commission's disclosure was already provided to the parties.

DISCLOSURE MATERIALS REQUESTED

The Commission requests the following documents to be disclosed:

- All Documents that are potentially relevant to the matter before the Tribunal;
- All emails, memo, notes exchanged between officials of the Respondent potentially relevant to the matter before the Tribunal.

All of which is respectfully submitted this 1st day of June 2009.

Daniel Poulin
Canadian Human Rights Commission

This is Exhibit "C" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

WilsonChristen LLP
BARRISTERS

JEFFERY WILSON
Certified by the Law Society of Upper Canada as a specialist in family law.
jeffery@wilsonchristen.com
direct 416.956.5622

June 5, 2009

SENT BY OVERNIGHT COURIER

Karen Cuddy
Justice Canada
Indian Residential Schools Team
90 Sparks Street, 3rd Floor
Ottawa, Ontario
K1A 1H4

Daniel Poulin
Canadian Human Rights Commission
Canada Place
344 Slater Street, 8th Floor
Ottawa, Ontario
K1A 1E1

Nicole Bacon
Registry Officer
Canadian Human Rights Tribunal
160 Elgin Street– 11th Floor
Ottawa, Ontario
K1A 1J4

Dear Ms. Cuddy, Mr. Poulin and Ms. Bacon:

RE: First Nations Child and Family Caring Society of Canada et al. and Attorney General of Canada

In accordance with the April 8, 2009 direction of the Tribunal and its subsequent indulgence of a further week for production of our material, the enclosed Brief includes as follows:

Tab 1: the rule 6(1)(a)(b) and (c) material facts, position on the legal issues and relief FNCFCS seeks;
Tab 2: the rule 6(1)(d) list of documentation for which no privilege is claimed;
Tab 3: the rule 6(1)(e) list of documentation for which privilege is claimed;
Tab 4: the rule 6(1)(f) list of potential witnesses (non-expert) the Complainants intend to call; and

Tab 5: the rule 6(3) preliminary list of potential expert witnesses without, at this point in time, any expert reports.

Yours truly,
WILSON CHRISTEN LLP

Jeffery Wilson
JW/jld
Enclosures

c.c. Cindy Blackstock
Candace Metallic

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

Preliminary Disclosure Brief of the First Nations Child and Family Caring Society of Canada and The Assembly of First Nations

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TO: **Daniel Poulin**
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AND TO: Guy Grégoire
Director, Registry Operations
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Ottawa, Ontario K1A 1J4

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CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

Index to Preliminary Disclosure Brief of the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations

(as of June 5, 2009 and pursuant to Rule 6 of the Canadian Human Rights Tribunal Rules of Procedure)

TAB NO.

Court File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

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

Respondent

STATEMENT OF PARTICULARS, DISCLOSURE, PRODUCTION OF THE COMPLAINANTS

[Rules 6(1)(a)(b) and (c) Canadian Human Rights Tribunal of Procedure]

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Counsel to First Nations Child and Family Caring Society of Canada and Assembly of First Nations.

Overview

1. There is insufficient funding for statutory[1] child welfare and protection programs for registered Indian[2] children and families normally resident on reserve.

2. The fact of insufficient funding can readily be measured by the significantly greater public funding available, and benefit received, for the statutory child welfare and protection programs that are, and have been provided to registered First Nations children and families living off reserve, and non-First Nation children living on and off reserve.

3. To date[3] the Respondent has not contested these assertions. Thus, a registered First Nation child and First Nation family entitled under statute to child welfare or child protection services and normally resident on reserve receives a lesser benefit compared to that received by all others.

4. The under-funding of statutory child welfare and protection programs targeted at registered First Nations normally resident on reserve engages sections 3 & 5 of the *Canadian Human Rights Act*.

5. In this inquiry[4], the Complainants are respectfully asking the tribunal to give effect to the principle of substantive equality[5]. The evidence the Complainants intend to present will enable the tribunal to compare the child welfare needs and statutory services available to the public generally against the child welfare needs and statutory services available to registered First Nation children and families normally resident on reserve and determine that there exists differential treatment and discriminatory practices in relation to the benefit provided.

Material Facts

6. First Nations Child and Family Caring Society of Canada ("FNCFCS") is an umbrella organization servicing First Nations Child and Family Services Agencies ("FNCFS Agencies") in Canada. Thus, it is an organization with particular expertise and experience in working with First Nations children and families on and off reserve in the context of their child welfare and child protection needs.

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[1] Each province and territory has legislation that provides for child welfare and child protections services and program to be implemented to ensure a minimum standard of care for all children.

[2] "Indian" is the term used in section 91(24) of the *Constitution Act*, granting the federal government jurisdiction over "Indians and Lands Reserved for Indians", and is used in other pieces of federal legislation enacted under this head of power. However, in this submission, the term 'First Nation(s)' will be used to describe people who are referred to in legislation as an 'Indian (s)'.

[3] The Complainants filed a joint complaint 2006/1060 with the Canadian Human Rights Commission ("CHRC") on February 23, 2007. The Respondent filed no response disputing the content of the Complaint. In fact, as the Complainants will demonstrate at the inquiry, the Respondent participated in the development of all reports substantiating the complaint.

[4] The Commission requested the institution of an inquiry in September of 2008.

[5] *Hodge v. Canada (Ministry of Human Resources Development)* [2004] S.C.J. No. 60.

7. Assembly of First Nations (AFN) is the national political representative body of First Nation governments and their citizens in Canada, including those living on reserve and in urban, rural areas. The AFN represents over 600 First Nations. FNCFCS and AFN are the joint complainants. They filed a complaint, 2006/1060 (the "Complaint") on February 23, 2007.

8. The Respondent is the Attorney General of Canada (representing the Minister of Indian and Northern Affairs) pursuant to the April 8, 2009 directions of the tribunal, and is referred to as "Canada".

9. The Complainants assert that Canada, through its First Nations Child and Family Services Program ("FNCFS Program"), does not provide sufficient funding to ensure culturally based statutory child welfare and protection programs for registered First Nation children and families normally resident on reserve that are comparable to those received by all other children and families.

10. Canada is responsible for the funding of such statutory and culturally based child welfare and protection services on reserve through authorized First Nation Child and Family Services Agencies Bands, Tribal Council or in the absence of available First Nation child welfare agencies through the Provinces or Territories. FNCFS Agencies carry out the identical mandate of agencies or government departments funded for the same statutory child welfare and protection programs off reserve by provincial and territorial governments.

11. The Complainants intend to demonstrate that Canada does not provide the funds to enable comparable benefits that are available, and received, by all others.

12. The Complainants intend to demonstrate that the effect of this discriminatory practice includes the denial, in contravention of statutory obligations, of essential child welfare and child protection programs to on reserve First Nation children and families to their severe detriment, and this impacts upon a constituency of children and families known to have greater child welfare and child protection needs.

13. As the Complainants will also demonstrate, this discriminatory practice contravenes "Jordan's Principle[6]" passed unanimously by the House of Commons on December 12, 2007.

14. Furthermore, this Tribunal will have the opportunity of hearing from the Complainants' witnesses in support of each of the following facts:

(i) The Complainants, together with Canada, participated in a series of expert studies[7] designed to examine the nature of the differential treatment in the provision of

[6] Jordan's Principle is a child first principle, the origins of which are that of a case of Canadian jurisdictional wrangling that left a small child, Jordan River Anderson, unnecessarily in a hospital where he passed away because the provincial and federal authorities could not sort out who was responsible for the funding for his home-care. According to Jordan's Principle, the government of first contact is to provide the services immediately required for an First Nation child in priority to a determination of which of the governmental jurisdictions within Canada are responsible.

statutory child welfare and child protection services on and off reserve and to provide recommendations on the improvement to Canada's current funding structures, policies and formulas;

(ii) The findings contained in the expert studies substantiate the differential treatment arising from the current funding structures, policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve;

(iii) Canada's response, *without* supporting expert analysis and opinion, included strategies that did not redress the inequities.[8] Separate and independent reports from the Auditor Generals of Canada and British Columbia in May of 2008, and the recent March 2009 Report of the Standing Committee on Public Accounts[9] found that Canada's response did not redress the inequities;

(iv) Canada independently commissioned studies that came to the same conclusion[10] as that of the Complainants in respect of the inequities;

(v) Canada did not provide the Canada Human Rights Commission with any factual material to contradict the assertions of discriminatory practices in the Complaint; and

(vi) Canada has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in First Nations Child and Family Services Agencies being unable to meet their statutorily mandated responsibilities[11].

15. The Canadian Human Rights Commission requested an inquiry. An inquiry is necessary because findings of fact are required for a determination of the legal issues.

Position on the Legal Issues

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[7] The studies include the "Joint National Policy Review-Final Report" of June 2000 and a series of three reports: "Bridging Econometrics and First Nations Child and Family Service Agency Funding" (2004); "Wen: de We Are Coming to the Light of Day" (2005) and "Wen de The Journey Continues" (2005)

[8] This Tribunal will hear evidence about Canada's proposed "Alberta Response Model" and a national funding approach referred to as the "First Nations Child and Family Services Prevention Enhancement".

[9] March 2009, 40th Parliament, 2nd Session, Hon. Shawn Murphy, MP Chair : "Chapter 4, First Nations Child and Family Services Program-Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General".

[10] Amongst other documentation that is subject of disclosure at Tab 2 of the Particulars Brief, reference can be made to the 2007 INAC "Evaluation of the First Nations Child and Family Services Program"; the 2006 Deloitte Enterprise Risk Services Report – Risk Assessment Results "First Nations Child and Family Services Program"

[11] October 2006 Revised 2006-10-26 Fact Sheet "First Nations Child and Family Services" contains this excerpt:

> However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care and in order for the agencies to meet their mandated responsibilities.

Section 5 CHRA "Service"

16. If, as is argued, the evidence will demonstrate, that:

(a) The Government of Canada's First Nations Child and Family Services Program is the primary, if not exclusive source of public funding for statutory required and culturally based child welfare and protection programs for registered First Nation children and families normally resident on reserve,

(b) The purpose of First Nations Child and Family Services Program is that which Canada describes; namely:

> The main objective of the First Nations Child and Family Services (FNCFS) Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to First Nations children and families on reserve are **comparable to those available to other provincial residents in similar circumstances**[12] (Emphasis added)

(c) The funding provided under Canada's First Nations Child and Family Services Program is not simply an administrative or executive transfer of funds to the First Nations Child and Family Services Agencies, Bands and Tribal Councils that provide for provincial statutory required child welfare and child protection services on reserve. Canada exercises independent control and imposes terms and conditions for the distribution and use of funds that may be different and supplementary to those terms and conditions for the distribution and use of funds in the case of all other children; and

(d) Without the provision of substantively equitable funding by Canada to that provided for by the Province and Territories, registered First Nation children and families on reserve are denied a comparable standard of help, assistance and benefit,

the funding is a "service"[13] within the meaning of section 5 of the *Canadian Human Rights Act*. Certainly, and at the very least, the resolution of this issue requires factual findings and a determination after a full hearing. As noted in one reviewing judicial tribunal where in another

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[12] INAC Fact Sheet: "First Nations Child and Family Services" (Date Modified: 2008-11-03).

[13] See *Chambers v. Saskatchewan (Department of Social Services)*1988 CarswellSask 300 (Sask. C.A.), [1988] S.J. No. 464 (C.A.) at paragraph 38 where the Court observed: "Broadly speaking, services provided by the Crown are available to all members of the public. Most services the Crown provides can be described as publically available benefits. Provision of financial assistance to people in need is but one example."
See also *Chipperfield v. British Columbia (Ministry of Social Services)* [1997] B.C.H.R.T.D. No. 20: the Tribunal rejected the notion that the provision of funding cannot be a "service" for human rights purposes when the sole purpose of the funding is to permit access to targeted accommodation of a need. In *Courtois v Canada (Department of Indian Affairs and Northern Development)* [1990] C.H.R.D. No. 2, the Tribunal considered section 5 of the CHRA to find that the provision of funding for education on a reserve was a "service" available to the general public despite the constitutional jurisdictional divide regarding the provision of funding for education on and off reserve. In *Ontario Human Rights Commission v. Ontario* (1994), 19 O.R. (3d) 387, [1994] O.J. No. 1732 (C.A.), funding denied to an individual because of an age limitation was found to be discriminatory, and the funding in that case was to provide financial assistance to persons needing assistive devices.

human rights discrimination complaint case, a similar preliminary issue was raised about meeting the test of a service:

> **6.** In our view, there is a clear jurisdictional issue raised as to whether the relationship between the Diocese and its postulants can be characterized as a "service" within the meaning of s. I of the Code. That is not a pure question of law. A proper analysis of the issue can only be done on a factual record establishing, for example, the nature of the relationship between the Diocese and those it accepts as postulants, the mutual obligations and expectations between them, what is provided to the postulants by the Diocese, the basis upon which things are provided to postulants and the like. Those factual determinations are best made by the Tribunal, which would have the advantage of hearing live evidence on these issues if it thought it advisable. Also, the Tribunal has special expertise on issues of interpreting its home statute and the reviewing court would benefit from that opinion.[14]

Prohibited Ground of Discrimination

17. The Complainants submit that they have established a *prima facie* case of discrimination on the grounds of race or national or ethnic origin.[15] Only First Nation children and First Nation families on reserve suffer the effect of the discriminatory practices.

18. The Complainants submit that the issue of an appropriate comparator group will be properly assessed on the facts of the Complaint and following the tribunal's examination of the purpose of the service [16] and the differential child welfare and protection needs[17].

19. Provincial and Territorial child welfare and child protection statutes do not provide for a lesser standard in application of child welfare and child protection principles for registered First Nation children and families normally resident on reserve. All children in similar needs are to receive the same benefit under the law. Funding structures, policies and formulas which results in a lesser benefit for under registered First Nation children and families under the law, is discriminatory on the prohibited grounds of race, national or ethnic origin.

20. The evidence will demonstrate that the needs of First Nations Child and Family Services Agencies and the needs of the children and families that they serve are certainly not less[18] than those of children and families off reserve and the agencies that serve them, and thus the remedy sought.

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[14] *Incorporated Synod of the Diocese of Toronto v. Ontario (Human Rights Commission)* [2008] O.J. No. 1692 at paragraph 6

[15] *Marakkaparambil v.Ontario (MOHLTC)* [2007] O.H.R.T.D. No. 24 where the Tribunal applies the *Law* analysis to discrimination complaints about government services and benefits offering up the following test: is it plain and obvious that the complaint cannot succeed on the *Law* framework, in the human rights context, on the facts submitted? See, in particular, paragraph 39.

[16] *Battleford and District Co-operative Ltd. v. Gibbs* [1996] S.C.J. No. 55 at paragraph 33.

[17] *Lavoie v. Canada* [2002] 1 S.C.R. 769 at paragraph 40 may be instructive:

> ...the type of scrutiny proposed by the respondents- namely to choose comparator groups based on jurisdictional considerations- finds no support neither in *Law* nor in any other s.15(1) case. On the contrary, the very essence of an entrenched bill of rights such as the *Charter* is to analyze differential treatment as an issue of equality rights, not of federal versus provincial jurisdiction...

[18] The Complainants rely upon the Royal Commission on Aboriginal Peoples.

Relief Requested

21. The purpose of the tribunal hearing is to achieve a substantiation of the complaint to the Commission and for an order against the federal authorities:

(1) Pursuant to section 53 (2)(a) of the *CHRA* requiring the immediate cessation of disparate funding, as described above;

(2) Pursuant to section 53(2)(a), and in order to redress the discriminatory practices:

(a) The application of Jordan's Principle to federal government programs affecting children and which implementation shall be approved by the Canadian Human Rights Commission in accordance with section 17;

(b) The adoption of all of the funding formula (updated to 2009 values) and policy recommendations contained in "Wen: de The Journey Continues [:] The National Policy Review on First Nations Child and Family Services Research Project Phase 3" and which implementation shall also be approved by the Canadian Human Rights Commission in accordance with section 17; and

(3) Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to:

(a) As compensation, subject to the limits provided for in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989[19] and thereby experienced pain and suffering;

(b) As compensation for the expenses required to enable those persons who experienced pain and suffering to receive therapeutic, repatriation, cultural and linguistic services and for the expenses to enable First Nations Child and Family Services Agencies to provide such services.

(4) Pursuant to section 53(2)(d) full compensation for the expense of legal services; and

(5) Pursuant to section 53(2)(a) requiring that payment of funds, as referred to above, be implemented without the reduction of funding for any First Nations programs, including Firth Nations Child and Family Services Agencies.

[19] As the evidence at the hearing will reveal, in 1989, Canada introduced the funding formula known as "Directive 20-1, Chapter 5."

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

Tab 2: Rule 6(1)(d) list of documentation for which no privilege is claimed by the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations

1. First Nations Child and Family Caring Society of Canada (FNCFCS). "FNCFCS Strategic Directions 2006-2011." 9 May 2006. <http://fncfcs.com/docs/strategicDirections2006_2011.pdf>

2. Assembly of First Nations (AFN). "Description of the AFN." <http://afn.ca/article.asp?id=58>

3. AFN. "Charter of the Assembly of First Nations." April 2003. <http://afn.ca/article.asp?id=57>

4. AFN. "Resolution No. 53." 5, 6, 7 December 2006. <http://afn.ca/article.asp?id=3538>

5. FNCFCS. "Fact Sheet: Jordan's Principle." <http://fncfcs.com/docs/JordansPrincipleFactSheet.pdf>

6. "39th Parliament, 2nd Session: Private Members' Business. Edited Hansard: Number 012." 31 October 2007 (Motion 296 in support of Jordan's Principle, passed unanimously in House of Commons on December 12, 2007)

7. The Joint National Policy Review on First Nations Child and Family Services

8. FNCFCS. "Wen:de Series of Reports Summary Sheet." 12 March 2007. <http://fncfcs.com/docs/WendeReportsSummary.pdf>

9. McDonald, Rose-Alma J., PhD, Dr. Peter Ladd, et al. "First Nations Child and Family Services: Joint national Policy Review, Final Report." June 2000. <http://www.fncfcs.com/docs/FNCFCS_JointPolicyReview_Final_2000.pdf>

10. Loxley, John, Fred Wien, and Cindy Blackstock. "Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report." FNCFCS, December 2004.

11. FNCFCS. "Wen:de We Are Coming to the Light of Day." 2005.

12. FNCFCS. "Wen:de The Journey Continues." 2005.

13. ACS Legal Services Branch. "Sample Trilateral Agreement." January 2007.

14. 2008/2009 Comprehensive Funding Arrangement Alberta Region for Use with Recipients other than First Nations and Tribal Councils.

15. Indian and Northern Affairs Canada (INAC). "First Nations Child and Family Services: Alberta Implementation (presentation)." 24 August 2007.

16. Office of the Auditor General of Canada. "Report of the Auditor General of Canada to the House of Commons: Chapter 4 First Nations Child and Family Services Program – Indian and Northern Affairs Canada." May 2008.

17. Office of the Auditor General of British Columbia. "2008/2009: Report 3, Management of Aboriginal Child Protection Services." May 2008.

18. INAC. "Evaluation of the First Nations Child and Family Services Program, Project 06/07." March 2007.

19. Deloitte Enterprise Risk Services. "First Nations Child and Family Services Program, Risk Assessment Results." 2006.

20. INAC. "Fact Sheet: First Nations Child and Family Services Program." 3 November 2008. <http://www.ainc-inac.gc.ca/ai/mr/is/fn-chfam-eng.asp>

21. INAC. "Fact Sheet: First Nations Child and Family Services." October 2006.

22. Letter from Cindy Blackstock to Honourable Chuck Strahl, 9 March 2009.

23. Letter from Honourable Chuck Strahl to Cindy Blackstock, cc: Deputy Grand Chief Chris McCormick, Geoff Stonefish, Betty Kennedy, 28 May 2009 (reply to letter dated 9 March 2009).

24. Letter from Jean Crowder (MP, Nanaimo-Cowichan, NDP Aboriginal Affairs Critic) to Kathy Langlois (Director General, Health Canada), cc: Honourable Leona Aglukkaq, Cindy Blackstock, Chief Angus Toulouse, Karen Pugliese, 25 May 2009.

25. Minutes: FNCFS Joint National Policy Review, "National Advisory Committee Draft Meeting Minutes," 30 September – 1 October 2002.

26. "Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General: Report of the Standing Committee on Public Accounts" March 2009

27. 000460 INAC. "E-mail from Margaret Mitchell to Barbara Caverhill; Gilles Rochon." 28 November 2002.

28. 000474 INAC. "E-mail from Jerry Lyons to Louise Deschenes, CC; Catherine Green; Priscilla Corcoran; Terri Harrison." 29 November 2002.

29. 000475 INAC. "E-mail from Jerry Lyons to Kathy Green." 29 November 2002.

30. 000810 INAC. "E-mail from Margaret Mitchell to Andrew Kenyon." 14 January 2003.

31. 000814 INAC. "E-mail from Terri Harrison to Jerry Lyons; Kathy Green." 16 January 2003.

32. 000815 INAC. "E-mail from Margaret Mitchell to Jerry Lyons; Kathy Green; Terri Harrison." 17 January 2003.

33. 000894 INAC. "E-mail from Bruce Waddell to Doug Forbes; Gordon Shanks; James Moore; John Sinclair; Michael Roy." 11 November 2002.

34. 001017 INAC. "E-mail from Margaret Mitchell to Jerry Lyons; Kathy Green; Meredith Porter." 3 February 2003.

35. 000443 "Costing for Determining Average Allocation for FNCFS Agencies to Provide In-Home Preventative Services."

36. 001105, 001107 INAC. Implementation of the Family Support Program in First Nations Communities."

37. 001074, 001075, 00186 INAC. "In-Home Family Support Programming."

38. 000060 INAC. "Health and Children RGMAP Working Group." 11 July 2002.

39. 000161 INAC. "DRAFT Health and Children RGMAP Working Group." 25 July 2002.

40. 000065 to 00075 INAC. "Education and Social Development RGMAP Working Group." 17 July 2003.

41. 000111 INAC. "Education and Social Development RGMAP Working Group: Social Development Proposals." 24 July 2003.

42. 000196 INAC. "Maintenance."

43. 001180 INAC. "Speaking Notes for DM at DMCAP-FNCS In Home Family Support Program."

44. 000093 INAC. "E-mail from Kathy Green to Kathleen Campbell, Re: RGMAP Summer Working Group: Education and Social Development." 19 July 2002.

45. 000213 INAC. "E-mail from Bruce Waddell to Barbara Caverhill; Dan Beavon; Danielle White; David Henley; Elissa Tilley; Helen Young; Janice Birney; Kathleen Campbell; Kathy Green." 13 August 2002.

46. 000215 INAC. "E-mail from Kathleen Campbell to Barbara Caverahill; Bruce Waddell; Dan Beavon; Danielle White; David Henley; Elissa Tilley; Helen Young; Janice Birney; Kathy Green." 14 August 2002.

47. 001164 INAC. "Memo: Chantal Bernier to Priscilla Corcoran." 19 August 2002 (p. 1 only).

48. 000271 INAC. "E-mail from Kathy Green to Lynne Newman, CC: Kathleen Campbell; Sheila van Wyck." 17 September 2002.

49. March 9, 2007 Email from Vince Donoghue to Damien Lafrenière

50. October 28, 2003 Evidence re 37th Parliament, 2nd Session, Subcommittee on Children and Youth at Risk of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities

51. October 1, 2002 Email from Kathy Green to Lynn Newman with attachments

52. 001209 to 001225 Compilation of Regional Table Information Adjustment Facts for New Provincial Programs and Services

53. 001091 Excerpt (one page) from IFSP Table by Region

54. 001094 to 001099 Information Briefing Note for the Deputy Minister

55. December 7, 2004 E-mail from Priscilla Corcoran to Pam Hunter and Vince Donoghue

56. 001736 and 001737 Annex B re: Funding Costs and Source of Funds

57. 001765 to 001774 Annex A Contributions to support culturally appropriate prevention and protection services for Indian children and families resident on reserve

58. 001878 Implementation of a Prevention-Focused Approach

59. 001137 to 001163 First Nations Child and Family Services Options for Policy Change

60. 001088 to 00192 and 00194

61. March 16, 2009 letter from Chantelle Bryson to Canadian Human Rights Tribunal, together with attached Schedules "A", "B" and "C"

62. ACS Legal Services Branch. "Western Cree Tribal Council Child Welfare Agency/Canada/Alberta: 2055 Consolidated Child, Youth and Family Enhancement Agreement December 1, 2005

63. INAC Internal Audit of the First Nations Child and Family Services Program March 2007

64. March 19, 2009 letter to Mr. Shawn Murphy, MP from Michael Wernick of INAC with attachments referred to therein

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

Tab 3: Rule 6(1)(3) list of documentation for which privilege is claimed by the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations

1. Any and all memoranda, or written communications between the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations and their legal counsel or in preparation for Canadian Human Rights Tribunal hearing

Tab 4: Rule 6(1)(f) list of potential witnesses (non-expert) the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations intend to call

Canadian Human Rights Tribunal File No. T1340/7008
First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada

Potential Witness Chart as of June 5, 2009 (Non-Experts)

Name	Credentials	Organization	Gist of Testimony
*Sheila Fraser	Chartered Accountant, FCA	Auditor General of Canada	Inequity of child welfare funding both in Directive 20-1 and new Alta based approach
*John Doyle	Chartered Accountant, MBA, M. Accounting	BC Auditor General	Inequities in funding. Released a joint report done with the AOG on First Nations child welfare funding 2008
Chuck Strahl		Minister of Indian and Northern Affairs Canada and Member of Parliament (Conservative)	Inequities in child welfare funding

Name	Credentials	Organization	Gist of Testimony
*Shawn Murphy	Bachelor of Business Admin, Bachelor of Law	Member of Parliament (Liberal) and Chair of the Standing Committee on Public Accounts	The Standing Committee did a follow up to the AOG report and found both the Directive and new approach to be inequitable
*Jean Crowder	Bachelor of Arts, Psychology	Member of Parliament (NDP). Opposition critic on Aboriginal Affairs	Introduced the Private Members Motion on Jordan's Principle to the House of Commons and to speak to reason for doing so having regard to child welfare needs of First nations children and current inequities and funding as an essential service.
*Marc Lemay	Lawyer	Member of Parliament (BQ)	Observations and history of involvement giving rise to his public position in and outside of Parliament on the issues of funding and the current inequities.
Joan Glode	Master of Social Work	Mi'kmaw Family and Children's Services	Observations arising from 3 successive Child and Family Services reviews with INAC and identification of funding

Name	Credentials	Organization	Gist of Testimony
			inequities as an independent and crucial factor
Warner Adam	Bachelor of Social Work	Executive Director, Carrier-Sekani CFS	25 years of experience and resulting observations of the funding issue and its relevance to inequitable services.
Lise Haddock	Master of Social Work	Executive Director, Lalumsmeen CFS (Cowichan Tribes)	10 years of experience in working in B.C. and observations on the impact of the funding issue and its relevance to her work and the matter of inequitable Child and Family Services and funding as an essential service.
Judy Levi	Bachelor of Social Work	CFS Coordinator, New Brunswick	Presentation of impact of the funding issue on capability of First Nation agencies to service or effectively servicing their clients, particularly in the not atypical small native communities.
Richard Gray		Director of Social Dev, CSSQL	Works for the umbrella organization for FN in Quebec

Name	Credentials	Organization	Gist of Testimony
		(Quebec Region)	and Labrador re: health and social issues. He has been involved in national tables on CFS for the past 3-4 years. Commissioned Dr. Loxley to compare what INAC was offering under the new Alberta approach with what Quebec region would have received under Wen:de and found the new model fell well short of what Wen:de recommended and observations re: funding as an essential service.
Elsie Flette	Master of Social Work	CEO Southern First Nations Authority, Manitoba	Became involved in the NPR[1] in 1997 and will testify to the first hand impacts Directive 2001 has on First Nations agencies and the identity of funding with equitable provision of services especially the discrepancy between on and off reserve delivery of services to First

[1] NPR refers to "joint natural policy review" by INAC and AFN

Name	Credentials	Organization	Gist of Testimony
			Nations children.
Derald Dubois	Master of Social Work	Director, Touchwood CFS, Saskatchewan	Was on the "project management team" which consisted of one AFN rep, one INAC rep and one Director's rep (Derald) who were charged with the implementation of the NPR recommendations and will speak to the inequities of the current funding and the fact and nature of funding as an essential service.
Carolyn Buffalo	Chief, lawyer	Montana First Nation	Will speak to her own experiences with her child who was affected by the inequitable provision of funding and the identity of that inequity with necessary services for her son.
Zack Trout	Councilor	Cross Lake First Nation	Will similarly speak to personal experiences with his own children arising from the discriminatory provision of funding.

Name	Credentials	Organization	Gist of Testimony
*Marvin Berstein	Lawyer	Child Advocate of Saskatchewan	Will be summonsed to give evidence of the work of his office on the issue of discriminatory funding and his office's observations of the impact of such funding inequity.

*Summons required

Tab 5: Rule 6(3) list of potential expert witnesses the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations intend to call, with reports to follow on or before June 30, 2009

Canadian Human Rights Tribunal File No. T1340/7008
First Nations Child and Family Caring Society of Canada and Assembly of First Nations v. Attorney General of Canada

Potential Witness Chart as of June 5, 2009 (Experts)

Name	Credentials	Organization	Testimony
Jaap Doek	Lawyer/Judge Child rights expert	Former Chair of the United Nations Committee on the Rights of the Child	Applicability of the U.N. Convention on the Rights of the Child to the issues before the Tribunal and international reference to disparate funding as constituting rights violations.
Margo Greenwood	PhD	Director of the National Collaborating Centre on Aboriginal Health	Aboriginal child rights expert will testify to how inequalities and will provide an opinion on how funding inequities have been recognized as contrary to international indigenous human rights Conventions.

Name	Credentials	Organization	Testimony
John Loxley	PhD Economics	University of Manitoba	Principle economist on the Wen:de reports and will provide expert opinion evidence on the impact of inequitable funding, as so found, and the monetary extent of the gap to correct the inequitable funding practices.
Fred Wien	PhD, Developmental Sociology	Dalhousie University	Expert opinion as the principal investigator in Wen:de and will given opinion evidence on the Wen:de findings, the factual underpinning to funding as a service and the impact of inequitable funding practices. Will also discuss remedial measures taken in Alberta and his involvement in discussions with INAC and Alberta authorites and resulting opinion as to how to correct for the inequities.
Brad McKenzie	Phd, Social Work	University of Manitoba	Expert opinion arising from prior work and qualifications especially in Manitoba concerning funding as a service and inequities arising

Name	Credentials	Organization	Testimony
			from the current funding system.
Nicholas Trocme	PhD, Social Work	McGill University School of Social Work	Principal investigator of the Canadian Incidence Study on Reported Child Abuse and Neglect, contributing author to Wen:de. Opinion evidence on factual connection between funding and services and disparate impact on First Nations children.
Judy Finlay	PhD candidate(Expected completion July 2009)	Associate professor at Ryerson and former child and youth advocate in Ontario	Focus on Ontario; impact of funding formula, and funding as a service and disparate impact of current funding.
Dr. Noni MacDonald	Pediatrician	President of the Canadian Pediatric Society and professor of medicine at Dalhousie University.	Applying experience will provide opinion on Jordan's Principle and how current funding is a macro contravention of Jordan's Principle.
Amir Attaran	PhD (Law)	Professor University of Ottawa, editorial board member	Opinion evidence on the violation of equality rights occasioned by an inequitable funding formula.

Name	Credentials	Organization	Testimony
		LANCET and the Canadian Medical Association Journal	
John Milloy	Historian Researcher		Expert evidence that connects historical inequitable funding as a cause for discriminatory practices and compares the result to child and family welfare programs to that of the experience of the abuse arising within the residential schools.

This is Exhibit "D" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

First Nations Child and Family Caring Society of Canada et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

AMENDED STATEMENT OF PARTICULARS OF THE CANADIAN HUMAN RIGHTS COMMISSION

CANADIAN HUMAN RIGHTS COMMISSION
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1

Philippe Dufresne / Daniel Poulin
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OVERVIEW

1. This complaint involves an allegation of discrimination in the provision of a service on the grounds of race and national or ethnic origin. The Complainants, the Assembly of First Nations (AFN) and the First Nations Child and Family Caring Society of Canada (the Caring Society), allege that the Respondent, Indian and Northern Affairs Canada (represented herein by the A.G. of Canada), discriminates against Aboriginal children in the provision of a service, by inadequately funding child welfare services on reserve contrary to section 5 of the *Canadian Human Rights Act* (the *Act*).

2. It is alleged generally that the funding formulas used by the Respondent, a part of the First Nations Child and Family Services National Program Manual, result in the inequitable and under-funding of services pursuant to provincial/territorial child welfare laws. Specific concerns centre on the under-funding of agency infrastructure and services designed to keep families together, which contributes to a growing number of Aboriginal children in state care. Through this funding formula and the related arrangements with direct service providers, the Respondent is responsible for the provision of child welfare services on reserves.

A. MATERIAL FACTS

Complainants

3. The first Complainant, the Caring Society, is a national non-profit organization that provides research, policy and professional development, and supports to First Nations child welfare agencies. Its aim is to promote the well-being of First Nations children, youth, families and communities with a particular focus on the prevention of, and response to, child mistreatment or neglect.

4. The second Complainant is the AFN. The AFN is the national political representative body of First Nation governments and their citizens in Canada, including those living on reserve and in urban, rural areas. The AFN represents over 600 First Nations.

5. The Caring Society and the AFN are joint complainants and filed the complaint at issue on February 23, 2007.

Respondent

6. The Respondent, formerly Indian and Northern Affairs Canada (INAC), now known as Aboriginal Affairs and Northern Development Canada (AANDC), represented by the Attorney General of Canada, is one of the federal government departments responsible for meeting the Government of Canada's obligations (including fiduciary obligations) and commitments to First Nations, Inuit and Métis, and for fulfilling the federal government's constitutional responsibilities in the North. INAC's responsibilities are largely determined by numerous statutes, negotiated agreements, treaties, and relevant legal decisions.

Discriminatory Practice

7. At issue in this complaint is the under-funding of child welfare services to First Nations children on reserve.

8. FNCFS agencies operate on reserve pursuant to provincial/territorial legislation [*It must be noted that this is stated to be without prejudice to asserted First Nations jurisdiction over child welfare*]. At the time the complaint was filed with the Commission, these agencies were funded by AANDC according to a national

funding formula known as Directive 20-1 (in British Columbia, Manitoba and New Brunswick), and as the Enhanced Prevention Focused Approach (Enhanced Approach) (in Alberta, Saskatchewan, Nova Scotia, P.E.I. and Quebec). In Ontario, funding is done under a separate agreement known as the 1965 Indian Welfare Agreement. Currently, the Enhanced Approach has been expanded to include New Brunswick and Manitoba. Where there are no agencies, the provinces provide the service and may be reimbursed by AANDC.

9. The Respondent is responsible for the funding of such statutory and culturally based child welfare and protection services on reserve through provincially authorized First Nation Child and Family Services (FNCFS) Agencies, Bands and Tribal Councils, in the absence of available First Nation child welfare agencies throughout the Provinces or Territories. FNCFS Agencies are required to carry out the same statutory services as agencies or government departments funded for child welfare and protection programs off reserve by provincial and territorial governments.

10. It is alleged that Directive 20-1 provides unlimited funds to place First Nations children in foster care but almost no resources to keep children at home. This chronic and discriminatory under-funding of preventive child welfare services results in higher numbers of children being seized from the home than would otherwise be the case. Preventive child welfare services - often referred to as "least disruptive measures" - are almost completely absent on reserve, and First Nations are therefore deprived of their benefit. These services, regarded as standard for children off reserve, include family counselling and guidance, in-home supports and parent aides, child and respite care, parenting programs, and services to assist families dealing with the serious illness of the child or a family member.

11. It is further alleged that although the Enhanced Approach was meant to rectify the shortcomings identified in Directive 20-1, it has failed to do so, as evidenced by studies commissioned by the Respondent.

12. Both funding regimes, whether Directive 20-1 or the Enhanced Approach, result in substantive inequality for aboriginal children and families on reserve. The effect of the current funding regime and the resulting inequality constitutes adverse differentiation in the provision of a service, as it results in the denial of essential child welfare and child protection services to on reserve First Nations children and families and impacts upon a constituency of children and families known to have greater child welfare and child protection needs.

13. As for the 1965 Indian Welfare Agreement applicable to Ontario, it will be demonstrated that while it is possible that Ontario agencies receive more funding than the agencies funded under the two other arrangements, facts suggest that the funding arrangement does not adequately account for the unique, and higher child welfare needs of First Nations children nor does it adequately account for the unique practice context of FNCFS agencies similar to the rest of the country. In addition, AANDC documents suggest that a cap has been placed on the amount of funding for child welfare services in Ontario.

14. As the Complainants will also demonstrate, this discriminatory practice contravenes "Jordan's Principle", passed unanimously by the House of Commons on December 12, 2007.

15. Furthermore, witnesses will testify to the following facts:

(i) The Complainants, together with the Respondent, participated in a series of studies designed to examine the nature of the differential treatment in the provision of statutory child welfare and child protection services on and off reserve and to provide recommendations to improve the Respondent's current funding structures, policies and formulas;

(ii) The findings contained in the studies substantiate the differential treatment arising from the current funding structures, policies and practices to the severe detriment of registered First Nation children and families normally resident on reserve, who receive unequal child welfare services as a result;

(iii) The Respondent's response, *without* supporting expert analysis and opinion, included strategies that did not redress the inequities. Separate and independent reports from the Auditor General Reports of Canada and British Columbia in May of 2008, the June 2011 Status Report of the Auditor General of Canada, the March 2009 and February 2012 Reports of the Standing Committee on Public Accounts and the Federal Government's response found that the Respondent had not redressed the inequities;

(iv) The Respondent independently commissioned studies that came to the same conclusion as that of the Complainants' in respect of the inequities;

(v) The Respondent has acknowledged that the current funding practices and structure contribute to disproportionately growing numbers of registered First Nation children in child welfare and protection care and results in FNCFS Agencies being unable to meet their statutorily mandated responsibilities to provide a standard of child welfare and protection services.

16. The evidence will demonstrate that:

(a) The Government of Canada's First Nations Child and Family Services Program is the primary, if not exclusive source of public funding for statutorily required and culturally based child welfare and protection programs for registered First Nation children and families normally resident on reserve;

(b) The purpose of the First Nations Child and Family Services Program is that which the Respondent describes, namely: The main objective of the First Nations Child and Family Services Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to First Nations children and families on reserve are comparable to those available to other provincial residents in similar circumstances;

(c) The funding provided under the Respondent's First Nations Child and Family Services Program is not simply an administrative or executive transfer of funds to the FNCFS Agencies, Bands and Tribal Councils that provide for provincial statutory required child welfare and child protection services on reserve. The Respondent exercises independent control and imposes terms and conditions for the distribution and use of funds that may be different and supplementary to those terms and conditions for the distribution and use of funds in the case of all other children; and

(d) Without the provision of substantively equitable funding by the Respondent to that provided for by the Province and Territories, registered First Nation children and families on reserve are denied a comparable standard of help, assistance and benefit. This funding is a "service", within the meaning of section 5 of the *Act*.

B. ISSUES

17. The issue which is raised in this case and which the Tribunal must address is as follows:

> Has the Respondent discriminated against Aboriginal children in the provision of a service, namely either the lack of funding and/or the effect of the funding formula used for the funding of child welfare services to First Nations children and families, or adversely affected them, the whole contrary to s.5 of the Act on the grounds of race and national or ethnic origin?

C. THE LAW AND THEORY OF THE CASE

Prima facie case

18. The initial onus is upon the Complainant to establish a *prima facie* case of discrimination on at least one of the grounds alleged. The threshold for proving such a case is low. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent."[1] That answer or explanation must be believed and not shown to be a pretext.[2] Once a complainant establishes a *prima facie* case of discrimination, she is entitled to relief in the absence of justification by the respondent.[3]Once a *prima facie* case of discrimination is established, the burden of proof shifts to the respondent to demonstrate that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified.

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[1] *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears* [1985] 2 S.C.R. 536 at page 558

[3] *Ontario Human Rights Commission* v. *Etobicoke* [1982] 1 S.C.R. 202 at page 208

19. It is submitted that the evidence so far clearly demonstrates the existence of a *prima facie* case of discrimination. Only First Nations children and families on reserve suffer the effect of the discriminatory practices.

20. While a Comparator group may exist in the present case, one is not required. As the Federal Court found, a comparator group is not part of the *definition* of discrimination, but rather, is an *evidentiary tool* that may assist in identifying whether there has been discrimination in some cases.[4] In effect, if a comparison were to be made, it will be argued and evidenced that it consists of Aboriginal children and families living off reserve and non-Aboriginal families and children living off-reserve.

21. Provincial and Territorial child welfare and child protection statutes do not provide for a lesser standard in the application of child welfare and child protection laws and services for registered First Nations children and families normally resident on reserve. All children with similar needs are to receive the same benefit under the law. Funding structures, policies and formulas which result in a lesser benefit for under-registered First Nations children and families under the law, are discriminatory on the prohibited grounds of race, national or ethnic origin.

22. The evidence will demonstrate that the needs of FNCFS Agencies and the needs of the children and families that they serve are certainly not less and are probably more than those of children and families off reserve and the agencies that serve them, and thus justify the remedy sought.

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[4] *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 446 at para. 290.

***Bona fide* justification**

23. When the evidence establishes a *prima facie* case of discrimination, the burden shifts to the Respondent to demonstrate that its decision is a *bona fide* justification under the *Act*. To do so, the respondent must, in light of the decisions of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission v. BCGSEU* ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (*"Grismer"*), demonstrate on the balance of probabilities that:

    a) The respondent adopted the standard for a purpose or goal rationally connected to the function being performed;

    b) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

    c) The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the complainant without incurring undue hardship.

Provision of a service

24. The Commission will submit that the facts at issue do constitute a "provision of a service" under the *Act* and reiterates the pleadings found at paragraph 16 of the Complainants' original Statement of Particulars.

    Gould v. Yukon Order of Pioneers [1996] 1 S.C.R. 571
    Watkin v. Attorney General of Canada, 2008 FCA 170
    Canada (Attorney General) v. Davis, 2013 FC 40

25. In addition, the Commission will argue, in the alternative, that the Respondent is the effective provider of child welfare and protection services performed by the Agencies and Provinces in that the Respondent exercises effective and complete control over the funding, budget, administration, management and mandate of the Agencies and is involved in the development of policies that directly affect child welfare practices. Thus the acts of the Respondent impacts on the provision of the service by the Agencies and therefore constitutes a discriminatory practice in the provision of a service.

> See by analogy *Canadian Pacific Limited v Canada (Human Rights Commission)*, [1990] F.C.J. no. 1028

D. REMEDIES

26. The Commission seeks the following remedies:

a) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent immediately cease the discriminatory practice and more particularly an Order requiring the immediate cessation of disparate funding;

b) The full and proper adoption and implementation of the funding formula (updated to 2013 values) and policy recommendations contained in Wen:de The Journey Continues and in The National Policy Review on First Nations Child and Family Services Research Project Phase 3 within a period of six months; and

c) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent, along with the complainants, the Commission and the intervener Chiefs of Ontario conduct a study on the 1965 Ontario Agreement in order to ensure that the services provided in Ontario are equivalent to those provided across the country. Full and proper adoption

and implementation of any needed improvements to the formulas to be completed under the supervision of the Commission.

27. The Complainants have advised the Commission that they wish to seek the following remedies:

a) Pursuant to paragraph 53(2)(d) of the *Act* the payment of a sum of $112,000,000 (one hundred and twelve million dollars) into a trust fund to be administered in a way to be agreed upon by the parties or, failing, as ordered by the Tribunal, as compensation for the expenses required to enable those persons who were removed from their communities to receive therapeutic, repatriation, cultural and linguistic services and for the expenses related to providing those services;

b) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent undertakes to give full and proper implementation of Jordan's Principle across its services pursuant to Private Members Motion 296; and

c) Pursuant to paragraph 53(2)(a) of the *Act*, an Order that the Respondent undertakes, in the event that First Nations child and family service agencies may be developed in the future in any province or territory, provide a level of child welfare funding that ensures First Nations children and families on reserves receive equitable benefit pursuant to Provincial/Territorial child welfare laws and standards.

E. WITNESSES

28. The Commission will call the witnesses named and described in Annex A.

DISCLOSURE MATERIALS PROVIDED

29. The Commission's most recent disclosure will be provided to the parties on February 1, 2013.

All of which is respectfully submitted this 29th day of January 2013.

Philippe Dufresne / Daniel Poulin
Sarah Pentney / Samar Musallam
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Counsel for the Commission

Annex A

Commission Witnesses

NON-EXPERTS	
NAME AND TITLE	**SUBJECT OF TESTIMONY**
Cindy Blackstock Executive Director, First Nations Child and Family Caring Society of Canada	Dr. Blackstock has been in her current position since 2002. Her experience in social work and specifically with First Nations organizations such as the Anderson Family, Norway House Cree Nation, the Assembly of Manitoba Chiefs and the Assembly of First Nations has provided her with a range of experiences and knowledge of a range of social issues affecting First Nations people across the country. She was the co-principle investigator of the Wen:de series of reports, and she will discuss the policy review conducted by INAC/AANDC and the AFN. Dr. Blackstock was directly involved in the creation of Jordan's Principle, passed unanimously by the House of Commons on Dec. 12, 2007. Dr. Blackstock will discuss the over-representation of First Nation's children in child welfare and the factors driving this over-representation, including the negative outcomes arising from the unnecessary placement of children in child welfare care. She will testify generally to the facts giving rise to the complaint and the remedies being sought.

Elsie Flette CEO South First Nation Authority Manitoba	Ms. Flette has been the Executive Director of West Region Child and Family Services for just under 20 years. Her agency is mandated by the provincial government to oversee, support, fund agencies who provide direct service on and off reserve delivery. She will speak to the inequities of services on reserve, discussing the National Program Manual on First Nations Child and Family Services and the Internal Audit Manual from INAC.
Judy Levi Coordinator, North Shore Mic Mac District Council (New Brunswick)	Ms. Levi has been working in her position for the past 19 years. She will speak about the organization of child welfare/protection agencies in New Brunswick, how funding is received and by whom. She is involved in advice, guidance and negotiations with the government and can discuss the differences between the funding received by the provinces and the federal government. Ms. Levi will also speak about Directive 20-1 and how this formula has been implemented in the areas she works and the inadequate child welfare resources it has resulted in. She will also discuss the impacts of the inequities on small agencies.
Brenda Ann Cope Comptroller, Mi'kmaw Family and Children's Services of Nova Scotia	Brenda Anne Cope is responsible for finances and administration services at the Mi'kmaw Family and Children's Services of N.S., where she has worked since the year 2000. She will discuss how the agency secures its funding, in particular the two funding services; provincial and federal. Ms. Cope will explain the authority under which money can be provided to children in their parents' homes. She will also speak to the changes made in 2008 with the Enhanced Approach and discuss the caps on federal funding, which were not implemented in provincial funding.

Richard Gray Director, First Nations of Quebec and Labrador Health and Social Services Commission	Mr. Gray works for the umbrella organization for First Nations in Quebec and Labrador concerned with health and social issues. He has been involved in national tables on CFS for the past 3-4 years. He will testify on the changes that have arisen from the "enhanced funding arrangement."
Derald Dubois Executive Director, Touchwood Child and Family Services (Saskatchewan)	Mr. Dubois was on the "project management team" which consisted of one AFN representative, one INAC representative and one Directors' representative (Mr. Dubois) who were charged with the implementation of the NPR recommendations. He will speak to what the recommendations were. He will also testify on the difficulties faced by agencies.

Steve Knudsen Former Executive Director of Secwepemc Child and Family Services Agency (British Columbia)	Mr. Knudsen has more than 35 years of experience in the area of social services, primarily in the area of child welfare and family support. He spent 7 years as the Executive Director of the Secwepemc Child and Family Services Agency. He will testify to the provincial and federal legislative requirements for child welfare and funding services, the inequalities arising out of these structures and policies and the level of control exercised by the Respondent in the provision of these services.
Darin Keewatin Executive Director of Kasohkowew Child Wellness Society (Alberta)	Mr. Keewatin has more than 20 years of experience in the area of child welfare and family services. He will speak to the provincial and federal legislative requirements for child welfare and funding services in Alberta, both on and off reserve. He will also testify to the inequalities created, the lack of culturally appropriate services and the Enhanced Approach as well as the impact it has had on the child and family services.

Carolyn Bodahnovich Financial Officer, West Region Child and Family Services (Manitoba)	Ms. Bodahnovich has more than 20 years of experience in the area of child welfare and family services. She will testify to the legislative and standard requirements for child and family services, the impacts of the Respondent's funding levels, as well as the level and impact of the control exercised by the Respondent and her experiences working with both the Federal and Provincial governments to ensure compliance.
Jonathan Thompson Director, Health and Social Development, Assembly of First Nations	Mr. Thompson was the AFN representative and co-chair of the Joint National Advisory Committee. He worked to create the framework, costing and purpose of the *Wen:de* studies and oversaw the work done. He will speak to his involvement in both.

Commission Expert Witnesses

Dr. Nicolas (Nico) Trocme

Director of the Centre for Research on Children and Families, McGill University School of Social Work

Dr. John Loxley

Professor of Economics, University of Manitoba

Dr. Frederic Wien

Professor, Maritime School of Social Work, Dalhousie University)

Dr. John Milloy

Professor and Historian at Trent University

This is Exhibit "E" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Valerie Gideon

I, Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch ("FNIHB") at the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2017. Prior to that I was the Assistant Deputy Minister of Regional Operations at FNIHB for five years. I report directly to the Deputy Minister of ISC on all matters of First Nations and Inuit health. I am Mi'kmaq from the Gesgapegiag First Nation and have spent my entire career dedicated to First Nations and Inuit health and wellness.

2. In my capacity as Senior Assistant Deputy Minister of the FNIHB, I have personal knowledge of the significant efforts Canada has made to comply with the orders made by the Tribunal in 2017 CHRT 35 (the "2017 Ruling") and 2018 CHRT 4 (the "2018 Ruling").

3. This affidavit is aimed to provide the most up-to-date information and evidence since my May 24 and June 21, 2018 Affidavits and October 30-31, 2018 cross-examination testimony on Canada's activities on Jordan's Principle and those ordered on mental health. The information is organized in the following five themes:

    a) Response to First Nations Children Identified Needs;
    b) Communications and Outreach;
    c) Administration and Operations;
    d) Monitoring Compliance; and,
    e) Consultation.

4. Also included is evidence on how Canada is working with the Parties on the outstanding issues as articulated in the First Nations Child and Family Caring Society of Canada's ("Caring Society") December 21, 2018 motion. These issues include funding on the Choose Life Pilot Project, appeals process, and ISC staff training. This information should help to demonstrate that strong collaboration exists with the Parties, and that through monthly discussions at the Jordan's Principle Operations Committee (JPOC), Consultation Committee on Child Welfare (CCCW), Jordan's Principle Action Table (JPAT), and the Choose Life Working Group, close collaboration is maintained with the Parties. ISC is committed to continuing this work and does not require continued supervision by the Tribunal in order to remain firm in this ongoing commitment.

Response to First Nations Children Identified Needs

5. Since July 2016, Canada committed up to $679.9 million over three years (2016/17 – 2018/19) to support the implementation of Jordan's Principle. On March 19, 2019, the Government announced $1.2 billion over three years (2019/20 – 2021/22) to ensure Canada continues to meet its legal obligations under Jordan's Principle.

6. Funding for Jordan's Principle is distributed in two ways: either directly through ISC (e.g., to the child/family/guardian or service provider/vendor) or through funding contribution agreements with First Nations communities and service delivery organizations (e.g. Bands, Tribal Councils) and other First Nation partner organizations (e.g., service coordinators). In the first case, requests for First Nations children requiring products and/or services are sent directly to ISC for determination and payment.

7. In the second case, First Nations children requiring products or services can be identified by a community, service provider or coordination organization. ISC will provide funding to communities or organizations to provide services to children, assist in pulling documentation together in submitting requests directly to ISC, as well as to facilitate and track access to products and services delivered. Communities or organizations will submit to ISC an estimated number of children requiring products or services generally as a group request and this request is determined within the Tribunal-ordered timeframes of 48 hours to 7 days. In keeping with the terms and conditions of their contribution agreements, within a period of time following the end of the agreement's fiscal year (approximately three months), funding recipients report on the actual number of children served and the products and services provided. As such, it is difficult to provide a direct count on the number of children receiving services or products on a real-time basis.

8. From July 2016 to February 28, 2019, an estimated 216,000 requests were approved for funding by ISC either through direct payment or through contribution agreements. Of these approved requests, roughly 134,333 were approved from April 1, 2018 to February 28, 2019. Of the 134,333 requests, 13,152 (9.7%) were paid directly by ISC, and 121,181 (90.2%) services, support and products were approved for administration through contribution agreements. The Jordan's Principle February Monthly Ministerial Report is attached to this affidavit as **Exhibit A**. It provides a regional breakdown of the number of requests and funding allotted between April 1, 2018 and February 28, 2019.

9. From 2016-2019 (up to February 28, 2019), $466 million was spent to fund approved requests. An additional $46 million was committed and to be paid by March 31, 2019. Of the $466 million spent, the largest number of requests (over $144 million) were for mental health and suicide prevention services such as land-based treatment, community camps/events, elder counselling, psychological assessments and treatment, institutional placement and treatment. Respite services, which provide relief to the child's family or caregiver(s), is the second largest number of requests (about $118 million) followed by allied health services such as speech and language therapy, physiotherapy and occupational therapy (about $90 million). A document called "Jordan's Principle Expenditures by Funding/Functional Areas", dated February 28, 2019 is attached to this affidavit as **Exhibit B**.

10. Specific to mental health services and the payment of mental health actuals in Ontario as ordered in the 2018 Ruling, seven claims were submitted: five group requests and two from individuals. Roughly $1.7 million was paid for the five group requests submitted, and $860.00 was paid for the two individual requests. The claims on actual costs range from $57.10 for an individual claim to $846,902 for a group claim. As discussed with Chiefs of Ontario counsel earlier this month, Canada is continuing to determine any claims submitted. A data tracker on paragraph 426 orders is attached as **Exhibit C**.

a) While these costs are specific to paragraph 426 of the February 1, 2018 Ruling, as of April 2019, an additional $33 million has been expended on approved mental health requests in the Ontario region alone.
b) Furthermore, since the start of the Choose Life Pilot Project in April 2017 until February 22, 2019, an additional $102 million (included in the $144 million cited in paragraph 9) was approved to support an estimated 22,126 children and youth living in the 49 Nishnawbe Aski Nation (NAN) communities. Over $73 million was approved in the 2018/19 fiscal year, Funding for Choose Life continues and an evaluation process of the Choose Life Pilot Project is underway in partnership with NAN. The NAN Choose Life Track Sheet as of February 22, 2019 is attached to this affidavit as **Exhibit D**.

11. In paragraph 135(1)(D) of the 2017 Ruling, the Tribunal ordered Canada to re-review all denied requests for services, pursuant to Jordan's Principle or otherwise, dating back to April 1, 2009 to ensure compliance. The results of this re-review were reported by Sony Perron in his November 15 and December 15, 2017 affidavits. As communicated in his affidavits and my previous affidavits, Canada continues to determine any previously denied requests since April 2007 when submitted. The choice to re-review previous denied cases since April 2007 was consistent with the Government of Canada's commitment to Jordan's Principle made by the House of Commons, motion 296, in 2007.

12. As of April 9, 2019, a total of 274 cases were re-reviewed of which roughly 105 were found to have been approved by an existing ISC program, and 35 were approved under Jordan's Principle. The other cases were found to be incomplete (e.g., missing information on needed product), inactive (e.g., requestor did not get back to region), were ineligible (e.g., adult request) or were denied (e.g., fit-bit, noise canceling headphones, cellphone). A chart detailing the re-review of previously denied cases from April 1, 2007 to April 9, 2019 is attached to this affidavit as **Exhibit E**.

13. Of the 35 requests that were approved upon the re-review and the costs were documented in the case file, an estimated $43,600 was funded by Jordan's Principle. Previous denied requests that were approved include: formula (e.g., Enfamil, Similac), assessments (e.g., educational-behavioural, psycho-educational), tablets, strollers, swing chairs, transportation to speech therapy, shoes, hearing aids, bifocals, and orthodontics.

Canada's Commitment to the Principle of Substantive Equality

14. Following up from paragraph 11 of my affidavit of June 21, 2018, Canada has been making significant efforts to meet the distinct needs and circumstances of First Nations children and families to ensure substantive equality is achieved.

15. Canada continues to use the document titled, "Jordan's Principle – Substantive Equality Principles" to guide the determination of requests. As previously mentioned

in my affidavits, this document was created together with the Parties and was approved for use at the February 2018 JPOC meeting. This document remains on Canada's website and is shared with communities and requestors by the Focal Point or can be accessed through the Client Information Packages that have been created for regional distribution at community meetings and events.

16. For requestors, the document is aimed to provide information about substantive equality and identify was type of information they should consider submitting at the time of their request. For Focal Points and Assistant Deputy Ministers who are involved with the determination of requests, this document provides a guide on the various questions posed when considering requests using the substantive equality lens. The Case Summary form that is used by the FNIHB ADM of Regional Operations in determining requests recommended for denial by regions, as well as the Summary Form used by the ADMs who are evaluating and determining Appeals are shown in **Exhibit F**. Each form explicitly outlines for the reviewers the "Guidance Questions to Help Assess Substantive Equality".

17. While the data reporting system is not able to share the number of requests that have been approved under the substantive equality lens, Canada's implementation has given a very broad spectrum of support to First Nations children and communities. For example, a child who experienced extreme trauma was approved for private school attendance, where the child excelled academically. Where a child on the Autism spectrum was prone to violent episodes, one on one care was given to his family. At the less intensive scale of the needs spectrum, children with mental health conditions have been provided with bikes, laptops and software, YMCA family memberships and noise cancelling headphones. Children with physical disabilities have been provided with adaptive family vehicles, home gyms, and daily respite care.

18. Recent efforts have been underway to develop and support the determination of requests using the lens of safeguarding the best interests of the child. As highlighted below in paragraph 44, the document was approved at the April 2, 2019 CCCW meeting and is attached as **Exhibit G**.

Communications and Outreach

19. With respect to Canada posting clear information on Departmental websites according to paragraph 135(3)(A) of the 2017 ruling, the Government of Canada website materials about the definition of Jordan's Principle have not been changed or altered in any way since the 2017 Ruling was implemented. A link to the website can be found here: https://www.canada.ca/en/indigenous-services-canada/services/jordans-principle/definition-jordans-principle-canadian-human-rights-tribunal.html

20. Following my cross-examination on October 30 and 31, 2018, at the request of the Panel, I shared screen shots of the website that confirmed that Canada had updated its definition of Jordan's Principle according to the May 2017 Ruling. Minor changes to

the website are made regularly to update the numbers of approved Jordan's Principle requests as well as the regional contact information for making a request.

21. At the November 9, 2018 JPOC meeting, a deck of communications and advertising activities was presented for the Parties' consideration. During JPOC discussions and email communications with the Parties, advertising activities were established to reach First Nations families, foster parents, and health, education, social development professionals, both in First Nations communities and in urban settings. Targeted advertisement activities were conducted mainly through a digital-first campaign, utilizing YouTube, Pelmorex (weather station), Native Touch (mobile), Facebook, Twitter, First Nations Drum (print) and LinkedIn. To support these and other communication activities in the 2018-2019 fiscal year, approximately $373,500 was expended.

22. These activities are in addition to the 2017-18 activities which included the Aboriginal Peoples' Television Network ("APTN") advertisements. In 2017-18, $434,556.52 was spent on communications, including approximately $150,000 for the APTN advertisement, as ordered in paragraph 135(3)(B) of the 2017 Ruling.

23. Preliminary analysis of the advertising campaign conducted by ISC Communications experts indicates that there were more visits to the website, calls to the Jordan's Principle National Call Centre, and calls generating a service request during the campaign run than at any other time since the website and call centre were launched. Attached to this affidavit as **Exhibit H** is a document called "Analytics on Jordan's Principle Website and Call Centre 2017-March 31, 2019."

24. Over the coming months, ISC will continue to work in collaboration with the Parties to share information and promote awareness of Jordan's Principle. This includes ongoing posts on the ISC's Facebook and Twitter channels, continuing to update the website to ensure information is up-to-date and responsive to the needs of First Nations families, and exploring opportunities to increase awareness and understanding of Jordan's Principle through outreach efforts with partners and stakeholders. The bringing together of the former Indigenous and Northern Affairs Canada and Health Canada's First Nations and Inuit Health Branch in the newly established ISC has enabled a one-stop shop approach for communications planning and execution.

25. Aside from this communication strategy and advertising plan, various outreach activities are undertaken by ISC staff to continue to raise awareness within ISC staff and other federal public service staff about Jordan's Principle. In all circumstances, the definition from the 2017 Ruling is communicated. As an example, on August 16, 2018, I joined the Deputy Minister's bimonthly broadcast to all ISC staff to share information on Jordan's Principle.

26. In March 2019, two webinars were held for interested ISC and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) national and regional staff. On both occasions, employees were directed to read and understand the Rulings and the

definition of Jordan's Principle, and to identify unmet needs for children that existed in their area and to refer these to Jordan's Principle if they were unable to meet the need(s). The presentation delivered to staff, called Jordan's Principle and the Government of Canada's Commitment, is attached as **Exhibit I**.

27. Regarding communications with stakeholders pursuant to paragraph 135(3)(C) of the 2017 ruling, communications with regional and national stakeholders and the general public continue regularly. Activities initiated through headquarters include media outreach on Facebook and Twitter. Regional communiqués to First Nations partners are being updated to inform them about the February interim relief order and Budget 2019 commitment. ISC is seeking to ensure all First Nations individuals, families and communities that there is no disruption in their ability to access products or services to address the unmet health, social or education needs.

28. In February 2019, I sent letters to provincial/territorial ministries of health, community and correctional services. The purpose of the letters are to inform provincial/territorial officials about Jordan's Principle and improve future collaborations on serving the needs of all First Nations children. Example letters sent to the Manitoba ADM responsible for Child and Family Programs and a Youth Centre in Manitoba are attached as **Exhibit J.** Several provinces have submitted responses to date and bilateral discussions are being arranged as a starting point. A Federal/Provincial/Territorial meeting of the Ministers Responsible for Social Services scheduled for April 23-24, 2019 will include a discussion on Jordan's Principle implementation.

29. Collaboration with provincial and territorial governments on Jordan's Principle also exists at the regional level. For example, on November 15, 2018, the Minister of Indigenous Services, along with the 11 signatory Chiefs from Maskwacis, Siksika Nation, Bigstone Cree Nation and Kee Tas Kee Now Tribal Council and the Minister of Children's Services for the Government of Alberta, signed a Memorandum of Understanding ("MOU") on Jordan's Principle. The MOU on Implementation of Jordan's Principle in Alberta is attached as **Exhibit K**.

30. This MOU is the first of its kind between the federal government, provincial government and First Nations and will help ensure all First Nations children in Alberta, on and off reserve, can access the supports and services they need, when they need them. It allows for First Nations-driven solutions and a common approach to the implementation of Jordan's Principle. This transformative work is a significant milestone toward the Truth and Reconciliation Commission's Third Call to Action, calling on all levels of governments to fully implement Jordan's Principle.

31. At a regional level, community events and various communication and outreach events and activities are held on a regular basis. These are documented in monthly activity reports submitted to the Parties at JPOC meetings for their information. For instance, a monthly bulletin is maintained by the FNIHB Manitoba regional office

that is aimed to inform First Nations about regional Jordan's Principle activities, the Tribunal Rulings, and share best practices and stories that are submitted by children and families. Attached as **Exhibit L** is the Jordan's Principle Manitoba Monthly Bulletin for March 2019. This bulletin was emailed to a large distribution list of regional stakeholders and partners including: Jordan's Principle Case Managers who work within communities; Tribal Council Case Coordinators who oversee Tribal regions; individuals from specialized service provider organizations such as the Rehabilitation Centre for Children, Manitoba Adolescent Treatment Centre, and St. Amant; individuals from First Nations inner city organizations such as the Eagle Urban Transition Centre, Ndinawe, MB Keewatinowi Okimakanak Inc.; members from the Assembly of Manitoba Chiefs; and, FNIHB staff involved in community support.

32. Regional employees regularly engage with communities, schools, service providers and First Nations organizations to share information about Jordan's Principle and support communities in identifying and addressing requests under Jordan's Principle. Community visits are made to reach members and families and presentations are provided to engage more broadly. In all presentations made, the May 2017 Ruling and definition of Jordan's Principle are highlighted, as is the process for making a request.

33. Between November 27, 2018 and January 31, 2019, the following presentations/visits were made across the country with partners including First Nations communities, Band/Tribal Council staff, service providers and schools:

a) November 27, 2018 – Rouyn-Noranda, QC community meeting. Copies of the slideshows presented are attached to this affidavit as **Exhibit M**.
b) December 2, 2018 - Manitoba First Nation Education Resource Centre - Presentation to the Early Childhood Development Committee, Winnipeg.
c) December 4, 2018 - Presentation to the Atlantic Region Public Health and Primary Care Committee, a working committee of the Atlantic First Nation Health Partnership.
d) December 5, 2018 – Prince Albert – Northern Saskatchewan. The materials presented at Saskatchewan information sessions are attached as **Exhibit N**.
e) December 5, 2018 – Ontario - working meeting with ISC Regional Operations (RO) and CFS agency in Nogdawindamin.
f) December 6, 2018 – First Nation Health Authority (FNHA), BC - community engagement/presentation in Canim Lake (Interior Region). Provided the Jordan's Principle Handbook to providers, communities and individuals to support awareness about the program as well as sharing the ISC Jordan's Principle website.
g) December 6, 2018 – Ontario meeting with Sagamok First Nation - discussion of their proposal and the Jordan's Principle Child First Initiative.
h) December 7, 2018 - Wasagamack First Nation, Manitoba. Discussion on Jordan's Principle related housing modification requests and required

documentation. General discussion on Jordan's Principle leading up to housing modification issues/requests.

i) December 7, 2018 – Ontario meeting with Anishinabek Health Director on Jordan's Principle.
j) December 7, 2018 – Manitoba, Eagle Urban Transition Centre – development of a resource manual for external stakeholders on the Implementation of Jordan's Principle (including definition).
k) December 12, 2018 – Presentation to the Dilico Health Anishinabek Health Conference.
l) December 15, 2018 – meeting with Saskatoon Authority.
m) December 18, 2018 - Norway House Cree Nation – Jordan's Principle Case Manager – phone discussion and sharing of Jordan's Principle Checklist for Housing Modifications/Repairs.
n) January 3, 2019 - Presentation to Alberta Heath Services: Allied Health Services.
o) January 3, 2019 - Email to all Health Directors in Alberta.
p) January 4, 2019 – Dakota Ojibway Child and Family Services in Manitoba.
q) January 4, 2019 - Dakota Ojibway Tribal Council – Child and Family Services – Manitoba, Presentation and training on the Indian Registration System and implementation of Jordan's Principle.
r) January 8, 2019 – Ontario meeting with Tikinagan Child and Family Services Team, discussed definition.
s) January 10, 2019 - Manitoba, Interdepartmental Federal Working Group (including provincial representation as guests).
t) January 16 and 17 2019 – Ontario AIAI Jordan's Principle Health summit – approximately 60 people attended.
u) January 19, 2019 – Manitoba, Tribal Housing Advisors - At request of our Senior Housing Services Coordinator, information sharing to seven new Tribal Housing Advisors - Orientation.
v) January 21, 2019 – MB, Seven Oaks School.
w) January 22, 2019 – meeting with the École Montgomery Middle School, BC.
x) January 23, 2019 - Presentation to Chiefs of the Atlantic First Nations Health Partnership
y) January 23, 2019 – Health Directors' Network Quebec Meeting.
z) January 23, 2019 – Ontario Director keynote at Anishinabek Health Conference. More than 300 people attended this event.
aa) January 24, 2019 - Federation of Saskatchewan Indian Nations Summit Booth and informal presentation.
bb) January 25, 2019 – Ontario met with Wikiwemikong Child and Family Services team to discuss definition, process, and access.
cc) January 26, 2019 – Regina, SK communities.
dd) January 31, 2019 – Ontario meeting with Six Nations Health Director, revisited definitions, process, and next steps.

34. When presentations and community events are held in Ontario, regional employees ensure that partners are aware of the orders specific to mental health services for First

Nations children in Ontario. On February 27, 2018, the lead Ontario Focal Point participated in a panel discussion at the Chiefs of Ontario's Health Forum. This slide deck, called "Jordan's Principle Child First Initiative – Chiefs of Ontario Health Forum" is attached as **Exhibit O.** As shown on slide 8, information was shared on mental health claims. The aim of the presentation was to inform First Nations representatives that Canada would continue to make retroactive payments on mental health actuals since January 2016. Canada has not set a deadline for accepting these.

35. Working with the Parties and other First Nations partners on communication strategies and plans are critical for the successful implementation. On September 12-13, 2018, Canada funded the AFN to organize and host a national event titled, "Jordan's Principle Summit: Sharing, Learning, and Growing: Imagining the Future of Jordan's Principle" in Winnipeg, MB. Nearly 1,000 participants participated in this event. According to a CBC article titled, "Families share how Jordan's Principle has helped their children", the Summit was a success and brought together advocates to share best practices. This CBC article was published on September 12, 2018 and is attached to this affidavit as **Exhibit P**.

36. Additionally, under paragraph 135(3)(E) of the May 2017 Ruling, Canada provided the Caring Society and AFN with $100,000 each to develop training and public education materials relating to Jordan's Principle. Recently, the AFN published its handbook titled, "Accessing Jordan's Principle: A Resource for First Nations Parents, Caregivers, Families and Communities" which can be found at: http://xatsull.com/wp-content/uploads/2019/01/Jordans-Principle-Handbook-Online.pdf.

37. With the funding provided to the Caring Society to develop training and public education materials, the Caring Society created the Jordan's Principle scholarship fund to support First Nations students studying at a Canadian university who demonstrate commitment to Indigenous children's health and community service as well as academic commitment and achievement. Additional information on the scholarship fund can be found at: https://fncaringsociety.com/jordan%E2%80%99s-principle-scholarship.

Administration and Operations

38. At the request of the Caring Society, on February 1, 2018, a Jordan's Principle National Call Centre opened at FNIHB's headquarter office. Working with regional Focal Points, the aim of the Call Centre is to support immediate intake of requests and/or respond to any questions that arise from the general public. At the request of the Caring Society at the February 12, 2019 CCCW meeting, the Call Centre will shortly start to record each incoming call. This measure aims to avoid situations where individuals calling the Call Centre report not having received a timely response and ISC not having the ability to verify the report aside from relying on employee notations.

39. As communicated in past affidavits, the administration and operations of Jordan's Principle are guided by Standard Operating Procedures (SOPs). The SOPs remain an evergreen document to reflect updates aimed at improving policies and procedures that are discussed with the Parties and regional staff.

40. On October 5, 2018, the SOPs were sent to the Parties and members of JPOC for comments and feedback. Many of the changes made reflected the concerns of the Caring Society's August 20, 2018 document entitled, "Concerns with Canada's Compliance on Jordan's Principle", as well as those shared through emails.

41. At the November 9, 2018 JPOC meeting, the SOPs were discussed. Parties agreed to provide further comment while ISC incrementally implemented positive changes made to this point, as shown in a draft version of the Jordan's Principle SOPs which are attached to this affidavit as **Exhibit Q**. As a result, on November 20-22, 2018 during the Focal Point Meeting in Ottawa, employees were directed to start using this version and were trained to determine requests using the same processes and procedures.

42. To support the growth in number of requests and identify efficiencies, in December 2018, I approved additional human and financial resources in each region. Depending on the needs, regions reorganized staff to improve response and payment turnaround times. A dedicated financial accounting team now exists to help process payments quicker.

43. In December 2018 and January 2019, the Caring Society published an updated "Concerns with Canada's Compliance on Jordan's Principle" document. To continue to address the concerns published, as well as those shared at JPOC meetings, through emails or telephone calls, Canada is working with the Parties to revise the November version of the SOPs. **Exhibit R** provides a cross-walk document containing the concerns identified and how Canada has proposed to respond to each concern in the updated SOPs. The aim is to have this SOP version presented at the April 28, 2019 JPOC meeting for discussion.

44. Generally speaking, the key changes in the SOPs involve:

    a. inserting language on the February 21, 2019 Interim Order;
    b. changing the denial letter template so the reason for the denial is made clearer instead of only referring to the May 2017 order language;
    c. including the new Principles for Safeguarding the Best Interests of the First Nations Child document that was approved at the April 2, 2019 CCCW meeting, which is attached as **Exhibit G**);
    d. inserting text on the newly created Jordan's Principle Clinical Case Conferencing Policy and Procedure draft that is currently under review of the Parties, which is attached as **Exhibit S**); and,
    e. updating the appeals section to include a more independent process for Jordan's Principle requests.

45. There has been progress on implementing an improved appeals process for Jordan's Principle to address the Parties' request for involvement of independent First Nations experts in health, social and education. At the April 2, 2019 CCCW meeting, the new appeals process statement of work and implementation work plan were approved. These documents are attached to this affidavit as **Exhibit T**.

Monitoring Compliance

46. With respect to the initial determination of requests under paragraph 135(2)(A)(ii) of the 2017 ruling, which are 12 to 48 hours for an individual child and 48 hours to seven days for groups of children, compliance rates have fluctuated despite our best efforts.

47. The latest data reports available on compliance are for the month of February 2019. This compliance report is attached as **Exhibit U**. It shows that from February 1 to February 28, 2019, 1327 individual requests were received that were deemed as ready for determination. Of those, 1145 or 86% were approved, 106 (8%) denied, and 76 (6%) were in the process of being evaluated and determined at the time of reporting.

48. Approximately 82% of urgent requests were determined within 12 hours. Approximately 75% of non-urgent individual requests were determined within 48 hours.

49. Also shown in the February compliance report (Exhibit U), from February 1 to February 28, 2019, roughly 31 requests were received for community-managed supports for groups of children that were deemed ready for determination. Of the 31 requests, 24 or 77% were approved, five (16%) were denied, and two were in the process of being determined at the time of reporting. There were no requests that were deemed urgent and 25 (86%) were determined within seven calendar days.

50. As shown in Exhibit C above with regards to paragraph 426 of the 2018 Ruling and payment of all mental health actuals in Ontario, all seven submissions were evaluated and determined in accordance with the timelines and payments were issued within the 15 days as ordered.

51. Data reporting is a standing item on JPOC meeting agendas. At JPOC, various data reports are shared for discussion including up-to-date compliance rates (refer to Exhibits A and U) as well as a monthly activity report that highlights all activities undertaken or underway in each region and at headquarters. These activities include communications and outreach, community events, and compliance activities.

Data Collection and Reporting Framework

52. As stated above, on a regular basis, Canada shares various data reports with the Parties. These include weekly Jordan's Principle National Call Centre reports and monthly Jordan's Principle Compliance Reports (refer to Exhibit A). The weekly Jordan's Principle National Call Centre Report statistics for April 1-7, 2019 are attached to this affidavit as **Exhibit V**.

53. Given the increased interest in data shared by Canada with the Parties, at the January 17, 2019 CCCW meeting, I committed to the Parties that we would work to develop a Reporting Framework that identifies the existing indicators being collected and discuss additional indicators of interest. A special meeting is being planned for April 17, 2019 to discuss this framework. Once complete, this framework is intended to guide future reporting, including compliance rates, and discussions at JPOC and CCCW. At the April 2, 2019 CCCW meeting, I shared a document listing indicators and existing data collection on Jordan's Principle requests for discussion. This document is attached to this affidavit as **Exhibit W.**

Longitudinal Study on First Nations Children and Youth

54. Further to my May 24, 2018 affidavit on mental health, Canada has pursued a number of activities to better understand the access challenges faced by First Nations children with regards to mental health but also other types of services. The Gap Analysis Report that was ordered in paragraph 425 of the 2018 Ruling was completed on March 23, 2018 with feedback and input from the Parties and the First Nations Mental Wellness Framework Implementation committee. A list of actions taken to respond to this order and paragraph 426 which was to retroactively pay for mental health actuals in Ontario, is attached to this affidavit as **Exhibit X**.

55. This Gap Analysis report helped to identify that new data and research are necessary. In late 2018, I approved work on a Longitudinal Survey on First Nations Children and Youth.

56. With involvement of the Parties, this Longitudinal Study is being led by the independent First Nations Information Governance Centre (FNIGC). FNIGC is developing a proposal for the feasibility/planning of the Child Development Survey (measuring the impacts of Adverse Childhood Experiences among other elements) and revision to the existing First Nations Community Survey. The AFN and the Caring Society have been involved in calls between Canada and the First Nations Information Governance Centre, as we seek to identify scope, scale and timing of the feasibility study. To date, the feasibility study will cost an estimated $600,000 and will take approximately 20 months.

Consultation

57. The Tribunal has ruled that Canada shall work with the Parties on Jordan's Principle through consultation and resolve any outstanding issues when they arise. I have made every effort to work with the Parties and collaborate on the policy and operations of Jordan's Principle and addressing gaps in First Nations children mental health. Wherever possible, I have sought to create and foster an open and transparent dialogue to respond to issues promptly and effectively so that the Government's activities and commitments on Jordan's Principle are reflective of Parties' understandings and of our regional First Nations partners.

58. I was responsible for updating the Jordan's Principle Operations Committee terms of reference, including adding a Parties' co-chair which is presently occupied by the AFN. I sought support of the Parties to include Jordan's Principle on the agenda and work plan of the Consultation Committee on Child Welfare. ISC continues to support and fund the joint work of the Jordan's Principle Action Table that is chaired by the AFN. On a regular basis, ISC responds to questions of the Caring Society regarding requests for specific children as well as those aimed at clarifying/addressing operational and data issues.

59. I have developed a proposal for a Common Secretariat to achieve better coordination in ISC's support and participation in meetings involving the Parties, whether they involve Jordan's Principle or the First Nations Child and Family Services Program. This approach was approved by the CCCW on April 2, 2019. Attached as **Exhibit Y** is the proposal on the Common Secretariat Consultation with Parties to the Canadian Human Rights Tribunal Complaint that includes a description of its function and implementation.

60. Dr. Blackstock and I co-chair an Expert Advisory Committee on development of a policy lens and training for the public service to prevent discriminatory ideologies, policies and practices from being perpetuated against First Nations children in the public service. The draft terms of reference and work plan for the First Nations Children's Rights/Mandatory Training Curriculum and Policy Lens Advisory Group are attached as **Exhibit Z**. In addition, to respond to the Parties' concerns about ISC's performance, at the April 2, 2019 CCCW meeting, I tabled a draft of ISC's Executive Performance Objectives related to implementation of the Orders for comment. This document is attached to this affidavit as **Exhibit AA.**

61. In order to better track and respond in a timely manner to cases brought forward to my attention by the Caring Society, I have created a position in my office that is also supporting the creation of the improved appeals process. While new, the intention of this client representative function is to provide monthly reports to the Caring Society of cases tracked, outcomes, etc.

62. I keep in close contact with the Parties. I am often corresponding with one or multiple parties on a weekly and sometimes daily basis. It is fair to say that someone from my team is in contact with one or more of the Parties on a daily basis.

63. I want to reassure the Tribunal that ISC is committed to working with the Parties through consultation to resolve issues as they arise. I view the collaborative work with the Parties as a long-term measure to ensure that the unmet needs of First Nations children are being met and to further ensure that the legacy of Jordan River Anderson is honoured and fulfilled.

64. Over the next year, working with the Parties and under the advice of the Jordan's Principle Action Table that is chaired by the AFN, I will continue to support and participate directly in the continued development of the longer term implementation approach to Jordan's Principle.

SWORN TO before me at the City of Ottawa, Province of Ontario, on April 15, 2019.

A Commissioner for Taking Affidavits
L. HANSSENS

Dr. Valerie Gideon

This is Exhibit "F" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

And

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Joanne Wilkinson

I, Joanne Wilkinson, the Assistant Deputy Minister of Child and Family Services Reform Branch at the Department of Indigenous Services Canada (ISC), AFFIRM THAT:

1. I have been an Assistant Deputy Minister reporting to the Deputy Minister, since March 2018 responsible for child and family series reform and have been responsible for child and family services programming since October 2018. In that role, I have knowledge of the significant efforts Canada has made to comply with the orders made by the Tribunal in the February 1, 2018 ruling (the "2018 Ruling").

2. This affidavit provides information further to the May 24, 2018 affidavit of Paula Isaak in relation to how Canada continues to comply with the orders from February 1, 2018, in consultation with the Parties.

3. Canada has made significant investments in First Nations Child and Family Services (FNCFS) since the January 2016 Tribunal ruling. Prior to the Tribunal's orders, the FNCFS Program's total expenditures were $680.9 million (2015-2016).[1] Since that time, Canada's investments for the program have grown to approximately $1.2 billion in 2018-2019, almost double the program's investments. Over 98% of the funding is contribution funding going directly towards front line service delivery for First Nations children and families.

4. This growth in spending comes from the commitments made by Canada through Budget 2016 and Budget 2018 as well as additional funds the Department provided to address pressures for agencies. In February 2018, Canada committed to spend $1.4 billion over 6 years, starting in 2017-2018, to address funding pressures facing First Nations Child and Family Services agencies, while also increasing prevention resources for communities so that children can be safe and families can stay together. These new funds are on top of investments made through Budget 2016 of $634.8 million over five years and ongoing for the First Nations Child and Family Services (FNCFS) Program.

5. As reported in previous affidavits/submissions:
   a) In 2016-2017, as part of Budget 2016 and a first step, Canada allocated an additional $71.1 million to begin responding to the orders to meet the immediate needs of First Nations children and families. Canada also provided an additional approximately $20 million to respond to funding pressures faced by agencies. Canada also began responding to the September 2016 Tribunal orders with respect to small agencies and additional funding in prevention.[2]
   b) In 2017-2018, Canada continued to roll out year 2 of Budget 2016 investments of $98.6 million (Canada's May 24, 2016 submission). Canada also made available Budget 2018 investments (which started in 2017-2018) of approximately $70.3 million to begin responding to retroactive reimbursements of actuals (Canada's letter to the Tribunal June 8, 2018 Annex C).
   c) In 2018-2019, Canada worked with partners to implement Budget 2018 investments. This includes Canada's commitment to ramp up funds to Year 5 of Budget 2016's funding and investments in remoteness. Canada also included a new dedicated stream of funding for Community Well-being and Jurisdiction Initiatives.

[1] This includes both Vote 1 and Vote 10 expenditures
[2] Cassandra Lang Affidavit January 25, 2017

6. As of April 5, 2019, Canada has paid over $178.7 million towards funding actual and retroactive claims since February 2018.

7. Canada has also worked with the Parties to the complaint to set up a system for funding actual needs as ordered by the Tribunal. Canada has committed to continue paying actual needs until an alternative funding system is in place (for further details on these points, see below under "Development and Implementation of an Alternative Funding System and "Funding of Actual Costs, including Retroactive Reimbursements to January 26, 2016").

8. The Consultation Committee on Child Welfare ("CCCW") remains the primary forum for resolving issues relating to implementation of Tribunal orders. With the valuable input provided by the CCCW, ISC has been able to successfully implement several aspects of the Tribunal orders. The National Advisory Committee on First Nations Child and Family Services Reform ("NAC") has also provided advice and support with respect to the implementation of the orders. These forums have also been effective for information-sharing on ISC activities and providing status updates.

9. I can offer the following information with respect to the Tribunal's Orders from the Ruling on First Nations child and family services.

Analysis of Needs Assessments and Cost Analysis Research

10. At paragraphs 408, 409, 418, 419, and 421 of the Ruling, the Tribunal ordered Canada to analyze the needs assessments completed by First Nations agencies and to do a cost analysis of those needs, including the real needs of small First Nations agencies. The Tribunal also ordered Canada to provide a reliable data collection, analysis, reporting methodology, and ethical guidelines. With respect to these Orders, Canada reports as follows:

    a) As outlined in Canada's letter to the Tribunal on April 9, 2019 and its affidavit on May 3, 2018, ISC provided approximately $2 million in funding, through the Assembly of First Nations (AFN), for the Institute of Fiscal Studies and Democracy (IFSD) to conduct an analysis of existing agency needs assessments, as well as a cost analysis of agency needs to support the development of an alternative funding model for First Nations child and family services agencies
    b) On July 10, 2018 and September 19, 2018, IFSD provided an update on its research to the NAC. The AFN confirmed that these presentations would serve as the reports on Phase I and Phase II of the IFSD research.
    c) On November 16, 2018, the AFN shared the IFSD Draft Interim Report. This report was discussed at the November 19, 2018 Consultation Committee on Child Welfare ("CCCW") meeting.
    d) On November 26, 2018, IFSD presented its draft report to the NAC.
    e) On December 17, 2018, IFSD's final report was received. Throughout the process, IFSD posted monthly online updates to stakeholders on the

progress of the project. These reports can be viewed at the following link: http://www.ifsd.ca/en/monthly-updates.

f) Both the CCCW partners and the IFSD report indicated that more work is required. The final IFSD report and the need for future research were discussed at the January 17, 2019, February 12, 2019 and April 2, 2019 meetings of the CCCW as well as the February 20-21, 2019 meeting of the NAC.

g) Canada received IFSD's new proposal for future research, including the development of a funding model, on March 6, 2019. The proposed budget for the research is approximately $1.7 million. This proposal is under review by Canada and discussions have been underway with the CCCW.

h) Email exchanges were made between Dr. Blackstock and me regarding Canada's position on the final report and its expectations for future research. This email exchange was shared with the CCCW for the April 2, 2019 meeting and is attached to this affidavit as **Exhibit 1.**

i) As outlined in the email exchanges and discussions at the CCCW, Canada acknowledges the comprehensive survey work undertaken by IFSD with First Nations Child and Family Services agencies across the country. The report is a good starting point for providing valuable information on agencies' needs and key gaps, and is a helpful piece of research to be considered in moving towards a new funding methodology. However, it did not include a full analysis of existing program funding as it only focuses on 2017-2018 financial information of agencies. For example, Budget 2018 investments and actuals are not included in the analysis nor are there any comparisons with other systems/models. The report also did not propose options for a new funding methodology or a funding approach. More work is needed to reflect the impacts of Budget 2018 investments and the payment of actuals for First Nation agencies, and to ensure a comprehensive approach to developing a new funding methodology.

j) Some additional considerations that Canada also communicated include:
    i. An open and transparent contracting process, given the scale of funding and that this is an unanticipated new phase in the research;
    ii. An interest for Indigenous researchers to be included in the work;
    iii. ISC's concerns on the proposed timeline for the additional research resulting in the establishment of a new funding methodology being delayed to 2020;
    iv. Consideration on how the three studies (Ontario Special Study, Nishnawbe Aski Nation Remoteness Quotient, and IFSD) will need to be integrated into the new funding model for the Program;
    v. ISC's full participation in the research to ensure an effective transition for implementation of the new funding model;
    vi. How the research needs to be inclusive of First Nations, including those not served by FNCFS agencies, for example, over 80 First Nations in British Columbia are served by the provincial government.

k) The report has also been shared with senior officials, including the Deputy Minister of ISC. On March 26, 2019, the Deputy Minister, the Associate Deputy Minister, the acting Director General of the Program, and I met with IFSD to discuss the report's recommendations and the new proposal.
l) These discussions are ongoing. Canada continues to work with the Parties through the CCCW as well as members of the NAC on the work related to reform and the long-term funding methodology for the FNCFS Program.

Development and Implementation of an Alternative Funding System

11. At paragraphs 410, 416, and 420 of the Ruling, the Tribunal ordered Canada to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, building repair services, the child service purchase amount and for small agencies. As outlined above, further work is needed on the development of an alternative funding system. The IFSD submitted a new proposal for future research, including for the development of a funding model, on March 6, 2019. Canada is currently reviewing the proposal and trying to identify a source of funds with partners, including the CCCW and the NAC, on a long-term funding methodology. Although the approach for future research is still to be determined, Canada is of the view that forums such as the CCCW and the NAC are an effective approach in reaching a resolution and moving these issues forward.

12. Canada remains committed to continuing to pay on actuals until an alternative funding system is in place.

13. As addressed in the May 24, 2018 affidavit of Paula Isaak, all agencies received their initial allocation of funding on or before April 1, 2018. Where the initial allocation was not able to meet their needs in any of the areas ordered by the Tribunal, the agency was able to submit claims to have their actual costs covered (As per the 1965 Agreement, core funding for Ontario FNCFS agencies is flowed through the Ontario government).

14. In addition to the initial agency allocation, ISC provided funding from Budget 2018 (ramp-up funding) at the end of June 2018, to bring funding up to Year 5 Budget 2016 amounts. The Budget 2018 funding also enables funding adjustments for small agencies in the area of prevention on an ongoing basis. An email detailing the transfer of funds to regions on June 29, 2018 is attached to this affidavit as **Exhibit 2**. The email also reminds regional offices that if funding is not sufficient to meet agencies' needs, the agencies can submit a claim for retroactive reimbursement or payment on actuals (In Ontario region, immediate relief/prevention funding flows directly to Ontario First Nations).

15. Canada has also worked with partners to set up and implement a system for funding actual needs of agencies as ordered by the Tribunal. Since February 1, 2018 Canada has paid over $178.7 million in both actual costs and retroactive reimbursements, as of April 5, 2019. More information follows below under

"Funding of Actual Costs, including Retroactive Reimbursements to January 26, 2016".

16. Tools to support agencies in making claims have been developed and shared with recipients. These include National Recipient Guides on Retroactive Payments; Guides on Operations and Prevention; and an Ontario Region Recipient Guide.

17. Throughout summer and fall 2018, Canada worked with the Parties through the CCCW as well as with the NAC to integrate comments and feedback into these documents. This was an effective approach in getting advice to improve the documents before sending updated versions to the agencies. Canada intends to continue consulting partners in developing any additional tools in the future. For example, on November 9, 2018, ISC sent the updated recipient guides based on feedback provided by the Parties. ISC also shared the track versions to demonstrate where the changes were made. The November 9, 2018 email and attachments of the recipient guides are attached (as well as other documents shared with the Parties) to my affidavit as **Exhibit 3.** On March 29, 2019 ISC also sent the guides for 2019-2020 to the CCCW for review and feedback. The email and a copy of the guides for 2019-20 are attached to my affidavit as **Exhibit 4.**

18. On June 7, 2018, Paula Isaak sent an email to the CCCW with a proposed process to guide the payment of actuals moving forward, and a related escalation process. A copy of Paula Isaak's June 7, 2018 email and attachments is attached to my affidavit as **Exhibit 5.**

19. By June 13, 2018, additional instructions were provided to regions with respect to the escalation protocol for requests relating to the reimbursement of retroactive and 2018-2019 actual claims costs, as well as any other situation requiring escalation. A copy of the email and attachments is attached to my affidavit as **Exhibit 6**. Based on recommendations from the Parties, the documents were revised and provided to regions on September 6, 2018. A copy of the email and attachments is attached to my affidavit as **Exhibit 7**.

20. Based on communication with the Parties in September 2018, ISC has also created an interim appeals process for dealing with FNCFS-related claims. The documents that are related to the interim appeals process are attached to my affidavit as **Exhibit 8**. Canada will continue to work with partners to update and adjust this process moving forward.

21. Canada also consulted with the Parties to update the Programs Terms and Conditions, which has allowed for greater flexibility and has expanded on eligibility for expenditures, including those related to capital/building repairs. Information about the updated Terms and Conditions was provided to agencies on January 21, 2019. A copy of the email and attachments is attached to my affidavit as **Exhibit 9**. The Terms and Conditions are also available online on ISC's

website.[3] Communications with partners and additional related exhibits on this can be found below under "Consultation with Partners".

22. Canada has also worked with partners to develop reporting tools to track results related to prevention programming. The system benefits from our collective work to develop indicators and outcomes which are now included in the FNCFS Program's Terms and Conditions, and provides for an effective measurement of the positive impact of prevention activities. The following activities took place:

a) For 2018-2019, ISC developed an interim reporting tool to begin collecting information related to outcomes in the current Terms and Conditions. Documents related to program outcomes and indicators was shared with the Parties on July 3, 2018 and is attached to my affidavit (see #38 g or **Exhibit 24** as part of the attachments); the interim reporting tool for prevention was shared with the Parties on September 27, 2018 and is attached to my affidavit (See #38 u or **Exhibit 29** as part of the attachments); the interim prevention reporting tool for fiscal year 2018-2019 was shared with regions on October 30, 2018 for distribution to agencies and is attached as **Exhibit 10.** This was the minimum required to report on the new Budget 2018 funding.

b) FNCFS agencies and service providers have the opportunity to use the actuals funding process to hire temporary or permanent staff to help to support data collection and reporting activities.

c) Canada worked with partners to develop a more permanent online reporting system for prevention. The system was launched on April 1, 2019 for 2019-2020 and the information was shared with the CCCW on March 19, 2019. The email and attachments sharing this information is attached to my affidavit as **Exhibit 11**.

d) The enhancements of the new Data Management System (DMS) now allow for agencies to enter their prevention data online in a secure manner; reduces in the reporting burden on agencies and regions; collects accurate and robust data; and provides an online platform where agencies can access and assume ownership of their data. User Acceptance Testing was completed in February 2019 with participation from FNCFS agencies and ISC staff. This work is ongoing and ISC continues to support regions and agencies in using the new system.

23. For further information on the implementation of the orders between February 1, 2018 and May 24, 2018, see Paula Isaak's May 24, 2018 affidavit at page 5 and Exhibit F.

[3] Website link for English: https://www.aadnc-aandc.gc.ca/eng/1386520802043/1386520921574 and French: https://www.aadnc-aandc.gc.ca/fra/1386520802043/1386520921574

Funding of Actual Costs, including Retroactive Reimbursements to January 26, 2016

24. At paragraphs 411, 417, and 421 of the Ruling, the Tribunal ordered Canada to provide funding to agencies on actual costs for prevention/least disruptive measures, building repairs, intake and investigation, legal fees, the child service purchase amount and for small agencies, retroactive to January 26, 2016 by April 2, 2018.

25. On July 24, 2018, Canada sent correspondence to all agencies encouraging them to submit their claims for retroactive reimbursement and for payment on actuals in the areas of expenditures in prevention, intake and investigation, legal fees, building repairs, child service purchase, as well as small agency expenses, at their actual costs, as ordered by the Tribunal. The correspondence notes that should they have pressures not covered by their initial allocation, ramp-up funding, or actuals that they should contact their ISC regional office. The email was developed based on input from the Parties. The July 24, 2018 email is attached to my affidavit as **Exhibit 12.**

26. As of April 5, 2019, one hundred and ninety two (192) requests for retroactive reimbursement have been received. $106,128,730.59 has been paid and $50,569,334.60 is being processed (within 15 day timelines). Two hundred and thirty five (235) requests for payment of actual 2018-19 costs have been received. $72,601,171.77 has been paid and $48,645,390.43 is being processed. The claims being processed include over 50 new claims which were received near the end of the fiscal year for 2018-2019. Thirty seven (37) requests for payment of actual 2019-20 costs have been received and are being processed for payment in the 2019-2020 fiscal year. The information is provided as part of a weekly report to the parties (see #38e or **Exhibit 23** as part of the attachments).

27. As of April 5, 2019, seven claims have been denied: two for retroactive costs, four for 2018-19 costs, and one which was claimed in advance for proposed 2019-20 costs. These recipients have been notified of their right to appeal, and have been informed of the process for doing so. One request for appeal was made for $1,944,810 and a response (denial) was provided on March 15, 2019.

28. As previously addressed in Paula Isaak's affidavit of May 24, 2018, Canada agreed to extend the Tribunal's ordered deadline of April 2, 2018 by nearly one year to March 31, 2019 for payment on actual costs and retroactive reimbursements.

29. To continue to support this flexible approach for agencies and communities submitting claims, Canada has further extended its dates for submission of retroactive and actual claims costs. Correspondence was sent to agencies on March 29, 2019 to communicate the change. A sample of this correspondence (also shared with the CCCW) is attached as **Exhibit 13**. Retroactive claims for actual costs for Prevention and Operations and Band Representative Services for the period of January 26, 2016 to March 31, 2018 will now be accepted until

December 31, 2019. The deadline for current year actual costs claims (fiscal year 2018-2019) for Prevention and Operations and Band Representative Services is now **September 30, 2019**.

Assessing Agency Deficits

30. At paragraph 429 of the Ruling, the Tribunal ordered Canada to identify which First Nation agencies, including the NAN agencies, referred to in the Ruling have child welfare or health services related deficits and to assess those deficits.

31. For a detailed overview of actions taken to implement this order between February 1, 2018 and May 24, 2018, see page 9 of Paula Isaak's May 24, 2018 affidavit.

32. On May 3, 2018, Canada submitted a report to the Tribunal, including 2016-2017 agency deficit analysis and Stage 1 agency cost analysis report from IFSD.

33. As reiterated in Paula Isaak's May 24, 2018 affidavit, emails were sent to agencies in April and May 2018 inviting them to submit retroactive claims for deficits. Canada has been working with First Nations agencies to address any deficits and develop a plan for any surpluses.

34. On December 18, 2018, ISC HQ confirmed in writing with regional offices that agencies do not need to be in a deficit to claim costs on actuals. As outlined in the recipient guides, funding for prevention, legal services, child service purchase amounts, intake and investigation, building repairs, and all costs for small FNCFS agencies is based on the actual needs of the children and families served by FNCFS agency as reflected by expenditures in these categories. A copy of this email is attached to my affidavit as **Exhibit 14**.

35. Canada is also currently working on a deficits analysis for 2017-2018 fiscal year. Once the analysis is complete it will be shared with the Parties.

Communication with Agencies

36. In paragraph 430 of the Ruling, the Tribunal ordered Canada to communicate to FNCFS Agencies any immediate relief ordered by the Tribunal. Regarding the implementation of communications with FNCFS agencies on matters pertaining to this Order, Canada reports the following communications between ISC Headquarters and recipients:

    a) For a detailed overview of actions taken to implement this order between February 1, 2018 and May 24, 2018, see Paula Isaak's May 24, 2018 affidavit from pages 6-8, including Exhibits M, N, and O.
    b) Tools to support agencies in making claims have been developed and shared with recipients including National Recipient Guides on Retroactive

Payments and Payment of Actuals and Ontario Guides as outlined above. ISC headquarters and regional offices remain in ongoing communication with agencies to support them in submitting claims for reimbursement.

c) Following a review of FNCFS agencies, letters were sent to three agencies on July 5, 2018 confirming their classification as "small agencies," and advising of their resulting eligibility for retroactive and actual claims in all areas. Please note that these three agencies had previously been classified as large agencies at the time of the February 1, 2018 departmental mail out regarding the 2018 CHRT 4 ruling. A copy of these letters is attached to my affidavit as **Exhibit 15**.

d) On July 18, 2018, an email was sent to seven agencies serving a child population of 800-1000, informing the agencies that due to the updated program definition, they had been newly classified as "small agencies" and were therefore eligible to make claims for actual costs in all areas. A copy of the email is attached to my affidavit as **Exhibit 16.**

e) On July 24, 2018, an email developed with input from the Parties was sent to all FNCFS agencies encouraging them to submit claims and noting that if they had pressures not covered by their initial allocation, ramp-up, or actual costs, that they should contact their ISC regional office. A copy of this email is attached to my affidavit as **Exhibit 17.**

f) Also on July 24, 2018, letters were sent to three agencies who were in the process of receiving delegation from the province of Ontario at the time of the February 1, 2018, orders ("pre-designated") in Ontario indicating their eligibility for reimbursement of retroactive costs moving forward. On this date, letters were also sent to two agencies that were pre-designated during the retroactive period confirming their eligibility to make retroactive claims. A copy of these letters and attachments is attached to my affidavit as **Exhibit 18.**

g) On October 16, 2018, emails were sent to all small FNCFS agencies verifying that all salaries are eligible for actual funding to a level comparable to the provincial wages and benefits, both retroactively back to January 26, 2016, and going forward. A copy of this email is attached to my affidavit as **Exhibit 19.**

h) On October 18, 2018, emails were sent to all FNCFS agencies on the Children's Special Allowance Act (CSA) informing them that ISC does not include the CSA in calculations of funding under the stacking limits policy, and asking them to report CSA separately from other revenue sources in their financial statements. As an example, a copy of the email that was sent to Alberta region agencies is attached to my affidavit as **Exhibit 20.**

i) On November 9, 2018, updated recipient guides were sent to the regions and agencies. These include National Recipient Guides on Retroactive Payments; National Recipient Guide on the Payment of Actuals; Guides on Operations and Prevention; and multiple Ontario Region Recipient Guides. A copy of the email and updated recipient guides is attached to my affidavit as **Exhibit 3**.

j) On January 21, 2019, an email was sent to all FNCFS agencies noting the updated First Nations Child and Family Services Terms and Conditions, now in effect. A copy of the Terms and Conditions are attached to my affidavit as **Exhibit 9**.
k) On March 26, 2019, an email was sent to recipients with a request to share their information regarding claims with the Consultation Committee on Child Welfare and is attached to my affidavit as **Exhibit 21**.
l) On March 29, 2019, an email was sent to recipients with new deadlines for retroactive and 2018-2019 claims. A sample of this email is attached to my affidavit as **Exhibit 13**.

37. ISC Regions also have substantial and ongoing contact with recipients regarding their claims. As well, ISC Regions are engaged in ongoing consultations with agencies regarding the implementation of prevention reporting tools.

Consultation with Partners

38. Paragraph 431 of the Ruling ordered Canada to enter into a consultation protocol with the Parties. Regarding the implementation of a consultation protocol, Canada reports as follows:

a) For a detailed overview of actions taken to implement this order between February 1, 2018 and May 24, 2018, see Paula Isaak's May 24, 2018 affidavit at pages 11-12, including Exhibits X, Y, Z, AA, BB, and CC.
b) Terms of Reference for the Consultation Committee Child Welfare (CCCW) have been developed. Agreement was reached on outstanding issues the week of July 23, 2018 and the Terms of Reference were approved at the August 2, 2018 CCCW meeting.
c) To date, CCCW meetings have been held on the following dates:
    i. May 10, 2018;
    ii. June 22, 2018;
    iii. July 9, 2018;
    iv. July 20, 2018 (teleconference);
    v. August 2, 2018;
    vi. September 5, 2018;
    vii. October 23, 2018;
    viii. November 19, 2018;
    ix. December 11, 2018;
    x. January 17, 2019;
    xi. February 12, 2019; and
    xii. April 2, 2019.
d) Further to copies of minutes of previous meetings already submitted to the Tribunal, minutes for the January 17, 2019 (final copy) and February 12, 2019 (draft copy) CCCW meetings are attached to my affidavit as **Exhibit 22**.
e) As part of ongoing transparency and information-sharing, ISC regularly provides activity and data reporting to the Parties of the Tribunal process

to demonstrate ongoing implementation of the Tribunal orders as well as a status update on the reimbursement of actual expenditures to FNCFS service providers. ISC is sending weekly updates on CHRT implementation progress, including claims for reimbursement, to the CCCW. The most recent update of April 5, 2019 is attached as **Exhibit 23**.

f) On June 7, 2018, Paula Isaak sent an email to the CCCW with a proposed process to guide the payment of actuals moving forward, and a related escalation process. A copy of this email and attachments is attached to my affidavit as **Exhibit 5**.

g) On July 3, 2018, Margaret Buist sent an email on behalf of Paula Isaak to the Parties with the updated, revised FNCFS Terms and Conditions and other related attachments (e.g. program outcomes and indicators). Feedback from CCCW members requested by July 18, 2018. A copy of this email and attachments is attached to my affidavit as **Exhibit 24.**

h) On July 13, 2018, an email was sent on behalf of Paula Isaak to CCCW requesting feedback on draft text to be sent to agencies regarding funding issues that may exist after actuals and ramp-up allocations. A copy of the July 13, 2018 email is attached as **Exhibit 25**.

i) Between July 17-20, 2018, the Caring Society, the AFN, COO, and the Department exchanged emails regarding the FNCFS Terms and Conditions.

j) On July 20, 2018, Paula Isaak exchanged emails with the CCCW regarding the timelines for reporting on the revised outcomes and indicators for the FNCFS Program.

k) On July 24, 2018, Paula Isaak provided responses to additional questions from the Caring Society and COO on the Terms and Conditions and provided an updated outcomes and indicators document for the FNCFS Program. A copy of this email and attachments is attached to my affidavit as **Exhibit 26**.

l) Following up from discussions at the CCCW, letters were sent to pre-designated agencies in Ontario in accordance with paragraph 430 of the Ruling on July 24, 2018.

m) On July 25, 2018, Paula Isaak sent the draft recipient guide for actual costs to the CCCW. The message also included a response to comments from the Caring Society on the escalation protocol and the proposed process for paying actuals going forward; comments were requested by August 10, 2018.

n) On July 27, 2018, Paula Isaak sent an email to partners on compensation and timelines for determining data on number of children in care.

o) On August 2, 2018, a document about FNCFS Capital was shared at the CCCW.

p) On August 9, 2018, Margaret Buist sent an email to partners with follow-up to the August 2, 2018 CCCW meeting, including templates of letters sent to pre- designated agencies in Ontario.

q) On August 17, 2018, Paula Isaak sent an email to partners with: an overview of the escalation protocol; a revised National Recipient Guide on

the payment of actuals (incorporating partner comments); and responses to questions and comments from the Caring Society, as well as from COO on the payment of actuals. A copy of this email and attachments is attached to my affidavit as **Exhibit 27.**

r) On August 23, 2018, Paula Isaak sent an email to partners which included: the revised Ontario 2018-19 Draft Recipient Guide for Band Representative Services; the Ontario Guide for Prevention/Operations; and a draft letter to agencies asking them to separate out the Children's Special Allowance in their revenues, if possible. Comments were requested by August 31, 2018.

s) On August 30, 2018, Paula Isaak sent an email to partners including the following information: a CWJI guidelines document; a document outlining the status of CWJI consultations; and updated Terms and Conditions (including an overview of Treasury Board Secretariat comments). Comments on the CWJI documents requested by September 7, 2018.

t) On September 11, 2018, Paula Isaak emailed the partners the following documents:

   i. Two agency funding agreements (including the CHRT Notice of Acceptance of Requests (NAR) and the CHRT Text Deviation);
   ii. an interim appeals process flow chart;
   iii. an interim appeals process checklist;
   iv. a draft letter to small agencies on salary adjustments; and
   v. a chart to track documents shared and input received.

   A copy of the email and attachments are attached to my affidavit as **Exhibit 28.**

u) On September 27, 2018, Paula Isaak sent an email to the partners attaching the following documents (including revisions):

   i. a letter to agencies on the Children's Special Allowance;
   ii. a letter to small agencies regarding compensation for former employees;
   iii. a sample denial letter and additional information on the interim appeals process;
   iv. the interim prevention reporting tool; and
   v. the estimated number of children in care for the FNCFS program.

   A copy of this email and attachments are attached to my affidavit as **Exhibit 29**.

v) On October 5, 2018, I sent an email to partners informing them that Paula Isaak had been appointed President of the Canadian Northern Economic Development Agency, and that I would be assuming responsibility for the entire children and family services file, moving forward.

w) On November 6, 2018, I sent an email to partners as follow-up to the October 23, 2018 CCCW meeting confirming commitments made at the meeting. This email also introduced Odette Johnston as acting Director General for the Children and Families Branch of ISC. This email is attached to my affidavit as **Exhibit 30**.

x) On November 6, 2018, I sent an email to the Caring Society, responding to

questions on the weekly summary of agency claims.

y) On November 9, 2018, I sent the Parties an information package including revised recipient guides, CWJI guides, and a tracker with documents that have been shared to date. This information package is attached to my affidavit as **Exhibit 3.**

z) On November 20, 2018, the Deputy Minister and Associate Deputy Minister sent an email to all ISC staff, reporting on the implementation of CHRT orders, and emphasizing responsibilities regarding document preservation and provision in response to litigation.

aa) On December 3, 2018, I sent an email to the Parties with updated agreements and a response to Caring Society comments. A copy of the email and attachments is attached as **Exhibit 31.**

bb) On January 18, 2019, I sent an email to the Parties with the new FNCFS Program Terms and Conditions, including a response to outstanding comments/concerns received from the CCCW. A copy of the email and attachments is attached as **Exhibit 32.**

cc) On January 21, 2019, I re-sent email to the Parties to respond to questions on legislation that were asked by the CCCW on November 19, 2018.

dd) On March 19, 2019, I sent an email to the Parties regarding the new Data Management System for FNCFS agencies for reporting on prevention. A copy of this email and attachments is attached to my affidavit as **Exhibit 11.**

ee) On March 29, 2019 for me sent an email to the Parties on the extension of deadlines past March 31, 2019 for retroactive and actual claims (extension are now December 31, 2019 and September 30, 2019 respectively). A copy of this email is attached as **Exhibit 13**.

Small Agencies

39. Canada has complied with the Tribunal's order to reimburse small agencies for their actual costs. Since the February 2018 order, Canada has been funding small agencies' actual costs and has retroactively reimbursed those agencies for their actual costs back to January 26, 2016.

40. Since February 2018, Canada has paid over $35 million in actual costs and retroactive reimbursements for small agencies, including approximately $24 million for retroactive payments and approximately $11 million for actual payments.

41. Regions have supported agencies in their planning for actual needs. For example, in British Columbia region, ISC worked with all 20 small agencies to undertake a needs-based planning process to develop plans and implement the proposed activities in the communities they serve. Agency staff participated in workshops regarding legal, wage parity, prevention, renovations, and engagement exercises with their communities. Tools were developed in the region for the agencies to streamline the process of bringing information to their communities. ISC also

travelled to communities, as requested by the agency, to work with them and support the development of their prevention plans. Some examples of new and expanded programming that will be funded through the actuals process are: staff training (prevention, Indigenous teachings, crisis intervention, suicide prevention); cultural workers and elder supports; increased community liaison and community wellness workers; family preservation programming and counselling; supports for youth aging out of care; cultural permanency planning programs; foster parent cultural training programs; programs for children who witness violence; Indigenous trauma training programs; and increased staff, to ensure manageable caseloads and staff in remote communities.

42. As reiterated in Paula Isaak's May 24, 2018 affidavit, Canada communicated to small agencies clarifying that their deficits are covered as part of retroactive payments. Emails were also sent to all agencies, including small agencies, encouraging them to submit their claims and requesting them to contact the region should they feel they have unmet needs.

43. Subsequent to the February 1, 2018 orders to fund actual costs for small agencies, the definition of small agencies was revised to include those with a child population of less than 1000, thereby increasing the number of agencies eligible to claim actual costs in all areas.

44. Following a review of FNCFS agencies letters were sent to select agencies confirming their classification as "small agencies" and advising them on their eligibility for retroactive and actual claims in all areas. See above, "Communications with Agencies" under d) and e).

45. Based on discussions with the CCCW, Canada agreed to retroactively reimburse salary increases and benefits for small agency staff back to January 26, 2016 to bring them in line with provincial counterparts. On October 16, 2018, emails were sent to all small FNCFS agencies verifying that all salaries are eligible for actual funding to a level comparable to the provincial wages and benefits, both retroactively back to January 26, 2016, and going forward.

46. Canada cannot reimburse agencies for costs that have not been actually incurred. Funding for the FNCFS Program falls under the Contribution Program entitled "Contributions to provide women, children and families with Protection and Prevention Services". The Directive on Transfer Payments (which is issued under subsection 7(1) of the *Financial Administration Act*), states that "the total amount of contribution funding paid to a recipient under a funding agreement does not exceed the eligible expenditures actually incurred by the recipient in completing the recipient's initiative or project, or such portion of these expenditures as was to be funded under the agreement."[4]

[4] Directive on Transfer Payments https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14208&section=html

47. Canada's interpretation is consistent with the statutory provisions of the *Financial Administration Act*, which is the core legal framework that sets out the formal rules for the administration and management of the government.

Building Repairs and Capital Needs

48. Canada has complied with the Tribunal's order on building repairs. Since the February 2018 order, Canada has been funding actual costs of buildings repairs and has retroactively reimbursed agencies back to January 26, 2016.

49. Since February 2018, Canada has paid over $15.4 million in actual costs and retroactive reimbursements for building repairs, although there may be other capital-related costs included in prevention or small agency claims for which details are not included in the claims forms.

50. In consultation with the Parties, Canada has also updated its Terms and Conditions to allow for greater flexibility and expand on eligibility for expenditures, including related to capital/building repairs. A copy of the Terms in Conditions is attached to this affidavit as **Exhibit 9**.

Remoteness Quotient Research Update

51. As noted at paragraphs 343-346 of the Ruling, the Tribunal has received updates concerning the development and implementation of a remoteness quotient ("RQ") for three FNCFS Agencies that serve Nishnawbe Aski Nation ("NAN") communities, including a process for obtaining expert advice. Regarding the status of this endeavour, Canada reports as follows:

    a) For a detailed overview of actions taken to implement these orders between February 1, 2018 and May 24, 2018, see pages 9 and 10 of Paula Isaak's May 24, 2018 affidavit, including Exhibit S.
    b) On August 22, 2018, the Interim Remoteness Quotient Report was shared with the Assembly of First Nations for review by the Consultation Committee on Child Welfare and filed with the Tribunal by Falconers LLP on behalf of NAN and Canada.
    c) On June 19, 2018, Margaret Buist sent an email to NAN requesting further information on the methodology and approach being used for calculating the remoteness quotient.
    d) On June 22, 2018, the Revised Interim Report was received from the NAN consultant.
    e) On July 4, 2018, Margaret Buist sent an email to NAN with comments and questions to address the final report on the child welfare remoteness quotient.
    f) On July 25, 2018, NAN provided the first draft of the Final Report for Phase II of the Remoteness Quotient project to ISC.

g) On September 5, 2018, NAN and Canada provided a further update to the Tribunal, indicating that a final draft has been submitted and is being reviewed with the researchers.
h) On September 27, 2018, NAN and Canada provided an update to the Tribunal, indicating that a revised draft of the Final Report for Phase II of the Remoteness Quotient study was received from the researchers and is being reviewed.
i) On November 26, 2018, NAN and Canada provided an update to the Tribunal, indicating that a revised version of Phase II of the Remoteness Quotient Final Report was received from the researchers and is being reviewed.
j) On January 11, 2019, NAN and Canada provided an update to the Tribunal, indicating that some areas of the report require additional analysis and that a third-party reviewer was retained to support this work. This update is attached to my affidavit as **Exhibit 33**.
k) On January 31, 2019, NAN and Canada provided an update to the Tribunal, indicating that work is progressing slower than anticipated and that NAN and Canada were hoping to finalize the report by early March 2019.
l) On February 28, 2019, NAN and Canada provided an update to the Tribunal, indicating that the third party reviewer has completed their work, and that the Tribunal can expect a further update by March 29, 2019
m) On March 29, 2019, NAN filed the Final Remoteness Quotient Report with the Tribunal.

Ontario Special Study

52. Since October 2017 the Technical Table Child and Family Well-Being in Ontario has been in agreement to move forward on a special study of issues related to First Nations on-reserve child welfare services in Ontario. Regarding the current progress of the Ontario Special Study, Canada reports as follows:

a) For a detailed overview of actions taken to implement paragraphs 365-366 of the Ruling between February 1, 2018 and May 24, 2018, see Paula Isaak's May 24, 2018 affidavit at page 10 and Exhibit T.
b) On July 20, 2018, Canada and COO provided a progress report to the Tribunal on the Ontario Special Study.
c) On September 28, 2018, Canada and COO submitted an update to the Tribunal: the Ontario Technical Table has reviewed the draft submitted by Meyers Norris Penny, and does not consider the report to be complete at this time. COO and Canada continue to discuss the study and will provide a further update to the Tribunal in January 2019.
d) On January 2, 2019, Canada and COO submitted the scheduled update to the Tribunal on the Ontario Special Study. COO has retained a consultant to work with the Ontario Technical Table to address gaps in the existing report. The study is not considered to be complete at this time.

e) On April 1, 2019, Canada reported to the Tribunal on the status of the Ontario Special Study, and indicated that COO and ISC continue to work together and will report back to the panel by May 13, 2019.

Long term reform – Enabling First Nations to exercise jurisdiction over child and family services

53. Canada is also taking significant steps towards long-term reform in Indigenous child welfare. On February 28, 2019, Bill C-92, an Act respecting First Nations, Inuit and Métis children, youth and families, was introduced in Parliament. A copy of the announcements is attached to my affidavit as **Exhibit 34** and **Exhibit 35**. The Bill is currently making its way through the Parliamentary process and seeks to:
    a) affirm the jurisdiction of Indigenous peoples in relation to child and family services; and
    b) set out principles (best interests of the child, cultural continuity, and substantive equality) applicable, on a national level, to the provision of child and family services in relation to Indigenous children.

54. The active engagement and commitment of Indigenous partners at all levels was central to the co-development of this proposed legislation. This engagement included 65 engagement sessions with nearly 2000 participants, including many CCCW and NAC members.

55. In the fall of 2018, engagement also occurred through a Reference Group with representation from the Assembly of First Nations, Inuit Tapiriit Kanatami, the Métis National Council, and the Government of Canada. The Reference Group recommended the development of high-level federal legislation that would both affirm the inherent right of Indigenous peoples and also include broad principles to guide the delivery of Indigenous child and family services.

56. In-person engagement sessions were also conducted with Indigenous partners, provincial and territorial representatives on the proposed content of the Bill in January 2019. This included sessions with the CCCW and the NAC.

57. This Bill sets the stage for comprehensive reform and could be a powerful tool to support community-based prevention and the well-being of Indigenous children and families. The introduction of Bill C-92 represents an historic opportunity to break from the past and focus on the safety and well-being of children and youth.

58. To ensure a smooth transition and implementation of the Bill should it receive Royal Assent, ISC is exploring the co-development of distinction-based transition governance structures, with representation from Indigenous partners and Provinces and Territories. These governance structures, for example, could identify tools and processes to help increase the capacity of communities as they make progress toward assuming responsibility over child and family services. Such governance structures could also assess gaps and recommend mechanisms to

guide future funding methodologies.

59. Ultimately, the proposed legislation is a matter for Parliament. This work is consistent with paragraph 412 and 413 of the Tribunal's February 2018 ruling, which notes that in line with the spirit of UNDRIP, and reconciliation, the Panel's orders will remain in place until one of four things occur, the first of which is "Nation (Indigenous)-to-Nation (Canada) agreement respecting self-governance to provide its own child welfare services."

Retention of Jurisdiction

60. On October 30 and 31, 2018, Paula Isaak and Valerie Gideon were cross-examined before the Tribunal regarding their May 24, 2018 affidavits.

61. Following the cross-examinations on October 31, 2018, the Tribunal determined that Canada was no longer required to provide reporting affidavits.

62. Overall, Canada is in substantial compliance with all existing orders. A substantive amount of work has been completed to achieve compliance and significant resources have been devoted to satisfying the orders now, retroactively, and moving forward.

63. Canada is also moving forward on long-term reform initiatives such as the proposed legislation for enabling First Nations to exercise jurisdiction over child and family services. This is a critical element of the Government of Canada's six points of action to address the overrepresentation of Indigenous children and youth in care in Canada. More information on the progress on the six points of action is available on ISC's website: https://www.sac-isc.gc.ca/eng/1541188016680/1541188055649

64. As was addressed to the Tribunal previously, Canada would like to move away from using the cumbersome litigation process involving affidavits and cross-examinations and rather continue the collaborative process to share information with partners. This approach is consistent with the Attorney General's Directive on Civil Litigation Involving Indigenous Peoples, in which the core objective is "to advance an approach to litigation that promotes resolution and settlement, and seeks opportunities to narrow or avoid potential litigation".[5] Canada has dramatically increased investments and has made significant efforts in changing the program both for the immediate and long term. Canada has demonstrated that it has established a system that is able to respond to the needs of First Nations children and families. The Government also remains committed to continue consulting with the Parties on the implementation and monitoring of these orders.

[5] https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html

65. The Tribunal's adjudication of this matter has had a transformative impact on the lives of Indigenous children in Canada.

66. I swear this affidavit in support of Canada's submissions for no other or improper purpose.

AFFIRMED before me at the City of Ottawa, Province of Ontario, on April 16, 2019.

A Commissioner for Taking Affidavits

Joanne Wilkinson

This is Exhibit "G" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Paul Thoppil

I, Paul Thoppil, Chief Financial Officer at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Chief Finances, Results, and Delivery Officer at the Department of Indigenous Services Canada ("ISC") and the former Indigenous and Northern Affairs Canada. I have been in this position since 2014. I report directly to the Deputy Minister of ISC. I am responsible for supporting the deputy heads in fulfilling their financial management responsibilities and accountabilities, among other elements, and for providing leadership and ensuring effective management of departmental financial resources within the Department's legislative mandate.

2. In my capacity as Chief Finances, Results, and Delivery Officer of ISC, I have read the ruling in 2018 CHRT 4 ("Ruling") of the Canada Human Rights Tribunal ("Tribunal"), dated February 1, 2018 and have personal knowledge of the significant efforts made by the Government of Canada ("Canada") and ISC to comply with the Tribunal's orders. In response to the Tribunal's decision in 2018, to support the full implementation of the Ruling, I focused on securing supplemental funding for the First Nations Child and Family Services (FNCFS) Program, establishing revised departmental financial management policies, and facilitating revisions to funding agreements with agencies. Where my knowledge is based on information and belief, I verily believe it to be true.

Increased Funding for FNCFS

3. The Government has dramatically increased the funding for the FNCFS Program since the Tribunal substantiated the complaint on January 26, 2016. The affidavit of Joanne Wilkinson, states that prior to the Tribunal's orders, the FNCFS Program's total expenditures were $680.9 million (2015-2016). Since that time, Canada's investments for the program have grown to approximately $1.2 billion in 2018-2019, almost double the program's initial investments. As a result, ISC does not anticipate having to fund the FNCFS Program by reallocating funds from other ISC programs, outside of for cash management purposes.

Budget Management

4. At paragraphs 422 and 423 of the Ruling, the Tribunal ordered Canada to stop reallocating funds from other social programs, especially housing, if it has the adverse effect of leading to apprehensions of children or other negative impacts; and to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities.

5. The genesis of these orders on reallocation resulted from the Tribunal's findings concerning Canada's practice of funding the FNCFS Program by reallocating funds from other departmental social programs, in particular housing. Specifically, at paragraph 272 of the Ruling, the Tribunal found that the "practice of reallocating funds from other programs is negatively impacting housing services on reserve and, as a result, is adversely

impacting the child welfare needs of children and families on reserve by leading to apprehensions of children".

6. The administration and management of public monies is set out in the *Financial Administration Act* and is used by all Government of Canada departments. In performing my duties, I must be guided by that legislation and the policies established to implement it.

7. Program funding is originally approved by the Government through the Federal Budget process and subsequently approved by Treasury Board. Departmental funding appropriations are provided to Departments on a yearly basis in the Estimates process and voted by Parliament. The main estimates outline spending for departments, agencies and programs, and contain the proposed wording of the conditions governing spending that Parliament will be asked to approve. The information provided in the estimates is reproduced as the schedule to the *Appropriation Act.*

8. Budgets within ISC are determined based on anticipated needs, which are normally established through historical trends and forecasting. To support senior management within the Department in meeting their responsibilities under the *Financial Administration Act* and supporting policies (such as the Management Accountability Framework), ISC continually monitors and forecasts program demand to meet program funding needs and legal obligations.

9. On occasion, there is a need to reallocate funding internally within the Department to respond to immediate pressures to ensure continuity of services to First Nations. This is ISC's effort to be consistent with paragraph 276 of the Ruling ordering Canada, under section 53 (a) and (b) of the *Canadian Human Rights Act,* to cease the discriminatory practice and prevent it from reoccurring, while also recognizing that "some reallocations may be inevitable in Federal government". Notwithstanding the above, we have initiated steps to review the state of financial management in the Department in our efforts to be in compliance with the Ruling.

Budget Management: Internal Review and Discussions February – May 2018

10. The affidavit of Ms. Paula Isaak, former Assistant Deputy Minister responsible for the FNCFS Program, dated May 24, 2018 provides a detailed account of actions taken to implement paragraphs 422 and 423 of the Ruling between February 1, 2018 and May 24, 2018. As noted by Ms. Isaak at page 11 and Exhibits U, V, and W of her affidavit, the following actions were taken:

    a) On February 1, 2018. Margaret Buist, Director General of the Children and Families Branch of ISC, sent an email to all Regional Directors General and Child and Family Services regional staff directing them to review the Ruling. This email is Exhibit "U" to Ms. Isaak's May 24, 2018 affidavit;
    b) On February 8, 2018, Ms. Isaak and I sent a directive by email to all departmental Assistant Deputy Ministers and Regional Directors General to advise they could no

longer reallocate social programs funding, including housing. to cover shortfalls. This email is Exhibit "V" to Ms. Isaak's May 24, 2018 affidavit;

c) ISC developed a chart to evaluate past reallocations from other social programs. This chart confirmed social development programs have previously been in deficit positions and have received reallocations from other programs to cover those deficits. This chart is Exhibit "W" to Ms. Isaak's May 24, 2018 affidavit;
d) At the time of Ms. Isaak's affidavit, she attested that since February 15, 2018, as ordered by the Tribunal, Canada has not permanently reallocated funds from social programs, including housing.

11. In addition to those actions, ISC held a series of senior management discussions on the implementation of the these Orders:
    a) On April 5, 2018 a meeting was held with Regional Social Directors;
    b) On April 6, 2018, a meeting was held with Regional Corporate Services Directors;
    c) On April 18, 2018, a meeting was held with Regional Directors General; and
    d) On May 1, 2018, I chaired a meeting of the Financial Management Committee.
    e) At a May 14, 2018 departmental meeting of the Senior Management Committee (including Regional Directors General and Regional Executives), the analysis and implementation of these Orders were discussed.

Budget Management: Development of Reallocation Policy and Budget Management Principles May – December 2018

12. Since this initial email, ISC has continued to expend significant efforts in collaboration with the Consultation Committee on Child Welfare (CCCW) to support the direction given by Ms. Isaak and myself to create a more fulsome policy regarding reallocation of funds that adheres to the Tribunal's orders. ISC's efforts to develop that policy include:

    a) On July 30, 2018, Ms. Buist, Director General presented a draft of the reallocation policy during a teleconference with Regional Directors General for consultation.
    b) On September 17, 2018, Ms. Buist presented a draft of the reallocation policy at the Directors General – Implementation and Operations Committee.

13. Even though a reallocation policy would govern internal financial decisions, in order for the Department to respect the Consultation Protocol, consultation with the CCCW was undertaken. On October 15, 2018, Joanne Wilkinson sent the draft policy on reallocation to the CCCW for consultation. A copy of this correspondence is attached to this affidavit as **Exhibit A**.

14. On November 1, 2018, comments on the reallocation policy were received from the First Nations Child and Family Caring Society (the 'Caring Society'). These comments are attached to this affidavit as **Exhibit B**. The Department did not receive comments from the other Parties.

15. In the development of a reallocation policy, the Department recognized a need for a whole-of-Department approach for all programs. This resulted in the development of Budget

Management Principles that went beyond the Ruling, which provides guidance to ISC departmental officials in the context of the implementation of the Tribunal orders and are applicable to the management of all programs within the Department. The Budget Management Principles support the Government's *Policy on Financial Management*, which provides the key responsibilities for Deputy Heads, Chief Financial Officers, Senior Departmental Managers and the Comptroller General of Canada in exercising effective financial management. As such the Budget Management principles were reviewed by the Comptroller General of Canada's office in December 2018. The *Policy on Financial Management* is attached as **Exhibit C.**

16. The Policy on Financial Management sets out specific responsibilities for departmental Chief Financial Officers. Among these, CFOs lead and manage the assessment of financial pressures, both on an in-year and multi-year basis, and recommend resource management strategies, including opportunities to reallocate funds as necessary, and where appropriate.

17. The Budget Management Principles serve as the foundation for the Reallocation Policy, and are founded on financial management practices for public entities in Canada, and are informed by the Indigenous Services context, specifically. ISC intends to continue to implement the Reallocation Policy and the Budget Management Principles indefinitely.

18. On November 19, 2018, the draft reallocation policy, Budget Management Principles, comments received from the Caring Society, and next steps were discussed at the Indigenous Services Canada - Senior Management Committee.

19. On January 16, 2019, the ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds ("the Reallocation Policy") and the corresponding Budget Management Principles were approved by the Financial Management Committee to support compliance with the directive sent out by myself and Ms. Isaak on February 8, 2018, and to ensure that First Nations children and families benefit from the full allocation of funding intended for implicated ISC programs. The Reallocation Policy and the Budget Management Principles complement each other:
    a) The Budget Management Principles guide budget management at Indigenous Services Canada (ISC), and serve as the foundation for the Reallocation Policy. These Principles were posted on the ISC's website on February 1, 2019, and are attached as **Exhibit D.**
    b) The Reallocation Policy applies to the social and housing programs at Indigenous Services Canada (ISC). The Reallocation Policy is attached as **Exhibit E.**

20. The vast majority of the comments received from the Caring Society on November 1, 2018, were accepted and integrated into the final policy The Department was unable however, to integrate a few comments into the final policy, including extension of the policy to all ISC programs, and the restriction of temporary cash management reallocations to a period of 30 days. Our responses to these comments were distributed to the CCCW along with the approved Reallocation Policy on January 8, 2019. The responses to these comments and a copy of the correspondence are attached as **Exhibit F.**

21. Within the context of the oversight provided by to senior management by the Budget Management Principles, a decision was taken to include additional programs within the Reallocation Policy. Specifically, education programs were chosen as Ms. Isaak was Assistant Deputy Minister of the Education, Social Development Programs and Partnerships Sector, and this was in line with her overall financial responsibilities.

22. Additionally, the Department of Indigenous Services Canada was created in August, 2017, which merged services housed under the former Indigenous and Northern Affairs Canada with the First Nations and Inuit Health Branch. With this, and given the adverse impact that reallocations from these programs could have on First Nations children and families, it was determined that including both education programs and health programs under the umbrella of the Reallocation Policy was consistent with the Budget Management Principles. As such, the Reallocation Policy applies to not only the five departmental social programs and housing as identified in the Ruling, but also education and health programs.

23. The Reallocation Policy identifies Permissible Reallocations under section 5.6, and governs the transfer of funds for cash management under section 5.7. The Policy permits reallocations in six circumstances. Implementation and oversight of the Reallocation Policy is the responsibility of the Chief Finances, Results, and Delivery Office Sector. For clarity, section 5.7 defines cash management transactions as temporary movements of funds to address cash flow challenges (advancing initiatives that have been approved but for which dedicated funds have not yet been received). These funds are then returned once funding has been received.

24. It is important to note the role that cash management plays in the federal government's expenditure management system. Within the Estimates process, the Supplementary Estimates provide departments with the opportunity to access additional funds or to make other financial adjustments to their appropriations within the current fiscal year. Because this process only occurs once or twice in a fiscal year, programs may temporarily reallocate funds within a fiscal year to address cash flow challenges for initiatives that have been approved but for which dedicated funds have not yet been received. Funds are returned later in the year to the original source, once funding is received.

25. Additionally, throughout the year, initiatives/projects may be also delayed for a variety of reasons, such as weather/winter roads or contracting issues. To ensure that funding is still used to support communities, the Department may ask Treasury Board for the ability to spend that funding in future years, when it will be needed for the original project. In line with accepted fiscal management principles, ISC programs may also use funding originally allocated to a delayed project to support other initiatives, with funds being returned to the original program in a future fiscal year.

26. Within this context, senior management determined that restricting temporary cash management reallocations to a period of 30 days would not be possible.

Budget Management: Implementation of the Reallocation Policy

27. The Reallocation Policy has superseded the email from Ms. Isaak and I on February 8, 2018 and is now in effect. The Reallocation Policy and Budget Management Principles were distributed by email to the departmental Assistant Deputy Ministers on February 25, 2019. This email is attached as **Exhibit G**. Additionally, ISC is developing implementation tools in the form of monthly reports for 'temporary' cash management and permanent reallocations.

28. Regarding the 'temporary' cash management implementation tool, ISC has developed a monthly reporting process, including attestations, which identify transfers of funding out of implicated programs. Each region must attest that these transfers reflect 'temporary' cash management, and that they will not result in an adverse impact on First Nations children and families. Additionally, this monthly report will require departmental officials to complete an attestation and identify a resource management plan to return the funds back to the implicated program. The resource management plan will include the source of funds that will be used for the reimbursement.

29. On April 3, 2019, the draft monthly reports were presented to the Regional Operations – Senior Management Committee for consultation. These attestations are to satisfy section 6: Policy and Operational Requirements of the Reallocation Policy.

30. Regarding the permanent reallocation implementation tool, before any future reallocation can be implemented, ISC requires the responsible approving senior departmental officials to give a rationale explaining why the reallocation is necessary - including supporting evidence - and confirmation that no adverse impact on First Nations children and families is anticipated as a result of the reallocation.

31. A Guidance Document has been written to aid ISC departmental officials in assessing if a reallocation of funds is likely to have an adverse effect/impact that leads to additional apprehensions of First Nations children, or impacts First Nations children and families negatively to prevent discriminatory practices from reoccurring due to the ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds (the 'Policy on Internal Reallocation').

32. Prior to full implementation within the Department, the 'temporary' cash management implementation tool, permanent reallocation implementation tool and Guidance Document will be shared with the CCCW for consultation.

33. As previously discussed at paragraph 8 of my affidavit ISC prepared a chart that evaluated reallocations from other social programs (for fiscal years 2014-2015, 2015-2016, and 2016-2017). This chart confirmed that social development programs had previously been in deficit positions and received reallocations from other programs to cover those deficits.

34. For 2018-19, this chart has been updated and shows the net of the program's spending versus their allocation by year for the programs implicated in the policy. This table is

attached as **Exhibit H.** Annual reporting of ISC results are reported in the Public Accounts of Canada, as well as in the Departmental Result Report.

Budget Management: Consultations with the Parties after Approval of Reallocation Policy January – April 2019

35. I will distribute the implementation tools for the Reallocation Policy, including the Guidance Document, to regional ISC officials in April 2019 after the majority of year end accounting processes affecting the implicated accounts have been completed. Going forward, ISC expects the tools will continue to develop with input from the Consultation Committee on Child Welfare and regional ISC officials.

Agency Agreements

36. As I previously stated at paragraph 3 of my affidavit, the *Financial Administration Act* sets out the requirements for the administration and management of public monies used by all Government of Canada departments. In performing my duties, I must be guided by that legislation and the policies established to implement it. This includes policy requirements for transfer payment programs such as the funding agreements ISC enters into with First Nations child welfare agencies, further described below.

37. Government-wide policy requirements for transfer payment programs are established by Treasury Board Secretariat in the Policy on Transfer Payments (PTP) and the Directive on Transfer Payments (the "Directive"). The objective of the PTP and the Directive is to ensure that transfer payment programs are managed with integrity, transparency and accountability in a manner that is sensitive to risks; are citizen- and recipient-focused; and are designed and delivered to address government priorities in achieving results for Canadians. For example:

    a) the Directive requires that a funding agreement must be executed with each recipient before a payment is made.

    b) Appendices F and G of the Directive establishes requirements for funding agreements that both support departmental accountability requirements and meet the needs of recipients, including ensuring that departmental requirements do not pose an undue administrative burden.

Treasury Board Secretariat's PTP and Directive on Transfer Payments are attached as **Exhibit I.**

38. To ensure effective implementation of the PTP and the Directive within the Department, I establish and maintain a suite of departmental guidance documents, as well as national funding agreement models that must be used as the basis for all ISC funding agreements. The national funding agreement models vary based on recipient type. The Funding Agreement-Other (FA-Other) is the model used for recipients that are other than First Nations and Tribal Councils, including for example, agencies and other service providers.

39. Although all ISC funding agreements must be based on one of the national models, the specific needs of each recipient or recipient type are considered and accommodated, where possible, through two formal processes:

a) In instances where recipients are already under an existing agreement, changes to the agreement are made by way of notice (the Notice of Acceptance of Requests, or the NAR) which simply requires the signature of a delegated ISC official. Use of a notice allows the Department to legally change the agreement very quickly in response to a request and avoids the administrative burden of amending the funding agreement.

b) In instances where recipients are entering a new agreement, any required changes to the model are made through the internal Text Deviation process, prior to presenting the agreement to the recipient for signature.

40. According to the material submitted by the Caring Society (and in particular, the Navarro Affidavit #4, Exhibits L, M and N), ISC reviewed the standard language included in the FA-Other funding model to identify the changes required to support the needs of agencies and ensure compliance with the Tribunal orders. The proposed changes were documented in a draft NAR and Text Deviation Request.

41. On September 11, 2018, Ms. Isaak distributed the following documents for consultation to the CCCW: the current FA-Other funding model; draft versions of the proposed NAR and Text Deviation Request; and a draft updated sample funding agreement. This email is attached as **Exhibit J**.

42. On September 25, 2018, the Caring Society provided feedback on the draft updated sample funding agreement. This email is attached as **Exhibit K**.

43. ISC integrated the majority of this feedback and on December 3, 2018, Ms. Wilkinson responded to the Caring Society and provided the following: a formal ISC response to the feedback, updated versions of the NAR and Text Deviation Request; and an updated sample funding agreement. The email is attached as **Exhibit L**.

44. However, there are two areas of disagreement between the Caring Society and ISC related to standard language that is included in all Government of Canada funding agreements regarding a) the powers of Parliament and the Minister, and b) the provision of a dispute resolution process.

45. The PTP and Directive require departments to include clauses in agency funding agreements which enumerate those exceptional circumstances which would enable department to terminate agreements. In the case of agency funding agreements:

a. if Parliament opts not to vote funds that would fund the agreement (section 6.1 of agency funding agreements);

b. if Treasury Board changes or ends the program (section 6.2(a) of agency funding agreements);

c. if the Minister changes or ends the program (section 6.2(b) of agency funding agreements); or

d. If Parliament changes funding levels (section 6.2(c) of agency funding agreements).

46. The Directive also indicates departments should include a provision for a dispute resolution mechanism in funding agreements. Section 28.1(b) of agency funding agreements provides for such a dispute resolution process to address disagreements between recipients and Canada. This applies to the entire funding agreement with Agencies, including funding provided outside of the Tribunal orders. This provision therefor allows Agencies access to a dispute resolution process to all aspects of their funding, not just those covered by the Tribunal orders and the appeals process outlined in the affidavit of Joanne Wilkinson.

47. Due to the requirements outlined above, the Department was not in a position to accept the two changes suggested by the Caring Society.

48. I make this affidavit in support of Canada's response to the Parties' motions to extend Tribunal jurisdiction beyond March 31, 2019, reallocation and agency agreements and for no improper purpose.

SWORN TO before me at the City of Ottawa, Province of Ontario, on April 16, 2019.

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A Commissioner for Taking Affidavits

P. Thoppil

Paul Thoppil

This is Exhibit "H" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Valerie Gideon

I, Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch ("FNIHB") at the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2017. Prior to that I was the Assistant Deputy Minister of Regional Operations at FNIHB for five years. I report directly to the Deputy Minister of ISC on all matters of First Nations and Inuit health, including mental health services. I am Mi'kmaq from the Gesgapegiag First Nation and

have spent my entire career dedicated to First Nations and Inuit health and wellness.

2. In my capacity as Senior Assistant Deputy Minister of the FNIHB, I have read the February 1, 2018 ruling ("Ruling") of the Canada Human Rights Tribunal ("Tribunal"), and have personal knowledge of Canada's efforts to comply with the Tribunal's orders ("Orders").

3. The government is moving forward with a number of initiatives and it is open to talking with the parties to resolve issues. As described below, input has been requested directly from the Parties which has facilitated the sharing of information and concerns. To the extent more information is required, I would ask the parties to contact us directly as an alternative to further litigation.

Mental Health Gaps and Analysis

4. At paragraph 425 of the Ruling, the Tribunal ordered Canada to analyze all its mental health programs on reserve and in the Yukon in order to identify gaps in services to First Nations children. Regarding its implementation, I can offer the following information:

a) On March 25, 2018, Canada completed this report titled, "Gap Analysis: Federally Funded Mental Wellness Services for First Nations Children". The report analyzes ISC programs that fund mental health for First Nations on reserve and in the Yukon, and identifies potential gaps in mental health services to First Nations children. This analysis also identifies challenges and proposes next steps to address the gaps. This report is attached to this affidavit as **Exhibit "A"**.

b) Canada shared this report with external audiences, including the Complainant and Interested Parties ("the Parties"), to seek their feedback and advice and help us better understand the on-the-ground realities regarding mental health and prevention activities. The goal is to improve the analysis undertaken by departmental officials and support future ISC policy and program decision-making.

c) On March 25, 2018, I emailed this analysis to the Parties. My email is attached to this affidavit as **Exhibit "B"**. On March 26, 2018, comments were submitted by Dr. Cindy Blackstock, Executive Director of the First Nations Child and Family Caring Society ("Caring Society"). Where possible, these comments were incorporated into the April 2, 2018 report.

d) On March 26, 2018 Dr. Tom Wong, Chief Medical Officer of Public Health and Executive Director of the Office of Population and Public Health at FNIHB, shared the report for expert feedback with members of the First Nations Mental Wellness Continuum Framework Implementation Team. The mandate of this Team is to support the meaningful and ongoing implementation of the First Nations Mental Wellness Continuum

Framework and the Honouring Our Strengths Framework, which focus on ensuring the provision of culturally-based, culturally-relevant, and effective mental wellness services to First Nations; whose membership includes First Nations regional representatives; and which is led in partnership by the Assembly of First Nations, the First Nations and Inuit Health Branch of Indigenous Services Canada, the Thunderbird Partnership Foundation, and the First Peoples Wellness Circle.

e) On April 4, 2018, a revised draft analysis was shared with the Parties and on April 5, 2018, the report was discussed at a meeting of the Jordan's Principle Oversight Committee ("JPOC"). I led the discussion and explained Canada will maintain this report as evergreen to ensure that the views of our partners, including the Parties and the Implementation Team are captured. As the report is updated with the comments received, I will share the updated version with the Parties.

5. To improve our understanding of the various gaps and help address them, FNIHB plans to engage an Indigenous expert or Indigenous organization, through a request for proposals process, to undertake a broader analysis of the gaps in mental health services for First Nations children. We expect this work to be undertaken this fiscal year.

6. In addition, FNIHB is presently completing a literature review to further assess potential gaps in mental health services for First Nations children, based on published gray literature. Once completed, this literature review will be shared with the Parties, along with the most recent version of the gaps analysis report.

7. Once the above analysis is completed, together with the Parties, Canada would like to develop projects and/or initiate necessary program and policy changes to address and eliminate the service gaps that have been identified. In my experience, we can adopt best practices from models such as the Choose Life Pilot Project for remote communities in Northern Ontario. As I stated in my other Affidavit dated May 24, 2018, reporting on the Tribunal's May 26, 2017 Ruling, the Choose Life Pilot Project is an example of a pilot project demonstrating a collaborative approach to addressing the challenge of meeting the mental health needs of children and youth. Later in this Affidavit, I will provide more information about this Project as well as the funding that has been allocated to NAN and its communities.

Funding Mental Health Services

8. At paragraph 426 of the Ruling, Canada was ordered to fund the actual costs of mental health services for First Nations children and youth in Ontario. Regarding its implementation, I can offer the following information:

a) Upon receiving this Order, Canada drafted a letter to First Nations to inform them about this Order and how to submit the receipts using the

new declaration and reimbursement forms that were created. Attached to this affidavit as **Exhibit "C"** is the letter and the Declaration and Reimbursement Forms.

b) To meet the Order for payments to be processed no later than 15 business days after receipt of the documentation of expenses, a process was developed internal to the department to fast track these payments. The following service standards to expedite all these payments were created:

   i. 5-10 business days for Focal Points to process the payment of a claim; and,

   ii. 10 business days for Accounting Hubs to process payments to requesters, vendors, or service providers.

c) On January 29, 2018, I emailed the drafted letter and forms to the Parties and the Commission inviting comments before the letter was finalized and sent to the stakeholders. This email is attached to this affidavit as **Exhibit "D"**.

d) On February 1, 2018, Lori Doran, Acting Regional Executive at FNIHB and Anne Scotton, Regional General Director of Regional Operations of Indigenous Services Canada, emailed/faxed or sent the letter to over 386 recipients in Ontario including First Nation communities tribal councils, service coordinators and service coordination organizations. The letter informs the recipients of the February 1, 2018 ruling and states that ISC will immediately begin to cover the actual costs for the provision of mental health services for the period of January 26, 2016 to February 1, 2018.

e) In February and March 2018, ISC sectors had a meeting to coordinate the approval process and reimbursement payments to support Band-only submissions under paragraphs 426 and 427 (reimbursement of Bands actual costs). This process ensures a streamlined process for Bands while issuing one ISC payment. It also avoids any unnecessary confusion by Bands of whom to contact to seek reimbursement.

f) Since the Ruling and Order was issued, during regular community visits, the Ontario regional Jordan's Principle Focal Point had spoken to community members about this Order and discussed the steps required to submit a reimbursement. In some instances, a presentation with this information was distributed. An example, on March 7, 2018 the Focal Point visited the Neskantaga First Nation which is a remote Oji-Cree First Nation band government in northern Ontario and presented on Jordan's Principle, the Tribunal's Rulings of May 26, 2017, as amended on November 2, 2018, and the February 1, 2018 Ruling on the Child and

Family Services Program specific Order on mental health. Attached as **Exhibit "E"** is this presentation.

9. When a submission under paragraph 426 is made, the process for the initial evaluation and determination follows that under the Jordan's Principle - A Child-First Initiative. This process is explained in my May 24, 2018 Affidavit on compliance with the May 26, 2017 Ruling. Generally, the request is submitted to the Ontario regional Focal Point who will review and determine the request under the Tribunal's timelines ordered under Jordan's Principle (12-48 hours for urgent requests; 48 hours to 7 days for community or groups of children requests). Should the Focal Points recommend a denial (full or partial requests), the request is sent to the FNIHB Acting Assistant Deputy Minister of Regional Operations to review and determine. To date, no denials were recommended or made.

10. As of April 25, 2018, seven submissions have been received. Two submissions are from families of First Nations children and five are from First Nations communities including Bands, and Child and Family Services. Of the seven submissions, five have been approved and two are pending as more information is required. The five submissions total approximately $1.5 million in reimbursement costs that include items such as mental health family meetings, training on mental health First Aid, home and school visits, elder consultations, provider salaries, and travel costs.

11. Of the five submissions, all were paid within the 15-day period as ordered. As shown in **Exhibit "F"**, from the time the Ontario region approved the request with all the necessary documentation to when headquarters approved the payment (cheque, electronic data interchange, or direct deposit), all payments were issued on average within 11 days. An initial approval was made and communicated to the applicant; however, the payment start time cannot be entered into the system until the full documentation is submitted by the requestor and entered into the payment system.

12. Once ISC has issued the payment, the time in which the individual or the community receives the funding varies, and is dependent on the method of payment choice by the requestor. For example, if the recipient has provided Canada with direct deposit information, the time of the payment is faster compared to those who request a cheque through Canada post.

13. Given the similarities of paragraphs 426 and 427 that ordered Canada to fund Band Representative Services for Ontario First Nations at the actual cost of providing those services retroactively to January 26, 2016, where submissions from Bands or Child and Family Service Agencies were/are received, departmental officials work together to ensure that one payment is made, avoiding possible confusion among the Band or Agency members. For example, regarding the submission of the Wahnapitae First Nation Health Department that is highlighted in **Exhibit "G"**, since they submitted items not considered as *mental health* (e.g., court costs, legal documents and fees, staff salaries and benefits), the

Ontario region sent the submission for review and payment to ISC officials who are working to comply with paragraph 427.

14. In addition to these reimbursements ordered by the Tribunal, through Jordan's Principle, Canada is addressing the unmet mental health needs of First Nations children and youth through Jordan's Principle. It is difficult to provide an exact total number of requests that have been received for mental health services to the Jordan's Principle – A Child-First Initiative given the difficulty in defining what mental health services are or if the requests should only include those for a First Nations child. To protect the privacy of the child, their health condition is not requested nor tracked. However, to demonstrate Canada's actions in addressing the mental health gaps that have been identified under Jordan's Principle, the following preliminary data is shared:

    a) Preliminary analysis shows that approximately 39% of approved requests are for mental health supports that include land-based cultural interventions. This may be a conservative estimate, as additional supports coded simply as 'therapeutic services' may have an underlying mental health cause as well. The most frequently requested mental health supports are community/First Nation organization managed and funded through contribution agreement, and do not specify the nature of the intervention.
    b) Using FNIHB's definition and financial coding of "mental health and wellness", roughly $45.1 million has been allocated to fund approved services, supports and/or products. The coding including services such as those funded for fetal alcohol spectrum disorder (e.g., education and nutritional counselling); maternal child health (e.g., screening and assessment); Brighter Futures (e.g., development and promotion of parenting skills); Suicide Prevention (e.g., prevention and knowledge development); Treatment Centers Program (e.g., alcohol and drug treatment); allied services (e.g., physio, occupation and speech therapy); and, day programs (e.g., specialized programming for children requiring physical, mental and/or social stimulation).

15. Included in this data under Jordan's Principle are requests that have been approved to support requests submitted to the Choose Life Pilot Project. As shown in **Exhibit "H"**, since the start of this Project in April 2017 to May 11, 2018, roughly $29.8 million has been spent on Choose Life projects submitted by First Nations communities, tribal councils, schools and health authorities in the NAN territory. However, an additional $37.4 million has been approved to fund approved projects this fiscal year. In total, about 23,351 First Nations children and youth will be receiving health, social and/or educational services, supports and/or products as a result of this Pilot Project. In addition, $2.9 million was provided to NAN to support the implementation of this Project including corporate services, communications, outreach activities, two NAN Choose Life Coordinators, a NAN Crisis Coordinator and a NAN Mental Health Service Coordinator.

16. Choose Life is a two-year (2017/18 – 2018/19) pilot project under the Jordan's Principle – A Child-First Initiative that began on April 11, 2017 with the 49 Nishnawbe Aski Nation ("NAN") communities. It is aimed to provide immediate funding relief to any NAN First Nation or related First Nations service provider organization with children and youth at risk of suicide by fast-tracking proposals for group child and youth mental health prevention programs/services regardless of the timing of their submission.

17. While the type of services, supports and products vary, roughly over $8.0 million has been spent to support land-based culturally appropriate mental health activities under the Choose Life Pilot Project, with an additional $8.5 million committed this fiscal year. These land-based activities include sporting and leisure supplies, equipment, transportation to camps, community guides, and elders to provide teachings on culture, trapping, snaring, boating, snowshoe making.

18. As the Senior ADM responsible for mental health at ISC, I am fully committed to addressing the unmet needs for government services of First Nations children, whether it concerns mental health or otherwise. I understand the significant impact that suicide and mental health has on communities, and am working in partnership with First Nations, the Parties and provincial/territorial governments to ensure that First Nations have access to the treatment and prevention services that they need, and that the health outcomes of First Nations are improved.

19. I hope through this Affidavit, I have demonstrated that Canada has complied with the paragraphs 425 and 426 and remains committed to filling gaps in access to mental health services together with the Parties and experts. For this reason, I ask the Tribunal and Parties to contact me directly for additional information.

SWORN TO before me at the City of Ottawa, Province of Ontario, May 24, 2018.

B. Hanssens

A Commissioner for Taking Affidavits

Bernard Hanssens
185510-7

Valerie Gideon

This is Exhibit "I" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Valerie Gideon

I, Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch ("FNIHB") at the Department of Indigenous Services Canada ("ISC"). I have held this position since December 2017. Prior to that I was the Assistant Deputy Minister of Regional Operations at FNIHB for five years. I report directly to the Deputy Minister of ISC on all matters related to First Nations and Inuit health, including Jordan's Principle and the Jordan's Principle – A Child-First Initiative ("CFI").

2. I am Mi'kmaq from the Gesgapegiag First Nation and have spent my entire career dedicated to First Nations and Inuit health and wellness. I am deeply committed to securing a healthy and rewarding future for First Nations children for the seven generations before us. My two daughters are First Nations and I value this responsibility beyond what can be expressed in this affidavit. I strongly believe in Jordan's Principle and will continue to strive to achieve true collaboration with the Parties to address the unmet needs of First Nations in accordance with the definition and application of Jordan's Principle.

3. In my capacity as Senior Assistant Deputy Minister of FNIHB, I have read the May 26, 2017 ruling of the Canadian Human Rights Tribunal ("Tribunal"), as amended on November 2, 2017 (the "Ruling"), and have personal knowledge of Canada's efforts to comply with the Tribunal's Orders regarding Jordan's Principle ("Orders"). I have also read the various affidavits and submissions filed by the Parties in response to the affidavits of Mr. Perron, the former Senior Assistant Deputy Minister dated November 15, 2017 and December 15, 2017.

4. In the paragraphs that follow, I will describe the efforts and actions taken by Canada to comply with the Orders as well as addressing concerns raised by the Parties since the compliance reports of November and December 2017. I will also address questions that were posed to Mr. Perron, ISC's Associate Deputy Minister, at his May 9, 2018 cross-examination.

5. I wish to emphasize Canada has been implementing Jordan's Principle by aspiring to work collaboratively with the Complainant and Interested Parties (the "Parties"). While we understand trust needs to be repaired based on years of legal proceedings on this matter, I wish to underline my commitment to advancing our shared interests in addressing the unmet needs of First Nations children for government services they are entitled to receive, including those necessary to fulfill the principle of substantive equality.

6. Canada is moving forward with a number of initiatives to improve its operational procedures, data monitoring and other service enhancements, and it is consulting with the Parties to resolve issues as these arise. As explained below, a number of consultative meetings have been held where I invited the Parties to join in developing or improving upon the activities and operations internally on Jordan's Principle. As an example, on April 26, 2018, I invited the Parties, their staff members working on Jordan's Principle and their litigator to join a discussion whereby their concerns or questions on departmental activities could be answered.

7. Canada is committed to ensuring the unmet needs of all First Nations children stemming from gaps in access to government services are addressed. When gaps are identified, concerns are raised, or disagreements are expressed, Canada would ask the Parties to further engage with Canada through emails to myself or discussions at the Jordan's Principle Oversight Committee ("JPOC") or the Protocol Consultation Committee as an alternative to further litigation. Once again, it is my sincere intent to proactively respond and address issues with

respect to implementation. While rebuilding trust will take time, ISC is fully committed to addressing the concerns of the Parties in order to improve the lives of First Nations children across Canada.

8. I am highly committed to being accessible, at any level, to address issues and to adapt wherever possible and to a maximum extent legal and policy parameters to make the federal system more responsive to the unmet needs of First Nations children through the full definition and application of Jordan's Principle.

Definition of Jordan's Principle

9. Canada has committed to fully implementing the definition of Jordan's Principle as ordered by the Tribunal in its Ruling. Federal department staff and stakeholders have been informed of Jordan's Principle, its definition, and the May 26, 2017 Decision, as amended on November 2, 2017.

10. Canada has taken several important steps since November 2, 2017 when the Orders were amended. A staff teleconference took place on November 22, 2017 with all Regional Executives, Regional Directors General, Focal Points, management and staff of the Jordan's Principle Division. The purpose of this teleconference was to inform staff about the amended Orders that allowed for clinical case conferencing in specific situations and the revised timeframes for evaluating and determining requests. Weekly Jordan's Principle teleconferences are used to speak to and respond immediately to operational issues and also to train Focal Point staff. To facilitate understanding, all Focal Points received the amended Decision and Orders, a guidance document summarizing the Orders, and the updated version of the September 2017 Delegation of Authorities. The guidance document is attached to this affidavit as **Exhibit "1"** and the Record of Discussion from the November 22, 2017 teleconference is attached as **Exhibit "2"**.

11. In January 2018, Mr. Perron emailed all known schools boards across Canada to inform them of Jordan's Principle and the Ruling. The content of this email was shared with the Parties before the email was sent. The purpose of his email was to ask for the school boards' assistance in helping to identify any First Nations children who are going without the educational and/or other government-funded services that they may need. Text was provided to the school board to assist in the dissemination of information on and about Jordan's Principle to the children, their parents/guardians and teachers/educational instructors. Mr. Perron's email is attached to this affidavit as **Exhibit "3"**.

12. In February 2018, a Jordan's Principle regional communiqué was disseminated to all Ontario and Northern stakeholders including First Nations Chiefs, Tribal/Band Council members, and service coordination organizations. The aim of the communiqués was to provide specific information on how Jordan's Principle was being implemented in the regions with partners and providers, and identified the

ISC staff who would be able to help individuals and communities to obtain the supports they required. Over the next month, all other regions will send out similar communiqués that provide specific information on how Jordan's Principle is being implemented in their own region, including names of the Jordan's Principle Focal Points which they can contact for further information or to submit a request. For example, **Exhibit "4"** is the communiqué that was disseminated in the Ontario region on February 1, 2018 to more than 236 stakeholders.

13. Information sessions were also held with partners, communities, service coordinators, service delivery agencies and others at various national, regional, and local events. The purpose of these sessions was to inform various groups and audiences about Jordan's Principle, including the story of Jordan River Anderson, the Tribunal decisions of 2016 and 2017, the definition of Jordan's Principle, and the Government's actions for implementation and compliance. Examples of these presentations include:

a) Internal presentations:
   i. In December 2017, Bonnie Beach, Director, Jordan's Principle, FNIHB presented to officials from the Privy Council Office, Treasury Board of Canada Secretariat, and departmental colleagues;
   ii. On May 8, 2018, Ms. Beach presented to ISC's senior management Operations and Service Delivery Committee.

b) External presentations:
   i. In January, 2018, I presented on Jordan's Principle to the National Advisory Committee for reforms of the Child and Family Services Program that is chaired by the Assembly of First Nations ("AFN") and includes membership from the First Nations Child and Family Caring Society (Caring Society) and Family and Child Service Agency representatives appointed from every region.
   ii. In February 2018, Ms. Beach presented to the Canadian Pediatric Association at the Children's Hospital of Eastern Ontario.

c) Regional outreach: Information sessions were held in various locations to update stakeholders on Jordan's Principle. For example,
   i. In Alberta, more than 500 inquiries or requests have been made about Jordan's Principle since November 2017. Approximately 20 presentations have been given.
   ii. November 3, 2017: Information session at Saskatchewan Regional Office to Saskatoon Health and Family Services;
   iii. November 17, 2017: Regional Tripartite meeting with the Federation of Saskatchewan Indian Nations representatives, Child Family Service Directors, the Ministry of Social Services;
   iv. November 20, 2017: Kettle First Nation visit and meetings with Chief and Council to update on Jordan's Principle;
   v. November 23, 2017: Information session for Onion Lake First Nation;

vi. December 6, 2017: Information session at Prince Albert Grand Council Health;

vii. January 12, 2018: Update at the Alberta Jordan's Principle working group – representatives from health, social, and education who are now overseeing the direction of information sessions to service providers;

viii. January 22, 2018: Information session with the Saskatchewan Advocate for Children and Youth in Saskatoon;

ix. February 6-9, 2018: Quebec Health and Social Directors Network discussion;

x. March 8 and 9, 2018: Information session at Black Lake First Nation and Athabasca Health Authority;

xi. On August 17, 2017, the Manitoba region hosted a symposium for all staff at the former INAC Regional Operations explaining Jordan's Principle – CFI along with the Jordan's Principle definition and its impact on day to day business;

xii. March 28, 2018 and April 20, 2018: Québec Tripartite Table on Jordan's Principle;

xiii. In the Atlantic region, presentations were made at meetings of the Atlantic First Nations Health Partnership (FNIHB Atlantic's co-management table with First Nations), Atlantic Health Directors, and trilateral committees in Nova Scotia, Prince Edward Island, and Newfoundland. Additional presentations aimed to raise awareness were delivered to: the IWK Health Centre (Women and children's hospital in Nova Scotia); Halifax Regional School Board; Vitalité Health Network (New Brunswick health authority); Community-based staff for child and family portfolios and health authority employees, in Sheshatshiu, Natuashish, and Happy Valley-Goose Bay (all in Labrador); and, orientation sessions were held for two new service coordinators; and

xiv. In British Columbia, ISC and the British Columbia First Nations Health Authority ("FNHA") presented at the Mental Health and Wellness Summit to more than 200 attendees in Vancouver, February 7-8, 2018. Jordan's Principle was also profiled at the BC Indigenous Services Canada Joint Gathering with over 500 attendees also in Vancouver January 16-18, 2018. In January 2018, the FNHA distributed Jordan's Principle kits to over 600 sites across the province. Recipients included BC First Nations community health centres, band offices, Friendship Centres, Delegated Aboriginal Child and Family Service Agencies, regional health authorities, First Nations schools (130), Aboriginal Patient Navigators/Patient Liaisons, FNHA regional offices and nursing centres and other locations on request. Kits were also presented at regional sub caucus and Caucus sessions in five of five regions.

14. Since the November 15, 2017 reporting affidavit, Canada has, in consultation with the Parties, implemented an expanded and targeted communications and outreach

plan aimed to enhance the public's knowledge of Jordan's Principle, the definition and Canada's commitments. These activities include:

a) Creation of the Jordan's Principle 24/7 bilingual National Call Centre that was announced on February 1, 2018. The goal of this Call Centre is to provide First Nations with a live person, 24-hours a day, 7 days a week, who is able to respond to any questions on Jordan's Principle and/or start the Intake Form for a requested service, support or product;

b) Monthly social media plans with draft Facebook and Twitter messages about Jordan's Principle and the CFI; Attached as **Exhibit "5"** is an example of an email and attachment from Ms. Beach to the Parties regarding the social media plan for April 2018;

c) Website updates to include the definition of Jordan's Principle, background information, monthly updates on the number of approved requests of the CFI, and information on substantive equality that was prepared and approved by the JPOC:
    - https://www.canada.ca/en/indigenous-services-canada/services/jordans-principle/jordans-principle-substantive-equality-principles.html
    - https://www.canada.ca/fr/services-autochtones-canada/services/principe-jordan/principe-jordan-principes-egalite-reelle.html

d) New posters, attached as **Exhibit "6"**, wallet cards, and banners were drafted to include the new Jordan's Principle National Call Centre toll-free line whose number was agreed to by the Parties:
    1-833-JP CHILD (English)
    1-855-PJ ENFAN (French)

e) ISC is in the preliminary stages of developing two important networks; a Service Coordinator Network and a Navigator Network. The aim of these Networks will be improving integration and communication amongst Service Coordinators and Navigators. Further these Networks will provide and share insights and lessons learned. A training plan, similar to the one used with Focal Points, will also be developed and implemented vis-à-vis these Networks. ISC will work with the Assembly of First Nations and its existing Jordan's Principle tables to establish the Networks over the coming weeks.

15. In addition to the efforts noted above, Canada is continuing to disseminate knowledge of Jordan's Principle and is partnering with many regional First Nations organizations to ensure the general public and First Nations are informed about Canada's legal obligations. For example, the Saskatchewan region has established a partnership with the Saskatchewan First Nations Family and Community Institute to organize information sessions in the coming months with

various audiences including service providers. Registration to attend these sessions is open at www.sfnfci.ca.

16. Updates on the Ruling and Canada's work to meet the Orders continue to be discussed with senior management at the various departmental forums, which meet frequently, some as often as weekly, including ISC Regional Executive and Regional Director General meetings, FNIHB Senior Management Committee meetings, and the Jordan's Principle Oversight Committee.

17. At present, Canada has been working with the Alberta First Nations Health Consortium and the British Columbia FNHA to ensure that their website content on Jordan's Principle is compliant. On April 26, 2018, changes were made to the FNHA website to ensure compliance with the definition of Jordan's Principle and included the new toll free Jordan's Principle National Call Centre line that was created on February 1, 2018.

18. These collaborative efforts demonstrate Canada's continued efforts to work with the Parties to ensure Canada is applying Jordan's Principle as defined by the Tribunal, and that all of Canada's public education material on the definition are in compliance with the Ruling.

Definition of First Nations

19. Canada's current interpretation of "First Nations" children as it relates to children requesting services as per the Ruling refers to those children who are registered Indians under the *Indian Act*, as well as those entitled to be registered living on and off reserve. As I discussed with the Parties at the April 26, 2018 meeting, I am presently working with federal department central agencies on options with respect to Jordan's Principle eligibility criteria. I have invited the advice of the Parties on this policy work which can continue through the longer-term work on Canada's approach to Jordan's Principle that is being co-developed with First Nations as coordinated with the AFN.

20. With respect to the Parties questions at the May 9, 2018 cross-examination regarding non-status children and the provision of services to these children once Bill S-3 is proclaimed:

    a) Canada is consulting with First Nations and affected individuals on how best to implement these changes. Until these statutory amendments to section 6 of the Indian Act are in force, non-status children are not eligible to be registered;

    b) While the exact date of the first non-status child to have requested services under the CFI is not known, approximately 37 requests have been received as of May 11, 2018 from children who became eligible under the December 22, 2017 Indian Act amendments. Letters to most of these children or their family/guardian were issued on May 8 and 11, 2018. The remaining letters are presently being prepared. These letters indicate that

the request is pending a review by ISC under Jordan's Principle and that they will be contacted following the completion of the review. The requestor is asked to contact the National Call Centre should the child's situation change.

22. With regards to the Parties' interest in how requests under Jordan's Principle are being served in the Yukon, I wish to confirm that when assessing a request submitted under the CFI for a child of one of the three Yukon First Nations who are bands subject to the provisions of the Indian Act, including eligibility for status, eligibility under Jordan's Principle is determined based on the child's registered status or that of their parent(s) based on the requirements set out in the Indian Act. For the other eleven remaining Yukon First Nations who are subject to a Self-Government Agreement and the Yukon Self-Government Act, eligibility will be determined on whether the child is included in the membership code of the self-governing First Nations.

23. On May 4 and May 7, 2018, Canada sent a letter to all persons who made requests for services under the Jordan's Principle: A Child-First Initiative for a child who does not have status. Attached as **Exhibit "7"** is a template of a letter that was mailed out. At the request of the Caring Society at the May 9, 2018 cross-examination and at the May 11, 2018 weekly Focal Points teleconference call, Focal Points were instructed to contact these persons in order to ensure that the health status of the child was not impacted.

24. Additionally, letters are being prepared in anticipation of further requests being received by children that are not eligible under Jordan's Principle – Child First Initiative.

Consultative Forums

25. The partnerships and collaboration on First Nations children policy and programming that Canada has today with First Nations, including all the Parties, have been strengthened and increased in public visibility. Direct lines of communications are available and responsive on a daily basis between the Parties and myself, or other management responsible for Jordan's Principle.

26. Since the last compliance report in December 2017, Canada has increased the time dedicated at the JPOC meetings to permit greater transparency of all policy and operational activities, to allow for documentation to be shared, and to encourage an open discussion with the Parties and other participants. For example, past meetings may have been scheduled for one hour; whereas now, they could run for three hours.

27. In 2018, JPOC has met three times to discuss and assist with the development and implementation of an improved response to the implementation of Jordan's Principle. In addition, a special meeting was held with the Parties on April 26,

2018 to discuss outstanding concerns. Attached as **Exhibit "8"** is the agenda and records of discussion for the January 12, 2018 JPOC meeting; **Exhibit "9"** is the agenda and record of discussion for the February 23, 2018 JPOC meeting; and **Exhibit "10"** is the agenda and action items for the April 5, 2018 JPOC meeting.

28. Canada has also increased its engagement with the Parties to help alleviate concerns that have been raised with or outside the Tribunal. Regular updates on policy, operation and data activities are shared with the Parties including: weekly updates on the Jordan's Principle National Call Centre are emailed, monthly activity reports on all policy, operation, public communications, and data activities are shared at JPOC meetings. Attached to this affidavit as **Exhibit "11"** is Ms. Beach's email to the Parties with the statistics for the National Call Center for the period from February 1, 2018 until April 29, 2018 and **Exhibit "12"** is the monthly activity report as at March 28, 2018.

29. In addition, Canada's engagement work for the long-term sustainable approach on Jordan's Principle is being co-developed with First Nations as coordinated with the AFN with contribution from members of the First Nations Councils on Elders, Children and Youth, and Women at the Jordan's Principle Action Table, National Advisory Committee meetings and regional consultations. On April 30, 2018, the AFN was invited to present this engagement process and activities at the ISC Senior Management Committee which is chaired by the Deputy Minister.

30. When concerns are raised, Canada has been making efforts to immediately address those concerns through email or telephone discussions. On April 26, 2018, at my invitation, I met with all Parties to discuss outstanding implementation issues. The Caring Society and Chiefs of Ontario provided written lists of these concerns in advance of the meeting. Canada decided to hold this collaborative meeting in order to respond to the Parties' concerns with regards to eligibility, case review, the appeal process, closing service gaps, and ensuring substantive equality. The Parties expressed concerns in a number of areas, and I created a Summary Action Table of actionable items both prior to the meeting and arising from that meeting, all of which have been addressed, or are in the process of being addressed. Attached as **Exhibit "13"** is a copy of the Summary Action Table, which was distributed to the Parties on April 27.

31. To address the concern expressed regarding the availability of funding to respond to all the gaps identified by the CFI, the AFN was invited to and participated at the February 25, 2018 and March 8, 2018 FHIHB Senior Management Committee meetings in which the Jordan's Principle budget for 2017/18 and 2018/19 was discussed. The AFN heard from regions and headquarters about the request and approval rates, potential funding shortages that may be experienced, as well as the actions that will be undertaken to address any potential funding shortfalls in the future.

32. Regarding the availability of funding that has been raised by the Parties in past reporting Affidavits I want to assure the Tribunal that all measures are being

taken to ensure funding will be available to meet the identified needs of First Nations children. During the Choose Life Working Group teleconferences with the Nishnawbe Aski Nation (NAN) that I co-chair, I reassured the Nation and its communities of the funding available. To ensure they would receive funding, I instructed regions to change all community contribution agreements, where possible, to allow flexible arrangements so communities maintain autonomy over their activities by carrying forward any unspent funds in 2017/18 to the 2018/19 fiscal year. The Government subsequently made this change to flexible agreements wherever possible for communities which received funding under the Child First Initiative. As well, Jordan's Principle – A Child First Initiative was identified as a mandatory program so any outstanding reporting requirements on a community's/recipient's contribution agreement would not lead to withholding of funds for Jordan's Principle.

33. In my experience, the Choose Life Pilot Project is one of the most successful collaborative initiatives in which I have participated. This Working Group was immediately created following Canada's agreement to work with and implement NAN's requested order on the Choose Life Pilot Project on March 20, 2018. It is comprised of nine members (5 from NAN, 2 NAN lawyers, 3 FNIHB staff including myself). Since its implementation, 13 meetings have been held to discuss the Project's implementation and support the two NAN Choose Life Coordinators that work directly with the communities.

34. Choose Life is a two-year (2017/18 – 2018/19) pilot project under the CFI that began on April 11, 2017 with the 49 NAN communities. It is aimed to provide immediate funding relief to any NAN First Nation community or related service delivery organization in Ontario with children and youth at risk of suicide by fast-tracking proposals for group child and youth mental health prevention programs/services regardless of the timing of their submission. NAN argued that a Choose Life order would ensure Canada's fulfillment of Jordan's Principle and on September 6, 2017 provided a report to the Tribunal on the achievements and successes.

35. As shown in **Exhibit "14"** since the start of this Project in April 2017 to May 11, 2018, roughly $64.3 million has been approved to support communities, educational institutions, Tribal Councils and health authorities servicing 23,351 children. An additional $2.9 million was provided to NAN to support the implementation of this Project including corporate services, communications, and outreach activities. Also, on April 5, 2018, $1.4 million was allocated to fund an additional NAN Choose Life Coordinator and NAN Mental Health Service Coordinator.

Processing of Jordan's Principle Cases

36. Canada has refined its processes and procedures for the review, approval, funding, and data reporting of Jordan's Principle requests. Canada is actively working

towards the initial evaluation and determination of a request occurring within the ordered timeframes and this remains a priority for Canada.

37. Since the November affidavit, the delegations and operating procedures have been refined to address regional issues as well as those communicated by the Parties. At all stages of its development, the Parties were consulted, resulting in the Caring Society providing substantive comments on the delegation instructions. Attached to this affidavit as **Exhibit "15"** is the latest draft of the Standard Operating Procedures that includes comments we received from the Caring Society as of May 6, 2018.

38. These Standard Operating Procedures ("SOP") communicate the processes used for the review, processing and reporting of Jordan's Principle requests. In response to the Parties' question during the May 9, 2018 cross-examination regarding the movement of the case through the system and length of time:

a) Regional Focal Points receive the request and when the necessary information is made available they are to initially review and determine the request with the timeframes ordered (refer to section 2.3.2 in SOP);

b) Since the creation of ISC in December 2017, Focal Points at FNIHB formerly with Health Canada and education and social Focal Points at Education and Social Development Programs and Partnerships (ESDPP) and formerly with Indigenous and Northern Services Canada, are able to work with one another to seek expertise in federal programming. However, the first Focal Point that receives the request is responsible for its initial evaluation and determination. As suggested by the Caring Society, the intake form contains the minimal information elements required to conduct an evaluation;

c) Focal Points conduct clinical case conferencing with professional(s) with relevant competency and training who are already involved in the child's case, for the sole purpose of obtaining the minimal information required to determine the case. If the professional(s) does not have the competency and training to provide the assessment required, the Focal Point contacts the recipient if an assessment is needed from another professional with relevant competency and training. The child's family/guardian, First Nation community/service providers or departmental experts can also be contacted for the purpose of gaining required information to determine the case;

d) Should they recommend a denial (full or partial request), they must send the case to FNIHB Headquarters for the review and determination. Focal Points also send requests for specialized services: pharmaceuticals; medical equipment and supplies; and, dental/orthodontic treatments. Requests for First Nations children with no status number are also sent to Headquarters. (refer to section 3.2.4 of SOP);

e) The purpose of sending these requests to FNIHB Headquarters is for enhanced consistency in the review and determination given that most are outside of existing federal programming. This process allows Canada to identify where federal programming gaps exist and identify ways to address the gap.

f) Once the request is received, the Senior Program Officer who is responsible for the intake email at FNIHB Headquarters reviews the request for completeness. For requests that contain the complete information, Ms. Beach can approve. Any request that was recommended for denial and has the complete information in the case file is brought to a review meeting with FNIHB's ADM of Regional Operations that occurs three times each week;

g) At each review meeting, the Senior Program Officer prepares a one-page summary form that includes a check-list to ensure the necessary information is submitted. This form accompanies the file and can be seen in section 3.5.3 of the SOP. For complete case files, the file is reviewed by the ADM of Regional Operations in one of the three weekly meetings that are scheduled;

h) Should the request be approved, the regional Focal Point notifies the requestor. Headquarters is responsible for ensuring that all responses to cases where a denial was made is sent to the requestor. As Ordered in the May 26, 2017 Ruling, the information in this letter communicates the reason of the denial, the ability to appeal the decision and the timelines (refer to section 3.5.3 in the SOP for the template letter);

i) Attached as **Exhibit "16"** is a decision-making diagram that provides the Tribunal and Parties with information about the roles and responsibilities of those involved in the review and determination process;

j) Attached as **Exhibit "17"** is the ISC departmental organization chart. At the next JPOC meeting on June 25, 2018 once a Jordan's Principle organizational chart is drafted, I will share and describe the various roles and responsibilities within ISC to the Parties.

39. While approvals are made for services, supports and/or products, Canada cannot guarantee the delivery of the approved item. We work closely with existing vendors wherever possible to ensure timely delivery but since Canada is not the service provider, timelines are dependent on the vendor/manufacture's timelines. Furthermore, since Canada funds the service provider or organization selected by the family or the child, the timelines for service delivery are negotiated only between the child, their family/guardian and the provider.

40. While there is currently no payment standard in terms of when a payment is made from the time it is approved, as of February 2018, financial officials who process the approved Request for Payment are required to treat Jordan's Principle invoices as priority payments. This process will reduce the amount of time between request approval and service delivery. The process is highlighted in Chapter 4 of the SOPs.

41. Federal departments, including ISC, do not have a financial payment system able to distinguish payments issued to vendors, manufacturers or individuals. However, at the request of the Parties for this information at the May 9, 2018 cross-examination, I offer to share with the Parties the available information my financial colleagues are able to gather from the payment system at a future JPOC meeting; possibly at the next meeting tentatively scheduled for June 25, 2018. This information will include the average time by fiscal year that Jordan's Principle payments have been made, excluding those provided by First Nations communities or recipients to service providers directly as part of their Contribution Agreement, which represent approximately 85% of requests approved in 2017-18.

Tracking of Jordan's Principle Requests

42. As of March 30, 2018, the close of the second fiscal year of the CFI, an estimated 68,507 health, social and/or educational services, supports and/or products have been approved. Since the start of the Initiative in July 2016 until March 30, 2018, approximately 73,447 requests have been approved for First Nations children. During this time, over 99% of requests have been approved. Of the 68,507 requests approved in the 2017/18 fiscal year, 6,668 requests were administered directly by ISC and 61,839 requests were approved for administration by First Nations organizations or partners, and First Nations communities. Attached to this affidavit as **Exhibit "18"** is the Ministerial Monthly Jordan's Principle Report from March 2018 which contains statistics from April 1, 2017 to March 30, 2018. These monthly reports are provided to senior management and shared with the Parties at JPOC for discussion.

43. As shown in this Exhibit, and in response to the Chiefs of Ontario request at the May 9, 2018 cross-examination, from April 1, 2017 to March 30, 2018, about 41,152 requests were approved for Ontario First Nations children of the national total of 68,507. Of these requests 2,101 were approved for individual children and 39,051 for groups of children where funding is provided to First Nations communities or organizations. Since the CFI is a joint FNIHB and ESDPP Initiative, approvals are captured for all health, social and educational requests combined. As data and reporting is a standing item on the JPOC meeting agendas, following future analyses of new data where distinctions may possibly be made between the two areas, they will be shared for discussion.

44. In the November 2017 Affidavit of Mr. Perron, Canada reported a compliance rate in meeting the 12-48 hours timeframe to initially evaluate and determine a

request of roughly 72% of all requests between June 30 – July 13, 2017 and 80% from July 7 – 13, 2017. Since November 1, 2017 to March 30, 2018, Canada is meeting the 12-48 hour timeframe for individual requests on average about 84.9%. As shown in **Exhibit "19"** the highest compliance rate for the initial evaluation and determination of individual requests within the 12-48 hour timeframe was in December 2017 at 92.2% and lowest in March 2018 at 78%. The distinction in compliance between FNIHB and ESDPP are presented in this Exhibit. This Exhibit reports on the monthly compliance rates and by region from November, 1, 2017 to March 31, 2018.

45. In response to the questions posed to Mr. Perron at his May 9, 2018 cross-examination regarding the number of dental and orthodontic requests, during the period between June 2017 and March 2018, 108 requests for dental and orthodontic procedures were submitted of which 55 were specific to orthodontic or orthodontic related procedures.

46. In response to COO's question regarding compliance rates and request outcomes for Ontario only, as shown in **Exhibit "20",** during the latest reporting data from April 25 to May 1, 2018, no requests were denied. Of the 65 requests submitted that were ready for the initial evaluation and determination by the Ontario regional Jordan's Principle Focal Point, 66 or 68% were approved; 3 or 4.6% were pending a decision; and, 16 or 24.6% were sent to headquarters for the Assistant Deputy Minister – Regional Operations Sector evaluation and determination. In that week, the Ontario region met the compliance rate for the initial evaluation and determination 86% of the time.

47. Canada continues to strive for 100% compliance, and we are examining the reasons that compliance rates are not yet perfect. Reasons for lesser-than-standard compliance rates include the assessment of implications that are beyond government-funded services and substantive equality, as well as the time lag at headquarters for the ADM of FNIHB Regional Operations to verify/question that all relevant information has been provided to determine the request and the time the requestor is notified. I also learned that some of the regions were not factoring time required to access more information from the requester in which case the clock start time for the compliance rates may be inaccurate.

48. I have endeavoured to find out why compliance rates are lower in some parts of the country than others and to put corrective actions in place immediately. As shown in **Exhibit "21"**, on May 7, 2018, I wrote to FNIHB Regional Executives to ask them to work with their Jordan's Principle teams to review their data tracking reports and set out an action plan for corrective action. Also shown in this Exhibit is an email from Ms. Beach to all the Jordan's Principle Focal Points asking them to submit their weekly data reports using the required time frames

49. To reach and maintain compliance, Canada has employed more staff to review requests in order to meet the evaluation and determination timeframes. Additionally, Canada has created a client-friendly package to help requesters

provide the necessary information in order to avoid delays in processing. These client-friendly packages were approved by the Parties and are available in French and English. We are working with the AFN to embed this package in AFN's Client Handbook which will be distributed to the public, communities, stakeholders to inform them of Jordan's Principle and explain what is needed to seek funding coverage by the CFI in the coming weeks. The client-friendly package containing the request form, reimbursement form, and guide are attached to this affidavit as **Exhibit "22"**.

50. Canada is committed to ensuring that Jordan's Principle has been and continues to be implemented as ordered and is responsive to the needs of First Nations children and their families/guardians. In March 2018, Canada, in collaboration with the Parties, developed a client satisfaction survey to support this commitment and determine how well the Government's actions are being received by First Nation communities, providers, children and their family/guardians. Responses to this survey are due May 31, 2018. As of May 4, 2018 about 110 surveys have been returned. To increase the response rate, a second distribution will be mailed out later this month. Once the survey results are ready, the Parties will receive a report and a discussion will take place at a future JPOC meeting. Attached to this affidavit as **Exhibit "23"** is the final version of the Jordan's Principle Survey.

51. Weekly reporting continues to take place using the tracking tool shared in the affidavits of Mr. Perron. Weekly data reports are shared with ISC's Assistant Deputy Ministers that include the number of requests, the outcomes (e.g. approved, denied, pending) as well as the compliance rates according to the Tribunal's timeframes. Additionally, monthly summary reports are provided to the Deputy Minister and the office of the Minister of Indigenous Services. Tracking updates are shared with the Parties for discussion at JPOC.

52. In addition to these processes and tracking of cases, as Canada reported in its November 2017 compliance report, Canada committed to continue to re-review any past denied Jordan's Principle cases from April 1, 2007 applying the definition ordered in the May 26, 2017 ruling. As noted in the November 2017 Affidavit of Mr. Perron, various methods were used to help identify past denied cases. This included a search from Library Archives Canada on national and local newspapers, as well as informal or unplanned discussions that regional staff had when they visited communities such as First Nations bands/Tribunal Councils, teachers, service providers or parents.

53. In February 2018, Canada printed over 50,000 Jordan's Principle posters and distributed them nation-wide including school boards and educational institutions, nursing stations, First Nation community buildings, and community centres. The poster messaging, developed and approved in consultation with the Parties, highlighted that this re-review of denied cases since 2007 was being undertaken. **Exhibit "3"** refers to Mr. Perron's January 2018 email to school board executives across the country, which explains Jordan's Principle and attaches the poster in English and French.

54. Canada continued to search for previously denied requests that had been submitted to headquarters or regional staff, and to re-review them using the definition of Jordan's Principle as articulated in the Order of May 26, 2017, as amended November 2, 2017.

55. As reported in the December reporting affidavit of Mr. Perron, there were 105 past denied requests that were approved by an existing program and 133 past denied requests that were re-reviewed in response to the Tribunal's Order. Since then, Canada has identified an additional 52 formerly denied requests. Attached to this affidavit as **Exhibit "24"** is a chart detailing the review of previously denied requests by region received since 2007. As shown in this chart, of these 52 cases, 18 were approved by another program (e.g., the NIHB Program), 15 were approved upon further review, 1 was denied, 1 was ineligible (non-Status), and 17 required additional information in order to render a decision.

56. Further to the Parties' interests in the number of adults identified who were children in the past with previously denied requests, the age of the child and year of the request was available for 93 requests. Of these, there are 13 where the original request was for a child who is an adult in 2018. These requests are from prior to 2016 and the exact date of birth was not available, nor was the precise date of the incoming request. For example, it may have been indicated that the request was approved for all 0-6 years age group or that the request was submitted in 2009. Here is a breakdown of the 13 requests:

a) 6 were approved by an existing program or by the Province;
b) 2 were denied: food supplements for 19 year old at the time of the request and $60,000 for tuition to attend a School for the Deaf; and
c) 5 cases contain incomplete information and the outcome is unknown. Despite all effort to locate the incomplete information, we have not been successful.

57. For the requests where additional information is required, Canada is in the process of obtaining further details in order to make a determination.

58. Together with the AFN and based on input received from the Parties, Canada prepared a "Call Out Letter" which was distributed at the Chiefs' Assembly on Federal Legislation on May 1-2, 2018. Attached as **Exhibit "25",** the letter confirms the definition of Jordan's Principle and provides contact information for anyone aware of any previously denied requests.

59. Canada is committed to re-reviewing any cases that are submitted and will not place a cut-off or end-date on this initiative. Canada commits to provide regular updates on this initiative in Monthly Activity Reports to the Parties and the Commission, through email communications or discussions at JPOC meetings.

Publicizing the Compliant Definition and Approach to Jordan's Principle

60. Canada has consulted with the Complainants and the Interested Parties for the purpose of developing training and public education materials relating to Jordan's Principle, and to ensure their proper distribution. The goal of these publicity measures is to raise awareness and improve outcomes for First Nations children and their families.

61. On January 29, 2018, the Caring Society released its Jordan's Principle videos on YouTube in English and French. The videos announced ISC's new Jordan's Principle National Call Centre toll-free phone number. The videos were shared on Facebook and Twitter on February 5, 2018 by the Caring Society and Dr. Blackstock retweeted it. To help share this video, Canada posted this video on the Healthy First Nations and Inuit Facebook page and GovCan Health Twitter on March 20, 2018.

62. From March 5 to March 30, 2018, radio announcements were aired at least three times per day on various Indigenous and local radio stations. Broadcasters were encouraged to also read the paid message in the traditional language(s) of its listeners. Canada was pleased to have had the messaging developed together with the Parties and ensure that the messaging was agreed upon/approved by all. Attached to this affidavit as **Exhibit "26"** is Ms. Beach's February 1, 2018 email to the Parties regarding the Jordan's Principle radio announcements.

63. On April 5, 2018, Canada published a document entitled, "Jordan's Principle – Substantive Equality Principles" on its website. This document was developed in collaboration with the Parties and was approved at the February 23, 2018 JPOC meeting. The purpose of this document is to help build understanding and raise awareness about Jordan's Principle and also to provide practical guidance in implementing substantive equality across the country. This document is periodically updated to ensure that it remains relevant and aligned with the Canada's priorities. It has been distributed to all Focal Points. Since April 30, 2018, it has been appended to all denial and appeals letters. The April 5, 2018 version of this document, as published on the website, is found in Chapter 3 of the Standard Operating Procedures. The Caring Society has recently suggested that a video be produced to enhance understanding of substantive equality and how it is applied in the context of Jordan's Principle.

64. In addition to the $100,000 paid to the Caring Society and AFN for the publication of Jordan's Principle as ordered in the May 26, 2017 ruling, Canada additionally funded the Caring Society $50,000 to start a scholarship in Jordan River Anderson's name and $16,000 to develop its own advertisement on Jordan's Principle.

65. Funding is also being allocated to the AFN this fiscal year to support the engagement work that they are coordinating to develop Canada's long term approach to Jordan's Principle as well as hosting a Jordan's Principle Summit in

Winnipeg this September. The AFN's collaborative partnership on this and all other activities relating to Jordan's Principle has resulted in positive approaches to better meeting the needs of First Nation communities. The AFN has shared information about its Handbook that is currently being developed using the $100,000 paid under the Order. Canada is committed to supporting the AFN with the development and dissemination of this Handbook.

66. On November 27, 2017, I encouraged all FNIHB employees to attend the National Film Board screening of "We Can't Make the Same Mistake Twice" to emphasize the importance of implementing the full meaning of Jordan's Principle. The film will be placed on the Intranet for viewing for a five year period. This email is attached as **Exhibit "27"**.

67. In addition to this Film, FNIHB is using a variety of tools to respond to Dr. Blackstock's request for enhanced cultural training of staff. For example, FNIHB has selected a contractor to develop mandatory cultural competency curriculum for FNIHB employees based on an open Request for Proposals. The contractor was selected with AFN and the Inuit Tapiriit Kanatami. The goal of this work is to develop an advanced training curriculum to promote awareness and capacity development among FNIHB employees including: the distinct histories, contexts, cultures, traditions, languages, governance, relationship to the federal government, health and social issues and trends, and organization and delivery of First Nations and Inuit health programs and services. The first phase of this project is currently underway and includes a literature review and environmental scan of existing training and programs currently in use. FNIHB is currently assessing the feasibility of expanding this curriculum development to all of ISC and would welcome the Caring Society in reviewing of the content and process. FNIHB has agreed to provide a draft ISC cultural competency training approach with interim milestones at the next Protocol Consultation Committee meeting to be scheduled.

68. Canada understands the importance that Indigenous persons have in influencing and making policy and program decisions. For that reason, through the Aboriginal Peoples Employment Program, which aims to increase, promote, and retain Indigenous employees in ISC's First Nations and Inuit Health Branch, a new Assistant Director responsible for Jordan's Principle will be hired in the coming weeks.

69. Canada has been reaching out to First Nations families, Child and Family Service agencies, health providers, and key stakeholders to encourage families to come forward with their requests for services and supports.

The Appeal Process

70. Canada is committed to making the Jordan's Principle appeal process fairer and easier to navigate. As of May 8, 2018 there have been five meetings of the appeals committee.

71. Canada is ensuring that all denial letters (see section 3.4.2 of the SOP) advise a requester of their right to appeal a decision within a year of the decision.

72. Section 3.4 of the Standard Operating Procedures outlines Canada's current appeal process. As outlined in the Standard Operating Procedures, the Appeals process:

a) Provides that an appeal may be made within one year of the date of denial;
b) Identifies who can submit an appeal;
c) Outlines the minimum information that must be submitted to initiate an appeal;
d) Outlines the factors considered by the Appeals Committee in rendering the decision; and
e) Provides for the communication of the decision within 30 days of receipt.

73. The Standard Operating Procedures and this process has been reviewed by the Parties, and reflects their comments. The Caring Society last provided comments on April 9, 2018 and again on May 4, 2018. The details of the appeals process are reflected in the Standard Operating Procedures and are identified on Canada's website. Additionally, these details will also be incorporated in the AFN's Client Handbook/Guide that is currently being developed.

74. In response to requests for an independent appeals process, Canada, on April 26, 2018, proposed the establishment of an external committee to review requests and render decisions on appeals (**Exhibit "28"**). This Appeals Committee would be comprised of three contracted Indigenous experts in health, social, and education and would be supported by a secretariat that would provide support to the decision makers and housed in my office.

75. Canada is committed to developing a comprehensive appeal process with the Parties and is waiting to receive feedback from the Parties on the proposed appeal process.

76. As the ADM responsible for Jordan's Principle, I am deeply committed to securing a healthy and rewarding future for First Nations children for the seven generations before us. I strongly believe in Jordan's Principle and will continue to strive to achieve true collaboration with the Parties to address the unmet needs of First Nations children in accessing government services and in accordance with the definition and application of Jordan's Principle. It is my hope that through this Affidavit, I have demonstrated the willingness of Canada to work together in partnership with the Parties on Jordan's Principle.

SWORN TO before me at the City of Ottawa, Province of Ontario, May 24, 2018.

A Commissioner for Taking Affidavits

Bernard Hanssens
18551G-7

Valerie Gideon

This is Exhibit "J" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Paula Isaak

I, Paula Isaak, the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships, AFFIRM THAT:

1. I am the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships ("ESDPP") of the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2015. I report directly to the Deputy Minister of ISC. I am responsible for policies, program design and partnerships related to First Nations child and family services, First Nation education programs, and social programs. Regional offices across Canada deliver these programs, and report formally through the Assistant Deputy Minister of Regional Operations.

2. In my capacity as Assistant Deputy Minister of ESDPP, I have read the February 1, 2018 ruling ("Ruling") of the Canada Human Rights Tribunal ("the Tribunal"), and have personal knowledge of Canada's efforts to comply with the Tribunal's orders.

3. On February 1, 2018, Canada released a statement from Minister Philpott stating that Canada is committed to fully complying with all of the Orders made by the Tribunal. Attached to this Affidavit as **Exhibit "A"** is the ministerial statement. In my capacity as the Assistant Deputy Minister of ESDPP, I am committed to implementing the Orders made by the Tribunal, in consultation with the Parties.

4. On February 27, 2018, Canada committed to spend $1.4 billion over 6 years, starting in 2017-18, to address funding pressures facing First Nations child and family service agencies, while also increasing prevention resources for communities so that children are safe and families can stay together. Attached as **Exhibit "B"** are relevant pages from the 2018 budget on funding for the First Nations Child and Family Services program.

Modifications to the Orders

5. At paragraph 445 of the Ruling, the Tribunal encouraged the Parties to seek any clarification or modification of the Orders. Canada consulted with the parties on proposed modifications to the orders, and reached consensus on those related to Band Representatives, mental health and analyzing agency needs. The list below sums up the actions taken:

   a) On February 13, 2018, after receiving a joint submission by the Parties on proposed language, the Tribunal amended the Orders on Band Representatives and mental health in Ontario. Schedule A: Annex to Ruling 2018 CHRT 4 is attached as **Exhibit "C"**.

   b) In March and April of 2018, Canada consulted with the Parties on additional proposed modifications.

   c) On April 9, 2018, based on the results of these consultations and an agreement on how to approach the orders related to analyzing agency needs, Canada submitted new proposed timelines to the Tribunal for paragraphs 421, 408, 409, 419, 441 and part of 421. The timelines were based on a proposal from the Institute of Fiscal Studies and Democracy ("IFSD") to do a cost analysis of agency needs, who were selected to do the work based on the recommendation of the Parties. **Exhibit "D"** includes a copy of this letter and its attachments. This letter also included that the IFSD's research would be subject to the Tri-Council Policy Statement on Ethical Conduct for Research involving humans and "Ownership, Control, Access and Possession" (OCAP) principles.

   d) On April 19, 2018 the Tribunal advised the parties that it was amending its Orders regarding paragraphs 408, 409, 419, part of 421 and 444 to reflect the Parties' amendments proposal and plan. Attached as **Exhibit "E"** is a copy of the Tribunal's correspondence on that matter.

e) In its April 9, 2018 letter to the Tribunal, Canada had also proposed revised language for additional paragraphs regarding the alternative system and timelines for the payment of actual costs (410, 416, 420, 411, 417 and part of 421).

f) The Tribunal has not yet made an order on these proposals, and on April 19 directed Canada to provide a response to questions concerning the proposed amendments to these orders. On April 27, 2018 Canada provided a response to that direction. Attached as **Exhibit "F"** is a copy of the response. Following Canada's response, both the Nishnawbe Aski Nation ("NAN") and the Caring Society have raised further questions, and the Tribunal has given Canada until June 8, 2018 to respond.

Analysis of Needs Assessments and Cost Analysis Research

6. At paragraphs 408, 409, 418, 419, and 421 of its Ruling, the Tribunal ordered Canada to analyze the needs assessments completed by First Nations agencies and to do a cost analysis of those needs, including the real needs of small First Nations agencies. The Tribunal also ordered Canada to provide a reliable data collection, analysis, reporting methodology, and ethical guidelines. With respect to these Orders, Canada reports as follows:

a) Following the release of the Ruling, Canada sent a letter to all agencies underscoring its commitment to improving how agency funding works, and to explain how it would be implementing the Orders. This letter also asked agencies who had not yet submitted their needs assessments to provide them to ISC as soon as possible to support this work. Attached to this affidavit as **Exhibit "G"** are the February 1, 2018 templates of letters that went to First Nations agencies, small agencies, and agencies in Ontario.

b) On January 22, 2018, Canada shared its preliminary analysis of the completed needs assessments with the Parties. This email and analysis are attached to this affidavit as **Exhibit "H"**.

c) On February 5, 2018, I sent a draft work plan to the Parties, including proposed activities and timelines, for the needs assessment research, as well as for the development of alternative funding system and accountability framework.

d) On February 12, 2018, on my behalf, Margaret Buist, Director General of the Children and Families Branch of ISC, sent draft statements of work to the Parties. These statements of work were to be used to guide the work of expert consultants on the analysis of the needs assessments and the broader cost analysis of agency needs, as well as for an assessment of agency information management and information technology ("IM/IT") needs.

e) Canada shared all of the completed needs assessments with the Parties via email on February 21, 2018.

f) On February 28, 2018, I sent an updated statement of work, based on comments from the Parties, for the needs assessment research and shared the Curriculum Vitae received from KPMG, who was invited to develop a proposal for this project based on their expertise doing similar work for the province of Ontario, their national reach and their ability to meet proposed timelines.

g) On March 2, 2018, I sent draft Ethical Research Guidelines to guide the needs assessment research and cost analysis of agency needs to the Parties.

h) On March 1 and 2, 2018, Foxwise Technologies, a company that was proposing to do the work on IM/IT needs, presented to the National Advisory Committee on First Nations Child and Family Services Program Reform (NAC).

i) Following discussions with the Parties and the NAC, ISC agreed to explore other experts/consultants for the needs assessment work, and to seek input on who and how to do an assessment of agency IM/IT needs.

j) On March 5, 2018, Canada submitted a progress report to the Tribunal with draft ethical research guidelines and a statement of work for the analysis of agency needs, which are attached as **Exhibit "I"**.

k) From March 8, 2018 to March 26, 2018, ISC met and corresponded with the First Nations Child and Family Caring Society (Caring Society), the Assembly of First Nations, and IFSD regarding the proposal that the IFSD undertake the needs assessment and cost analysis of agency needs research.

l) On March 28, 2018, a final proposal and updated timelines for completion were received from IFSD.

m) On April 3, 2018, Canada shared the IFSD proposal and timelines with the Parties.

n) On April 9, 2018, Canada shared the IFSD proposal and timelines with the Tribunal, as referenced in paragraph 5(c) and attached as **Exhibit "D"**.

o) Canada is providing funding for the IFSD research, through the Assembly of First Nations, in the amount of $2.091 million dollars.

p) On April 10, 2018, Kevin Page, President and CEO of IFSD, submitted a phase 1 report, which included reference to the fact that the data collected through the existing needs assessment exercise was insufficient to do a comprehensive cost analysis of agency needs. This report and its annexes are attached to this Affidavit as **Exhibit "J"**.

q) The IFSD's work is ongoing. Throughout May 2018, they are holding workshops with First Nations Child and Family Services ("FNCFS") agency representatives on budgeting and financing. These workshops are being held in Ottawa this month on: May 14-15, May 17-18, May 22-23, and May 24-25, 2018. All FNCFS agencies from

across Canada have been invited to participate. Phase 1 is expected to be completed at the end of July 2018.

7. Canada provided the Tribunal with a report on May 3, 2018. This report outlines Canada's approach to implementing the Ruling's Orders relating to analyzing agency needs assessments, developing an alternative funding system, and analyzing agency deficits. This report also reflects Canada's consultations with the Parties on the implementation of these orders. Attached to this affidavit as **Exhibit "K"** is a copy of the May 3, 2018 report.

Development and Implementation of an Alternative Funding System

8. At paragraphs 410, 416, and 420 of the Ruling, the Tribunal ordered Canada to develop an alternative system for funding prevention/least disruptive measures, intake and investigation, legal fees, building repair services, the child service purchase amount and for small agencies. Regarding the implementation of these orders, Canada reports as follows:

   a) As outlined above in paragraph 6(a), on February 1, 2018, Canada sent a letter explaining to First Nations child and family services agencies that ISC would pay their actual costs in all of the areas outlined in paragraph 8 above until an alternative system is in place.

   b) All agencies received their initial allocation of funding on or before April 1, 2018. Canada's approach to paying an agency's actual costs until an alternative system is put in place was outlined in Canada's April 27, 2018 letter to the Tribunal, which is referenced in paragraph 5(f) and attached as **Exhibit "F"**. If agencies do not have sufficient funding to meet their needs in any of the areas listed in paragraph 8 above, they can submit a claim to have their actual costs covered.

   c) In its May 3, 2018 report to the Tribunal, Canada committed to providing additional Budget 2018 funding to agencies by June 2018. At the May 10, 2018 meeting of the Consultation Committee, Canada began consultations with parties on how to allocate these funds across the country.

   d) As outlined in paragraph 6(o) above, Canada is providing funding to the IFSD, through the Assembly of First Nations, to do a cost analysis of agency needs. This cost analysis will inform the development of an alternative funding system for First Nations agencies.

   e) On April 9, 2018, Canada, in consultation with the Parties, proposed to the Tribunal that it would report on these Orders by October 12, 2018 and on the completion of the work by December 20, 2018. As outlined in paragraph 5(f), the Tribunal has asked Canada to respond to comments from the Parties on this and other proposed changes and has given Canada until June 8, 2018 to respond.

Funding of Actual Costs, including Retroactive Reimbursements to January 26, 2016

9. At paragraphs 411, 417, and 421, the Tribunal ordered Canada to provide funding to agencies on actual costs for prevention/least disruptive measures, building repairs, intake and investigation, legal fees, the child service purchase amount and for small agencies, retroactive to January 26, 2016 by April 2, 2018.

   a) As noted above in paragraph 6(a), on February 1, 2018, Canada sent letters to FNCFS agencies to communicate that ISC will immediately begin to cover the actual costs in prevention/least disruptive measures, building repairs, intake and investigations, legal fees, child service purchase amounts, and small First Nations agencies' costs, retroactive to January 26, 2016. Copies of the templates for these letters are attached as **Exhibit "G"**, as referenced in paragraph 6(a) of my affidavit.

   b) As outlined in its April 9, 2018 correspondence to the Tribunal, Canada has agreed to extend the Tribunal's ordered deadline of April 2, 2018 by nearly one year to March 31, 2019, to allow agencies time to gather information and submit claims.

   c) As of May 18, 2018, Canada has received 10 claims for reimbursement from agencies, totaling about $8.3 million dollars (note this includes one claim from an agency in Ontario for Band Representative Services). A summary of all claims received, including that it has taken on average between seven and nine business days to process them, is attached as **Exhibit "L"** of my affidavit.

10. Regarding paragraphs 412 and 413 of the Ruling, which ordered that Canada continue to provide funding based on actual costs for least disruptive measures/prevention, building repairs, intake and investigations, legal fees, child service purchase amounts, and small agencies to be reimbursed following the accountability framework and methodology agreed to by the parties or until another agreement is in place, Canada reports as follows:

   a) As mentioned in paragraph 3 of this affidavit, Canada released a ministerial statement on February 1, 2018 stating that Canada is committed to fully complying with the Orders.

   b) As mentioned in paragraph 4 of this affidavit, Canada made a $1.4 billion dollar budgetary commitment. See **Exhibit "B"** referenced in paragraph 4 of this affidavit for information from the 2018 budget on funding for the First Nations Child and Family Services program.

   c) As mentioned in paragraph 9 of this affidavit, Canada is reimbursing agencies actual costs in all of the areas ordered.

Communication with Agencies

11. In paragraph 430 of the Ruling, the Tribunal ordered Canada to communicate to FNCFS Agencies any immediate relief ordered by the Tribunal. Regarding the implementation of

communications with FNCFS agencies on matters pertaining to this Order, Canada reports as follows:

a) Following the February 1, 2018 letter to agencies, Regional Offices held calls or meetings with agencies regarding the implementation of paying retroactive actual costs. The larger group calls or meetings took place as follows:

   i. New Brunswick: February 13, 2018 and February 27, 2018

   ii. Newfoundland and Labrador: February 12, 2018 (Note: no request for meeting received from Miawpukek)

   iii. Nova Scotia: February 23, 2018

   iv. Prince Edward Island: February 27, 2018 (MCPEI joined with New Brunswick)

   v. Ontario: February 27, 2018, with follow up on March 28, 2018

   vi. Manitoba: February 26, 2018 and March 2, 2018 (Upcoming meeting with Southern Agency representatives May 1, 2018 and meeting with Northern Agency May 3, 2018)

   vii. Quebec: February 21, 2018 and February 27, 2018

   viii. Alberta: February 21, 2018, March 27, 2018 and March 28, 2018 (select agencies in March)

   ix. Saskatchewan: February 16, 2018 and February 27, 2018, April 26, 2018

   x. British Columbia: February 2, 2018 (call to each director), and March 6, 2018.

b) On March 2, 2018, I sent a draft Recipient Guide on retroactive payments to the Parties. It included that Canada is asking agencies to submit as many requests for reimbursement of retroactive expenses as possible by September 30, 2018. Should agencies require more time, including to March 31, 2019, Canada will provide it.

c) Canada received initial comments on the Recipient Guide from the Caring Society on March 14, 2018, and detailed comments on March 26, 2018.

d) On April 9, 2018, I shared the revised Recipient Guide and Ontario Guide with the Parties.

e) On April 18, 2018, further to consultation with the parties, Canada sent First Nations agencies the guides to assist with claiming retroactive expenses.

f) On April 30, 2018, an email was sent to small agencies clarifying that their deficits will be covered as part of retroactive payments.

g) Also on April 30, 2018, an email was sent to non-small agencies clarifying that deficits in the areas ordered by the Tribunal will be covered as part of retroactive payments.

h) On May 1, 2018, an email was sent to all agencies with deficits in prevention noting that they are eligible for reimbursement and offering support to make a claim.

i) Also on May 1, 2018 an email was sent to agencies with deficits in operations, noting that ISC would like to understand this deficit and noting areas eligible for retroactive reimbursement.

j) On May 1, 2018, I emailed the Parties the final version of the guides. The email is attached to this affidavit as **Exhibit "M"**. The most recent National Recipient Guide is attached as **Exhibit "N"**; and the Ontario Region Recipient Guide is attached as **Exhibit "O"**.

k) On May 17, 2018, these versions of the guides were sent to agencies, with a clarification noting that:

> "In keeping with the January 2016 and subsequent rulings of the Canadian Human Rights Tribunal on First Nations Child and Family Services, the Government of Canada is working with the parties to implement all of the Tribunal's orders. The Department is making changes to the program authorities to remove references to previous discriminatory funding approaches, and to reflect the most recent Tribunal orders. The Terms and Conditions and other guiding documents will continue to be revised as program reform takes place."

This was done to ensure agencies did not feel they were bound by outdated Terms and Conditions.

Funding for Band Representatives in Ontario, Retroactively and until a further Order is made

12. The Tribunal, at paragraphs 427 and 428 of the Ruling ordered Canada to fund Band Representative Services for Ontario First Nations at the actual cost of providing those services retroactively to January 26, 2016, and also ordered Canada not to deduct this funding from existing funding or prevention funding until such time as studies have been completed or a further order is made. Regarding the implementation of these Orders, Canada reports as follows:

a) The province of Ontario provides child and family services funding, programs and services. Canada is continuing to work through the Ontario Technical Table on Child and Family Well-Being, which includes representatives from First Nations, Canada and the province, to discuss the ongoing implementation of these Orders, as well as to begin discussions on how to fund Band Representatives on an ongoing basis.

b) On February 1, 2018, Canada sent a letter to First Nations and Tribal Councils in Ontario on the orders and to communicate that the Department will immediately begin to cover the actual costs of providing Band Representative services, including retroactively to January 2016. This letter is attached to this affidavit as **Exhibit "P".**

c) On February 14, 2018, Canada provided additional information and documentation to First Nations and Tribal Councils on retroactive payments and Band Representatives by email. Attachments included reimbursement forms, instructions, and declaration forms. This email is attached to this affidavit as **Exhibit "Q"**.

d) On February 28, 2018, Canada also provided additional information and documentation to First Nations agencies in Ontario on retroactive payments and Band Representatives by email. The documents provided included declaration forms, reimbursement forms, and instructions. This email is attached to this affidavit as **Exhibit "R"**.

e) As of May 18, 2018, Canada has received 23 claims for Band Representative Services, totaling about $6.3 million dollars (note this includes one claim from an agency in Ontario for Band Representative Services. Two of the requests were combined to cover mental health and Jordan's Principle. A summary of these claims is attached as **Exhibit "L"**, as outlined in paragraph 9(c) above. Note that amount referenced in paragraph 9(c) of $8.3 million and the amount referenced in paragraph 12(e) of $6.3 million total $14.6 million. Exhibit "L" references a total of $13.5 million, as the one claim from an agency for Band Representative Services is reported in both paragraphs 9(c) and 12(e).

Assessing Agency Deficits

13. At paragraph 429 of the Ruling, the Tribunal ordered Canada to identify which First Nation agencies, including the NAN agencies, referred to in the Ruling have child welfare or health services related deficits and to assess those deficits.

a) On May 3, 2018, Canada provided a copy of its deficit analysis to the Tribunal. This analysis included an agency deficit analysis. This analysis identified whether First Nations agencies had deficits, surpluses, or balanced positions for the 2016-2017 fiscal year.

b) On May 17, 2018, Canada met with NAN to discuss agency-specific deficits for NAN agencies, and agreed to continue to work together, including to support agencies to submit claims for deficits in the areas ordered by the Tribunal.

c) Canada is also working with First Nations agencies to address any deficits and develop a plan for any surpluses. For example, as outlined in paragraph 11 (f, g, h and i) Canada emailed agencies in April and May 2018, inviting them to submit retroactive claims for deficits.

Remoteness Quotient Research

14. As noted at paragraphs 343-346 of the Ruling, the Tribunal has received updates concerning the development and implementation of a remoteness quotient for three FNCFS Agencies that serve NAN communities, including a process for obtaining expert advice. Regarding the status of this joint endeavour, Canada reports as follows:

a) On September 8, 2017, NAN and ISC jointly submitted a progress report to the Tribunal on Phase I of the remoteness quotient research.

b) On March 8, 2018, NAN and ISC submitted a progress report to the Tribunal on a plan for Phase II of the remoteness quotient research, which is attached to this affidavit as **Exhibit "S"**.

c) On March 20, 2018, funds for Phase II were provided to NAN, in the amount of $471K. The remainder of the funds will be provided in fiscal year 2018-2019.

d) A draft of the Phase II report was provided to ISC in April 2018 and a final report will be provided in June 2018.

e) A meeting with NAN and the researchers was held on May 17, 2018 to review the draft of the Phase II report.

Ontario Special Study

15. Since October 2017 the Technical Table Child and Family Well-Being in Ontario has been in agreement to move forward on a special study of issues related to First Nations on-reserve child welfare services in Ontario. Regarding the current progress of the Ontario Special Study, Canada reports as follows:

a) On November 28, 2017, Canada and the Chiefs of Ontario submitted a joint progress report to the Tribunal regarding a call for proposals for the Ontario Special Study.

b) On January 31, 2018, a further progress report was submitted by Canada and the Chiefs of Ontario to the Tribunal regarding the beginning of the Ontario Special Study.

c) On April 5, 2018, a further progress report was submitted to the Tribunal along with the environmental scan report and information on the engagement phase of the study. This progress report is attached to this affidavit as **Exhibit "T"**.

d) The next progress report is scheduled from Canada and the Tribunal to the Tribunal for July 31, 2018.

Reallocation

16. Paragraphs 422 and 423 of the Ruling ordered Canada to stop reallocating funds from other social programs, especially housing, if it has the adverse effect of leading to apprehensions of children or other negative impacts; and to ensure that any immediate relief investment does not adversely impact Indigenous children, their families and communities. Regarding their implementation, Canada reports as follows:

a) On February 1, 2018, Ms. Buist sent an email to all Regional Directors General and Child and Family Services regional staff directing them to review the Ruling. This email is attached to this affidavit as **Exhibit "U"**.

b) On February 8, 2018, Paul Thoppil, Chief Financial Officer, and I sent a directive by email to all departmental Assistant Deputy Ministers and Regional Directors General to advise they could no longer reallocate social programs funding, including housing, to cover shortfalls. This email is attached to this affidavit as **Exhibit "V"**.

c) ISC developed a chart to evaluate past reallocations from other social programs. This chart confirmed social development programs have previously been in deficit positions and have received reallocations from other programs to cover those deficits. This chart is attached as **Exhibit "W"**.

d) Since February 15, 2018, as ordered by the Tribunal, Canada has not permanently reallocated funds from social programs, including housing.

e) ISC held a series of senior management discussions on the implementation of the these Orders:

   i. On April 5, 2018 a meeting was held with Regional Social Directors;

   ii. On April 6, 2018, a Regional Operations meeting was held with Regional Corporate Services Directors;

   iii. On April 19, 2018 a meeting was held with Regional Directors General; and

   iv. On May 1, 2018 a meeting was held of the Financial Management Committee, chaired by the Chief Financial Officer.

f) On May 14, 2018, the analysis and implementation of these Orders was discussed at a departmental meeting of the Senior Management Committee, which included Regional Directors General and Regional Executives.

Development of a Consultation Protocol

17. Paragraph 431 of the Ruling ordered Canada to enter into a consultation protocol with the Parties. Regarding the implementation of a consultation protocol, Canada reports as follows:

a) On February 8, 2018, the Caring Society submitted a progress report to the Tribunal.

b) On March 2, 2018, the AFN submitted a draft of the proposed Consultation Protocol to the Tribunal.

c) On March 22, 2018, the signing of the Consultation Protocol by all parties was completed. The correspondence from Stuart Wuttke, General Counsel for the

Assembly of First Nations enclosing the protocol is attached as **Exhibit "X"** and the signed Consultation Protocol is attached as **Exhibit "Y"**.

d) Also on March 22, 2018, an email was sent by Ms. Buist to all Regional Directors General and Regional Directors regarding the Consultation Protocol and directed those individuals to confirm they read and understood the document. Two information sheets prepared by the Caring Society were also included with this email. Ms. Buist's email is attached as **Exhibit "Z"**; the Consultation Protocol is **Exhibit "Y"**; and the Caring Society's information sheets are attached as **Exhibit "AA"**.

e) Draft terms of reference for a Consultation Committee have been circulated by the AFN for review and comments from the other Parties and Canada.

f) The Committee has agreed that the Caring Society and the AFN will chair the group, and the AFN will provide secretariat support. The Committee will meet at least four times a year.

g) On May 10, 2018, the first meeting of the Consultation Committee took place. The Consultation Committee Agenda is attached as **Exhibit "BB"** and the minutes as **Exhibit "CC"**. The Parties committed to provide input to the Assembly of First Nations by May 14, 2018 in order to finalize the Terms of Reference for the Committee. The final version has not yet been circulated.

18. I also wish to emphasize that the government is committed to consulting with the Parties in the implementation of these orders. Canada recognizes the valuable input the Parties have provided to ensure Canada's implementation of the orders is done in a way that best meets the needs of First Nations children and families. Canada looks forward to continuing to use the Consultation Committee as a way to discuss issues with the Parties, including related to any questions they may have about the contents of this affidavit.

AFFIRMED TO before me at the City of
Gatineau, Province of Quebec,
May 24, 2018.

Commissioner for Oaths Barreau du Quebec - 188739-4

Paula Isaak

This is Exhibit "K" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Reply Affidavit of Valerie Gideon

I, Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, SWEAR THAT:

1. I am the Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch ("FNIHB") at the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2017. Prior to that I was the Assistant Deputy Minister of Regional Operations at FNIHB for five years. I report directly to the Deputy Minister of ISC on all matters of First Nations and Inuit health, including Jordan's Principle and mental health services. I am Mi'kmaq from the Gesgapegiag First Nation and have spent my entire career dedicated to First Nations and Inuit health and wellness.

2. In my capacity as Senior Assistant Deputy Minister of the FNIHB, I have read the May 26, 2017 ruling, as amended on November 2, 2017 ("Ruling") of the Canada Human Rights Tribunal ("Tribunal"), and have personal knowledge of Canada's efforts to comply with the Tribunal's orders ("Orders"), including the Orders made in respect of mental health services as part of the Tribunal's February 1, 2018 Ruling.

3. I have also read the various affidavits, submissions, and requests for information filed by the Parties in response to my Affidavits dated May 24, 2018. There is also a proposal for further orders to be issued on consent of the Parties. In the paragraphs that follow and in the exhibits, I will attempt to describe the list of proposed draft consent orders; to what degree they reflect the current ones; and what is being done to address the concerns the Parties have raised. I wish to emphasize, however, that Canada is committed to a collaborative approach in the implementation of the Ruling. As described below, there are now certain forums (e.g., the Jordan's Principle Oversight Committee and the Consultation Committee) for the sharing of information and concerns. To the extent more information is sought, I would encourage the Parties to ask us directly while I also wish to emphasize that Canada will continue to cooperate fully. I wish to emphasize our willingness to address the Parties' concerns without the need to pursue further litigation to the maximum extent possible.

4. On June 6, 2018, David Taylor, on behalf of the First Nations Child and Family Caring Society, sent a letter asking for additional information in relation to my May 24, 2018 Affidavits and Paula Isaak's May 24, 2018 Affidavit. This letter is attached to this Affidavit as **Exhibit "A"**. On June 7, 2018, Maggie Wente sent a letter on behalf of the Chiefs of Ontario requesting additional information from Canada. This letter is attached to this Affidavit as **Exhibit "B"**.

5. Attached to this Affidavit as **Exhibit "C-1-3", "D-1-3", "E-1-3" and "F-1-3"** are the responses to the requests for information and documents relating to my May 24, 2018, Affidavits which were provided to the Parties on June 21, 2018.

6. I am pleased to have read that none of the Parties' affiants question Canada's compliance with the Rulings and its full implementation of the Orders. However, I do understand that there are outstanding and important questions related to improving the lives of First Nations children, their families and communities. Many of these questions are administrative and operational in nature, attached to this Affidavit as **Exhibit "G"** are responses to the questions raised by the affiants. I wish to confirm and underline Canada's commitment to pursue the improvement of our processes to address the unmet needs of First Nations children in a proactive manner and seek positive resolution in the spirit of the renewed relationship with First Nations built on respect and recognition.

7. With the support of the national and regional Jordan's Principle teams at Indigenous Services Canada, Canada has made honest attempts at demonstrating that Canada is dedicated to implementing Jordan's Principle and improving mental health services for First Nations children and their families by working together with the Parties as well as in partnership with First Nations across the country. While fully acknowledging that gaining trust of the Parties and of First Nations will take time, the Parties have agreed to oversee

with Canada the development and implementation of immediate relief measures (including those under Jordan's Principle) through the Consultation Committee established under the Consultation Protocol. Only where the Parties are unable to reach an agreement on a given matter should it then be referred back to the Tribunal.

8. In response to the First Nations Child and Family Caring Society's proposed list of draft consent orders, attached as Exhibit "D" to the Affidavit #2 of Doreen Navarro, sworn June 7, 2018, Canada has fully complied with the Rulings. Canada is prepared to discuss and collaborate with the First Nations Child and Family Caring Society on the issues that they have identified as being important to them in this list. These issues can and should be raised directly with me or through the already existing avenues for collaboration such as the Consultation Committee. Given the collaborative efforts of the various parties over the last number of months, and the good work that has resulted, Canada's view is that discussions outside the Tribunal process will continue to garner the results all Parties want to achieve. In the spirit of continued collaboration and transparency, Canada offers substantive responses to the concerns raised in the list of proposed draft consent orders attached to this Affidavit as **Exhibit "H"**.

9. Canada is committed to responding to questions related to Canada's compliance on the Rulings and Orders raised by the Chiefs of Ontario and the First Nations Child and Family Caring Society. These questions generally fall into four main themes of stakeholder events, outreach and communications, records of internal meetings, and data and statistics. Canada will respond to these questions in the most direct and collaborative way possible given the subject matter. For those questions that are operational or administrative in nature it may be that by email or through discussions at Jordan's Principle Oversight Committee meetings would be most effective and appropriate. These questions include the following issues:

    a. Chief of Ontario's requests for additional information on:
        i. List of regional stakeholder outreach sessions including dates, participants and outcomes;
        ii. Roles and responsibilities of regional and headquarter staff who work on Jordan's Principle;
        iii. Data on payments and reimbursements; and,
        iv. Complete documents on weekly reports submitted to senior management on approved requests.
    b. First Nations Child and Family Caring Society's requests for additional information on:
        i. Record of discussions at weekly teleconferences of Focal Point meetings;
        ii. Canada's work with First Nations partners on specific projects such as, the Service Coordination Network , a Navigator's Network with the AFN; Choose Life Pilot Project with NAN;

AFN's Client Handbook; and, a pilot on improving payment and delivery issues with the Independent First Nations;

iii. ISC work plans and participation at FNIHB's Senior Management Committee;

iv. Status of letters mailed to requestors on decisions; and,

v. ISC staff training activities.

10. In addition, Canada has been responding and continues to respond on a weekly basis to questions and information requests from the Parties on Jordan's Principle implementation, mental health and other operational and program delivery issues. For example, on April 26, 2018, I brought together the Parties, their counsel and interested staff, such as Health and Community Service Directors, to respond to their questions and be as open, transparent and accountable to the various activities undertaken on Jordan's Principle, mental health and other Indigenous Services Canada activities of their interest. Canada commits to continue these meetings as a way to enhance our existing collaboration and partnership.

11. Paragraph 63 of my May 24, 2018 Affidavit on Jordan's Principle refers to a document on Canada's website entitled, "Jordan's Principle – Substantive Equality Principles" that was developed and approved by the Parties at the February 2018 Jordan's Principle Oversight Committee meeting. This document is an example of Canada's commitment to the substantive equality principles as set out by the Tribunal in 2016 CHRT 2 Decision, paras 399-404 and 464-467 which describe substantive equality as follows: *"[S]ubstantive equality ...requires taking positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public.... [It takes] into account the full social, political and legal context of the claim. For [Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools.... [The government]is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples.... [Canada must consider]the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve."*

12. Canada is working side-by-side with the Parties on Canada's interim work on the Jordan's Principle – A Child First Initiative as well as longer-term work to address gaps in services, supports and products for First Nations children and that the health and well-being outcomes of First Nations children are improved. The Assembly of First Nations is coordinating the input of First Nations into this process which will inform a submission to the government on the future implementation of Jordan's Principle in the fall of 2018.

13. I also wish to emphasize that the government is committed to consulting with the Parties in the implementation of these orders. Canada recognizes the valuable input the Parties have provided to ensure Canada's implementation of the orders is done in a way that best meets the needs of First Nations children and families. Canada looks forward to continuing to work through the Consultation Committee as a means of effectively addressing issues raised by the Parties, including related to any questions they may have about the contents of this Affidavit.

SWORN TO before me at the City of
Ottawa, Province of Ontario,
June 21, 2018.

A Commissioner for Taking Affidavits
Jane Latham
LSO #42289P

Valerie Gideon

This is Exhibit "L" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA and
NISHNAWBE ASKI NATION

Interested Parties

Affidavit of Paula Isaak

I, Paula Isaak, the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships, AFFIRM THAT:

1. I am the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships ("ESDPP") of the Department of Indigenous Services Canada ("ISC"). I have been in this position since 2015. I report directly to the Deputy Minister of ISC. I am responsible for policies, program design and partnerships related to First Nations child and family services, First Nation education programs, and social programs. Regional offices across Canada deliver these programs, and report formally through the Senior Assistant Deputy Minister of Regional Operations.

2. In my capacity as Assistant Deputy Minister of ESDPP, I have read the February 1, 2018 ruling ("Ruling") of the Canada Human Rights Tribunal ("the Tribunal"), and have personal knowledge of the federal government's ("Canada") efforts to comply with the Tribunal's orders.

I have also read the various affidavits, submissions and requests for information filed by the parties in response to my affidavit dated May 24, 2018. There is also a request for further orders to be issued on consent of the parties. In the paragraphs that follow, I will describe what is being done to address the concerns raised in the proposed consent orders. I wish to emphasize, that Canada is committed to a collaborative approach in the implementation of the Tribunal's orders and we continue to be willing to discuss with any of the parties through the Consultation Committee or directly.

3. On June 6, 2018, David Taylor, on behalf of the First Nations Child and Family Caring Society, sent a letter asking for additional information in relation to my May 24, 2018 affidavit and Valerie Gideon's May 24, 2018 affidavits. This letter is attached to this affidavit as **Exhibit "A"**. On June 7, 2018, Maggie Wente sent a letter on behalf of the Chiefs of Ontario requesting additional information from Canada. This letter is attached to this affidavit as **Exhibit "B"**.

4. Attached to this affidavit as **Exhibit "C-1 to C-9"** are the responses to my affidavit of May 24, 2018, which were provided to the parties on June 19, 2018.

Proposed Consent Orders

5. In response to the Caring Society's proposed list of draft consent orders, attached as Exhibit "D" to Affidavit #2 of Doreen Navarro, sworn June 7, 2018, Canada states that it has fully complied with the Ruling of February 1, 2018.

6. Canada offers the following reply to proposed draft orders 2(A), 2(B), and 2(C):

   a) Canada agrees that an agency does not have to be in an overall deficit position in order to have its actual costs reimbursed for prevention/least disruptive measures, building repairs, intake and investigation, and legal fees. Canada will continue to pay actual costs, and does not demand that the agency be in a deficit position overall before reimbursement is made.
   b) Canada can work with the parties to clarify this, including through our existing tools (e.g. recipient guide for the reimbursement of retroactive claims).
   c) Since the February 1, 2018 Ruling, Canada has been reimbursing agencies as ordered by the Tribunal, regardless of whether the agency was or is in an overall deficit position between January 2016 and March 2018. As of June 14, 2018, Canada has received 39 claims for the orders related to agencies and for Band Representative Services, totaling over 18 million dollars.

d) Canada has interpreted the Tribunal's February 1, 2018 order about actual costs to mean that it should reimburse agencies for actual costs incurred, i.e., an expenditure for which they do not already have a source of funds and therefore have incurred a cost.
e) Under the *Financial Administration Act,* Canada cannot reimburse expenses that have not been incurred. For example, Canada cannot pay for a legal expense that did not occur or for a prevention activity that did not happen. In addition, Canada cannot reimburse for a service already being paid for by another government or public entity, e.g., the Ontario government.
f) The above position - where public funds have already been provided for reimbursement of an expenditure, such that no "actual cost" was incurred - is consistent with the wording ISC has adopted in its reimbursement guides and forms.
g) Canada continues to be willing to discuss with any of the parties through the Consultation Committee or directly any issues related to the provision of actual costs.

7. Canada offers the following reply to proposed draft order 2(D):

a) Canada is willing to consult the parties either through the Consultation Committee or directly and interested stakeholders (e.g. the National Advisory Committee on First Nations Child and Family Services Program Reform) on the development of an appeals process.
b) Currently, Canada has created an escalation process for decisions on potential denials and has shared this process with the parties for feedback.

8. Canada offers the following reply in response to proposed draft orders 2(E) and 2(F):

a) In keeping with the February 1, 2018 Ruling and orders, Canada is paying small agencies' actual costs retroactive to January 2016 (when they did not have a source of funds and therefore had incurred costs). Canada is also paying all small agency costs moving forward until an alternative system is put in place.
b) Canada has increased funding through Budget 2018; provided retroactive payments; and is reimbursing actual costs for small agencies until such an alternative system is implemented.
c) Should a small agency feel it has unmet needs, Canada is encouraging them to contact the regional ISC office as soon as possible.
d) As previously mentioned in paragraph 5 above, Canada cannot reimburse agencies for costs that they have not actually incurred.

9. Canada offers the following information in response to proposed draft orders 2(G), 2(I), and 2(K):

a) Canada has already shared the approach it used to analyze and report on the surpluses and deficits with the parties and included this information in our May 3 submission. It is further clarified in Exhibit "C1".

b) Where federal funds were separated out in financial statements provided by agencies, we did not include other sources of funding in the calculation of a deficit or a surplus. Where an agency mixed their sources of funding, then a pro-rated approach was used.
c) Canada is willing to review the deficits/surplus analysis for agencies who did not report their sources of revenue. However, such agencies would be required to amend and resubmit their previous financial statements with specific sources of revenue identified.

10. Canada offers the following reply to proposed draft order 2(H):

a) ISC is willing to commit to working with Canada Revenue Agency and review how provinces and territories apply the Children's Special Allowances ("CSA") Act.
b) The CSA is a tax-free payment to child protection agencies and institutions to support the costs of "maintaining children in care." The monthly CSA payment is equal to the maximum Child Canada Benefit payment. Generally, the province/territory receives these funds on behalf of children for whom they are responsible, as they are deemed the legal guardian when children are in care, in order to defray costs.
c) It is important to note that in Manitoba there is litigation against the province regarding their use of the CSA which has been brought by six First Nations and Metis child and family services agencies (Animikii Ozoson Child and Family Services, Sandy Bay Child and Family Services, Peguis Child and Family Services, Southeast Child and Family Services, Michif Child and Family Services, and Metis Child, Family and Community Services).

11. Canada offers the following reply to proposed draft order 2(J):

a) Canada could consider reimbursing an agency's costs if that agency can show that it used funding it received from a First Nations or Tribal Council to pay for incurred expenses in any of the areas subject to the Tribunal's orders. For example, in a situation where a First Nation paid for an agency's prevention activities because the agency did not have sufficient federal funding to pay for the service itself.
b) If Canada were to reimburse an agency for an item or service that a First Nation or Tribal Council has paid for, then that agency will need to reach an agreement with the First Nation or Tribal Council regarding reimbursement of those funds.
c) Canada is committed to reviewing the specific situation of each agency to ensure that the Tribunal's orders are implemented in a way that assists agencies to achieve the best outcomes for First Nations children, families and communities.

12. Canada has already agreed that the Panel continue to retain jurisdiction over these orders until March 31, 2019 which is proposed in draft order 3(A), as per our correspondence dated April 9, 2018 and included in our May 3, 2018 submission.

13. In response to proposed draft order 3(B), Canada agrees to provide an update. Canada would like to move away from using the litigation process involving affidavits and cross-examinations to share information now that the Consultation Committee is in place.

14. I also wish to emphasize that the government is committed to consulting with the Parties on the implementation of these orders. Canada recognizes the valuable input the Parties have provided to ensure Canada's implementation of the orders is done in a way that best meets the needs of First Nations children and families. Canada looks forward to continuing to use the Consultation Committee as a way to discuss issues with the Parties, including related to any questions they may have about the contents of this affidavit.

AFFIRMED before me at the City of
Gatineau, Province of Quebec,
June 21, 2018.

Hilaire Groulx, Barreau du Québec
1887394
A Commissioner for Taking Affidavits

P. Isaak
Paula Isaak

This is Exhibit "M" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

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

Complainants

– and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

– and –

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

Respondent

– and –

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

CLOSING SUBMISSIONS of the CANADIAN HUMAN RIGHTS COMMISSION

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Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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

Respondent

– and –

CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL CANADA

Interested Parties

CLOSING SUBMISSIONS OF THE CANADIAN HUMAN RIGHTS COMMISSION

OVERVIEW

1. This case deals with fundamental principles of human rights law and access to justice for Aboriginal peoples and in particular, First Nations children, one of the most vulnerable and disadvantaged groups in Canada.[1] This case is unique and of great significance,[2] and calls us all to live up to our collective social responsibility to care for, support and give all children an equal chance to succeed.[3]

2. The Assembly of First Nations (the "AFN") and the First Nations Child and Family Caring Society of Canada (the "Caring Society") filed a complaint with the Canadian

[1] Auditor General of Canada's Report to the House of Commons, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada (2008), Canadian Human Rights Commission's Book of Documents ["CHRC BOD"], Exhibit ["Ex."] HR-03, Tab 11 at p. 5 ["OAG Report 2008"].
[2] *APTN v. Canada (Human Rights Commission),* 2011 FC 810, at para. 3; see also *Canada (Attorney General) v. FNCFCS and AFN,* unreported, November 24, 2009, T-1753-08 at p. 2024.
[3] *Wen:De* The Journey Continues (2005), CHRC BOD, Ex. HR-01, Tab 6 at p. 19 ["*Wen:De* Report Three"].

Human Rights Commission (the "Commission") on February 23, 2007, alleging that Aboriginal Affairs and Northern Development Canada's ("AANDC")[4] First Nations Child and Family Services Program and corresponding on reserve funding formulas result in inequitable levels – and in some cases a complete denial – of child welfare services[5] for First Nations children ordinarily resident on reserve.[6]

3. The Complainants allege that this amounts to discrimination in the provision of services customarily available to the public on the grounds of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act* (the "*CHRA*").[7]

4. The Commission participates in the hearing of this complaint before the Canadian Human Rights Tribunal (the "Tribunal") in accordance with its public interest mandate pursuant to section 51 of the *CHRA*.[8]

5. Over the course of a year, the Commission led evidence establishing that AANDC's FNCFS Program and on reserve funding formulas, including Directive 20-1, the Enhanced Prevention Focused Approach ("EPFA"), and Ontario's "Memorandum of Agreement Respecting Welfare Programs for Indians" (the "1965 Agreement"), constitute a service under section 5 of the *CHRA*, as they provide a benefit conferred in the context of a public relationship.

6. The evidence also established that AANDC denies and/or differentiates adversely against First Nations children and families on reserve in the provision of this service based on prohibited grounds of discrimination, namely race and national or ethnic origin, in that AANDC's FNCFS Program and on reserve funding formulas: (i) are based on assumptions and not the actual needs of First Nations communities; (ii) create perverse incentives which contribute to the overrepresentation of First Nations children in care;

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[4] At the time of the complaint, the Respondent was the Department of Indian Affairs and Northern Development Canada (otherwise known as "INAC"). As of June 13, 2011, the Respondent's new applied title is Aboriginal Affairs and Northern Development Canada (otherwise known as "AANDC"). For the purposes of these submissions and in order to be consistent, the Commission will refer to the Respondent as AANDC throughout.

[5] Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3: Child welfare refers to "a set of government and private services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect. Child welfare agencies will typically investigate allegations of abuse and neglect, supervise foster care and arrange adoptions. They also offer services aimed to support families so that they can stay intact and raise children successfully and to remedy risks in families where the child has been removed so reunification can occur."

[6] Complaint Form, CHRC BOD, Ex. HR-01, Tab 1 at pp. 1-3.

[7] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 5 ["*CHRA*"].

[8] *CHRA, supra*, s. 51.

(iii) lack funding for prevention services and least disruptive measures, despite the fact that these services are critical to address the greater needs of First Nations on reserve; and (iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

7. In its response, AANDC led evidence with respect to its FNCFS Program and funding formulas, but failed to establish a *bona fide* justification for the discriminatory practice. Furthermore, AANDC led no evidence to demonstrate that remedying or preventing the discrimination would cause undue hardship on the basis of health, safety or cost.

8. As a result, the Commission submits that the complaint has been substantiated and that a systemic remedy should be granted pursuant to section 53 of the *CHRA*,[9] in order to ensure that First Nations children have equitable and meaningful access to child welfare services on reserve, and that they can ~~"m~~make for themselves the lives they are able and wish to have" without discrimination.[10]

[9] *CHRA, supra*, s. 53.
[10] *CHRA, supra*, s. 2.

PART I – STATEMENT OF FACTS

A) History of First Nations in Canada: Impact of Early Federal Government Policies and Actions

9. While the allegations in this complaint deal with present day funding and programs involving First Nations child welfare services on reserve, it is necessary to consider the issue in the full historical context, in particular the legacy of Indian Residential Schools ("IRS"). As was stated by the Royal Commission on Aboriginal Peoples ("RCAP"):

> In this respect, the past is more than something to be recalled and debated intellectually. It has important contemporary and practical implications, because many of the attitudes, institutions and practices that took shape in the past significantly influence and constrain the present. This is most obvious when it comes to laws such as the *Indian Act*,[11] but it is also evident in many of the assumptions that influence how contemporary institutions such as the educational, social services and justice systems function.[12]

i) The Indian Residential Schools System as an Early Form of Child Welfare

a. Management of the Schools: Chronic Neglect and Underfunding

10. The IRS system was initially built on partnerships between the federal government and various churches that lasted until 1969.[13] While the churches would remain involved to a certain extent after 1969, they were no longer managing the IRS system. The last federally funded residential school was closed in 1986. While some residential schools[14] would continue to operate after 1986, federal funding would cease.[15]

11. The overall purpose of the IRS system was to "kill the Indian in the child".[16] As Dr. John Milloy,[17] an expert witness for the AFN, stated in his book, *A National Crime:*

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[11] *Indian Act*, R.S.C. 1985, c. I-5 ["*Indian Act*"].
[12] Report of the Royal Commission on Aboriginal Peoples (Vol. 2), CHRC BOD, Ex. HR-02, Tab 7 at p. 56 ["RCAP Report"].
[13] Statement of Apology to Former Students of Indian Residential Schools by the Right Honourable Stephen Harper, CHRC BOD, Ex. HR-03, Tab 10 ["Statement of Apology"]; see also RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at pp. 442, 443, 493.
[14] Testimony of Dr. John Milloy, Transcript Volume ["Vb"] 33 at pp. 107-108: "Residential schools" include boarding schools, industrial schools, and, if one goes back to the 1840's, manual labour schools. Boarding schools were typically small and close to the children's communities, while industrial schools were generally large and centrally-located.
[15] Dr. John Milloy's Expert Report, "A National Crime", Ex. AFN-1 at pp. xvii, 238 ["A National Crime"]; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 11, 16.
[16] RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 476; see also A National Crime, Ex. AFN-1 at p. xv; see also Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.
[17] Dr. John Milloy's Curriculum Vitae, CHRC BOD, Ex. HR-12, Tab 265. Dr. Milloy was qualified as an expert before the Tribunal in the history of Indian Residential Schools ("IRS"), including the origin and vision of the IRS

The Canadian Government and the Residential School System, 1879 to 1986, in this way the IRS system ―was, even as a concept, abusive."[18]

12. The federal government began funding IRS in 1883.[19] On August 22, 1895, the Acting Deputy Superintendant General of AANDC requested a ―warrant for the committal of an Indian child to an Industrial School", the purpose of which was to remove Indian children that were, in the view of Indian Agents,[20] ―not being properly cared for or educated".[21]

13. Many of the schools were located in western Canada, with some in Ontario and Québec and only one in eastern Canada.[22] Dr. Milloy estimates that there were approximately 135 IRS in total.[23] While it is impossible to determine exactly how many children attended these schools based on the limited information available,[24] Dr. Milloy estimates that at any given time approximately 15% of all Indian children were attending IRS.[25]

14. Dr. Amy Bombay,[26] an expert witness for the AFN, testified about the number of First Nations people on reserve today who attended IRS:

> DR. BOMBAY: […] So, first, looking at the proportion of First Nations adults on reserve who attended themselves, we found that 19.5 percent of adults living on reserve attended residential school. Just to point out that, because I just spoke about the negative effects of early life adversity, 58.1 percent of the survivors attended between the ages of 5 and 10, and there were actually a smaller proportion who actually started attending residential school at an earlier age than 5, and also a smaller proportion who attended after the age of 10, but the majority

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system, the policies upon which it is based, as this evolved through time from the beginning until the closure of the IRS, the role of the federal government with regard to the establishment and operations of the IRS and the children attending, the operation of the IRS system, the funding of the IRS, the problems with the IRS and its impacts and the closure of the IRS and the transition to and relationship with the child welfare system.

[18] A National Crime, Ex. AFN-1 at p. xv; see also testimony of Chief Robert (Bobby) Joseph, Transcript Vol. 42 at p. 83.

[19] Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 102.

[20] A National Crime, Ex. AFN-1 at p. 68: Indian Agents, who represented AANDC in the communities, were ―to assist" in the recruitment of Indian children for IRS, which was seen as ―vital to attain the goal of civilization".

[21] Department of Justice Warrant for the Committal of Indian Children and Corresponding Regulations Relating of the Education of Indian Children (1895), CHRC BOD, Ex. HR-13, Tab 278 at pp. CHRC639/1-CHRC639/2, CHRC639/7, CHRC639/11.

[22] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 102-104; see also A National Crime, Ex. AFN-1 at p. 307 (list of schools in 1931).

[23] Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 103.

[24] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 119; Vol. 41 at pp. 9-12.

[25] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 12-13; see also Dr. John Milloy's Chart: Number of Children in Indian Residential Schools from 1930 – 1980, CHRC BOD, Ex. HR-12, Tab 267.

[26] Dr. Amy Bombay's Curriculum Vitae, CHRC BOD, Vol. 13, Tab 312. Dr. Bombay was qualified as an expert before the Tribunal on the psychological effects and transmission of stress and trauma on wellbeing, including the intergenerational transmission of trauma among the offspring of IRS survivors and the application of the concepts of collective and historical trauma.

> of these individuals attended between the age of 5 and 10 when the brain is undergoing rapid development, and that these childhood adversities would be expected to have significant effects.[27]

15. Soon after their establishment, the schools began running deficits. The federal government set funding for the IRS system based on a per capita amount, which quickly proved to be insufficient.[28] Despite efforts to increase the number of students in the system, it was consistently and chronically underfunded until after the Second World War.[29] In order to address the deficits, children were forced to work at the schools running farming and dairy operations.[30]

16. Dr. Milloy testified about the impact of persistent funding shortfalls in the IRS system:

> DR. MILLOY: […] So, it's a litany of bad food and bad nutrition, a litany of inadequate clothing, a litany of inadequate teachers and it all runs back to the same cause, the system is starved for resources. And, to the extent to which the system is starved for financial resources and it is allowed to remain so, then it is starved of moral resources as well. People who say they are caring for children are not doing so and they know they're not doing so and they refuse to stop doing what they're doing, which is inadequate. There's an RCMP inspector that returns a child to a residential school. It's in the text. And he says to his superior, having seen the inside of the school, "If this was a white school, I'd have the principal in court tomorrow." It wasn't a white school, it was an Indian residential school and so he let it pass. So, there was a wider neglect than what the Department was practising, right? […][31]

17. The per capita funding, which remained in existence until 1957, also led to overcrowding in the schools.[32] This in turn affected the children's health and wellbeing.[33]

18. For instance, many of the children's communities were ~~r~~ife with tuberculosis".[34] As a result of the overcrowding in the schools, the rate of sickness amongst the children was very high. It is estimated that approximately 42% of the children who attended IRS were

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[27] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 120-121; see also Dr. Bombay's Power Point Presentation: Intergenerational Effects of Indian Residential Schools, CHRC BOD, Ex. HR-14, Tab 337 at p. 21 [~~D~~r. Bombay's Power Point"].
[28] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 111-114, 125-129.
[29] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 110-114, 125-129, 179-180.
[30] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 170-172; see also A National Crime, Ex. AFN-1 at pp. 120-121.
[31] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 174-175.
[32] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.
[33] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.
[34] Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 130.

affected by tuberculosis, and that many were simply sent home to die.[35] Dr. Milloy testified about the disproportionate impacts tuberculosis had on children who attended IRS:

> DR. MILLOY: […] We know that the tuberculosis rates amongst the Aboriginal population in Canada and therefore the Aboriginal children in residential schools far outstrips any other rates. It's really easy to be an Aboriginal historian because you just have to multiply everything by five. You have to multiply all the bad stuff by five, right?
>
> Tuberculosis five times, right? Death by suicide at least five times. You go on and on and on that they are at the head of every line you don't want to be at the head of and in the back of every line you don't want to be at the back of and usually five times more grievous than anything else.[36]

19. In 1938, the federal government finally began providing funding to the schools in order to address the alarming rates of tuberculosis after it came to light that the City of Ottawa was actually spending more money to combat the disease than AANDC.[37]

20. The schools also had difficulty attracting qualified teachers as a result of their remote locations and the nature and purpose of the schools generally.[38] In 1911, the federal government was ready to take hold of the IRS system and impose standards for the care and education of the children (including cleanliness, food, clothing, etc.). Therefore, the federal government included such standards in their contracts with the churches; these contracts were never re-negotiated after 1911.[39]

21. As Dr. Milloy testified, notwithstanding the serious problems with the IRS system, it continued to exist year after year without ever being reformed:

> DR. MILLOY: […] When the Bryce Report first came out, or the second Bryce Report came out, there was a – and it's in the text again an editorial in the "Saturday Night," you know, that magazine that died a few years ago, saying, "This is worse than the death toll during the First World War, but we needn't worry about it because it's the scandal of the day, and next week we'll be on to something else and we'll forget all about it." Well, of course, next week we were on to something else and there was no reform in the system. So it was impervious to critique from the outside. It was incapable of improvement from the inside. I

[35] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.
[36] Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 142.
[37] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 144-145.
[38] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 136-139.
[39] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 136-141.

> mean, what they needed was budgets and they weren't getting them. So it just drifted along, right?[40]

b. Integration

22. Post-1946, attempts were made to integrate Indian children into provincial school systems.[41] AANDC sought to ~~"in~~tegrate" (as opposed to assimilate) children by placing them in provincial schools. However, this movement did not account for the cultural shock that took place when these children found themselves in provincial institutions.

23. In order to integrate Indian children, the federal government approached provincial school boards and built roads connecting reserves to more centrally-located communities.[42]

24. Dr. Milloy testified that as a result of this policy shift, residential schools were to be closed; however, even as the number of schools in existence decreased, the number of IRS students increased.[43] In fact, residential schools continued to exist for more than four decades as the move toward integration carried on:

> Integration and closure was a long and difficult process: nearly four decades. During those forty years, children still left their homes to attend a residential school. Many never returned. They died or were lost to culture and community in an extensive system of fostering and out-adoption by non-Aboriginal families. Many who did return were unable, because of their residential school experience, to contribute to the life and health of their communities. That experience, despite [AANDC's] intentions and administrative and financial reforms, remained what it had been before the war – one of neglect and abuse.[44]

25. Around the same time, the federal government began to integrate other social services, including child welfare services.[45] As some residential schools closed down, many of the children, having nowhere else to go, were taken into child welfare care.[46] AANDC also began to hire social workers in order to deal with the increasing number of Indian children in care.[47]

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[40] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 176-177.
[41] A National Crime, Ex. AFN-1 at p. 190; see also testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 180-188.
[42] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 194-202.
[43] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 186, 200.
[44] A National Crime, Ex. AFN-1 at pp. 190-191.
[45] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 187-204.
[46] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 15-16, 187-204.
[47] Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 188-192.

26. The RCAP report described the child welfare system in place at the time as follows:

> Children who entered the [child welfare] system were generally lost to family and community — or were returned with there having been little input to change the situation from which they were taken in the first place […].
>
> Every facet of the system examined by [RCAP] revealed evidence of a program rooted in antiquity and resistant to change.
>
> An abysmal lack of sensitivity to children and families was revealed. Families approached agencies for help and found that what was described as being in the child's "best interest" resulted in their families being torn asunder and siblings separated. Social workers grappled with cultural patterns far different than their own with no preparation and no opportunities to gain understanding. It was expected that workers would get their training in the field.
>
> The agencies complained of a lack of adequate resources, and central directorate staff complained of a lack of imaginative planning for children by agencies […].
>
> The funding mechanisms perpetuated existing service patterns and stifled, even prevented, innovative approaches. There was little statistical data and, what there was, was next to useless for program planning purposes. There was no follow-up on adoptions and thus no way to gather the data upon which any kind of evaluation of the adoption program could be based […].
>
> The appalling reality is that everyone involved believed they were doing their best and stood firm in their belief that the system was working well […]. The miracle is that there were not more children lost in this system run by so many well-intentioned people. The road to hell was paved with good intentions and the child welfare system was the paving contractor.[48]

27. However, integration proved to be a challenge. As Dr. Milloy noted, Indians "[lived] in the wrong place" – spread out across the country in "over 600 communities" – which made it very difficult for them to access centrally-located existing social services.[49]

[48] RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 989 (footnotes omitted).
[49] Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 188.

c. History of Abuse

28. Many of the children who attended residential schools were mentally, emotionally and/or physically abused. Dr. Milloy testified about the purpose of the IRS system, which manifested itself in the day-to-day operation of the schools:

> DR. MILLOY: […] The system was Savage, the system itself, this sort of flip-flop, right, because I thought when I first looked at it, when you read the discourse, that the Indians were the savages, right, to be civilized in this process. But if you think about it, there was a savagery [or] violence in the very idea of residential schools.
>
> It wasn't only about separating children from their parents and communities and putting them in the schools, it was about cutting the artery of culture that flowed between parents, children and community. That was to be destroyed willy-nilly.[50]

29. For many of the children who suffered abuse at residential schools, suicide was their only escape.[51] For others, the effects of their abuse followed them back to their communities.[52]

30. In addition to the rampant abuse at IRS, the children lived in institutions devoid of any real parenting, nurturing or cultural influences. Those in charge of residential schools, including principals and teachers, were not always qualified for the positions they held, a situation which was exacerbated by the chronic underfunding of the IRS system.[53]

31. The federal government and the churches that ran the schools were aware that children were being abused.[54] However, very little was done to address the issue. As Dr. Milloy testified, the IRS system essentially operated on inertia:

> DR. MILLOY: […] It seemed that the best way to define the system and its relationship with the students was to simply say – and this is a very ill – this is a word which is not – I think which is undervalued, and that is that the system was careless. It just was a shrug of the shoulders, right, it became routine. It just sort of marched on. […][55]

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[50] Testimony of Dr. John Milloy, Transcript Vol. 34 at p. 42.
[51] Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 2-4.
[52] Testimony of Chief Bobby Joseph, Transcript Vol. 42 at pp. 48-58, 83-87; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 122-124.
[53] A National Crime, Ex. AFN-1 at pp. 129-132; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 71-87.
[54] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 44 and following, 103-109; see also A National Crime, Ex. AFN-1 at pp. 109-156.
[55] Testimony of Dr. John Milloy, Transcript Vol. 34 at p. 51.

32. The federal government "virtually came to the end of the residential school road by 1986", although some residential schools remained in existence until 1996.[56] The IRS system was a lived reality for thousands of Indian children for more than a century, many of whom endured adverse treatment at the schools, including: the loss of their families; the loss of their culture and traditions; a lack of parenting, nurturing and care; physical, mental and emotional abuse; malnutrition; and illness.

33. In his apology on behalf of Canada, Prime Minister Stephen Harper described the IRS system as follows:

> The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.[57]

d. The Legacy of Residential Schools: Intergenerational Impact and Collective Trauma

34. The IRS system represents a shameful and traumatic legacy that still affects Aboriginal peoples and communities today. Some children who attended residential schools had parents and/or grandparents who also attended. Dr. Bombay studied the link(s) between generations in order to determine the intergenerational impact of IRS, and the extent to which these impacts are compounded depending on a family's history of attendance at IRS:

> DR. BOMBAY: [… The] 20.2 percent who attended themselves and the 31.1 percent who had at least one parent who attended, 12.9 percent had at least one grandparent who went to residential school. This leaves only 35.8 percent of First Nations on reserve who were not themselves or who were not intergenerationally affected by residential schools.
>
> So it really seems to be a very large proportion of the on reserve population that has been either directly or indirectly affected by residential schools. And I would also just like to point out that within this 35.8 percent that had not been affected intergenerationally by residential schools, they still could have had uncles or aunts or other close family members or other close family friends who maybe had a role

[56] A National Crime, Ex. AFN-1 at p. 238.
[57] Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.

> in their caregiving, and so these individuals still could have been indirectly affected by residential schools.
>
> And also, even if they didn't have these kind of close connections, if they lived in a community which was severely impacted by residential schools, they also could have had indirect effects from the communitywide effects as well.[58]

35. As Dr. Milloy explained, the impact that the IRS system had and continues to have on Aboriginal peoples is marked and evident:

> DR. MILLOY: [… If] you go to the [Truth and Reconciliation Commission] hearings and speak to those people, they talk about the transgenerational impact. […T]here are some concrete transgenerational impacts, for example:
>
> The scourge of fetal alcohol syndrome is a physical transference; right? We have those people who are excessive drinkers, they may have given birth to [children with fetal alcohol syndrome], but the transgenerational survivors, as they call themselves, survivors being children who didn't go to residential schools, but whose parents or grandparents did, said that they were raised in homes that, as the young people in that British Columbia case said, we can't live with them; this was not a proper way of being brought up.
>
> […]
>
> [… They] talk very seriously about the extent to which their lives were disrupted by parents who had been in the schools.[59]
>
> […]
>
> [… So]when you're trying to create an explanation, yet again this discriminatory factor: why is it that they're at the bottom of every list you don't want to be on the bottom of and at the top of every list you don't want to be at the top of? Why [are] our Aboriginal people in this special place?
>
> But you're right, it's got to do with the workings of all of those factors particular to that particular group, but I think you've put your finger on one of the big differences and that is, as you said an hour ago or so, that was the attempt to cut the artery of culture. That's really something special and I think something that has been could be […] under estimated in terms of the way in which you write out the larger narrative about this group compared to other poor ethnic groups in the country.[60] (emphasis added)

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[58] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 123-126; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 21-24.
[59] Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 113-115.
[60] Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 175-177; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at p. 2 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).

36. Dr. Bombay has conducted research on the intergenerational impacts of the IRS system.[61] In her testimony, she noted that it is "generally accepted that adverse conditions early in life can impact the developing brain and increase vulnerability to mood disorders and other disorders as well."[62]

37. One commonly cited study examined the effects of early childhood adversity on children who grew up in orphanages in Romania.[63] These children displayed measurable differences in both the functionality and structure of their brain and brain activity.[64] The study therefore concluded that early life experiences can result in greater risk and vulnerability to the consequences of future stress, and that the nature of the environment in which the children are raised can exacerbate the severity of these impacts, putting them at even greater risk.[65]

38. Dr. Bombay also testified about how constant exposure to stress can affect the development of a person's brain:

> DR. BOMBAY: […] So if a person is exposed to continual stress, this person would be expected to be at risk for a number of a range of outcomes as […] the different brain regions are developing at different times, and if there is stress going on throughout these periods we would expect a range of negative outcomes. So in addition to the timing of the exposure to stress, the chronicity of the exposure to stress is also important to consider. […][66]

39. Other studies have shown that early life adversity can lead to negative health and social outcomes later in life. For example, the Adverse Childhood Experience Study (the "ACE Study") asked 17,000 middle-class Americans to indicate what, if any, adverse childhood experiences they had endured before the age of 18, including: emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, domestic violence, household

[61] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 11 and following; see also see also Dr. Bombay's Expert Report, "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma (2013), CHRC BOD, Ex. HR-13, Tab 314 ["Dr. Bombay's Expert Report"]; see also Letter from Amy Bombay to the AFN re: Expert Report, CHRC BOD, Ex. HR-13, Tab 313.
[62] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 97 and following.
[63] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 97 and following.
[64] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 98-100.
[65] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 98-100.
[66] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 101; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 10-11.

substance abuse, household mental illness, parental separation/divorce, and/or incarcerated household member.[67]

40. The ACE Study found that one in eight participants (or 12.5%) had experienced four or more of the adverse childhood experiences, and that these adversities ~~–t~~end to to be interrelated and tend to be typically experienced on a chronic basis."[68] Therefore, exposure to one adverse childhood experience increases a person's risk of being exposed to another.[69] Additionally, the ACE Study found that these experiences had cumulative effects, meaning that ~~–t~~he more adversity you are exposed to, the greater the effects" on the person.[70]

41. Dr. Bombay testified about the statistical relationships between adverse childhood experiences and a person's behaviour, health and social outcomes later in life:

> DR. BOMBAY: […] So this is just one of the findings from one of the published reports coming out of this study which showed graded relationships between the number of childhood adversities and the number of comorbid health outcomes and health problems that they experienced. So on the bottom axis is their adverse childhood experience score, which is just the number of childhood adversities they experienced and, as you can see, we see this linear relationship, that the more childhood adversities they are exposed to, the more health problems they have.
>
> And not only did they find this relationship with a number of health outcomes and health problems that these people had, but they found the same linear graded and cumulative relationships with a number of physical health outcomes, including heart disease, liver disease, pulmonary disease, and even sexually transmitted diseases, as well as linear relationships with mental health outcomes, so depression, suicide attempts and fetal [alcohol syndrome] – and those aren't health outcomes, but as well as other health outcomes, mental health outcomes as well.
>
> Not only did they find these linear relationships with health outcomes, but they also found relationships with social outcomes and behavioural outcomes. So just to list a couple of these, those with greater childhood adversity were at greater risk for intimate partner violence, both being a victim and perpetrating intimate partner violence.

[67] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-104; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.
[68] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.
[69] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.
[70] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.

> It was associated with impaired worker performance, so those who had higher levels of childhood adversity missed more days [at] work, which of course would impact their functioning and their socioeconomic status, and it was also associated with a number of other outcomes such as adolescent and unintended pregnancy, smoking, as well as sexual activity […].[71] (emphasis added)

42. Therefore, Dr. Bombay concluded that "early life adversity has really long-term potential negative effects on the brain and we see how this is manifested in the increased risk of being exposed to a range of mental and physical health outcomes that we see into adulthood and that begin to manifest themselves early in life."[72]

43. These findings are significant because many of the adverse childhood experiences in these studies were lived realities for Aboriginal children who attended residential schools. In her testimony, Dr. Bombay noted that IRS survivors, like the participants in the Romanian orphanage and ACE studies, were subjected to high levels of early life adversity, the negatives impacts of which are evident:

> DR. BOMBAY: […] So this is a graph from my chapter that I prepared for the most recent First Nations Regional Longitudinal Health Survey[73] on Adult Personal Wellness, and these survivors were presented with this list of potential adversities experienced in residential schools, which was derived based on historical research that has documented that many survivors experienced this range of adverse childhood experiences.
>
> The majority spoke about how isolation from family negatively impacted them, we see the same things that were measured in that adverse childhood experience study, like different forms of abuse, physical abuse, as well as additional forms of childhood adversity like witnessing abuse, which virtually all residential school survivors were subjected to, as well as bullying from other children and as well as things like having a lack of food, so physical neglect, a lack of clothing, as well as emotional neglect because these children were separated from their parents and did not grow up with a loving parent, which is exactly what we saw in the children who grew up in the Romanian orphanages. So we would expect that. […][74] (emphasis added)

[71] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 105-107; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 13-15.
[72] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 107.
[73] First Nations Information Governance Centre, "First Nations Regional Health Survey (RHS) 2008/10" (2012), CHRC BOD, Ex. HR-14, Tab 344.
[74] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 108-109; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 16-17.

44. Dr. Bombay also described how these early childhood adversities have impacted IRS survivors and future generations:

> DR. BOMBAY: […] Just to give you some example statistics, residential school survivors report higher levels of psychological distress compared to those who did not attend and they are also more likely to be diagnosed with a chronic physical health condition. This was from the most recent Regional Health Survey that reported that 76.1 percent of survivors had at least one chronic health condition versus 59.1 percent of First Nations adults who did not attend.
>
> So in addition to these negative effects on health outcomes, research has also looked at certain social outcomes in residential school survivors, with a lot of the research focusing on how their experiences have affected – has affected their parenting, because numerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing – being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools – how they treated the children, actually instilled negative – a lot of negative parenting practices, as this was the only models of parenting that they were exposed to. […][75] (emphasis added)

45. Dr. Bombay also noted that studies have shown that 43% of First Nations adults on reserve perceive that their parents' attendance at residential schools negatively affected the parenting they received, and 73.4% believe that their grandparents' attendance at residential school negatively affected the parenting that their parents received.[76]

46. Testifying about the importance of identifying the links (or pathways) between a person's involvement with the IRS system and consequent negative health and social outcomes, Dr. Bombay stated:

> DR. BOMBAY: […] So before we actually started to do this in our research, experts in the field of aboriginal health had already provided hypotheses about these pathways based on various anecdotal evidence from personal stories and books that have outlined the people's experiences in residential schools. And so this list is from a publication by, again, Dr. Laurence Kirmayer in discussing suicide, and because he suggests that residential schools is an important predictor of health and of suicide.
>
> So before we carried out our research, they suggested a range of pathways by which children of survivors are at an increased risk. Just to name a few, these

[75] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 109-110; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 16-17.
[76] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 110-111; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 17.

> included models of parenting and child rearing practices based on their experiences in residential school, it included the repetition of physical and sexual abuse that happened in residential school.
>
> They suggested that the loss of cultural knowledge, language and tradition that happened as a result of residential schools is one mechanism that contributes to the intergenerational transmission of these negative effects, the undermining of individual and collective identity and esteem, as well as damage to the relationship with the larger society.
>
> So while these proposed pathways provided a really important starting point, there had been no empirical research to confirm these mechanisms, so there was a need for quantitative data to really measure and identify the differences between children of residential school survivors and controls, and to identify the pathways that are putting these individuals at a greater risk. […][77] (emphasis added)

47. There have been qualitative studies on the intergenerational impacts of the IRS system, which have ~~r~~revealed that many children of residential school survivors struggled with issues, mental health issues, as well as issues related to cultural identity, so how they feel about being aboriginal, and again, parenting in this second generation".[78]

48. Similarly, quantitative research on the intergenerational impacts of IRS has found that:

> DR. BOMBAY: […] 37.2 percent of First Nations adults whose parents attended residential school had contemplated suicide in their life, so they have higher levels of suicidal ideation compared to those whose parents did not attend, and their levels were lower at 25.7 percent.
>
> This report also reported that the children – the grandchildren of survivors are also at an increased risk for suicide, as 28.4 percent of the grandchildren attempted suicide versus only 13.1 percent of those whose families – whose parents – grandparents did not attend residential school. […][79]

49. These findings are consistent among other measurements of health and wellbeing. For example, children of IRS survivors report higher levels of depressive symptoms.[80] They also report higher levels of psychological distress, and are at greater risk for chronic physical health conditions as compared to those who have not been affected by

[77] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 127-129; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 24.
[78] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 113; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 18.
[79] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 114-115; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 19.
[80] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 115-118; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 19.

residential schools.[81] This pattern extends to drug use, learning disabilities, skipping a grade and even the likelihood of contracting Hepatitis C.[82]

50. Overall, these studies confirmed that the offspring of IRS survivors experienced ―higher levels of adverse childhood experiences based on their parents' time in residential school and their parents' lack of exposure to proper parental role models".[83] In her article entitled, ―The Impact of Stressors on Second Generational Indian Residential School Survivors", Dr. Bombay summarized the findings of her research as follows:

> Summarizing, it appears that depressive symptoms are elevated among First Nations adults who had at least one parent who attended IRS, and that their parent's Survivor status moderated the effects of later stressor encounters to promote depressive symptoms. Furthermore, the present findings are the first to verify some of the mediators of the intergenerational transmission of IRS effects, as the increased depressive symptoms observed in children of IRS Survivors were shown to be mediated by greater exposure to different types of stressors (adverse childhood experiences, adult traumas, and perceived discrimination). Despite several limitations to the conclusions, including issues of directionality of effects, self selection of the sample, and the relatively small number of participants, the present investigation demonstrates that the impact of [IRS] is not limited to those who attended, but is also manifested in second generation offspring of Survivors. These data also make it clear that government, institutional, and medical services, as well as those originating from First Nations communities and organizations, aimed at promoting mental health and healing for First Nations peoples should not be limited to the direct victims of forced assimilation, but should also be offered to their offspring. Clearly, the past cannot be undone with respect to parenting practices and other factors that may potentially contribute to the intergenerational effects observed. However, the findings raise the possibility that strategies focusing on coping with stressors and on changing conditions that favour stressor exposure in future generations may diminish the otherwise ongoing intergenerational effects of trauma.[84] (emphasis added)

51. The IRS system and its legacy represent a ―collective" or ―historical" trauma.[85] As Dr. Bombay noted, in addition to the cumulative effects of the individual traumas

[81] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 116.
[82] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 118; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 19-20.
[83] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 127-140; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 24-37; see also ―The Impact of Stressors on Second Generational Indian Residential School Survivors", CHRC BOD, Ex. HR-14, Tab 340 [―Impact of Stressors"].
[84] Impact of Stressors, CHRC BOD, Ex. HR-14, Tab 340 at pp. 367-391.
[85] Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 38-46.

suffered at residential schools, there are collective traumas at the family and community level that impact and modify social dynamics, processes, structures, and functioning.[86]

52. This is not the only collective trauma that has impacted Aboriginal people in Canada. For example, the forced relocation and displacement of Aboriginal peoples has been linked to higher levels of substance abuse and depression.[87] It is also important to note that the intergenerational effects of collective trauma are not unique to Aboriginal peoples. The same effects have been shown in other groups/populations that have experienced similar collective race-based trauma that affected a large proportion of the population. Research has consistently found that collective trauma results in greater risk and greater needs amongst these groups.[88]

53. Many of the Commission and Complainants' witnesses testified about the impact of the IRS system on First Nations communities across the country.[89] Chief Robert (Bobby) Joseph, an Elder and IRS survivor, testified about how the system eroded long-standing First Nations' traditions and perspectives on child-rearing.[90] Theresa Stevens, Executive Director of Anishinaabe Abinoojii Family Services in Kenora, Ontario (~~–~~Anishinaabe Abinoojii"), testified about the impact IRS continues to have in the communities she serves:

> MS. STEVENS: […] So if the majority of our on-Reserve families, their parents or grandparents attended residential school and there was that family breakdown or the knowledge of parenting and traditional child-rearing practices, if that knowledge was broken or severed because parents or grandparents were sent to residential school […], it definitely had and continues to have an impact on the children and families.

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[86] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 28-30, 82-85, 94, 127-129, 133, 178-190; see also testimony of Chief Bobby Joseph, Transcript Vol. 43 at p. 50.
[87] Testimony of Dr. Amy Bombay, Transcript Vol. 41 at pp. 13-14, 67-68; see also RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 184.
[88] Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 28-30, 82-85, 94, 111-112, 127-129, 133, 178-190; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 18.
[89] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 119, 127, 135, 172-176; Vol. 2 at pp. 108, 111; Vol. 3 at p. 136; Vol. 46 at pp. 57, 58, 87, 172, 255, 256; Vol. 47 at pp. 53, 91-92, 307-308; see also testimony of Dr. Nicolas (Nico) Trocmé, Transcript Vol. 7 at pp. 175-176; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 60-61; see also testimony of Elsie Flette, Transcript Vol. 21 at p. 66; see also testimony of Theresa Stevens, Transcript Vol. 25 at pp. 29, 68, 80- 84, 89-90; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 70-71; see also testimony of Raymond Shingoose, Transcript Vol. 31 at p. 160; see also testimony of Chief Bobby Joseph, Transcript Vol. 42 at pp. 16, 28, 29, 34-37, 48, 70, 107; Vol. 43 at pp. 34, 40, 44-46, 49, 50, 57, 58-63; see also testimony of Barbara D'Amico, Transcript Vol. 53 at p. 26; see also testimony of Sheilagh Murphy, Transcript Vol. 54 at pp. 50-51; Vol. 55 at p. 75; see also testimony of Phil Digby, Transcript Vol. 59 at p. 149.
[90] Testimony of Chief Bobby Joseph, Transcript Vol. 42 at p. 64.

> We are seeing now the third and fourth generation of those families, so it was like a double impact […].[91]

54. In his Apology, the Prime Minister himself acknowledged the collective trauma and the intergenerational impacts that the IRS system has had on Aboriginal peoples:

> To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.[92]

ii) The Federal Government Takes Over the Provision of Child Welfare on Reserve: the "Sixties Scoop" and Residential Schools as Child Welfare Institutions

a. The "Sixties Scoop"

55. Another example of collective trauma is the large-scale removal of Aboriginal children from their homes in the 1960's and placement in foster care, which is commonly referred to as the "Sixties Scoop".[93] Ms. Stevens stated that many of the communities she serves in northern Ontario were deeply affected by the Sixties Scoop. She described how traumatic it was for First Nations families and communities when buses would drive into the communities and take all the children away.[94]

[91] Testimony of Theresa Stevens, Transcript Vol. 25 at p. 90.
[92] Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.
[93] Testimony of Dr. Amy Bombay, Transcript Vol. 41 at pp. 15-16; see also testimony of Theresa Stevens, Transcript Vol. 25 at pp. 28-29.
[94] Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 28-30, 80-84, 90; see also testimony of Tom Goff, Transcript Vol. 23 at p. 161; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 17; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 20; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 114-115; Vol. 48 at pp. 91-92.

b. Residential Schools as Child Welfare Institutions

56. After 1969, with integration proving to be a challenge, the federal government began to emphasize residential school enrolment for children who could not integrate. Specifically, it was encouraged for children who, in the opinion of AANDC social workers, the provincial Children's Aid Societies and/or the local Indian agent, could not be properly cared for at home.[95]

57. In other words, residential schools were used to house "neglected" children,[96] who were enrolled on a priority basis.[97] As Dr. Milloy noted, the fact that children were being neglected had in part, ironically, been caused by IRS: "[T]he dysfunction created by children who had been to residential school [and] who then [became] parents [was that they found] that their parenting skills [were] lacking, or who suffer[ed] from disabilities, as with the first two parents who [were] excessive drinkers, now separated […]".[98] Indeed, subsequent studies confirmed that neglect is the most common reason that First Nations children are brought into care.[99]

58. Nevertheless, the federal government apprehended "neglected" children and placed them in residential schools, which had effectively become child welfare institutions:

> DR. MILLOY: […] And when I talk about apprehensions, I talk about a definition of neglect made by someone who has the power to remove a child, right, so there is the apprehension process that you are familiar with, which is a court process, right, and there is the apprehension process which is an informal process that the department uses to remove children and place them in residential schools.
>
> […]
>
> These applications for admission to residential school were often not filled out by parents, they were often filled out by the Indian agent who says this child has to go to residential school because the parents are excessive drinkers and incapable of filling out this form, let alone raising their children.

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[95] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 85-86.
[96] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 85-86.
[97] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 149-151, 162-163.
[98] Testimony of John Milloy, Transcript Vol. 35 at pp. 88-89.
[99] *Wen:De* We Are Coming to the light of Day (2005), CHRC BOD, Ex. HR-01, Tab 5 at p. 8 ["*Wen:De* Report Two"]; see also Mesnmimk Wasatek: Catching a drop of light, Understanding the Overrepresentation of First Nations Children in Canada's Child Welfare System: An Analysis of the CIS-2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24 ["FNCIS Report 2003"]; see also CIS-2008 Major Findings Supplementary Tables, CHRC BOD, Ex. HR-07, Tab 92; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

> So there is that sort of informal departmental system which will fade away and become a very formal system of apprehension, within the laws of the given province. White children and First Nations children will be dealt with in the same fashion.[100]

59. As a result, the number of ―neglected" children who were placed in residential schools post-1960 was quite high, representing approximately 75% by 1966.[101] A 1967 research study of nine residential schools in Saskatchewan found that approximately 80% of the children in those schools had been placed there for child welfare reasons, and called for more in-home supports for families in order to avoid having to remove so many children from their homes.[102]

60. Notwithstanding the fact that the IRS system had transitioned from an educational institution to a repository for children taken into child welfare care, it was still chronically underfunded.[103] The lack of federal funding, coupled with the fact that children had to work more and more to produce revenue in order for the schools to survive, had a serious detrimental effect on their education, health and wellbeing.[104]

61. In 1951, the federal government amended the *Indian Act* to extend the application of provincial legislation to First Nations on reserve, including child welfare legislation.[105] The impact of provincial involvement in the provision of child welfare services on reserve is explored further below.

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[100] Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 91-93; see also A National Crime, Ex. AFN-1 at pp. 212-213; see also testimony of Chief Bobby Joseph, Transcript Vol. 42 at p. 45; Vol. 43 at p. 49.
[101] Testimony of Dr. John Milloy, Transcript Vol. 35 at p. 95; see also A National Crime, Ex. AFN-1 at pp. 215-217.
[102] George Caldwell, ―Indian Residential Schools: A Research Study of the Child Care Programs of Nine Residential Schools in Saskatchewan" (1967), CHRC BOD, Ex. HR-12, Tab 268 at pp. 57-69, 148-149.
[103] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 36-37.
[104] Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 143-149.
[105] Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 97-102; see also A National Crime, Ex. AFN-1 at pp. 216-217; see also *Indian Act, supra*, s. 88.

B) First Nations Child Welfare Policies and Funding on Reserve: A History

62. Pursuant to subsection 91(24) of the *Constitution Act, 1867*,[106] the federal government has exclusive legislative authority over ―Indians and Lands reserved for Indians". Subsection 92(7) of the *Constitution Act, 1867* indicates that provincial legislatures have authority over the establishment, maintenance, and management of hospitals, asylums, charities, etc.[107]

63. Section 88 of the *Indian Act* states that laws of general application apply on reserve unless and to the extent that such laws conflict with the *Indian Act* and its treaties.[108]

64. Therefore, the child welfare services that exist for First Nations people living on reserve result from the interplay of both federal and provincial heads of power.

65. Child welfare services are generally defined as a ―mandatory service, directed by provincial and territorial child welfare statutes [… the purpose of which is to investigate] reports of alleged maltreatment, provid[e] various types of counselling and supervision, and [look] after children in out-of-home care".[109] More generally, child welfare refers to ―a set of government and private services designed to protect children and encourage family stability" through the provision of child maltreatment prevention services and least disruptive measures, the aim of which is to ―safeguard children from abuse and neglect."[110]

66. Allegations of abuse and neglect are generally investigated by child welfare agencies, both on and off reserve, which often offer ―services aimed to support families so that they can stay intact and raise children successfully and to remedy risks in families where the child has been removed so reunification can occur."[111]

67. The following is a summary of the federal government's on reserve First Nations child welfare policies and funding formulas.

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[106] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App. II, No 5, s. 91(24) [―*Constitution Act, 1867*"].
[107] *Constitution Act, 1867, supra*, s. 92(7). The decision in *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union,* [2010] 2 S.C.R. 696, 2010 SCC 45 clarified provincial jurisdiction over child and family services.
[108] First Nations Child and Family Services National Program Manual (2005), CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.2.3 [―Program Manual 2005"]; see also *Indian Act, supra*, s. 88.
[109] Canadian Incidence Study 2008 – Major Findings Report, CHRC BOD, Ex. HR-05, Tab 46 at p. 9 [―CIS-2008"].
[110] Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3
[111] Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3

i) AANDC Reimburses Provinces to Deliver Child Welfare Services on Reserve and *Ad Hoc* First Nation Agencies Develop

68. Notwithstanding its legislative authority over Indians and their lands, the federal government has never enacted child welfare legislation.[112] Instead, in the mid-20th century it entered into agreements with provincial governments to deliver child welfare services to First Nations people on reserve.[113]

69. Each province has its own child welfare legislation and standards,[114] so practices varied from region to region.[115]

70. The services provided by the provincial governments were minimal and not delivered in a culturally-appropriate manner.[116] There was also an alarming number of First Nations children being taken into care and removed from their communities.[117] By the early 1980's, First Nation peoples began voicing their concerns and desire to take over the provision of child welfare services on reserve.[118] As a result, *ad hoc* First Nations child welfare agencies began operating on some reserves funded by the federal government; however, funding was inconsistent, unregulated and unclear.[119]

71. The federal government put a moratorium on these *ad hoc* arrangements in 1986, wanting instead to develop a set funding model for First Nations child welfare agencies.[120]

ii) AANDC's First Nations Child and Family Services Program ("FNCFS Program")

72. On July 27, 1989, Cabinet approved a new policy and management framework for a "First Nation Child and Family Service Program" ("FNCFS Program") on reserve.[121]

73. There are two types of agreements that AANDC has developed to "facilitate the provision of child and family services to First Nations children" on reserve: agreements

[112] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.
[113] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.
[114] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 78.
[115] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 11.
[116] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.
[117] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.
[118] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.
[119] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 4, section 1.1.6.
[120] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 4, section 1.1.6.
[121] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20.

with provincial and territorial governments, and comprehensive funding agreements with First Nations child and family services agencies.[122] They are detailed in turn below.

a. Creation of the FNCFS Program

74. The purpose and scope of the FNCFS Program are described in AANDC's "National Social Program Manual" (the "Program Manual").[123] At the time of the complaint, the Program Manual stated that the primary objective of the Program was to "support culturally appropriate child and family services for Indian children and families resident on reserve or [ordinarily resident on] reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province."[124]

75. Since that time, the language of the Program Manual has been amended.[125] The stated purpose of the FNCFS Program is now to provide child welfare services to First Nations on reserve "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".[126]

76. The principle of "reasonable comparability" is not otherwise defined in the Program Manual.[127]

77. AANDC states that "culturally appropriate services are ones which "acknowledge and respect the values, beliefs and unique cultural circumstances" of First Nations peoples and the communities served.[128]

78. For the purpose of the FNCFS Program, "ordinarily resident on reserve" is defined as an individual who lives: (i) at a civic address on reserve, or (ii) on reserve more than 50% of

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[122] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 43.
[123] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 5-6, section 1.3; see also National Social Programs Manual (2012), CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1 ["Updated Programs Manual 2012"].
[124] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2.
[125] To the extent there are inconsistencies between versions of documents entered into evidence before the Tribunal, the Commission submits that the Tribunal ought to give more weight to versions which pre-date the complaint. For example, see e-mail from Barbara D'Amico to Beverly Lavoie dated June 11, 2010, CHRC BOD, Vol. 14, Tab 386; see also e-mail from Joel Dei to William McArthur dated October 15, 2013, CHRC BOD, Ex. HR-15, Tab 455.
[126] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.
[127] House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 3, 6-8 (Sheila Fraser, Auditor General of Canada).
[128] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.3.

the time.[129] Therefore, the residency of a child's parent or guardian at the time they are taken into care determines whether they are "ordinarily resident on reserve", and therefore a federal government responsibility.[130] First Nations children who are living off reserve in order to access educational, medical or other social services not otherwise available on reserve are still considered to be "ordinarily resident on reserve".[131] Additionally, all children in the Yukon Territory are considered to be eligible for the purposes of the FNCFS Program.[132]

79. The Program Manual sets out AANDC's responsibilities for the social development programs it offers, including the FNCFS Program, as follows:

- to provide funding to eligible funding recipients as authorized by approved policy and program authorities;
- to lead the development of policy and provide policy clarification to eligible funding recipients;
- to provide oversight to ensure programs operate according to authorities and Canada's financial management requirements, by ensuring reporting and accountability requirements are met; and
- to further articulate regional processes and procedures necessary to implement the national manual.[133]

80. In carrying out its responsibility to oversee, manage and monitor First Nations' social development programs, AANDC conducts compliance reviews to ensure that "activities and expenditures comply with the program terms and conditions."[134] Compliance activities can involve on-site reviews of children in care and foster home files, employee interviews and discussions with individuals responsible for making decisions and or

[129] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.
[130] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.
[131] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.
[132] Funding Agreement – Government of Yukon 2011-2012, CHRC BOD, Ex. HR-13, Tab 305 at pp. CAN012193_0021-CAN012193_0024.
[133] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2.
[134] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also AANDC, "Contributions to support culturally appropriate prevention and protection services for Indian children and families resident on reserve – Renewal" (2007-2012), CHRC BOD, Ex. HR-11, Tab 236; see also AANDC, "Contributions to support culturally appropriate prevention and protection services for Indian children and families resident on reserve – Renewal" (2007-2012), CHRC BOD, Ex. HR-13, Tab 324.

approving program expenditures.[135] According to the Program Manual, failure to ―comply with these requirements constitutes a default of the funding agreement", and may result in ―immediate cash flow restrictions [or] denial to renew an agreement or program activity".[136]

81. The Program Manual also describes the limitations of its social development programs, specifically that eligible expenditures are restricted to those within AANDC's authorities and mandate, as well as by provincial/territorial legislation, guidelines and rates.[137]

82. Funding is flowed from AANDC Headquarters to AANDC regional offices, and then to First Nations child and family service agencies and/or the province/territory, respectively.[138] Each region is ―responsible for managing [its FNCFS Program] budget and prioritizing how funds are allocated."[139]

b. AANDC Designs and Implements Directive 20-1

83. AANDC implemented the FNCFS Program on reserve by issuing ―Directive 20-1", which came into effect on April 1, 1991.[140] Its stated purpose is to set out AANDC's ―policy regarding the administration of the [FNCFS Program]".[141]

84. The underlying principle of Directive 20-1 is a commitment to the ―expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances."[142] In addition, services are to be provided in accordance with the applicable provincial child and family services legislation in each region.[143]

[135] Updated Program Manual 2012, CHRC BOD, Ex. HR-13,Tab 272 at p. 11, section 13.0; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 97-113, Appendix C; see also letter from AANDC to Mi'kmaw Family and Children's Services dated February 28, 2011, CHRC BOD, Ex. HR-12, Tab 258.
[136] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0.
[137] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 7, section 5.0.
[138] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 5.4.1.
[139] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 5.4.1.
[140] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20; see also Program Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 9, section 16.0 [―Directive 20-1"].
[141] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 1, section 1.0.
[142] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 2, section 6.1.
[143] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 3, section 6.5.

85. Directive 20-1 was designed in 1988, and has not been significantly modified since that time.[144] It continues to apply in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory.[145]

86. Directive 20-1 provides funding to First Nations child and family service agencies in two separate streams: "operations" and "maintenance".[146]

b.i. Operations

87. Operations funding, which "covers all aspects of the agency's operations" or administrative costs,[147] is provided annually to First Nations child and family service agencies using a formula created by AANDC and set out in Directive 20-1.[148] AANDC "provides a fixed level of funding for [an agency's] operational costs based primarily on the previous year's" on reserve child population aged 0 to 18 years.[149]

88. The Program Manual sets out that the following activities are to be funded out of an agency's fixed operations budget:

- salaries and benefits;
- travel expenses;
- staff training and other professional development service (i.e., workshops, conferences);
- fee for service, including foster and adoption home assessments;
- legal services related to both agency operations and court costs incurred as a result of a child's apprehension;
- insurance;
- rent, utilities and/or mortgage;

[144] Updated Program Directive 20-1 (2005), CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1 ["Updated Directive 20-1"]; see also Comparison of Program Directives, CHRC BOD, Ex. HR-07, Tab 96; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.
[145] AANDC Power Point, "AANDC's Role as a Funder in FNCFS" (May 2013), CHRC BOD, Ex. HR-12, Tab 246; see also e-mail from Mary Quinn to Michael Wernick dated March 25, 2009, CHRC BOD, Ex. HR-13, Tab 317; see also AANDC Briefing Note, "How First Nation Child and Family Services (FNCFS) Works in Each Region", Respondent's Book of Documents ["Respondent's BOD"], Ex. R-13, Tab 5.
[146] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.4.1.
[147] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.
[148] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.
[149] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 88-89.

- IT equipment, rentals and supports;
- janitorial services;
- expenses related to Board of Directors and other committee operations;
- off-hour emergency services;
- special needs assessment and testing for children;
- audits, monitoring and evaluation (i.e., the cost of preparing agency evaluations); and
- para-professional, family support and prevention services, including in-home services.[150]

89. AANDC has fixed the costs associated with the above-noted services in Directive 20-1.[151] For example, legal services for First Nations child and family service agencies are capped at $5,000 per year under Directive 20-1.[152]

90. The above-noted list is not exhaustive,[153] and over time AANDC has added certain activities to the list as ―eligible operations costs" without providing a corresponding increase in operations funding for First Nations child and family services agencies to cover those costs.[154] For example, insurance, IT equipment and janitorial services were not included in an earlier iteration of the Program Manual, but are listed in the latest version from AANDC.[155]

91. AANDC's formula to determine the amount of operations funding per First Nations child and family service agency is ―based on the on reserve population of children from 0 – 18 as reported annually by [AANDC's] Lands Revenues and Trusts" based on the

[150] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 83.
[151] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered).
[152] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 6.
[153] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2.
[154] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33, 88-92; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 83 (see original list of items included under Directive 20-1's operations funding stream).
[155] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5.

population data of each band across Canada as of December 31 for the preceding year.[156] Each agency's operational funding amount is calculated by AANDC Headquarters' Finance Branch.[157]

92. There are four (4) components to AANDC's operations funding formula: (i) an administrative allocation; (ii) an allocation per member band; (iii) an allocation per child; and (iv) a remoteness adjustment.[158] The calculation of these funding components is detailed below.

93. First, agencies are eligible to receive an administrative allocation based on the size of their child population.[159] The maximum possible administrative allocation is $143,158.84.[160] This figure has remained unchanged since April 1, 1991, when Directive 20-1 first came into effect.[161] As an agency's total on reserve child population (aged 0 to 18 years) decreases, so too does their administrative allocation:

- a child population of 801 to 1,000 results in $143,158.84 administrative allocation;
- a child population of 501 to 800 results in $71,579.43 administrative allocation;
- a child population of 251 to 500 results in $35,789.10 administrative allocation; and
- a child population of 0 to 250 results in $0.00 administrative allocation.[162]

94. Second, agencies are eligible to receive a fixed allocation of $10,713.59 for each member band in their catchment area, which is defined as the ~~–~~geographic area for which the

[156] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-13, sections 19.0, 20.0.
[157] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.
[158] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.2.4; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1.
[159] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1.
[160] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1.
[161] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1.
[162] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2.

reference province or territory grants a mandate" to a First Nations child and family service agency.[163]

95. Third, agencies are eligible to receive an allocation of $726.91 per child aged 0 to 18 years in their catchment area.[164]

96. Fourth, and finally, agencies are eligible to receive an adjustment based on the remoteness factor of each member band, which is then averaged and used to adjust funding as follows:

- the adjustment factor for remoteness is multiplied by $9,235.23;
- the remoteness factor is multiplied by $8,865.90 times the number of bands within the agency's catchment area;
- the child population (0 to 18 years) is multiplied by $73.65 times the remoteness factor.[165]

97. Taken together, these four components make up an agency's operations funding under Directive 20-1, which is provided to First Nations child and family service agencies as a "Flexible Transfer Payment". In other words, agencies have "full authority to set [their own] priorities to be funded (within the sphere of the [FNCFS Program] so long as the mandate to protect children from neglect and abuse is met."[166]

98. The Program Manual states that First Nations child and family services agencies are "required to provide reports [on their operations] twice per year, effective September 30 and March 31", which "clearly indicate that the terms and conditions of the agreement have been met and that the [agency] continues to provide the service for which it is mandated."[167] These reports can include the following:

- a list of protection and prevention services provided;
- the number of families for whom protection services have been provided;
- the number of families in which child protection intervention resulted in the placement of children in alternate care;

[163] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 48, section 7.
[164] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.2.
[165] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 22-23, section 3.2.3.
[166] Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1(f).
[167] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.6.

- the number of families in which parent aide services were used for child protection purposes;
- the average length of stay for children in alternate care by age;
- reasons for children coming into care (neglect or abuse);
- the current number of trained or approved foster homes;
- the number of children placed in off-reserve resource;
- the number of approved adoption homes;
- the amount being spent on prevention as compared to protection;
- the number of children included in the families served (per service provided);
- the number of community-based child and family services committees active;
- the number of Elders committees currently operating;
- the number of public information, education-related sessions and workshops held during the period in question; and
- the types of workshops held and the number of attendees.[168]

b.ii. Maintenance

99. Maintenance funding is provided to First Nations child and family service agencies to ~~c~~over costs related to maintaining a child in alternate care out of the parental home, within AANDC authorities."[169]

100. AANDC does not apply a formula to determine maintenance funding under Directive 20-1.[170] Rather, it reimburses agencies based on the actual costs of <u>eligible</u> expenditures on a ~~d~~ollar-for-dollar basis."[171]

[168] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 40-41, sections 6.2.2, 6.2.4.
[169] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2.
[170] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.
[171] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.

101. Items AANDC deems "eligible" for reimbursement under maintenance are outlined in the Program Manual,[172] and include:

- the full costs of foster, group, institutional and kinship care[173] in accordance with provincially established rates "up to a maximum daily per diem allowable as set by AANDC authorities";[174]
- non-medical services to children in care with behavioural problems and specialized needs;
- purchases on behalf of children in care;
- other provincially-approved purchases not covered by other federal/provincial funding sources;
- post-adoption subsidies and supports; and
- professional services not covered by other jurisdictions or by Health Canada's Non-Insured Health Benefits Program.[175]

102. When provincial or territorial rates for foster, group and institutional care increase or decrease, AANDC is responsible to adjust an agency's maintenance funding accordingly.[176]

103. As soon as a child is taken into care (either by apprehension or by voluntary agreement with the child's guardian), the First Nations child and family service agency must notify AANDC of their action "in accordance with established regional practice"[177] in order to verify whether the child is a "federal responsibility" (i.e., if the child is registered or eligible to be registered as a Status Indian, is under the age of majority in the reference province/territory and whose custodial parent was ordinarily resident on reserve at the time).[178] The information AANDC requires is as follows:

- the child and his/her parents along with the relevant Indian Status number(s);

[172] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 15-18, 23, sections 2.3, 3.3.1.
[173] Kinship care is defined in the Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.15: "An alternate residence for a Child in Care, regulated in accordance with the standards of the reference province of territory, similar to a foster home but involving the use of the extended family of the Child in Care."
[174] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2.
[175] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at pp. 35-36, section 3.4.1.
[176] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.3.
[177] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 42, section 6.4.1.
[178] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 42-43, section 6.4.2.

- whether or not the custodial parent/guardian was ordinarily resident on reserve at the time of the apprehension;
- the birth date and gender of the child;
- whether the placement is an apprehension, a voluntary placement or a private placement under provincial or territorial legislation and standards;
- the level of care which the child is deemed to require; and
- if the rate for foster, group or institutional care is above the basic provincial/territorial rate, a statements signed by a qualified social workers confirming the level and rate required.[179]

104. The federal government has placed conditions and limits on maintenance funding under Directive 20-1. For example, the Program Manual states that AANDC will only reimburse maintenance expenses if the placement (i.e., foster home, group home and/or institution) is ―licensed or regulated and monitored in accordance with provincial legislation and standards."[180]

105. AANDC also explicitly prohibits certain items from being eligible for reimbursement under the maintenance component of Directive 20-1.[181] For example, the Program Manual defines the following items as ―non-eligible expenditures for maintenance":

- insured health services under the authority of provincial/territorial guidelines; and
- program areas which fall under the authority of other jurisdictions such as another AANDC Program, other federal departments, provinces of territories.[182]

106. Finally, the continuation of AANDC funding under Directive 20-1 is contingent upon its verification of an agency's maintenance expenditures through ―monthly reconciliations".[183] The Program Manual states that agencies must submit monthly invoices (otherwise known as ―monthly maintenance reports") to AANDC regional offices ―within 15 calendar days of month end."[184] The items listed in the invoice are then reviewed by AANDC and deemed ―eligible" or ―ineligible" maintenance expenses.

[179] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 42, section 6.4.1.
[180] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 15, section 2.3.3.
[181] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4.
[182] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.4.2.
[183] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 15, section 2.3.1.
[184] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.4.

107. The purpose of these reports is to ―review expenditures paid for services provided for eligible children […] to verify eligible expenses for billing purposes and to provide activity level indicators which AANDC uses for trend analysis."[185] The information required by AANDC includes: the child's name and province/territory of residence; the child's Indian Registry System number; the child's gender and date of birth; the child's child welfare and/or legal status (i.e., type of care); the number of days the child has been in care; the child's placement type; the applicable placement rates; the cost of ―additional" services, including child care support, clothing, therapy/assessment, etc.; and a description of each expense and associated cost.[186]

108. In reconciling monthly maintenance invoices, AANDC examines the charges and, according to the Program Manual, will approve them so long as they are ―in line with the provincial or territorial [per diem] rates for the level of care for which the child has been assessed".[187]

109. If the charges exceed the provincial or territorial per diem rates, AANDC requires First Nations child and family service agencies to ―itemize the additional charges and justify them."[188] AANDC then ultimately determines whether ―these additional costs are in line with [its FNCFS Program] authorities."[189] If AANDC decides that the charges as ―excessive", they ―must reject that portion of the claim that is in dispute and advise the [agency] accordingly".[190]

110. Maintenance funding under Directive 20-1 is provided to First Nations child and family services agencies as a ―Contribution Payment". In other words, it is a ―conditional transfer payment to an [agency] for a specified purpose pursuant to a Contribution Agreement that is subject to being accounted for and audited."[191]

111. AANDC develops an agency's maintenance budget at the beginning of each fiscal year ―based on verified expenses from the previous fiscal year and anticipated expenses for

[185] AANDC Website, ―Child and Family Services Maintenance Report – Form Instructions", CHRC BOD, Ex. HR-14, Tab 358 at pp. 1-4.
[186] AANDC Website, ―Child and Family Services Maintenance Report – Form Instructions", CHRC BOD, Ex. HR-14, Tab 358 at pp. 2-4.
[187] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.
[188] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.
[189] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.
[190] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.
[191] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 5.2.3.

the new fiscal year."[192] Funding is then advanced to the agency on a ~~-m~~monthly basis taking into consideration the level of expenses claimed in the [agency's monthly maintenance] reports".[193]

112. According to the Program Manual, once AANDC has verified an agency's monthly maintenance report, ~~-a~~djustments [are] made to the subsequent month's advance to bring the total amount advanced in line with the year to date actual eligible expenses."[194]

b.iii. Assumptions in the Calculation of Funding under Directive 20-1

113. Directive 20-1 was designed by AANDC in 1988.[195] Inherent in the formula are two assumptions. First, that each First Nations child and family service agency has an average of 6% of the on reserve total child population in care.[196] Second, that each agency has an average of 20% of on reserve families requiring services (or ~~-c~~lassified as multi-problem families").[197]

114. The 6% assumption operates all across Canada with the exception of Manitoba, where the assumption is that 7% of on reserve First Nations children are in care.[198]

115. The formula has not been significantly modified since 1988, and still operates based on these assumptions.[199]

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[192] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.2.
[193] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.3.
[194] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.3.
[195] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 1.
[196] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 97-98; see also AANDC Power Point, ~~-F~~irst Nations Child and Family Services Program: The Way Forward" (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 23.
[197] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.
[198] Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 19.
[199] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 14-16.

b.iv. Scale of First Nations Child and Family Service Agencies

116. AANDC's Program Manual states that Directive 20-1 is designed ~~–b~~based on an economy of scale whereby each eligible funding recipient should serve at least 801 children (0-18 years of age)."[200] In contrast, AANDC's updated version of Directive 20-1 states that each agency ~~–s~~hould serve at least 1,000 children (0-18 years of age)."[201]

117. However, both the Program Manual and the updated version of Directive 20-1 state that AANDC recognizes that ~~–in~~ exceptional circumstances this may be impossible and consideration for funding may be given for funding a smaller [agency] should [they] demonstrate the need based on" the following considerations:

- geographic reasons why they cannot belong to a larger agency, noting that isolation and remoteness may impede operational efficiency and effectiveness;
- the existence of cultural contrasts and extreme differences that would not support effective working relationships; and
- existing groupings and administrative arrangements for the service delivery of other social programs that could be used to deliver FNCFS services in a cost-effective manner.[202]

118. Notwithstanding the fact that AANDC explicitly allows for exceptions to its set minimum of 801 (or 1,000) children served, in at least some provinces it has decided not to permit the creation of any more small agencies.[203]

b.v. Children's Special Allowance

119. The Children's Special Allowance (the ~~–C~~SA") is a ~~–f~~ederal benefit paid [by the Canada Revenue Agency] on behalf of children who are in the care of provincial, territorial, or First Nation child welfare authorities."[204]

120. Directive 20-1 requires that First Nations child and family service agencies apply for the CSA within 30 days of bringing a child into care.[205] AANDC also requires that agencies

[200] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4.
[201] Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 55, section 8.1; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 5-6, section 9.1(a).
[202] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 56, section 8.1(a).
[203] AANDC Briefing Note ~~–1~~016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280 at p. 3 (unnumbered).
[204] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 32, section 2.1.7.

apply the amount of CSA received per child against the eligible maintenance expenses for that child, and that they ―document the use of these funds".[206]

b.vi. Comprehensive Funding Agreements

121. In order to flow funds to First Nations child and family service agencies under Directive 20-1, AANDC enters into comprehensive funding agreements (a requirement of the Treasury Board Policy on Transfer Payments).[207] These agreements are legal documents that cover a one-year period, and set out the components, conditions and terms of funding.[208]

122. For example, the agreements set out that under Directive 20-1, agencies are required to absorb any deficits they may incur, and use all surplus money for activities related to the FNCFS Program.[209]

b.vii. AANDC's Reporting Requirements and Compliance Activities

123. AANDC's Program Manual and comprehensive funding agreements also set out the ―deliverables" or reporting requirements of the agencies, including monthly maintenance reports and bi-annual operations reports, as previously described.[210]

124. In addition, AANDC requires First Nations child and family service agencies to provide ―annual financial statements", conducted by an independent auditor, within 120 calendar days of the end of the fiscal year.[211]

125. The Program Manual also states that a requirement of funding is that AANDC conducts ―on-site reviews" at least ―once every three years", and more frequently than that if

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[205] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 62, section 20.1(e).
[206] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 62, section 20.1(f); see also letter from AANDC (Manitoba Region) to Executive Directors of First Nation Child and Family Service Agencies in Manitoba (undated), CHRC BOD, Ex. HR-14, Tab 347; see also e-mail from Debbie Graham to Carol Schimanke et al. dated April 18, 2008, CHRC BOD, Ex. HR-15, Tab 450: At one time, AANDC reduced a First Nations child and family service agency's maintenance budget by the amount of Children's Special Allowance they received.
[207] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 26, section 4.4.1.
[208] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 27, section 4.4.7.
[209] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 26, section 4.4.1.
[210] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8; see also Funding Agreement National Model 2012-2013, CHRC BOD, Ex. HR-09, Tab 152 at pp. 3-4, sections 7, 11; see also Funding Agreement Saskatchewan Regional Model 2012-2013, CHRC BOD, Ex. HR-09, Tab 181 at pp. 3-4, sections 7, 11; see also Funding Agreement for Mi'kmaw Family & Children's Services of Nova Scotia 2013-2014, CHRC BOD, Ex. HR-10, Tab 197 at pp. 3-7, sections 7, 11.
[211] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 39, section 6.1.1.

agencies "show large variances" in their maintenance reporting.[212] A review team including officials from AANDC and/or the province/territory and First Nations child and family service agency conduct the on-site reviews, the purpose of which is to:

- confirm client (i.e., children and/or families') eligibility;
- enable AANDC to meet its accountability responsibilities for the expense of public funds; and
- determine and ensure compliance with provincial rates and the FNCFS Program's maximum allowable amounts.[213]

126. In order to satisfy the above requirements, the on-site review team will review case files, foster parent files, the administrative office practices (including accounting for payments), and the licensing and regulation of group homes and institutions.[214] Failure to comply with these reporting requirements can result in the delay or termination of funding by AANDC.[215]

iii) AANDC Reviews its FNCFS Program and Directive 20-1

127. Since it came into effect over twenty years ago, the FNCFS Program and Directive 20-1 have been reviewed many times by AANDC as well as external third parties. The following is a summary of the reviews of the FNCFS Program and Directive 20-1 in which AANDC participated.

a. The National Policy Review (2000) finds that AANDC's FNCFS Program and Directive 20-1 are Flawed and Inequitable

128. After "several years of experience" implementing the FNCFS Program and Directive 20-1, First Nations child and family service agencies "became increasingly critical" of various financial and policy aspects of the Program.[216]

129. Therefore, in the fall of 1999, AANDC and the AFN jointly undertook to carry out a review of the FNCFS Program and Directive 20-1.[217] The result of that research, which

[212] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 41, section 6.3.4.
[213] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 44-45, sections 6.5.3, 6.5.4.
[214] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 45, section 6.5.5.
[215] Notification of Overdue Reporting Requirements, CHRC BOD, Ex. HR-08, Tab 131; see also testimony of William McArthur, Transcript Vol. 64 at pp. 43-48.
[216] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81.
[217] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 7, 82.

was conducted between March 1, 1999 and March 31, 2000, was the Joint National Policy Review Final Report (the "NPR"), dated June 2000.[218]

130. The principal objectives of the NPR were to examine legislation and standards, agency governance, funding and communication issues, and to: (i) identify and record areas of concern with respect to required changes to AANDC's FNCFS Program; (ii) prepare a report presenting an analysis of the issues and making recommendation for changes to the FNCFS Program; and (iii) recommend an action plan and timeline to address the concerns.[219]

131. Ultimately, the NPR found that AANDC's FNCFS Program and Directive 20-1 were flawed and inequitable, for the reasons that follow, and recommended that a new policy and funding formula be developed jointly by AANDC and First Nations to replace Directive 20-1 and address the many areas of concern.[220]

132. The NPR found a number of flaws specifically related to AANDC's funding of First Nations child and family service agencies.[221]

133. First, the Directive 20-1 funding formula "provides the same level of funding to agencies regardless of how broad, intense or costly" the range of services are, making it difficult for agencies to provide a comparable range of services on reserve due to, among other things, insufficient funding for agency staff.[222] Further, Directive 20-1 "does not provide enough flexibility for agencies to adjust to changing conditions."[223]

134. Second, AANDC's failure to define eligible maintenance expenditures in Directive 20-1 results in "considerable variance in the definition of maintenance from region to region", and an inability to link funding to "provincial legislation, policies and practice standards" directly.[224] As a result, agencies reported that AANDC rejected maintenance expenses claimed for First Nations children in care that ought to have been reimbursed in accordance with provincial/territorial legislation and standards, including: "parent aide,

[218] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 7.
[219] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 8.
[220] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 18.
[221] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 98-99.
[222] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13, 65.
[223] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 70.
[224] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

legal fees/court appearance, counselling/therapy assessments, travel, special needs, regular maintenance, services for families (respite), foster parent training, services to the disabled, repatriation, youth services, etc."[225] Furthermore, the NPR found that an earlier evaluation conducted by AANDC in 1995 had also "concluded that the definition of maintenance should be clarified", but that "no national changes" had been made since that time.[226]

135. Third, AANDC's funding formula is too "rigid and unilateral" and does not allow for adjustments for: increases in the number of children coming into care (i.e., escalating maintenance expenditures); cost-sensitive items; the development of new provincial/territorial programs; or routine price adjustments for remoteness and/or the cost of living.[227]

136. Fourth, there is considerable variance in how Directive 20-1 is implemented from region to region, resulting in the inequitable and inconsistent application of the FNCFS Program and funding formula. Furthermore, the NPR concluded that these regional deviations do not "always support sound social work practice."[228]

137. Fifth, Directive 20-1 "does not provide a realistic amount of per organization funding" for small agencies.[229] This impacts an agency's "ability to deliver a range of services", and is often compounded by remoteness: "The smaller the agency, the more difficult it is to have the staff size, or level of expertise to provide a full range of services."[230]

138. Sixth, the funding available under the FNCFS Program is limited because of the maximum annual budgetary increase of 2%, which falls far short of the annual increases in First Nations child and family service expenditures.[231] In fact, the research conducted by AANDC and the AFN concluded that as of March 31, 1999, the "average per capita per child in care expenditure of the [AANDC] funded system is 22% lower than the average of the selected provinces."[232] This is alarming given that "studies suggest that

[225] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 84.
[226] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 13.
[227] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.
[228] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.
[229] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.
[230] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 14, 97.
[231] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.
[232] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 14, 94.

the need for child welfare services on reserve is 8 to 10 times [greater] than off reserve."[233]

139. Finally, with respect to legislation and standards, the NPR concluded that while First Nations child and family service agencies are required to ~~-c~~omply with the same administrative burden created by change in provincial legislation", they have ~~-n~~ot received any increased resources from [AANDC] to meet those responsibilities."[234] This contradicts the stated objective of the FNCFS Program to expand services on reserve to a level comparable to the services provided off reserve in similar circumstances.[235]

140. As a result of the findings of its review, the NPR made 17 recommendations to AANDC on how to address the flaws and inequities in the FNCFS Program and Directive 20-1.[236]

141. The three key recommendations of the NPR were as follows:

- that AANDC investigate the funding formula in Directive 20-1 because it is not flexible and is outdated, and that a new methodology be developed considering and addressing the following factors:
  - gaps in the operations formula;
  - adjustments for remoteness;
  - establishment of national standards;
  - establishment of an average cost per caseload;
  - establishment of caseload/workload measurement models;
  - ways of funding a full service model;
  - liability issues;
  - developmental costs;
  - development and maintenance of information system and technological capacity;
  - national demographics;
  - the impact on large and small agencies;
  - economies of scale;
- that AANDC seek funding to support prevention programming in accordance with provincial/territorial legislation, which is not adequately funded under Directive 20-1; and
- that AANDC immediately undertake a tripartite review of the provision of child and family services on reserve in the province of Ontario, pursuant to the 1965 Agreement.[237]

[233] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95.
[234] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 12.
[235] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 12.
[236] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

142. In response, AANDC noted that the NPR was "useful in highlighting a number of areas that need further work", and promised to "take a more in-depth look" at the issues of concern raised in the report.[238]

143. The NPR led to the establishment of the Joint National Policy Review National Advisory Committee (the "NAC") in 2001.[239] The NAC was comprised of officials from AANDC, the AFN and First Nations child and family service agencies.[240] One of the tasks of the NAC was to "explore how to change parts of [Directive 20-1] in line with the NPR recommendations."[241]

b. The *Wen:De* Reports (2005) find that AANDC's FNCFS Program and Directive 20-1 are Flawed and Inequitable

144. Following the release of the NPR final report in 2000 and the creation of the NAC in 2001, AANDC and other members of the NAC commissioned further research in order to establish that revisions to the FNCFS Program and Directive 20-1 were warranted. The NAC had the ability to review and approve the content of the report.[242]

145. Therefore, in May 2004 the NAC requested that the Caring Society "engage a skilled team of econometricians and related experts to identify at least three funding formula options for First Nations child and family service agencies".[243] AANDC provided "funding support" for the work,[244] and the result was three reports which were released over the course of a year and a half, collectively referred to as the "*Wen:De* reports": (i) Bridging Econometrics and First Nations Child and Family Service Agency Funding:

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[237] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121; see also Memorandum of Agreement Respecting Welfare Programs for Indians, CHRC BOD, Ex. HR-11, Tab 214 at p. 1 ["1965 Agreement"].
[238] Letter from the Honourable Robert D. Nault to AFN National Chief Mr. Matthew Coon Come dated August 7, 2001, CHRC BOD, Ex. HR-06, Tab 76.
[239] Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report (2004), CHRC BOD, Ex. HR-01, Tab 4 at p. 4 ["*Wen:De* Report One"]; see also Final Terms of Reference: Joint AFN/INAC National Advisory Committee on the Implementation of the First Nations Child and Family Services Policy Review (2001), CHRC BOD, Ex. HR-07, Tab 91.
[240] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4; see also testimony of Jonathan Thompson, Transcript Vol. 6 at p. 10.
[241] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4.
[242] Testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 9, 12-13.
[243] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4.
[244] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 5.

Phase One Report (2004);[245] (ii) *Wen:De* We Are Coming to the Light of Day (2005);[246] and (iii) *Wen:De* The Journey Continues (2005).[247]

146. An ~~–in~~terdisciplinary research team including experts in economics, First Nations child and family services, sociology, substance misuse, community development, management, public administration, management information systems, psychology and law" was assembled in order to carry out the work and prepare the reports.[248]

b.i. The First Wen:De Report (2004)

147. The first *Wen:De* report found that Directive 20-1 was flawed and inequitable, and that funding provided to First Nations child welfare agencies was not based on ~~–a~~ determination of need but rather on population levels", resulting in ~~–s~~ignificant regional variation in [its] implementation".[249]

148. The report also confirmed that the ~~–c~~oncerns and challenges expressed by the agencies reflected the [17] recommendations made in the [NPR]", including lack of funding for: prevention services, legal services, price adjustments, remoteness adjustments, management information systems, capital costs, culturally based programs, caregivers, staff salaries and training opportunities, as well as a general lack of comparability to programs and services offered by the provinces.[250]

149. In conclusion, the report stated that the ~~–im~~mediate redress of inadequate funding [is] necessary to support good social work practice", and set out three options for re-designing Directive 20-1:[251]

> Option One:
> AANDC could re-design the existing structure of Directive 20-1 to address the shortcomings and concerns noted in the NPR and through interviews with agencies conducted by the *Wen:De* research team.[252]

[245] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4.
[246] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5.
[247] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6.
[248] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 9.
[249] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 5.
[250] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 6, 8.
[251] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 6-14.
[252] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 7-11.

> Option Two:
> AANDC could provide funding in the same manner and at the same level as is done in each province/territory.[253]
>
> Option Three:
> AANDC could support the development of a First Nations funding model ~~–b~~based on community needs and assets [...] rooted in the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve."[254]

b.ii. The Second Wen:De Report (2005)

150. The second *Wen:De* report delved into an analysis of each of the three options for re-designing Directive 20-1 and concluded that option three – a First Nations funding model – was ~~–th~~e most promising" because it would allow AANDC and First Nations to re-conceptualize the ~~–p~~edagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children."[255]

151. The report also examined a number of issues with respect to the overrepresentation of First Nations children in the child welfare system[256] and the shortcomings of the funding formula itself, all of which will be dealt with in turn below.

152. Overrepresentation of First Nations Children in Care: The report examined the over-representation of First Nations children in care and the underlying factors that bring them into contact with the child welfare system.[257] As of 2005, there were ~~–a~~pproximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940's."[258] Furthermore, First Nations children are ~~–re~~moved at disproportionate rates due to neglect", which is primarily a result of ~~–p~~overty, poor housing and substance misuse".[259]

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[253] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 11-12.
[254] *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 12-13.
[255] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8.
[256] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 1-14.
[257] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 13-15.
[258] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8.
[259] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8; see also see also National Aboriginal Economic Development Board, ~~–R~~ecommendations on Financing First Nations Infrastructure" (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also AANDC Briefing Note, ~~–C~~omparability of Provincial and AANDC Social Programs Funding" (2008), CHRC BOD, Ex. HR-14, Tab 351; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 5

153. Ultimately, the report found that the ―present funding formula provides more incentives for taking children into care than it provides support for preventative, early intervention and least intrusive measures."[260] This is compounded by ―existing service deficits within the government and voluntary sector" on reserve make it more difficult to provide an ―adequate range of neglect focused services".[261] There are also ―far fewer provincial or municipal government services" available on reserve as compared to off reserve, meaning that on reserve ―First Nations families are less able to access child and family support services".[262]

154. The report concluded that the serious lack of AANDC funding for prevention services and least disruptive measures under Directive 20-1 also contributed to the ―unfavourable conditions" that exist for First Nations families and children on reserve.[263]

155. As a result of these factors and the greater needs of First Nations children on reserve, the report found that ―First Nations children on reserve were [2.5] times more likely to be placed in child welfare care than non Aboriginal children", experiencing ―placement rates of 15% as compared to 6% for non Aboriginal children."[264] As well, Aboriginal children were found to be ―more likely to require on-going child welfare services" and ―more likely to be brought to child welfare court."[265]

156. Therefore, the report concludes that ―it is apparent that one should expect the cost of providing services to Aboriginal children to be significantly higher given that these cases involve a significantly higher rate of intervention at every point of contact."[266] Furthermore, the ―disproportionate need for services amongst First Nation children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation."[267] (emphasis added)

(Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, Aboriginal Affairs and Northern Development Canada [―AANDC"]).

[260] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 114.

[261] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 62-63.

[262] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14.

[263] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14.

[264] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15.

[265] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 84.

[266] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15.

[267] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 7.

157. Lack of AANDC Funding for Prevention Services: The report identified "best practices" in the area of prevention and/or least disruptive measures, and considered the adequacy of funding for these services under Directive 20-1.[268]

158. There are three types of prevention services and/or least disruptive measures: (i) primary prevention, which is "defined as the range of population based or community development services provided to prevent child maltreatment"; (ii) secondary prevention, which are "services provided to children at risk of experiencing child maltreatment"; and (iii) tertiary prevention, which are services provided to "children who are at significant risk or are experiencing child maltreatment."[269] Generally, provincial child welfare legislation requires that primary, secondary and tertiary prevention services must "be exhausted prior to considering the removal of [a] child from her/his family."[270] In other words, removing a child from their family home should be the absolute last resort.[271]

159. However, the report found that AANDC's Directive 20-1 "inadequately invests in prevention and least disruptive measures."[272] In fact, the report concluded that the structure and design of the funding formula creates a perverse incentive for First Nations child and family service agencies to remove First Nations children from their homes because it provides dollar-for-dollar reimbursement of "maintenance" expenditures (or the costs for services required after a child is taken into care).[273] As a result, there "are more resources available to children who are removed from their homes than for children to stay safely in their homes."[274]

160. In addition, First Nations child and family service agencies reported AANDC having "disallowed prevention based expenditures" that were billed as maintenance.[275] AANDC's view is that funding for prevention services is provided under the fixed operations budget in Directive 20-1.[276] However, the report notes that this puts agencies

[268] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 18-21.
[269] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 18.
[270] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 18.
[271] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.
[272] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.
[273] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.
[274] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.
[275] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.
[276] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 13-14, sections 2.2.2, 2.2.3; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1,

in an impossible situation because ―they have inadequate funds in the operations pool to pay for these services", but AANDC will ―disallow the expenditure if it [is] billed under maintenance."[277]

161. As a result, the report concludes, First Nations children served by these agencies ―are denied an equitable chance to stay safely at home due to the structure and amount of funding under [Directive 20-1]. In this way, [Directive 20-1] really does shape practice – instead of supporting good practice."[278]

162. In the end, the report found that First Nations child and family service agencies required flexibility and ―sustainability in funding […] to support prevention programs which respond to the range of risk factors affecting child safety", and called on AANDC to provide a ―separate budget for least disruptive measures" and prevention services.[279]

163. Jurisdictional Disputes: The second *Wen:De* report also found that ―jurisdictional disputes continue to have significant impacts on the lived experiences of First Nations children – particularly those with special needs."[280] According to the research conducted in the preparation of this report, ―12 agencies had experienced 393 jurisdictional disputes [in 2004-2005] requiring an average of 54.25 person hours to resolve each incident."[281]

164. These disputes arise when ―there is a gap between what the federal government will fund on reserve and what the provincial statute requires", forcing the involvement of the provinces, who often have to ―step in and fund" services that AANDC refuses to fund.[282]

165. In essence, the report argues that in ―far too many cases [AANDC] puts its needs before the needs of the child",[283] and that a paradigm shift is required in order to ensure that the ―well being and safety of the child [are the] paramount consideration[s] in resolving

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CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 4-5.

[277] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21; see also AANDC Briefing Note, ―First Nation Child and Family Services (FNCFS) – Media Coverage" (2002), CHRC BOD, Ex. HR-15, Tab 467 at p. 4.

[278] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

[279] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 20, 21.

[280] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 16.

[281] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

[282] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 16-17.

[283] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

jurisdictional disputes".[284] In the end, First Nations children suffer the "most profound impact" of these "gaps in services and funding".[285]

166. Therefore, the report calls for the adoption of a "child first principle" whereby the government of first contact (i.e., "who first receives a request for payment of services for a First Nations child") will "pay without disruption or delay when these services are otherwise available to non Aboriginal children in similar circumstances."[286]

167. Lack of Funding under AANDC's Directive 20-1: The report concluded that "current funding levels are inadequate" for "human resources, capital costs, standards/evaluation, culturally appropriate services, records management and information technology."[287] Specific concerns identified by First Nations child and family service agencies in these areas are detailed below.

168. Capital costs include office space, workplace vehicles, funding for workplace vehicle travel, as well as computers, photocopies, office furniture and other equipment.[288] The agencies sampled in the preparation of the second *Wen:De* report noted "significant difficulty funding capital expenditures within [Directive 20-1]."[289]

169. With respect to human resources, the report found that "overtime compensation for staff working after hours on child protection matters was a critical area of concern".[290] There was also "variation in caseload size and case composition", with some social workers being left to "perform all duties", which poses real challenges given that "First Nations children and families [have been found] to require more service and thus more staff resources."[291] As well, two thirds of the First Nation agencies surveyed for the report felt their salaries and benefits were not competitive or comparable, contributing to high staff turnover rates.[292]

[284] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.
[285] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 91.
[286] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.
[287] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 40-41.
[288] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 32-33.
[289] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 33.
[290] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 36.
[291] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 37.
[292] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 37.

170. Culturally based operations and standards were found to be ~~a~~ key element in the delivery of culturally based services", and yet the report concluded that there was ~~n~~o funding in the current formula [i.e., Directive 20-1] to support policy development."[293] In addition, the report concluded that many First Nations child and family service agencies were ~~in~~ the process of developing their own child welfare laws", highlighting the need to consider finally implementing the first NPR recommendation to ~~e~~xpand the range of fundable child welfare authority beyond provincial delegation."[294]

171. Lack and/or Inadequacy of Remoteness Adjustments: The second *Wen:De* report also followed up on another NPR recommendation: that the remoteness factors used in Directive 20-1 be reviewed to ~~e~~nsure it adequately reflected the additional costs to child and family service agencies related to remoteness."[295] Under Directive 20-1, the ~~r~~emoteness factor classifies agencies in accordance with their distance from the service centre, degrees latitude, and year round road access."[296] However, the report found that ~~n~~o documented rationale exists" to support the factors which comprise the remoteness factor, and that the service centre used to determine the adjustment did ~~n~~ot necessarily reflect the place where agencies [went] to access" services.[297]

172. Lack of Cost of Living Adjustments: While Directive 20-1 contains a cost of living adjustment, ~~it~~ has not been implemented since 1995."[298] The effect of this is that between 1995 and 2005, there was a funding shortfall of 21.21% ~~p~~urely on account of inflation".[299] The report also found that as a result of the lack of a cost of living adjustment, First Nations child and family service agencies were given $112 million *less* in operations funding under Directive 20-1 than they would have otherwise received.[300] This has a cumulative effect, and the report stated that the lack of a cost of living adjustment led to ~~b~~oth under-funding of services and to distortion in the services funded

[293] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 38.
[294] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 38.
[295] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 44.
[296] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 44.
[297] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.
[298] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.
[299] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.
[300] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.

since some expenses subject to inflation must be covered, while others may be more optional".[301]

173. The Disproportionately Negative Impact that Directive 20-1 has on Small Agencies: The second *Wen:De* report also examined the impact Directive 20-1 had on small agencies, which at the time represented ~~"5~~5% of the total number of First Nation child and family service agencies in Canada, excluding the province of Ontario."[302] The report found that small agencies ~~"f~~ace significant challenges in terms of administrative and core staffing requirements" and delivering ~~"s~~ervices comparable to the provincial government child welfare agencies".[303] As well, the agencies surveyed in preparation of the report were unanimous that the ~~"p~~opulation policy threshold in Directive 20-1 was […] an inadequate means of benchmarking operations funding levels".[304]

b.iii. The Third Wen:De Report (2005)

174. The third and final *Wen:De* report expanded on how to re-design Directive 20-1, based on a national survey that was developed for First Nations child and family service agencies (excluding the province of Ontario).[305] The report presented a number of ~~"r~~ecommendations for policy change or clarification", as well as economic reforms or ~~"m~~odifications" to Directive 20-1 based on the results of the survey.[306]

175. The report concluded that ~~"u~~nder funding was apparent across the current funding formula components".[307] It also emphasized that the recommended changes to Directive 20-1 were ~~"i~~nterdependent" and that ~~"a~~doption [of these elements] in a piece meal fashion would undermine the overall efficacy of the proposed changes."[308]

176. Recommended Policy Changes or Clarifications: Among other things, the report recommended that AANDC ~~"c~~larify that legal costs related to children in care are billable under maintenance."[309] Since child welfare statutes across Canada ~~"r~~equire that social

[301] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.
[302] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.
[303] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 48.
[304] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 48.
[305] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 9.
[306] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.
[307] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.
[308] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.
[309] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

workers who remove a child or apply for a warrant must notify, and often appear, before the Courts", the report considered these costs to be essential, not discretionary.[310] These costs are not covered elsewhere under Directive 20-1, which provides only a small amount of operations funding for legal costs related to the administration of the agency itself.[311]

177. In addition, the report found that "support services related to reunifying children in care with their families" should be eligible maintenance expenses under Directive 20-1, since they are mandatory services according to provincial child welfare statutes.[312] These services include counselling, "cultural and language programs, mentorship, wellness programs, specialized treatment, [and] preparation for independent living services."[313]

178. The report also recommended the immediate implementation of Jordan's Principle, which will be discussed later in these submissions, in order to resolve the delays and disruptions in service to First Nations children caused by jurisdictional disputes both between and within levels of government.[314] In essence, Jordan's Principle calls on the government of first contact (in other words, the government that first receives a request to pay for a First Nation child's service) to pay for the service without question, and to pursue the resolution of the jurisdictional dispute *afterward*.[315]

179. Finally, the report recommended that AANDC clarify the "stacking provisions" in Directive 20-1 in order to make it easier for First Nations to "access voluntary sector funding sources to augment the range of resources they can provide without a financial penalty being imposed by [AANDC]."[316] The report also noted that these types of supports are available in "mainstream society".[317]

[310] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.
[311] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.
[312] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 18.
[313] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 18.
[314] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 16.
[315] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 16.
[316] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.
[317] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

180. Recommended Economic Reforms to Directive 20-1: The third *Wen:De* report also recommended fourteen economic reforms to Directive 20-1.[318] The key recommendations are highlighted below:

- that AANDC create a new funding stream for prevention and least disruptive measures, which are critical services that are chronically underfunded under Directive 20-1;[319]
- that AANDC adjust the current operations budget under Directive 20-01, which is ~~"s~~et at a level [that is] insufficient to cover necessary overhead costs (basic operating costs)";[320]
- that AANDC reinstate the annual cost of living adjustments for First Nations child and family service agencies on a retroactive basis back to 1995;[321]
- that AANDC modify its funding formula to address the challenges faced by small agencies by ~~"e~~xtend[ing] overhead funding to agencies with populations of 125 and above" (as opposed to the 250 child population threshold in Directive 20-1),[322] and by abolishing the ~~"s~~tep increases" or adjustments from 250 children to every 25 children in excess of 125;[323]
- that AANDC introduce an ~~"a~~cross the board increase in the remoteness allowance";[324] and
- that AANDC provide sufficient capital costs in order to address the ~~"i~~nadequate state of repair and accessibility of [the First Nations child and family service agencies'] buildings", as well as to accommodate the space required for new prevention programs and staff.[325]

181. The report recommended that the changes to Directive 20-1 be phased in over a period of seven years, the total value of which was $109.3 million per year in order to meet the needs of First Nations child and family service agencies.[326] The report also noted that the ~~"a~~nticipated economic, social and cultural benefits of fully implementing the recommended reforms are substantial, benefiting First Nations children, families, Nations and Canadian society at large."[327] Moreover, the report found that implementing these reforms would allow First Nations children to ~~"h~~ave a chance to receive equitable child

[318] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 18-32.
[319] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 19-22.
[320] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 24.
[321] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 18-19.
[322] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.
[323] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.
[324] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 25-26.
[325] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 28.
[326] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 21, 33.
[327] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 34.

welfare services", and for AANDC to ~~–s~~end a message to First Nations children that they really do count – and the days of under funding and under valuing them are over."[328]

182. After receiving the third and final *Wen:De* report, AANDC invited a number of the authors and contributors to present their findings and analysis to the Government of Canada's Central Agencies (i.e., Treasury Board of Canada, Privy Council Office, etc.), including: Dr. Cindy Blackstock,[329] Executive Director of the Caring Society, and two of the Commission's experts: Dr. John Loxley,[330] Professor of Economics at the University of Manitoba, and Dr. Nicolas Trocmé,[331] Professor of Social Work at McGill University.[332]

183. According to Drs. Blackstock, Loxley and Trocmé, at that meeting there was not a single question asked, and they left unsure of what impact, if any, their research, findings and recommendations would have on the FNCFS Program and Directive 20-1.[333]

184. AANDC officials testified that they use and rely on some of the findings and recommendations in *Wen:De* in their administration of the FNCFS Program.[334]

iv) AANDC Designs and Implements the Enhanced Prevention Focused Approach ("EPFA") in Some Jurisdictions

185. While the *Wen:De* research and reporting process was ongoing, AANDC engaged the province of Alberta to assist in the development and design of a new funding formula. The result of this process was the announcement of EPFA on April 27, 2007.[335]

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[328] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 34.
[329] Dr. Cindy Blackstock's Curriculum Vitae, CHRC BOD, Vol. 6, Tab 75.
[330] Dr. John Loxley's Curriculum Vitae, CHRC BOD, Ex. HR-12, Tab 243; see also letter from Dr. John Loxley to the Commission dated November 2, 2009, CHRC BOD, Ex. HR-12, Tab 244. Dr. Loxley was qualified as an expert before the Tribunal on financial and budgetary analysis and funding formulas for public program spending and policy outcomes.
[331] Dr. Nico Trocmé's Curriculum Vitae, CHRC BOD, Ex. HR-07, Tab 85; see also letter from Dr. Nico Trocmé to the Commission dated September 2, 2009, CHRC BOD, Ex. HR-07, Tab 104. Dr. Trocmé was put forward as an expert before the Tribunal on the epidemiology of child maltreatment and neglect, as well as child welfare service trends and policies.
[332] Testimony of Dr. Cindy Blackstock, Transcript Vol. 4 at pp. 4, 9-10; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 23-24; see also testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 15-19.
[333] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 4, 9-10; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 23-24; see also testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 15-19.
[334] Testimony of Barbara D'Amico, Transcript Vol. 51 at p. 77; Vol. 53 at pp. 46-47; see also testimony of Sheilagh Murphy, Transcript Vol. 54 at pp. 50-51.
[335] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0006; see also AANDC

186. Alberta had long criticized AANDC's Directive 20-1 funding formula, arguing that it had some "inherent inequities in its application with respect to the diverse and unique needs of each respective First Nation."[336] Alberta had also voiced concern that AANDC's rigid and inequitable funding formula was not comparable,[337] and created a "two-tier" service system for children in the province,[338] representing "a systemic barrier for First Nation agencies".[339]

187. While the Government of Alberta approached AANDC about these issues a number of times, their concerns went unanswered.[340]

188. In 2004, the Government of Alberta tabled new legislation – the *Child, Youth and Families Enhancement Act*[341] – along with "innovative policy directions" that encouraged prevention and early intervention supports, all of which became known as the "Alberta Response Model".[342] However, First Nations child and family service agencies in Alberta were not provided any additional funding from AANDC for these services.[343]

189. On May 24, 2006, Alberta's Minister of Children's Services, Heather Forsyth, met with the Honourable Jim Prentice, Minister of AANDC to discuss, among other things, how effective the Alberta Response Model had been in reducing the number of children in care off reserve.[344] At that meeting, the Ministers came to a "mutual understanding" that a "flexible federal funding formula for child welfare services, one that allows for federal

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Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391.

[336] Letter from Minister of Children's Services to the Honourable Robert Nault dated March 15, 2000, CHRC BOD, Ex. HR-14, Tab 370.

[337] Services to First Nations Children and Families: Alberta Children's Services Perspective (2005), CHRC BOD, Ex. HR-14, Tab 357 at p. CAN008771/7; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 300-301.

[338] Letter from Minister of Children's Services to the Honourable Jane Stewart dated March 11, 2003, CHRC BOD, Ex. HR-14, Tab 371.

[339] Letter from Minister of Children's Services to the Honourable Andy Scott dated August 19, 2005, CHRC BOD, Ex. HR-14, Tab 373.

[340] Letter from Minister of Children's Services to the Honourable Andy Scott dated August 19, 2005, CHRC BOD, Ex. HR-14, Tab 373.

[341] *Child, Youth and Families Enhancement Act*, R.S.A. 2000, c. C-12.

[342] Letter from Minister of Children's Services to the Honourable Andy Scott dated July 23, 2004, CHRC BOD, Ex. HR-14, Tab 372.

[343] Services to First Nations Children and Families: Alberta Children's Services Perspective (2005), CHRC BOD, Ex. HR-14, Tab 357 at p. CAN008771/2; see also testimony of Darin Keewatin, Transcript Vol. 32 at pp. 33-34.

[344] Letter from Minster of Children's Services to the Honourable Jim Prentice dated June 8, 2006, CHRC BOD, Ex. HR-14, Tab 374 at p. 1; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 35; see also AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391 at p. 2.

resources to be directed towards early intervention and prevention services on-reserve, should be made available to those [First Nations child and family service agencies] who wish to make positive changes to their child welfare service delivery systems."[345]

190. Following the 2005 presentation to Central Agencies of the final recommendations of the *Wen:De* reports, there was another meeting with Central Agencies in 2006 during which "representatives from Alberta" presented the Alberta Response Model.[346] After that meeting, Central Agencies expressed "support for prevention activities" to become part of the FNCFS Program and federal funding formula.[347]

191. AANDC, acknowledging that Directive 20-1 "does not provide sufficient funding for [First Nations child and family service agencies] to delivery culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve",[348] decided to develop a new funding formula in a "short time frame" based on the Alberta Response Model.[349]

192. AANDC, the province of Alberta and some First Nation agency Directors from Alberta engaged in a nine-month exercise of "examining the funding of [prevention services] and what it would look like for [First Nations child and family service agencies] in Alberta", using Directive 20-1 as the basis for discussions.[350] The "cost models" for EPFA were developed at AANDC Headquarters.[351]

193. AANDC announced EPFA in Alberta on April 27, 2007.[352] Since then, AANDC has transitioned[353] the following provinces from Directive 20-1 to EPFA: Saskatchewan

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[345] Letter from Minster of Children's Services to the Honourable Jim Prentice dated June 8, 2006, CHRC BOD, Ex. HR-14, Tab 374 at p. 1.
[346] Presentation to the Minister's Office Staff, *Wen:De – The Journey Continues*: Overview of the Research and its Recommendations, CHRC BOD, Ex. HR-14, Tab 385 at p. 8.
[347] Presentation to the Minister's Office Staff, *Wen:De – The Journey Continues*: Overview of the Research and its Recommendations, CHRC BOD, Ex. HR-14, Tab 385 at p. 8.
[348] AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391 at p. 1.
[349] Letter from the Honourable Him Prentice to the Minister of Children's Services dated September 18, 2006, CHRC BOD, Ex. HR-14, Tab 375 at p. 1.
[350] Testimony of Darin Keewatin, Transcript Vol. 32 at p. 38.
[351] AANDC Internal Audit Report, "Audit of the Implementation of the Child and Family Services Enhanced Prevention Focused Approach (2012), CHRC BOD, Ex. HR-10, Tab 194 at p. 10.
[352] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Vol. 13, Tab 271 at p. CAN052861_0006; also AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Vol. 14, Tab 391.

(2007),[354] Nova Scotia (2008),[355] Québec (2009),[356] Prince Edward Island (2009),[357] and Manitoba (2010).[358]

194. The FNCFS Program Manual states that the objectives of EPFA are to ensure:

- that families receive the support and services they need before they reach a crisis;
- that community-based services and the child and family system work together so families receive more culturally appropriate services in a timely manner;
- that First Nations children in care benefit from permanent homes (placements) sooner by, for example, involving families in planning alternative care options; and
- that services and supports are co-ordinated in a way that best helps the family.[359]

195. Under EPFA, funding for the development and operations of First Nations child and family service agencies remains the same as it was under Directive 20-1.[360] Therefore, an agency's fixed operations funding continues to be calculated using the formula created by AANDC and set out in Directive 20-1.[361]

196. The only differences between Directive 20-1 and EPFA are: (i) the addition of a third funding stream – prevention; (ii) the flexibility built into the formula; and (iii) the "block funding" approach to maintenance, whereby agencies receive a set (or block) amount of

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[353] House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 11 (Dr. Cindy Blackstock, Executive Directive, First Nations Child and Family Caring Society of Canada): First Nation agencies in these provinces can either transition to EPFA or continue under Directive 20-1; see also Senate of Canada, Standing Senate Committee on Human Rights, *Evidence*, 41st Parl, 1st Sess, No 24 (March 25, 2013) at p. 24:47 (Françoise Ducros, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).

[354] AANDC Backgrounder "Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007", CHRC BOD, Ex. HR-14, Tab 392.

[355] AANDC Backgrounder "Nova Scotia Partnership Framework for Enhancement Focused Approach – July 2008", CHRC BOD, Ex. HR-14, Tab 393.

[356] AANDC Backgrounder "Quebec Partnership Framework for Enhancement Focused Approach – August 2009", CHRC BOD, Ex. HR-14, Tab 394.

[357] AANDC Power Point, "Better Outcomes for First Nation Children" (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 5.

[358] AANDC News Release, "Canada, Manitoba and Assembly of Manitoba Chiefs Reach Agreement on Child Welfare Framework", CHRC BOD, Ex. HR-08, Tab 119; see also AANDC Backgrounder "Children and Families First: Manitoba First Nations Early Intervention and Prevention Services Enhancement Framework – July 2010", CHRC BOD, Ex. HR-14, Tab 395.

[359] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.2.

[360] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.

[361] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.1.

funding for maintenance based on their expenditures the previous year.[362] This process is referred to as the "re-basing of maintenance costs", and takes place annually.[363]

197. If maintenance costs the following year are greater than the set amount of maintenance funding an agency has received from AANDC, they must recover the deficit from their operations and/or prevention funding streams.[364] If there is a surplus, the agency can keep it and re-apply it to their child welfare program (i.e., operations, prevention, etc.), so long as the activity is AANDC-approved.[365]

198. Prevention services are "designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care of the amount of time a child remains in Alternate Care."[366] Ultimately, the goal of EPFA is to "reduce the number of [First Nations] children being brought into care" in order to achieve "cost containment" of maintenance expenditures under the FNCFS Program.[367]

199. Funding for prevention services under EPFA is "based on a cost-model" and fixed, much like operations funding.[368] The cost model assumes that First Nation families on reserve have on average three (3) children, and that 20% of families on reserve are in need of prevention services.[369] Thus, in order to calculate prevention funding, AANDC takes the total on reserve First Nations child population and divides it by three (3), and then multiplies that number by 20.[370]

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[362] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98; Vol. 62 at pp. 122-123; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181.

[363] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98; Vol. 62 at pp. 122-123; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 8 (Odette Johnston, Director, Social Programs Reform Directorate, AANDC).

[364] Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 393; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 96-98, 132-133; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181.

[365] Testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 155-156, 174-175.

[366] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 33, section 2.1.17.

[367] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 1.

[368] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.

[369] Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 22.

[370] Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 22.

200. Under EPFA, AANDC allows First Nations child and family service agencies to move funding from one stream (i.e., operations, maintenance and prevention) to another ―in order to address needs and circumstances facing individual communities".[371]

201. In order to be eligible to receive funding under EPFA (as opposed to Directive 20-1) in one of the provinces that has transitioned to the new funding formula, AANDC requires First Nations child and family service agencies to: (i) ―provide an initial five year business plan, subject to AANDC review and acceptance by the province, prior to receiving any funding under EPFA"; and (ii) ―provide annual updates of the five year business plan to continue receiving program funding under [EPFA]."[372] In addition, AANDC requires agencies to submit ―detailed financial budgets" each fiscal year.[373]

202. This new approach ―represents a major transition for First Nations agencies, and a more robust role for [AANDC] in supporting effective reform."[374] Under EPFA, First Nation agencies' business plans are submitted annually and subject to AANDC's ―approval and regular monitoring".[375] As well, AANDC ―meets quarterly with agencies […] to assess progress in shifting programming [… and] also conducts increased compliance reviews" of agencies.[376]

203. EPFA has been reviewed a number of times by AANDC, the Auditor General of Canada (the ―Auditor General"), the House of Commons' Standing Committee on Public Accounts (the ―PAC") and other independent auditors since its implementation in 2007. The findings of these reviews are described later in these submissions.

204. To date, EPFA has not yet been implemented in New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon Territory, despite commitments from AANDC that its goal was to have all remaining jurisdictions transitioned to EPFA by 2013,[377] and then again by 2014,[378] as well as repeated requests by provincial

[371] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.
[372] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.3.
[373] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.3.
[374] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at pp. 4-5.
[375] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.
[376] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.
[377] Letter from the Honourable Chuck Strahl to Mr. Nathan Cullen, MP, dated July 3, 2009, CHRC BOD, Ex. HR-06, Tab 71; see also House of Commons, Standing Committee on the Status of Women, *Evidence*, 40th Parliament, 3rd Sess, No 56 (February 15, 2011) at pp. 12, 16 (Sheilagh Murphy, Director General, Social Policy and Programs, AANDC).

governments and First Nation representatives.[379] At this point, AANDC cannot "predict when [it] will transition to EPFA in the five remaining jurisdictions."[380]

v) Provincial Agreements for the Provision of Child Welfare Services to First Nations on Reserve

205. As previously stated, there are two types of agreements that AANDC has developed pursuant to the FNCFS Program to "facilitate the provision of child and family services to First Nations children" on reserve: agreements with provincial and territorial governments, and comprehensive funding agreements with First Nations child and family service agencies.[381]

206. Specifically, AANDC has entered into agreements with the provinces of Ontario, British Columbia and Alberta for the provision of First Nations child welfare services on reserves. These agreements, which are distinctly different from the comprehensive funding agreements First Nations child and family service agencies are subject to, are described below.

a. Ontario's 1965 Agreement

207. The provision of child and family services to First Nations on reserve in Ontario is unique. In 1965, the Federal Government entered into an agreement with the province of Ontario "to enable social services to be extended to First Nations communities on an equal basis to what was provided for other provincial residents."[382] This agreement is

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[378] AANDC Power Point, "Better Outcomes for First Nation Children" (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 8; see also AANDC Briefing Note, "Action Plan for Implementation of Enhanced Prevention Focused Approach in British Columbia" (2012), CHRC BOD, Ex. HR-13, Tab 284.

[379] Letter from Minister of Children and Family Development to the Honourable Chuck Strahl dated February 17, 2009, CHRC BOD, Ex. HR-14, Tab 367; see also letter from B.C. Minister of Children and Family Development to the Honourable Chuck Strahl dated November 17, 2009, CHRC BOD, Ex. HR-06, Tab 69; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70; see also letter from Bill Zaharoff to Nita Walkem dated November 20, 2009, CHRC BOD, Ex. HR-06, Tab 73; see also letter from the First Nations Directors Forum to the Honourable John Duncan dated May 8, 2012, CHRC BOD, Ex. HR-13, Tab 318; see also letter from the Honourable John Duncan to Nita Walkem dated July 24, 2012, CHRC BOD, Ex. HR-13, Tab 319; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365; see also letter from British Columbia's Minister of Children and Family Development to AANDC dated February 5, 2014, CHRC BOD, Ex. HR-15, Tab 416.

[380] Master Qs & As: First Nations Child and Family Services, CHRC BOD, Ex. HR-13, Tab 329 at p. 17.

[381] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 43.

[382] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3.

called the "Memorandum of Agreement Respecting Welfare Programs for Indians", and is otherwise known as the "1965 Agreement".[383]

208. Pursuant to the 1965 Agreement, the Government of Ontario extends services to First Nations people living on reserve, which are cost-shared by the federal government.[384] These services include social assistance, child and family services, child care and homemaking.[385] The principal objective of the 1965 Agreement is the "provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities".[386]

209. The specific statutes and types of services covered under the 1965 Agreement are described in the Schedules to the Agreement.[387] The child welfare sections of the 1965 Agreement "have not been updated since 1981",[388] and the Schedules to the Agreement have not been updated since 1998.[389] Consequently, some programs have been "legally de-listed" because AANDC is not responsible for cost-sharing any new services or programs that Ontario provides to First Nations on reserve that are not explicitly accounted for in the Schedules to the Agreement.[390]

210. In other words, if Ontario decides to "put an emphasis on prevention by making whatever legislative changes [are] necessary in order to bolster those programs, both on and off Reserves",[391] AANDC could refuse to fund or reimburse the province for these programs or services on the grounds that they are not "eligible" for cost-sharing under or specifically included in the 1965 Agreement.[392] For example, AANDC does not consider mental health services, which are mandatory services under Ontario's *Child and Family*

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[383] 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/1.
[384] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3.
[385] Judith Rae, The 1965 Agreement: Comparison & Review (2009), CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/3. ["Judith Rae Report"].
[386] 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/1; see also testimony of Phil Digby, Transcript Vol. 59 at p. 15.
[387] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/15 – COO-102/37 (Schedule A).
[388] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 14, section 4.28.
[389] 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/37.
[390] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 66-75.
[391] Testimony of Phil Digby, Transcript Vol. 59 at p. 74.
[392] Testimony of Phil Digby, Transcript Vol. 59 at pp. 54-55, 69-72, 93-94, 128-129; Vol. 60 at pp. 82-83, 88-98, 101-102, 148-164, 200-203; see also AANDC Briefing Note, "1965 Agreement Overview" (2007), CHRC BOD, Ex. HR-11, Tab 239 at pp. 4-5; see also Ontario Regional Directive, Respondent's BOD, Ex. R-14, Tab 58 at p. 3, section 5.6.

Services Act (the "*CFSA*"),[393] to be eligible expenditures under the 1965 Agreement since the Schedule to the Agreement does not include the *CFSA*, which came into force in 1984.[394] Therefore, AANDC avoids having to cost-share these expenditures under the 1965 Agreement.[395]

211. The province of Ontario "pays for [the eligible] programs up front and invoices Canada" for the costs of the programs, which are then subject to the cost-sharing formula in order to determine the federal share.[396] At the beginning of each fiscal year, "Ontario provides [AANDC] a cash flow forecast", which, once approved by AANDC, allows them to pay Ontario "a one-month case advance, followed by monthly instalments", all of which is subject to a "10% holdback, which is paid out (with any adjustments) after the annual provincial audit."[397] AANDC flows funding to Ontario through an annual administrative process arrangement.[398]

212. The cost-sharing formula is set out in clause 3 of the 1965 Agreement.[399] It is "based on two elements, provincial per capita costs of financial assistance [to which funding for all programs is indexed] and per capita costs for First Nations specifically."[400]

213. The baseline for the federal share of costs under the 1965 Agreement is set at a minimum of 50%, on the understanding that there will likely be "additional cost[s] due to the higher cost on-reserve" of social programs, including the FNCFS Program, for which AANDC would be largely responsible.[401]

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[393] *Child and Family Service Act*, R.S.O. 1990, c. C-11.
[394] Briefing Note: Abinoojii Mental Health Services Mandate (2011), CHRC BOD, Ex. HR-11, Tab 224 at pp. 1-2; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 69-71.
[395] Briefing Note: Abinoojii Mental Health Services Mandate (2011), CHRC BOD, Ex. HR-11, Tab 224 at pp. 1-2; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 69-71; see also letter from AANDC to Ontario's Ministry of Community and Social Services dated May 26, 2009, CHRC BOD, Ex. HR-15, Tab 433.
[396] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18.
[397] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/9 – COO-102/11; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 32-33.
[398] Testimony of Phil Digby, Transcript Vol. 59 at pp. 106-108; see also Administrative Process Arrangement 2010-2011, Respondent's BOD, Ex. R-14, Tab 59.
[399] 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/5-COO-102/8.
[400] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18.
[401] Testimony of Phil Digby, Transcript Vol. 59 at p. 28.

214. The calculation of the cost-sharing formula was explained by Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, as follows:

> MR. TARLTON: And so with those two, I guess definitions or terms in mind, can you explain how the federal contribution to Ontario is calculated, and I'm specifically referring to clause 3.2 of the 1965 Agreement?
>
> MR. DIGBY: Yes. It's a little opaque when you're reading the Agreements, but I think it's simpler than it might appear because it really is just a cost-sharing formula that the governments agreed to back in 1965 and remains to this day.
>
> I think the context is that the federal government and provincial government at that time were trying to determine how should Canada reimburse, what should be the principles that Canada reimburses Ontario for extending these programs into First Nation communities.
>
> I think they looked at Social Assistance as the area where there was the best data, it gave a good proxy for the proportionate share of costs and relative share of costs in First Nation communities vis-à-vis the rest of Ontario.
>
> […]
>
> So the first half of the formula, if you like, I call it the 50 percent half, which is essentially look at – you take the average cost of Social Assistance in Ontario for everybody off-Reserve in the province, and let's say that's $200 per capita, and you take 50 percent of that number, so that would be $100 and then you divide that – so if the rate or welfare dependency on-Reserve was the same as off-Reserve – let's say that on-Reserve there was a much lower rate of welfare dependency and the costs there were also $200 per capita, then it would be a very simple ratio of $100 over $200, 50 percent, so then the claims that Ontario would make under the 1965 Agreement Canada would reimburse at 50 percent […].
>
> But at the time, of course, the formula also recognized, and I think Ontario negotiated this as part of the Agreement, that given that the costs were so much higher per capita in First Nation communities it was agreed that Canada would take the financial responsibility for most of that additional cost.
>
> So the second half of the formula essentially works like this, that you would do some simple math. Let's say that the cost per capita in First Nation communities is $1,000 per person, you do some simple math, you're trying to get the ratio, so you take $1,000 per person and then you subtract $200 per person, so the enumerator would be $800 and the denominator would be the cost per person in Aboriginal communities, $1,000. So that portion of the formula would be 800 over 1,000 or 80 percent.
>
> If you apply that then to the first half of the equation where we were taking 50 percent and the enumerator in that equation was, you put the total cost in Ontario of $200 and you multiply that by 50 percent, so that's $100 and the denominator would be $1,000, that would result in 100 over 1,000 or 10 percent.

> So you add the first portion of the formula which is 1/10 or 10 percent plus 8/10 or 80 percent and that would result in a federal cost-sharing ration of 10 plus 80, is 90 percent.
>
> […]
>
> And I think the example provided, although I used – so $200 a case is reasonably - $200 per person in Ontario is approximately the current cost; in First Nation communities I use the example of $1,000 a case, it's actually about $1,200 per person on-Reserve in Ontario.
>
> So the formula currently generates a figure of about 92 percent. The most recent audited figure from 2011-'12 was 91.897 something, so it's to the fourth decimal place.[402]

215. Therefore, the effect of the 1965 Agreement's cost-sharing formula is that as Ontario's expenditures for child welfare on reserve increase, so too does AANDC's share of those costs.[403]

216. In order to be eligible for ~~"f~~federal funding under the cost-sharing formula, program recipients must be: (1) registered Indians, and (2) resident on reserve, on Crown land, or off reserve less than 12 months."[404]

217. First Nations child and family service agencies are funded for the provision of child protection services according to the same funding model as provincial child welfare agencies in Ontario.[405] There are seven (7) fully-mandated ~~"N~~Native child and family service agencies in Ontario", including: Anishinaabe Abinoojii Family Services, Weechi-it-te-win Family Services, Dilico Anishinabek Family Care, Tikinagan Child and Family Services, Payukotayno Family Services, Akwesasne Child and Family Services and Native Child and Family Services of Toronto.[406]

218. There are two mechanisms used by the province of Ontario to provide a full range of child welfare services on reserve: (i) funding to fully-mandated child welfare societies, including provincial Children's Aid Societies and First Nations child and family service

[402] Testimony of Phil Digby, Transcript Vol. 59 at pp. 24-28; see also Ontario Regional Directive, Respondent's BOD, Ex. R-14, Tab 58 at pp. 5-7, 9-10, Appendix A.
[403] Briefing Note, "~~C~~hild and Family Services 2011-12 Budget Requirements – Ontario Region" (March 21, 2012), CHRC BOD, Ex. HR-11, Tab 228.
[404] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/24.
[405] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/26.
[406] Testimony of Phil Digby, Transcript Vol. 59 at p. 86; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/21 – CHRC650/22.

agencies for protection services; and (ii) service contracts for prevention services on reserve.[407]

219. Prevention programs targeted to First Nations on reserve began in Ontario in the late 1970's.[408] There are "three types of organizations that receive funding for prevention services", including: (i) fully-mandated Native child and family service agencies (listed above); (ii) individual First Nation communities; and (iii) pre-mandated Native Agencies.[409]

220. Fully-mandated Native child and family service agencies: Funding for the provision of prevention services by fully-mandated Native child and family service agencies can "range from $900,000 to $1.5 million."[410]

221. Individual First Nation communities: There are approximately "25 individual First Nations" in southern Ontario that receive prevention funding via service contract.[411] There are also some First Nation communities in southern Ontario that do not have service contracts and therefore receive no prevention funding.[412]

222. Pre-mandated Native agencies: There are presently six pre-mandated Native agencies in Ontario, meaning that they do not yet have "the full protection mandate" and are in the process of "develop[ing] their capacity to become a fully-mandated First Nations Child and Family Services Agency".[413]

223. Ontario receives approximately $17 million in prevention funding for First Nations on reserve annually,[414] which is reimbursed by AANDC in accordance with "protocols" that

[407] Testimony of Phil Digby, Transcript Vol. 59 at p. 82.
[408] Testimony of Phil Digby, Transcript Vol. 59 at p. 97.
[409] Testimony of Phil Digby, Transcript Vol. 59 at p. 98.
[410] Testimony of Phil Digby, Transcript Vol. 59 at p. 98.
[411] Testimony of Phil Digby, Transcript Vol. 59 at p. 98.
[412] Testimony of Phil Digby, Transcript Vol. 60 at pp. 113-118.
[413] Testimony of Phil Digby, Transcript Vol. 59 at pp. 98-101; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/24-CHRC650/25 (Note: Akwasasne Child and Family Services is now fully delegated).
[414] Testimony of Phil Digby, Transcript Vol. 59 at p. 111.

both levels of government have adopted.[415] These protocols vary depending on the agency or community in question.[416]

224. For the fully-mandated Native child and family services agencies in northern Ontario, AANDC uses the "ratio of Status Indian days of care to the total days of care as a proxy for how many people would be receiving the prevention service."[417] Mr. Digby provided the following example in his testimony:

> MR. DIGBY: […] So, for example, if one Agency had a budget of $1.5 million and two-thirds of their days of care are Status Indian days of care, then the province would only claim for reimbursement of $1 million, which would be two-thirds of the total, and then that would get reimbursed at the 92 percent cost-sharing.[418]

225. For the fully-mandated Native child and family services agencies in southern Ontario, AANDC relies on a "Convention" whereby Ontario agreed that approximately 80% of the recipients of prevention services "would be Status Indian on-Reserve, eligible for cost-sharing."[419] Therefore, Ontario submits a claim to AANDC for "80 percent of the total expenditure under that service contract."[420]

226. Ontario's invoices for on reserve child and family services are audited annually in accordance with the terms of the administrative process arrangement.[421] Audits are conducted and financed jointly by Ontario and AANDC, each of whom is responsible for 50% of the cost, and are meant to "verify the monthly claims and the payments" under the 1965 Agreement.[422] The auditors then "prepare a report of the findings", identify "ineligible claims" and "do a recalculation of all the funding factors in the formula on the 92 percent".[423]

227. The final invoice submitted by Ontario is therefore revised based on the findings of the audit. AANDC will only reimburse those expenditures deemed by the auditors to be

[415] Testimony of Phil Digby, Transcript Vol. 59 at p. 103.
[416] Testimony of Phil Digby, Transcript Vol. 59 at p. 103. For example, at Anishinaabe Abinoojii, AANDC assumes that 100% of the people accessing prevention services are Status Indians; however, a proxy is used for the remaining northern Native agencies.
[417] Testimony of Phil Digby, Transcript Vol. 59 at pp. 103-104.
[418] Testimony of Phil Digby, Transcript Vol. 59 at p. 104.
[419] Testimony of Phil Digby, Transcript Vol. 59 at p. 104.
[420] Testimony of Phil Digby, Transcript Vol. 59 at p. 104.
[421] Testimony of Phil Digby, Transcript Vol. 59 at p. 117.
[422] Testimony of Phil Digby, Transcript Vol. 59 at pp. 117-118.
[423] Testimony of Phil Digby, Transcript Vol. 59 at p. 119.

–eligible", and does –not reimburse Ontario for [items identified as ineligible for cost-sharing] by the auditors."[424]

228. If AANDC –ever terminated [the 1965 Agreement], the federal government would be obliged to assume direct service delivery once again or, more likely, arrange some alternative model."[425]

229. The 1965 Agreement has never been the subject of a formal review by AANDC. In 2000, the NPR Report recommended that AANDC –immediately undertake a tripartite review of the provision of child and family services on reserve in the province of Ontario […] pursuant to the 1965 Agreement".[426] This recommendation was reiterated in the *Wen:De* reports.[427]

230. However, to date these recommendations remain outstanding because AANDC has not undertaken any such review.[428]

231. The 1965 Agreement has been reviewed by various First Nation and other independent organizations, which have identified a number of shortcomings with the cost-sharing formula enshrined therein. First, and most importantly, the provincial funding model that is applied to Native child and family service agencies –does not reflect the needs of these [First Nations] communities and agencies."[429] Therefore, the development of an –Aboriginal funding model" that includes –adequate funding to support culturally appropriate programs" has been recommended.[430]

232. Second, the 1965 Agreement's cost-sharing formula does not include realistic –northern costs" because –[f]unding is based on provincial averages and benchmarks, and does not

[424] Testimony of Phil Digby, Transcript Vol. 59 at pp. 119-120.
[425] Affidavit of Tom Goff, sworn February 12, 2010, CHRC BOD, Ex. HR-11, Tab 216 at p. 4, para. 12l; see also Transcript of the Cross-Examination of Tom Goff dated February 25, 2010, CHRC BOD, Ex. HR-11, Tab 216.
[426] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.
[427] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.
[428] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 89; Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.
[429] Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7.
[430] Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 5; see also AANDC Briefing Note, –1965 Welfare Agreement in Ontario" (2000), CHRC BOD, Ex. HR-15, Tab 447.

account for […] the higher cost of services in northern and remote communities".[431] For example, in remote and northern First Nation communities in Ontario, the following are major challenges: transportation; staff recruitment and retention; access to suitable housing; limited access to court; lack of other surrounding health and social services; lack of available foster care homes; and the high cost of living.[432]

233. On average, Native child and family service agencies are servicing a geographic area that is 6.5 times greater than a provincial child welfare agency,[433] and have ~~"s~~ignificantly larger case volumes per thousand" and ~~"s~~ignificantly higher expenditures per capita" than provincial child welfare agencies off reserve.[434] As a result, Native agencies' ~~"c~~apacity to deal with growing demand and associated costs is limited [… and they find it] more difficult to cope with even small fluctuations in service demands or unanticipated case-related costs."[435]

234. Thirdly, the 1965 Agreement ~~"f~~ails to account for the lack of surrounding health and social services in most First Nations communities [… which] are absolutely essential to providing preventive, supportive, and rehabilitative services to children and families at risk", whereas provincial child welfare agencies already ~~"h~~ave the benefit of these programs in their communities".[436] As well, some prevention programs offered by the

[431] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also e-mail from Phil Digby to Steven Singer dated October 10, 2012, CHRC BOD, Ex. HR-15, Tab 428; see also e-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434.
[432] Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/28-CHRC650/30; see also Northern Remoteness Study and Analysis of Child Welfare Funding Model and Implications on Tikinagan Child and Family Services and Payukotayno Family Services, CHRC BOD, Ex. HR-11, Tab 219 at pp. 3-17; see also A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at p. CHRC649/39; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-6, 11, 14-15, 23.
[433] Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at p. CHRC650/30.
[434] A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at pp. CHRC649/38, CHRC649/84.
[435] Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at p. CHRC650/39.
[436] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-5; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 10; see also e-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434.

province of Ontario to residents off reserve have not yet been extended to First Nations children and families on reserve.[437]

235. Fourth, and finally, the 1965 Agreement does not provide for any funding for capital costs.[438]

236. In addition to the flaws that have been identified in the 1965 Agreement and the cost-sharing formula itself, First Nations and the province of Ontario have criticized AANDC's decision to cut funding for Band Representatives in 2003. In response to concerns raised by First Nations regarding the delivery of child welfare services to First Nations living off reserve, Ontario included in the *CFSA* a provision stating that Band Representatives are to be "given full party status in child protection proceedings before the court, involving a First Nations' child."[439]

237. As a result, AANDC agreed in 1988 to fund Ontario directly for Band Representatives up to $300,000 per year "on a claim by claim basis".[440] This recognized the "importance of participation by First Nations' representatives in child protection proceedings",[441] which is particularly important in southern Ontario where many First Nations are not served by a child and family service agency.[442] However, in 2003, AANDC announced that as a "result of a review of departmental social development program and spending authorities and to align with practices in other regions," funding for the Band Representatives program would be cut as of April 1, 2003.[443] The program was also considered to be "outside the scope" of the 1965 Agreement.[444]

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[437] E-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434; see also AANDC Briefing Note, "Child and Family Services in Ontario" (2010), CHRC BOD, Ex. HR-15, Tab 435; see also e-mail from Phil Digby to Barbara D'Amico dated November 29, 2013, CHRC BOD, Ex. HR-15, Tab 436.
[438] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19, COO-95/64; see also testimony of Phil Digby, Transcript Vol. 59 at p. 93.
[439] Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.
[440] Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.
[441] Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.
[442] Briefing Note: Band Representative Funding in Child and Family Services, CHRC BOD, Ex. HR-15, Tab 432 at p. CAN092868/1.
[443] Letter from the Minister of Children and Youth Services and the Chiefs of Ontario ["COO"] to the Honourable John Duncan dated March 25, 2011, CHRC BOD, Ex. HR-11, Tab 222 at p. 1; see also letter from AANDC to Government of Ontario (undated), CHRC BOD, Ex. HR-15, Tab 445.
[444] Briefing Note: Band Representative Funding in Child and Family Services, CHRC BOD, Ex. HR-15, Tab 432 at p. CAN092868/2.

238. AANDC's decision to terminate the Band Representatives program limits First Nations' "ability to respond effectively and in accordance with legislated time frames for action", and "erod[es their] ability to participate as intended" in the provincial legislation.[445]

239. For the foregoing reasons, notwithstanding the fact that the 1965 Agreement is largely considered to be "the best available [model or means by which AANDC] fulfill[s] its responsibility for child welfare programming on reserve",[446] many feel that the "financial benefit of the 1965 Agreement is diminishing".[447]

b. Alberta's Administrative Reform Agreement (1991)

240. In 1991, AANDC entered into an agreement with the province Alberta for the provision of child and family services to First Nations on reserve entitled, "Arrangement for the Funding and Administration of Social Services" (otherwise known as the "Administrative Reform Agreement").[448]

241. The Administrative Reform Agreement sets out that AANDC will "arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province, directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a reserve".[449] It also establishes that AANDC will "fund" comparable services and will "reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve."[450]

242. In Alberta, there are six (6) First Nations that are not served by a First Nations child and family service agency.[451] Therefore, the province of Alberta provides child protection and prevention services to those communities,[452] and then submits an invoice to AANDC

[445] Letter from the Minister of Children and Youth Services and the COO to the Honourable John Duncan dated March 25, 2011, CHRC BOD, Ex. HR-11, Tab 222 at pp. 1-2; see also letter from the Honourable John Duncan to the Minister of Children and Youth Services and the COO (undated), CHRC BOD, Ex. HR-11, Tab 223 at pp. 1-2.
[446] Affidavit of Tom Goff, sworn February 12, 2010, CHRC BOD, Ex. HR-11, Tab 216 at p. 3.
[447] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/7.
[448] Arrangement for the Funding and Administration of Social Services (1991), CHRC BOD, Ex. HR-13, Tab 270 ["Administrative Reform Agreement"].
[449] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3.
[450] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3.
[451] Testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.
[452] Testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.

for reimbursement in accordance with the formula set out in Schedule A to the Administrative Reform Agreement.[453]

243. AANDC's share of the costs for the child and family services delivered to the six First Nations that do not have a First Nations child and family service agency are calculated according to the formula set out at clause 2 of Schedule A to the Administrative Reform Agreement.[454] This formula accounts for maintenance expenditures (A), operations expenditures (B, C and D), and prevention services (E, F, G and D).[455]

244. At the beginning of each fiscal year, a cost estimate is prepared based on the actual year-end costs of the preceding fiscal year, and AANDC makes adjustments accordingly throughout the year.[456] In other words, if the costs of maintenance, operations or prevention increase for whatever reason in a given year, there's an ~~a~~adjustment built into the formula".[457]

245. This built-in adjustment also makes the Administrative Reform Agreement distinct from both Directive 20-1 and EPFA, pursuant to which child and family services were and are funded for the remaining First Nations communities in Alberta, neither of which provides an adjustment ~~o~~n an omnibus basis like that."[458]

246. Between fiscal years 2006/07 and 2010/11, costs for First Nations child and family services under the Administrative Reform Agreement increased from $8,266,615 to $14,437,782.[459]

247. The Administrative Reform Agreement remains in effect to this day.[460]

[453] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3; Schedule A; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.
[454] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 2.
[455] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 2.
[456] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 1.
[457] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 285-286.
[458] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 286.
[459] Administrative Reform Agreement Costs – 5 Year Trend, CHRC BOD, Ex. HR-13, Tab 307 at p. 1.
[460] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 280.

c. British Columbia's Memorandum of Understanding (1996) and Service Agreements (2012/13)

248. In 1996, AANDC entered into an agreement with British Columbia for the provision of child protection services to First Nations on reserve in that province entitled, "Memorandum of Understanding for the Funding of Child Protection Services for Indian Children" (the "B.C. MOU").[461] There are 72 First Nation communities that receive services from the province of British Columbia.[462]

249. The B.C. MOU states that the province will "administer [their provincial child welfare legislation] for the benefit of Indian persons under the age of nineteen and [that] Canada shall reimburse [the province] for the cost of Child Protection Services for any Eligible Child."[463] Eligible children are those "registered as an Indian".[464]

250. Pursuant to the B.C. MOU, the province is reimbursed by AANDC according to a "per diem system", which is set out in Appendices B and C to the MOU.[465] The per diem formula is based on two sets of costs: (i) administration and supervision – which is similar to "operations" funding under Directive 20-1 and EPFA, and (ii) maintenance.[466]

251. In order to calculate the per diem amounts owed to the province, AANDC takes a "percentage of all costs under a particular category".[467] The per diem system was meant to provide a "degree of flexibility to manage [the] total maintenance budget to cover off extra costs for some children and to provide universal services to all children."[468] In other words, the province and First Nation agencies were able to take any "unexpended maintenance" funding and use it to "support wages, benefits and administrative costs to

[461] Memorandum of Understanding for the Funding of Child Protection Services for Indian Children (1996), CHRC BOD, Ex. HR-13, Tab 274 ["1996 B.C. MOU"].
[462] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 5.
[463] 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 4, section 4.1.
[464] 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 2, section 2.2 i).
[465] 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 4, section 5.1; pp. 8-9, Appendix B.
[466] 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at pp. 8-9, Appendix B.
[467] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 21.
[468] Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 2 (pages unnumbered).

offset operational deficits."[469] This was considered to be an "especially critical component for the sustainability of [British Columbia's] many small agencies."[470]

252. The per diem funding for provincial reimbursement under the B.C. MOU is more fluid and not nearly as "prescriptive" as Directive 20-1, pursuant to which child and family services are funded for the remaining First Nations communities in the province.[471] For example, there are no limits placed on funding for legal costs under the B.C. MOU.[472]

253. Additionally, the B.C. MOU does not impose "population thresholds"; therefore, the province can receive funding from AANDC for the provision of services to a First Nations community with a child population threshold below 251, whereas First Nations child and family service agencies would receive $0 operational funding to serve the same community.[473]

254. The province of British Columbia also receives a rate adjustment for its administrative (or operational costs) each fiscal year based on a "recalculation of the per diem rates […] due to inflation" for the previous fiscal year.[474] This adjustment results in revision to not only the costs for children in care (i.e., direct or maintenance costs), but also to "administration" costs (i.e., operations costs) for the province.[475]

255. Both the province of British Columbia and First Nations child and family service agencies in that province receive an adjustment for maintenance rates (i.e., foster care and group care bed days); however, only the province receives an administrative adjustment.[476] For example, in fiscal year 2006-2007, as a result of rate adjustments, the

[469] Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at p. 2.
[470] Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 1 (pages unnumbered).
[471] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 21-22.
[472] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 21-22.
[473] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 22.
[474] Letter from B.C. to AANDC dated June 22, 2007, CHRC BOD, Ex. HR-13, Tab 281; see also letter from B.C. to AANDC dated May 28, 2010, CHRC BOD, Ex. HR-13, Tab 308; see also Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.
[475] Letter from B.C. to AANDC dated June 22, 2007, CHRC BOD, Ex. HR-13, Tab 281; see also letter from B.C. to AANDC dated May 28, 2010, CHRC BOD, Ex. HR-13, Tab 308; see also Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.
[476] Testimony of Dr. Cindy Blackstock, Transcript Vol. 49 at pp. 32-53.

administration rate for the province was retroactively increased by AANDC by 37.5%.[477] However, First Nations child and family service agencies in British Columbia do not receive any concordant administrative (or operational) rate adjustment, nor do they receive inflation adjustments pursuant to Directive 20-1.[478]

256. On April 1, 2011, AANDC transitioned both the province of British Columbia and First Nation agencies in that province from a per diem system to an "actual costs" system.[479] At the time, both the province and First Nations child and family service agencies were concerned about the effect this "move to actuals" would have on small agencies in particular,[480] which are "vulnerable to any reduction in operations or maintenance budgets."[481] There was also concern about whether AANDC had the "infrastructure or capacity to assess and approve costs in an efficient manner to meet the needs" of First Nations child and family service agencies.[482]

257. AANDC's stated purpose for imposing a "move to actuals" in British Columbia was to bring its FNCFS Program "funding into strict compliance with program authorities", notwithstanding the fact that it would "result in a significant decrease" in funding for both the province and First Nations agencies, and in some cases concern about the financial viability and potential closure of agencies.[483] In fact, AANDC's cost-savings as a result of the move to actuals were estimated to be "$3.5 million at the First Nations agency level, and [between] $2.5 to $3.5 million at the provincial level."[484]

258. The province of British Columbia has told AANDC that they invest more than $100 million annually in Aboriginal child welfare, and argue that the funding they are currently

[477] Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.
[478] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43.
[479] Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at pp.1-6.
[480] Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 3 (pages unnumbered).
[481] Briefing Note: BC Region First Nation Child and Family Services Transition Plan, CHRC BOD, Ex. HR-14, Tab 368 at p. 2.
[482] Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 2 (pages unnumbered).
[483] Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at pp.1-2; see also letter from the First Nations Directors Forum to the Honourable John Duncan dated May 25, 2012, CHRC BOD, Ex. HR-13, Tab 320.
[484] Profile of First Nations Child and Family Services in British Columbia, CHRC BOD, Ex. HR-14, Tab 348; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 165-166.

receiving for the services they provide on reserve is inadequate.[485] Of note is that when AANDC's other funding formulas – Directive 20-1 and EPFA – are hypothetically applied to the provision of services on reserve by the province of British Columbia, they both result in significantly less funding for the province.[486]

259. On April 1, 2012, the B.C. MOU was replaced by what is called the "Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve" (the "B.C. Service Agreement").[487] This Service Agreement is between the province of British Columbia and Her Majesty the Queen in Right of Canada, and sets out the new terms of funding for the provision of child protection services by the province to 72 First Nations.[488]

260. AANDC's role is described in the B.C. Service Agreement as "fund[ing] or reimburs[ing], within its authorities, [the province of British Columbia] to deliver child welfare services to First Nations children and families ordinarily resident on reserve."[489] It also explains that maintenance "will be reimbursed based on actual expenditures", as opposed to per diem rates (i.e., the move to actuals).[490]

261. According to the B.C. Service Agreement, operations funding is to be "provided annually" by AANDC to "deliver comprehensive (prevention and protection) child and family services, and covers all activities that support the service delivery of child and family services not covered by maintenance and development funding."[491] However, unlike the FNCFS Program Manual for Directive 20-1, the B.C. Service Agreement does not include a restrictive list of what constitutes an "eligible" operations expenditure.

262. Of significance, the B.C. Service Agreement includes at Appendix B a chart describing the "results of the [provincial] costing exercise", which determined that in fiscal year

[485] Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at p. 3; see also Profile of First Nations Child and Family Services in British Columbia, CHRC BOD, Ex. HR-14, Tab 348; see also Potential Reduction in Costs in British Columbia FNCFS, CHRC BOD, Ex. HR-13, Tab 282 at pp. CAN016292_0002-CAN01629_0003.
[486] British Columbia – Provincial Funding Formula for FNCFS Options for Discussion, CHRC BOD, Ex. HR-13, Tab 283 at pp. 1-3; see also testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 163-167.
[487] Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2012), CHRC BOD, Ex. HR-13, Tab 275 ["B.C. Service Agreement"].
[488] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 3, section 4.2.
[489] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 3, section 4.1.
[490] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.3.
[491] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 4, section 5.3.

2010/11 the province spent approximately $42 million to deliver child protection, family supports, special needs and children in care services on reserve – well above the $28 million they were provided in this 2012/13 Agreement.[492] AANDC ~~–a~~cknowledge[d] the results" of this exercise in the B.C. Service Agreement, and has agreed to ~~–c~~ontinue to collaborate on the articulation of costs."[493]

263. The 2012 B.C. Service Agreement was for a term of one year only, and AANDC acknowledged that it was a ~~–f~~irst step in transitioning to a new funding arrangement" with the province of British Columbia, and recognized that ~~–f~~urther steps will be undertaken as [they] move forward with the implementation" of EPFA.[494]

264. On April 1, 2013, the B.C. Service Agreement was renewed for another one year term.[495] AANDC enters into funding arrangements with the province of British Columbia in order to flow funding to them for the provision of these services on reserve, and continues to provide a cost of living adjustment to the province pursuant to the Agreement.[496]

C) Independent Canadian Reviews of AANDC's FNCFS Program and Funding Formulas find Inequities

i) Auditor General's Report (2008) finds that AANDC's FNCFS Program and on Reserve Funding Formulas are Inequitable

265. Following a written request from the Caring Society,[497] the Auditor General initiated a review of AANDC's FNCFS Program and on reserve funding formulas, and reported her findings to the House of Commons in 2008.[498] The purpose of the review was to examine the ~~–m~~anagement structure, the processes, and the federal resources used to implement the federal policy" on reserve.[499]

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[492] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at pp. 5 (section 7.2, 7.6), 10 (Appendix B).
[493] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.6.
[494] B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.5.
[495] Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-14, Tab 399 [~~–U~~pdated B.C. Service Agreement"]; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).
[496] Funding Agreement for Use with Provincial Governments (British Columbia Version) 2011-2012, CHRC BOD, Ex. HR-13, Tab 310; see also BC 2013-2014 Arrangement Routing, CHRC BOD, Ex. HR-14, Tab 400; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.
[497] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 21.
[498] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 1.
[499] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 1.

266. The Auditor General concluded that AANDC's current ~~"f~~unding practices do not lead to equitable funding among Aboriginal and First Nations communities", the effect of which is that First Nations children on reserve are taken into child welfare care at a disproportionate rate (almost eight times that of children in care residing off reserve).[500] As a result, the report made ten recommendations for clarification and reform of the funding formula and FNCFS Program generally.[501]

267. The Auditor General found that AANDC's ~~"u~~se of [Directive 20-1] has led to inequities"[502] because the funding formula itself was ~~"in~~equitable"[503] for the reasons that follow. First, the formula is outdated and ~~"d~~oes not take into account any costs association with modifications to provincial legislation or with changes in the way services are provided."[504]

268. Second, Directive 20-1 fails to address the needs of First Nations children because of the assumptions built into the structure of the formula.[505] For instance, the ~~"f~~ormula is based on the assumption that each First Nations agency has [6%] of on-reserve children placed in care", which ~~"l~~eads to funding inequities […] because, in practice, the percentage of children that they bring into care varies widely."[506] In fact, in the provinces surveyed by the Auditor General in 2007, the percentage of children brought into care ~~"r~~anged from 0 to 28 percent".[507]

269. In addition, the Auditor General concluded that AANDC's funding is ~~"n~~ot responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by First Nations agencies."[508]

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[500] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 2.
[501] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 32-35.
[502] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 6.
[503] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 19.
[504] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp.41-42.
[505] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.
[506] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.
[507] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.
[508] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

270. Thirdly, the report found that Directive 20-1 is "not adapted to small agencies", and that AANDC has taken little action to address concerns about the "funding and capacity [of small agencies] to provide the required range of child welfare services".[509]

271. The Auditor General also found that AANDC's funding of First Nations child and family service agencies is "not properly coordinated" and can be inconsistent between regions, particularly with respect to the CSA.[510]

272. In addition, the report recommended that AANDC clarify and define key policy requirements, including what is meant by "reasonably comparable services" and "culturally appropriate services".[511] It also recommended that AANDC "find ways to know whether the services that the [FNCFS Program] supports are in fact reasonably comparable",[512] noting the challenges many First Nations child and family service agencies have in accessing necessary health and social services on reserve.[513]

273. The Auditor General also found that AANDC "pre-determines the level of funding it will provide to a First Nations agency without regard" to the services the agency is bound to provide under their provincial delegation agreement in accordance with provincial legislation and standards.[514] In fact, the report concluded that AANDC had "limited assurance that child welfare services delivered on reserves by First Nations agencies comply with provincial legislation and standards."[515]

274. With respect to jurisdictional disputes, the Auditor General found that there were "fundamental differences between the views of [AANDC] and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care", which impacts the "availability, timing and level of services to First Nations children."[516] Moreover, the report concluded that for "First Nations children with a high degree of medical need", it may be that "placing these children in care

[509] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 21, sections 4.55, 4.56.
[510] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 22, section 4.58.
[511] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 11-13.
[512] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 13, section 4.25.
[513] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 12, section 4.20.
[514] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 14, section 4.30.
[515] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 15, section 4.34.
[516] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 16-17, section 4.39.

outside of their" communities is the only way to ensure they have ~~a~~access to the medical services they need."[517]

275. Looking at the budget of the FNCFS Program as a whole, the Auditor General concluded that AANDC's ~~b~~udgeting approach" was ~~n~~ot sustainable" because the Program's ~~e~~xpenditures are growing faster than the Department's overall budget".[518] In order to address these funding shortfalls, AANDC was re-allocating funding from other programs such as ~~c~~ommunity infrastructure and housing".[519]

276. As well, the report concluded that given the importance of the FNCFS Program and the impact it has on the lives of First Nations children and families across Canada, it was alarming that AANDC collected so little ~~i~~nformation on the actual services funded through its [Program and] funding formula". The Auditor General called on AANDC to define performance indicators and collect information on the results and outcomes of its funding formulas, since this information is critical to ~~[~~assess] the need for child welfare services in a particular First Nations community and [provide] guidance to determine the funding needed."[520]

277. The Auditor General also analyzed AANDC's new funding formula, EPFA, and found that ~~i~~t will provide more funds for the operations of First Nations agencies [and] also offers them more flexibility to allocate resources to different types of child welfare services."[521]

278. However, the report ultimately concludes that EPFA ~~d~~oes not address the inequities [the Auditor General has] noted under [Directive 20-1]" because it ~~s~~till assumes that a fixed percentage of First Nations children and families in all the First Nations served by an agency need child welfare services."[522] Therefore, EPFA still does not respond to or address the needs of First Nations, and pressures to ~~f~~und exceptions will likely continue to exist under the new formula" as a result.[523]

[517] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 17, section 4.40.
[518] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 25, sections 4.72, 4.73.
[519] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 25, section 4.72.
[520] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 27, sections 4.83, 4.85.
[521] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.53.
[522] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.54.
[523] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.54.

279. Overall, the Auditor General found that Directive 20-1 and EPFA do ―not treat First Nations or provinces in a consistent or equitable manner", the result of which is that ―many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves."[524] Therefore, the report called on AANDC to design a funding formula that is ―more than a means of distributing the [FNCFS Program's] budget", noting that the ―shortcomings of the funding formula have been known to [AANDC] for years".[525]

280. In response to the Auditor General's 2008 report, AANDC stated that they ―agree[d] with all [the report's] recommendations"[526] and had ―developed an action plan to address the concerns".[527]

ii) Public Accounts Committee's Report (2009) finds that AANDC's FNCFS Program and on Reserve Funding Formulas are Inequitable

281. Following the Auditor General's report in 2008, and in light of the ―disturbing findings of the audit," the PAC held a hearing on February 12, 2009 with ―officials from the Office of the Auditor General […] and [AANDC]" to examine the report and the FNCFS Program.[528] The PAC subsequently issued its own findings in a report dated March 2009.[529]

282. At the time, the PAC noted that they were ―very concerned" that at the hearing AANDC was only able to provide _vague generalities", and that there was ―no evidence of an action plan currently in place" to address the concerns and recommendations in the Auditor General's 2008 report.[530] The PAC requested that AANDC provide them with a ―detailed action plan" by April 30, 2009.[531]

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[524] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.66.
[525] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 21, 23, sections 4.57, 4.66.
[526] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 6.
[527] Briefing Note: Auditor General (OAG) Chapter 4: Child and Family Services (Information for Deputy Minister) dated August 27, 2008, CHRC BOD, Ex. HR-03, Tab 12 at p. 2 (pages unnumbered).
[528] Report of the Standing Committee on Public Accounts, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General of Canada (2009), CHRC BOD, Ex. HR-03, Tab 15 at p. 1 [―PAC Report 2009"].
[529] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15.
[530] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 3-4.
[531] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 4.

283. The report noted that at the PAC hearing in February 2009, AANDC ~~a~~cknowledged the flaws in [Directive 20-1]".[532] However, the PAC stated that they failed to ~~u~~nderstand why [Directive 20-1] is still in place", and remained ~~q~~uite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed."[533] As a result, the report called on AANDC to ~~i~~mmediately modify Directive 20-1" and report back on its progress by June 30, 2009.[534]

284. Analyzing EPFA, the PAC agreed with the Auditor General's stated concerns that the new formula does not address the inequities of Directive 20-1, and noted that they were ~~v~~ery disturbed that [AANDC] would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed" when they have known about the shortcomings of the funding formula for years.[535] Therefore, the report recommended that AANDC ensure that EPFA is ~~b~~ased upon need rather than an assumed fixed percentage of children in care", and report back to the Committee on its progress by December 31, 2009.[536]

285. The PAC also reiterated the Auditor General's concerns about the lack of a definition of ~~r~~easonable comparability", stating that ~~a~~t the very least, [AANDC] should be able to compare [the level of] funding" provided to First Nations child and family service agencies to similar provincial agencies, in order to determine whether its funding is sufficient to ensure reasonable comparability.[537] Therefore, the PAC recommended that AANDC conduct a ~~c~~omprehensive comparison of its funding" by December 31, 2009 and provide the results to the Committee.[538]

286. In addition, the PAC repeated the Auditor General's concern with AANDC's failure to define ~~c~~ulturally appropriate services", and called on AANDC to provide the Committee

[532] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 8.
[533] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 9.
[534] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.
[535] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.
[536] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.
[537] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 5-6.
[538] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 6.

with a ~~c~~lear indication of [what] progress [has been] made in defining ~~c~~culturally appropriate services'".[539]

287. Finally, the PAC report noted concern with AANDC's re-allocation of funding from programs such as infrastructure and housing in order to keep pace with the FNCFS Program's growing expenditures, and recommended that AANDC ~~d~~determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements."[540]

288. AANDC issued its response to the PAC report on September 19, 2009, and generally agreed with all of the Committee's recommendations.[541] Before the Standing Committee on Aboriginal Affairs and Northern Development in 2009, AANDC stated that it ~~r~~ecognize[d] the seriousness of the matters raised in [the OAG and PAC reports].[542]

iii) Auditor General's Follow-up Status Report (2011) finds that AANDC's FNCFS Program and on Reserve Funding Formulas Remain Inequitable

289. Three years after the release of the Auditor General's report and recommendations on AANDC's FNCFS Program, the Auditor General released a follow-up report in 2011.[543] The report ~~f~~ound progress to be unsatisfactory on several recommendations […] that are important for the lives and well-being of First Nations people", and concluded that this was in large part because of structural impediments in the programs themselves which ~~s~~everely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserve".[544]

290. For example, the Auditor General concluded that AANDC needs to: clarify service levels; create a legislative basis for the programs; ensure funding mechanisms are

[539] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 6-7.
[540] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 11.
[541] Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General, CHRC BOD, Ex. HR-03, Tab 16, pp. 1-6 (pages unnumbered) [~~"~~AANDC Response to PAC Report 2009"].
[542] House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 1 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).
[543] Status Report of the Auditor General of Canada to the House of Commons, Chapter 4: Programs for First Nations on Reserves (2011), CHRC BOD, Ex. HR-05, Tab 53 [~~"~~OAG Status Report 2011"].
[544] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 2.

appropriate; and encourage organizations to support local service delivery.[545] The Auditor General also noted concern about the AANDC's reporting requirements, and the burden that compliance activities places on First Nations.[546]

291. With respect to the FNCFS Program, the Auditor General found that AANDC had still not "defined [its] policy commitment to provide comparable services", absent which it is difficult to "demonstrate that [EPFA] provides services to children and families living on reserves that are reasonably comparable to provincial services."[547]

292. Overall, the follow-up report noted that services "available on reserves are often not comparable to those provided off reserves by provinces and municipalities", and that change "is needed if First Nations are to experience more meaningful outcomes from the services they receive."[548]

293. AANDC responded to the Auditor General's 2011 follow-up report, agreeing with the recommendations contained therein.[549]

iv) Public Accounts Committee's Follow-up Report (2012) finds that AANDC's FNCFS Program and on Reserve Funding Formulas Remain Inequitable

294. Following the Auditor General's 2011 status report, the PAC held two hearings on October 19 and 24, 2011 respectively, and issued its own follow-up report in February 2012.[550] At these hearings, the PAC heard witnesses from the Office of the Auditor General, AANDC and Health Canada.[551]

295. The PAC follow-up report supported the findings and recommendations in the Auditor General's 2011 report, and called on AANDC to address the "structural impediments to making meaningful, lasting improvements" for First Nations on reserve,[552] and to

[545] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 2.
[546] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 34, sections 4.83, 4.85.
[547] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 23, sections 4.49, 4.51.
[548] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 5.
[549] OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 8.
[550] Report of the Standing Committee on Public Accounts, Chapter 4: Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada (2012), CHRC BOD, Ex. HR-05, Tab 45 at p. 1 ["PAC Status Report 2012"].
[551] PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 1.
[552] PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 3.

–specify the level of services on reserve required for comparability to the services provided by provinces and territories".[553]

296. With respect to AANDC's progress in implementing the recommended reforms to the FNCFS Program, notwithstanding AANDC's testimony at the hearing that they had –fixed the funding formula", the PAC reiterated the Auditor General's concern that –AANDC had not yet defined culturally appropriate services, nor had it defined comparability or conducted a review to ensure that services available on reserve were reasonably comparable to those available off reserves."[554]

297. In response, AAANDC recognized that –many of the problems faced by First Nations are due to the structural impediments identified" by the Auditor General and PAC reports, and that these impediments –must be addressed before conditions on reserves will approach those existing elsewhere across Canada." [555]

v) Parliament Adopts "Jordan's Principle" in an Attempt to Address Jurisdictional Disputes

298. On October 13, 2007, Member of Parliament Jean Crowder (Nanaimo-Cowichan, NDP) tabled Private Member's Motion –M-296" in the House of Commons for the immediate adoption by the Government of Canada of a –child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children."[556]

299. Jordan's Principle is defined as:

> [… A] child first principle to resolving jurisdictional disputes within and between federal and provincial/territorial governments. It applies to all government services available to children, youth and their families.
>
> […]
>
> Where a jurisdictional dispute arises around government services to a Status Indian or Inuit child, Jordan's Principle requires that the government department

[553] PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 2.
[554] PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at pp. 8-9.
[555] Government of Canada Response to the Report of the Standing Committee on Public Accounts, Chapter 4: Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada, CHRC BOD, Ex. HR-05, Tab 54 (pages unnumbered).
[556] 39th Parliament, 2nd Session, Hansard of Private Members' Business: October 31, 2007, CHRC BOD, Ex. HR-03, Tab 20 at p. 2 (pages unnumbered) [–Jordan's Principle Motion 296"].

> of first contact pays for the service to the child without delay or disruption. The paying government can then refer the matter to inter-governmental processes to pursue repayment of the expense.[557]

300. The principle is named in memory of the late Jordan River Anderson of Norway House Cree Nation in Manitoba, who was born in 1999 with a ~~"c~~omplex set of genetic disorders."[558] Due to the ~~"l~~ack of services on reserve", Jordan's family made the ~~"d~~ifficult decision" to place him in the provincial child welfare system so that he could access the ~~"m~~edical care he needed."[559] As a result, Jordan ~~"s~~pent the first two years of his life in [a Winnipeg] hospital."[560]

301. Jordan's health eventually stabilized, and his doctors advised that he could leave the hospital and go to a ~~"s~~pecialized foster home"[561] close to the hospital with appropriate supports, including ~~"m~~edical equipment" and caretakers.[562] However, the federal and provincial governments ~~"a~~rgued over who should pay for Jordan's foster home costs" for more than two years.[563] In the meantime, neither level of government paid for the service(s), so Jordan remained in hospital.[564]

302. His doctors wrote letters to both governments calling on them to pay for Jordan to move to a specialized foster home because a ~~"h~~ospital is no place for a child to grow up in".[565] However, neither the federal nor the provincial government took responsibility for the situation.[566]

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[557] Fact Sheet: Jordan's Principle, CHRC BOD, Ex. HR-03, Tab 19; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 147, 151-153.
[558] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 141.
[559] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered).
[560] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 141; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 9.
[561] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered).
[562] Testimony of Corinne Baggley, Transcript Vol. 57 at pp. 10, 12.
[563] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 142; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 10.
[564] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 142-143, 146.
[565] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 143.
[566] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 143.

303. Sadly, after a two-year long jurisdictional dispute, Jordan passed away at the age of five, never having left the hospital.[567] His family and First Nations community created "Jordan's Principle" in his name not only to honour his legacy, but to "make sure that this never happens again to another child."[568]

304. Parliament passed motion M-296 calling on the Government of Canada to immediately adopt a child-first principle based on Jordan's Principle unanimously on December 12, 2007.[569]

305. Following the vote in the House of Commons, the Ministers of AANDC, Health Canada and the Federal Interlocutor for Métis and Non-Status Indians issued the following statement:

> […] Our Government is committed to putting children first and is proud to support motion 296, 'Jordan's Principle.'
>
> This Government believes that the health and safety of all children must always triumph over any issues of jurisdiction.
>
> [AANDC] is working closely with Health Canada as well as provincial and First Nations partners to ensure that jurisdictional issues do not impact a child's quality of care.[570]

306. The purpose of Jordan's Principle is to ensure that "First Nation[s] children [are not] denied access to government services or delayed receipt of access for government services because of additional barriers related to them being a First Nations child."[571] In the context of First Nations child and family services, Jordan's Principle is a mechanism through which to address existing gaps in jurisdiction and service delivery on reserve in

[567] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 146.
[568] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 146-147.
[569] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 15 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 148-149.
[570] Statement from the Federal Minister of Health and Minister of [AANDC] and Federal Interlocutor for Métis and Non-Status Indians regarding Motion 296, Jordan's Principle (December 12 ,2007), CHRC BOD, Ex. HR-03, Tab 22.
[571] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 153-154.

order to ensure that the services being provided are reasonably comparable to those available to children living off reserve.[572]

307. AANDC was given the lead to respond to motion M-296 and Jordan's Principle.[573] On June 24, 2009, AANDC entered into a Memorandum of Understanding (the "MOU") with Health Canada setting out each department's roles and responsibilities with respect to the implementation of Jordan's Principle.[574] The MOU states that if a "dispute over funding responsibility arises between the federal and provincial governments, [Health Canada and AANDC] will work together to engage and collaborate with the provinces and First Nations representatives to resolve the dispute through a multi-party case management approach".[575] This MOU was updated in January 2013.[576]

308. AANDC's definition of and response to Jordan's Principle focuses on cases "involving a jurisdictional dispute between a provincial government and the federal government" for a First Nations child living on reserve "who has been assessed by health and social service professionals and [has] been found to have multiple disabilities requiring multiple service providers."[577] This is considered to be the first stage of a "two-pronged approach", the second stage of which would "including discussions on important issues that relate to services for First Nation children with disabilities".[578]

309. After its unanimous adoption by Parliament, AANDC wrote to the provinces and territories in May 2008 indicating that it was "fully committed to honouring Jordan's Principle and [was] taking action to make sure that children with multiple disabilities

[572] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 154-155; see also AANDC Briefing Note, "Jordan's Principle" (2008), CHRC BOD, Ex. HR-14, Tab 352; see also AANDC, "Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302 at pp. 12-15.
[573] Testimony of Corinne Baggley, Transcript Vol. 57 at p. 24.
[574] Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2009), Respondent's BOD, Ex. R-14, Tab 41; see also testimony of Corinne Baggley, Transcript Vol. 57 at pp. 24-26.
[575] Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2009), Respondent's BOD, Ex. R-14, Tab 41 at p. 1.
[576] Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2013), Respondent's BOD, Ex. R-14, Tab 42.
[577] AANDC Questions & Answers re: Jordan's Principle, CHRC BOD, Ex. HR-14, Tab 377 at pp. 1-2; see also letter from the Honourable Chuck Strahl to the First Nations Leadership Council (undated), CHRC BOD, Ex. HR-14, Tab 379 at p. 1; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70.
[578] Letter from the Honourable Chuck Strahl to the First Nations Leadership Council (undated), CHRC BOD, Ex. HR-14, Tab 379 at pp. 1-2; see also testimony of Corinne Baggley, Transcript Vol. 58 at pp. 43-44; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70.

receive the services they need quickly."[579] In the letter, AANDC proposed "case conferencing as a method to assist all parties involved in a child's care to work collaboratively and efficiently to provide services that are comparable to those provided to other children living in similar geographic locations".[580] To that end, AANDC requested that each province and territory identify a "lead official" who could serve as a point of contact.[581]

310. In response, the provinces of Saskatchewan, Alberta, British Columbia, Ontario and Prince Edward Island, along with the Northwest Territories wrote to AANDC voicing support for Jordan's Principle generally.[582] However, some provinces voiced concern with the federal government's definition of Jordan's Principle and called for a broader response that more closely aligns with the spirit and wording of the Principle itself.[583] AANDC has also been criticized by "[a]dvocacy groups, First Nation leadership and provinces" for its narrow approach to Jordan's Principle.[584]

311. Despite the adoption of Jordan's Principle and governments' efforts to date, a 2012 study found that "First Nations children continue to be the victims of administrative impasses."[585]

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[579] Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent's BOD, Ex. R-14, Tab 40.
[580] Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent's BOD, Ex. R-14, Tab 40; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 22.
[581] Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent's BOD, Ex. R-14, Tab 40.
[582] Letters from Provincial Governments to AANDC re: Jordan's Principle, CHRC BOD, Ex. HR-14, Tab 364; see also letter from Province of Ontario to AANDC dated December 16, 2008, CHRC BOD, Ex. HR-15, Tab 438.
[583] AANDC & British Columbia, "Joint Process for the Continued Implementation of Jordan's Principle in British Columbia" (2011), Respondent's BOD, Ex. R-14, Tab 45 at p. 6, Appendix A; see also AANDC & New Brunswick, "Joint Statement on the Implementation of Jordan's Principle in New Brunswick", Respondent's BOD, Ex. R-14, Tab 46 at p. 7, Schedule One.
[584] Deputy Ministers' Recognition Award Nomination Form (2011), CHRC BOD, Ex. HR-13, Tab 327 at p. 4; see also letter from the First Nations Leadership Council to the Honourable Chuck Strahl dated November 14, 2008, CHRC BOD, Ex. HR-14, Tab 378 at p. 1; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 28.
[585] Canadian Paediatric Society, "Are We Doing Enough? A status report on Canadian public policy and child and youth health" (2012), CHRC BOD, Ex. HR-06, Tab 83 at pp. 28-29; see also AANDC, "Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302; see also AANDC Briefing Note, "Jordan's Principle and Children with Life Long Complex Medical Needs" (2007), CHRC BOD, Ex. HR-14, Tab 380; see also Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 390.

D) United Nations Committee on the Rights of the Child (UNCRC) Reviews AANDC's FNCFS Program and on Reserve Funding Formulas and Finds Inequities

312. In addition to the independent domestic reviews and reports on the inequities in AANDC's FNCFS Program and on reserve funding formulas, there has also been international attention shone on the issues of inequality among Aboriginal children in Canada. The Government of Canada signed and ratified the *United Nations Convention on the Rights of the Child* ("the *Convention*"),[586] and is therefore obligated to respect and ensure the rights and requirements enunciated by the *Convention* are fulfilled.

313. Pursuant to Article 44 of the *Convention,* each State Party undertakes to submit reports on the measures they have adopted which give effect to the rights recognized and the progress made on the enjoyment of those rights.[587] The United Nations Committee on the Rights of the Child (the "UNCRC"), which oversees the implementation of the *Convention*, reviews these reports and issues recommendations, filed its first "Concluding Observations" in response to Canada's 2001 second periodic report in October 2003 (the "October 2003 Report").[588]

314. In its October 2003 Report, the UNCRC made several recommendations, many of which dealt specifically with Aboriginal children in Canada, including:

- Article 22 recommended that Canada "continue to strengthen its legislative efforts to fully integrate the right to non-discrimination in all relevant legislation concerning children". In particular, this "right is to be effectively applied to all political, judicial and administrative decisions and in projects, [programs] and services that have an impact on all children belonging to minority and other vulnerable groups such as children with disabilities and Aboriginal children".[589]

- Article 25 recommended that the principle of "best interests of the child" contained in article 3 be appropriately analysed and objectively implemented with regard to individual and groups of children in various situations (e.g. Aboriginal children) […]."[590]

- Article 58 welcomed "the Statement of Reconciliation made by the Federal Government expressing Canada's profound regret for historical injustices

[586] *Convention on the Rights of the Child,* 44/25 of 20 November 1989, (entered into force 2 September, 1990) ["*UNCRC*"].
[587] *UNCRC*, Art. 44.
[588] Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, CHRC BOD, Ex. HR-03, Tab 23 ["UNCRC Report 2003"]; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 146.
[589] UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at pp. 5-6, Art. 22.
[590] UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 6, Art. 25.

committed against Aboriginal people, in particular within the residential school system". It also noted ~~t~~the priority accorded by the Government to improving the lives of Aboriginal people across Canada and by the numerous initiatives, provided for in the federal budget, that have been embarked upon since the consideration of the initial report". Further, the UNCRC expressed concern ~~t~~hat Aboriginal children continued to experience many problems, including discrimination in several areas, with much greater frequency and severity than their non-Aboriginal peers".[591]

- Article 59 urged the Government to pursue its efforts to address the gap in life chances between Aboriginal and non-Aboriginal children.[592]

315. In January 2009, the UNCRC released ~~G~~General Comment 11",[593] which arose out of a discussion with members of indigenous communities around the world concerning particular issues of concern to them. The objective of the General Comment was to provide States with guidance on how to implement their obligations under the *Convention* with respect to indigenous children. In its General Comment, the UNCRC highlighted the following concerns:

- Article 5 states that ~~t~~he specific references to indigenous children in the *Convention* are indicative of the recognition that they require special measures in order to fully enjoy their rights". The UNCRC acknowledged that ~~i~~ndigenous children face significant challenges in exercising their rights and that they continue to experience serious discrimination contrary to article 2 of the Convention in a range of areas, including in their access to health care and education",[594] which prompted the need for this general comment.[595]

- Articles 46, 47 and 48 discussed the family environment and ~~a~~lternate care", which Dr. Blackstock indicated was the international term used to describe children who are removed from the home.[596] Article 47 articulated the need to maintain ~~t~~he best interests of the child" and insisted that ~~t~~he integrity of indigenous families and communities should be primary considerations in development, social services, health and educational programs affecting indigenous children".[597]

- Article 48 referenced situations where indigenous children are removed from their homes. The UNCRC emphasized the need for ~~S~~States to ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20(3) of the

[591] UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 13, Art. 58.
[592] UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 13, Art. 59.
[593] Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, CHRC BOD, Ex. HR-03, Tab 24 [~~U~~UNCRC General Comment 2009"].
[594] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.
[595] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.
[596] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 160.
[597] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at p. 10, Art. 47.

Convention, pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background". Furthermore, the UNCRC spoke to the overrepresentation ~~a~~among indigenous children separated from the family environment"[598] and identified the need to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.[599]

316. As part of its obligations as a State Party, in November 2009, the Government of Canada filed its Third and Fourth Reports in anticipation of its 2012 UNCRC review.[600] The following sections were highlighted during the hearing:[601]

- Section 96 discussed the reality that ~~h~~half of the Aboriginal population in Canada is less than 25 years old, whereas 30 percent of all Canadians are under the age of 25".[602] Further, they stated that projections for growth in ~~t~~the Aboriginal population would continue to out-pace that of the general population over the next two decades."[603]

- Section 97 described the funding provided by the Government of Canada ~~t~~to First Nations and Inuit communities to deliver evidence-based programs and services to support the development of children in an effort to address the gaps in life chances between Aboriginal and non-Aboriginal children".[604]

- Section 98 addressed the ~~d~~disproportionately high number of Aboriginal children in state care as part of a broader social challenge of life on reserves, such as poverty, poor housing conditions, substance abuse and exposure to family violence".[605] The Government of Canada acknowledged a shift in its child welfare programs for Aboriginal children to a prevention-focused approach.

317. On October 5, 2012, the UNCRC provided its final observations concerning the reports filed by the Government of Canada.[606] The main points addressed during the hearing were as follows:

- Section 32, falling under the heading, ~~"N~~Non-discrimination", indicates the UNCRC's concerns regarding ~~t~~the continued prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin, and other

[598] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 10-11, Art. 48.
[599] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.
[600] Convention on the Rights of the Child, ~~"T~~Third and Fourth Reports of Canada", CHRC BOD, Ex. HR-03, Tab 25 [~~"C~~Canada's 3rd and 4th Reports to UNCRC"].
[601] Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 164-166.
[602] Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 96.
[603] Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 96.
[604] Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 97.
[605] Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 98.
[606] Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention*, CHRC BOD, Ex. HR-05, Tab 57 [~~"U~~UNCRC Report 2012"].

grounds". In particular, subsection (a) refers to the ~~–si~~gnificant overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care".[607]

- At subsection 32(d), the UNCRC notes their concern with the lack of action following the ~~–A~~uditor General's finding that less financial resources are provided for child welfare services to Aboriginal children than to non-Aboriginal children". Subsection 32(e) also refers to the ~~–e~~conomic discrimination resulted from direct or indirect social transfer schemes and other social/tax benefits, such as the authorization given to provinces and territories to deduct the amount of social assistance received by parents on welfare".[608]

- At section 33, the UNCRC provided its recommendations to address its concerns about discrimination identified in the Government of Canada's Reports:

  - Under subsection (a), the UNCRC urged the Government to ~~–ta~~ke urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the justice system and out of home care".

  - Following, subsection (d) urged the Government of Canada to ~~–ta~~ke immediate steps to ensure that in law and in practice, Aboriginal children have full access to all government services and receive resources without discrimination".

  - Subsection (e) recommended the State Party ~~–u~~ndertake a detailed assessment of the direct or indirect impact of the reduction of social transfer schemes and other social/tax benefit schemes on the standard of living of people depending on social welfare, including the reduction of social welfare benefits linked to the National Child Benefit Scheme, with particular attention to women, children, older persons, persons with disabilities, Aboriginal people, African Canadians and members of other minorities".[609]

E) AANDC's Internal Evaluations, Audits and Reviews of the FNCFS Program and on Reserve Funding Formulas Find Inequities

318. In addition to the above-mentioned independent and international reviews, AANDC has conducted its own reviews of the FNCFS Program and on reserve funding formulas, which have identified and acknowledged the shortcomings with, and inequities caused by, the Program and funding formulas.[610]

[607] UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, section 32.
[608] UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, section 32.
[609] UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, Art. 32.
[610] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at pp. ii; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. v-

i) Shortcomings and Inequities with AANDC's FNCFS Program and Funding Formulas

319. AANDC is aware of the "dire" circumstances of First Nations on reserve, and of the real administrative and operational difficulties its inadequate funding has on First Nations child and family service agencies on reserve.[611] An internal AANDC document explained why the FNCFS Program and funding formulas, particularly the fixed operations budgets, have not allowed First Nations child and family service agencies to provide a comparable level of service on reserve:

> Although the national formula was intended to ensure comparability of services with other Canadians, the disregard for the scope and content of provincial legislation in the formula perpetuated inequity of service in many provinces.
>
> […]
>
> While [FNCFS Program] expenditures have increased, the budgets [for First Nations child and family service agencies] continue to be woefully inadequate.[612] (emphasis added)

a. Directive 20-1

320. AANDC has acknowledged that "Directive 20-1 does not provide sufficient funding for [First Nations child and family service agencies] to deliver culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve."[613]

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viii, 29-31; see also Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 1-16; see also Mid-Term National Review for the Strategic Evaluation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program (2011), CHRC BOD, Ex. HR-08, Tab 113 at pp. v-vii, 18-20, 43; see also Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247; see also Evaluation of the First Nations Child and Family Services (FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303; see also Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359; see also Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38.

[611] First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Q's & A's, CHRC BOD, Ex. HR-11, Tab 233 at p. 1.

[612] Vince Donoghue Briefing Note, "Comparability of First Nations Child Welfare On Reserve" (undated), CHRC BOD, Ex. HR-11, Tab 234 at pp. 1-3.

[613] AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391 at p. 1; see also AANDC Backgrounder "Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007", CHRC BOD, Ex. HR-14, Tab 392 at p. 1.

321. Furthermore, AANDC acknowledged in 2007 that the funding and subsequent level of services provided to First Nations children and families on reserve pursuant to AANDC's FNCFS Program and Directive 20-1 funding formula are inferior to those received by children and families living off reserve who are served by the provinces and territories:

> [T]he current federal funding approach to child and family services [i.e., Directive 20-1] has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians.[614] (emphasis added)

322. AANDC is aware of these "weaknesses" and that they have "likely been a factor in increases in the number of children in care [… because Directive 20-1] has had the effect of steering agencies towards in-care options – foster care, group homes and institutional care because only these agency costs are fully reimbursed" and "resources for prevention outreach".[615]

b. EPFA

323. AANDC's internal reviews of EPFA have found that while the funding formula is "regarded as appropriate for meeting its intended outcomes", there are "challenges" that need to be addressed, including: "provincial requirements, human resource shortages, salary, support from government/agency management, community linkages, training, and geographical isolation".[616]

324. In 2010, AANDC evaluated the implementation of EPFA in Alberta and found that 75% of the First Nations child and family service agencies interviewed "felt that funding for the EPFA is not sufficient to achieve intended outcomes", and that "the funding model [was not], as currently designed, flexible enough to accommodate the varying needs of

[614] Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38 at p. 2 (pages unnumbered).
[615] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at p. ii; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii.
[616] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. vi, 13, 16-17, 21-24.

the agencies".[617] However, the EPFA funding model in Alberta has not been modified since its implementation in 2007.[618]

325. Similarly, in a 2012 audit of Nova Scotia's Mi'kmaw Children and Family Services Agency (the "Mi'kmaw Agency"), AANDC found the following with respect to the adequacy of EPFA funding:

> The management and staff of the [Mi'kmaw] Agency are having significant challenges in providing services and managing operations effectively. Opportunities exist to improve the effectiveness of Operations, but real and perceived shortfalls in financial and human resources require a focus on crisis management with little or no opportunities to adequately plan, monitor and improve operations. […][619] (emphasis added)

326. Specifically, the audit noted that fixed funding levels under EPFA "preclude the capacity to hire additional case workers to help meet the demand for services", and provide limited or no funding for capital requirements and legal costs.[620]

327. These findings were reiterated in AANDC's evaluation of the implementation of EPFA in Saskatchewan and Nova Scotia in 2012.[621] That evaluation also found that "[m]ore than half of agencies believe that funding is insufficient to meet their needs, particularly around salaries, training, the rising costs of institutional care, and the need for capital infrastructure".[622]

328. Overall, AANDC concluded that there is "concern that the EPFA funding mechanism will not allow [First Nations child and family service] agencies to keep up with provincial

[617] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. 26-27.
[618] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 109-110; Vol. 62 at pp. 48-54.
[619] Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at p. 1; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261.
[620] Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 11-12; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252
[621] Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 6; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247.
[622] Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 7; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at p. 31.

changes without negatively impacting their ability to provide consistent and quality programming."[623]

329. AANDC has also identified the evaluations of the FNCFS Program and EPFA funding model as "very high risk" in Nova Scotia, Saskatchewan, Québec and Prince Edward Island.[624]

ii) AANDC's FNCFS Program and on Reserve Funding Formulas are not Comparable to the Services and Funding it Provides to the Provinces

330. AANDC has noted that many First Nations "children and families are not receiving services reasonably comparable to those provided to other Canadians",[625] and that "First Nations are not receiving a fair level of services as compared to non-First Nations in Canada."[626]

331. AANDC has also found that the reason for the lack of comparability is that FNBCFS Program funding is insufficient "to permit First Nation communities to effectively and efficiently meet the needs of their communities and their statutory obligations under provincial legislation."[627]

332. Furthermore, AANDC is aware that the FNCFS Program is unable "to 'keep up' with provincial investments [in child welfare], creating a growing gap in investments on versus off-reserve".[628] According to internal AANDC documents, the inequitable levels of funding and services for the FNCFS Program are a result of the "2% cap on funding allocated to [AANDC] by Parliament" which has been in place since 1996.[629] This cap

[623] Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 14; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at pp. 30-31.
[624] Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359.
[625] AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354; see also AANDC Briefing Note, "Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2.
[626] AANDC Power Point, "Overview of Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 7.
[627] AANDC Power Point, "Overview of Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 10.
[628] AANDC Power Point, "Sustainability of Funding: Options for the Future" (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 3; see also AANDC Power Point, "Sustainability of Programming" (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 11-12, 17-18.
[629] AANDC Power Point, "Sustainability of Funding: Options for the Future" (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 6; see also AANDC Briefing Note, "Costs Associated with the Income Assistance and First Nations Child and Family Services Programs" (2007), CHRC BOD, Ex. HR-14, Tab 349.

has resulted in growing "A-base shortfalls [… because the 2%] lags inflation and demographic-driven demand".[630]

333. Given AANDC's constitutional responsibility for Indians and their lands, if First Nations child and family service agencies were forced to close their doors as a result of under-funding, AANDC would either have to provide those services directly, or fund the provinces to provide them on reserve.[631]

334. Senior government officials at AANDC have recognized that the Department provides less funding to First Nations child and family service agencies than it would have to provide the provinces and territories if they were to take over responsibility for child welfare on reserve.[632] Since eligible maintenance costs are reimbursed dollar-for-dollar, the amount of funding for operations and prevention, which AANDC has fixed for First Nations child and family service agencies on reserve, is where costs would likely increase if these services were provided by the provinces and territories:

> Within the social development programs, there are several areas where [AANDC] funding does not match provincial standards (e.g. […] operations-related funding for [First Nation] child and family services agencies). The cost of matching provincial standards [for social development programs as of 2006] would be at least $200 [million] annually.[633]

335. Notwithstanding the fact that the services would be provided to the same group of people (i.e., First Nations children and families ordinarily resident on reserve), AANDC has found that if the provinces were to take over the provision of child welfare services on

[630] AANDC Power Point, "Sustainability of Funding: Options for the Future" (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, "Is 2% Enough: AANDC Funding for First Nations Basic Services" (2007), CHRC BOD, Ex. HR-14, Tab 383 at pp. 2, 4, 8; see also AANDC Power Point, "First Nations Basic Services: Cost Drivers Project" (2005), CHRC BOD, Ex. HR-15, Tab 472 at pp. 3-4, 11, 18, 23, 32-37.
[631] *Constitution Act, 1867, supra*, s. 91(24).
[632] First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4; see also AANDC Briefing Note, "Explanations on Expenditures of Social Program" (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 2; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3.
[633] E-mail from John Dance to Johann Gauthier et al. dated February 1, 2006, CHRC BOD, Ex. HR-15, Tab 477 at p. 1.

reserve, it would likely result in "higher cost[s]" for the Department:[634]

> If current social programs were to be administered by [the] provinces, this would result in a significant increase in costs for [AANDC]. 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 [AANDC] an additional $2.2 [million] beyond what [AANDC] currently funds the First Nation Child and Family Services agency.[635] (emphasis added)

336. This is also the case in New Brunswick, where AANDC has found that if "responsibility for [FNCFS Program] delivery [were to] revert to the Province, it is likely that they will seek reimbursement of costs consistent with their provincial [legislation] which is in excess of the current agencies operations budget amounts":[636]

> The cost of [the province providing child welfare services on reserve] would be higher as the full provincial program would be delivered. [AANDC] would only fund the [First Nations child and family service agencies] on [Directive] 20-1, and the resulting shortfall would be borne by the [First Nations], increasing the deficit level of the New Brunswick [First Nations]. The province has expressed concern with signing any agreement that would result in less service to [First Nations] children than to other residents in the province.[637] (emphasis added)

337. Additionally, in fiscal year 2008-2009, AANDC compared its expenditures per child in care to those in the provinces of Alberta, Manitoba and British Columbia. There was a difference of more than $10,000 per child in care in both Manitoba and British Columbia, and of almost $4,000 per child in care in Alberta.[638]

338. As recently as 2012, senior AANDC officials noted that if the provision of child welfare services to First Nations on reserve was transferred from First Nations child and family

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[634] First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4.

[635] AANDC Briefing Note, "Explanations on Expenditures of Social Program" (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 2.

[636] AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3.

[637] AANDC Briefing Note, "New Brunswick First Nation Child and Family Services" (2002), CHRC BOD, Ex. HR-15, Tab 468 at p. CAN112546_0002.

[638] AANDC, "Comparison of Manitoba, British Columbia, Alberta, AANDC Child and Family Services Expenditures per Child in Care out of the Parental Home" (undated), CHRC BOD, Ex. HR-13, Tab 306.

service agencies to the provinces and territories, it could result in ―dramatic increases in [FNCFS Program] costs".[639]

339. Moreover, given the greater needs of First Nations people, it would likely require even greater financial investment from AANDC in order for the funding and services provided to First Nations children and families on reserve to be comparable to those offered by the provinces and territories off reserve.[640]

PART II – QUESTIONS AT ISSUE

340. The Commission submits the questions at issue before the Tribunal in the present matter are whether the Commission and Complainants have demonstrated a *prima facie* case of discrimination in establishing: (i) that AANDC provides a ―service" within the meaning of section 5 of the *CHRA*; (ii) that AANDC denies access to, or adversely differentiates against, First Nations on reserve in the provision of this service; and (iii) that the denial or adverse differentiation is in whole or in part based on the prohibited grounds of race and national or ethnic origin.

341. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under the *CHRA*. In the absence of such a justification, a discriminatory practice will have been established.[641]

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[639] AANDC Power Point, ―First Nations Child and Family Services Program: The Way Forward" (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 32; see also AANDC Power Point, ―First Nations Child and Family Services Program: The Way Forward" (August 22, 2012), CHRC BOD, Ex. HR-09, Tab 144 at p. 18; see also AANDC Power Point, ―First Nations Child and Family Services Program: The Way Forward" (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248 at pp. 13-17.

[640] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 9 (Dr. Cindy Blackstock, Executive Directive, First Nations Child and Family Caring Society of Canada).

[641] *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

A) Have the Commission and Complainants Established a *Prima Facie* Case of Discrimination?

342. The Commission submits that AANDC's FNCFS Program and corresponding on reserve funding formulas constitute a service pursuant to section 5 of the *CHRA*. Additionally, the Commission submits that AANDC denies and/or differentiates adversely in the provision this service based on race, national and ethnic origin. Specifically, AANDC's FNCFS Program and funding formulas: (i) are based on assumptions and not the actual needs of First Nations communities; (ii) create perverse incentives which contribute to the overrepresentation of First Nations children in care; (iii) lack funding for prevention services and least disruptive measures, despite the fact that these services are critical to address the greater needs of First Nations on reserve; and (iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

343. Moreover, AANDC has failed to correct the known flaws and inequities in Directive 20-1, EPFA and the 1965 Agreement.

344. In the alternative, the Commission submits that even if the services on reserve are found to be comparable to those offered by the provinces and territories off reserve, they are nevertheless inadequate given the greater needs of First Nations people.

i) Does AANDC Provide a Service Pursuant to Section 5 of the *Canadian Human Rights Act* (*CHRA*)?

345. The Commission submits that AANDC's FNCFS Program is a service pursuant to section 5 of the *CHRA* because it offers a benefit to First Nations children and families on reserve that is held out as a service and offered in a public context.

ii) Does AANDC Deny and/or Differentiate Adversely in the Provision of a Service Pursuant to Section 5 of the *CHRA* based on a Prohibited Ground?

346. The Commission submits that AANDC denies services and generally differentiates adversely in the provision of services based on race and national or ethnic origin. Specifically, the FNCFS Program, which only applies to registered Indians ordinarily resident on reserve, adversely differentiates against First Nations children and families on reserve by virtue of the fact that the Program and funding formulas:

(i) are based on assumptions and not the real or actual needs of First Nations children, families and communities;

(ii) create perverse incentives toward the removal and apprehension of First Nations children, thereby contributing to their overrepresentation in the child welfare system;

(iii) lack funding for prevention services and least disruptive measures, which are critical (and in some provinces mandatory) services to ensure that the greater needs of First Nations on reserve are met; and

(iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

B) Has AANDC Justified the Discrimination?

347. The Commission submits that AANDC has failed to meet the burden of establishing a *bona fide* justification under section 15(1)(g) of the *CHRA*, and has led no evidence to demonstrate undue hardship on the basis of health, safety or cost.

C) If Not, Which Remedies Should Flow?

348. The Commission seeks a remedy pursuant to subsection 53(2) of the *CHRA* that AANDC cease the discriminatory practice, and take measures to redress the practice and to prevent it or a similar practice from occurring in the future, in consultation with the Commission on the general purposes of the measures. This request for remedy will be further developed below.

PART III – SUBMISSIONS

A) The Legal Test for a *Prima Facie* Case of Discrimination

349. The initial onus is on the Complainants and Commission to make out a *prima facie* case of discrimination. A *prima facie* case consists of evidence that covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. If a *prima facie* case is established, a complainant is entitled to relief, in the absence of justification.[642]

350. In the context of the present complaint, the onus is on the Complainants and Commission to establish a *prima facie* case of discrimination, contrary to section 5 of the *CHRA*,[643] which states:

> **5.** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
>
> **5.** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
>
> *a*) d'en priver un individu;
>
> *b*) de la défavoriser à l'occasion de leur fourniture.

351. The Supreme Court of Canada has confirmed that human rights legislation has a fundamental and quasi-constitutional status. As such, it should be interpreted in a broad, liberal and purposive manner that best advances its broad underlying policy considerations.[644]

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[642] *McAllister-Windsor v. Canada (Human Resources Development)*, [2001] C.H.R.D. No. 4 at para. 27 [~~*McAllister-Windsor*~~"]. citing *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 558.

[643] *CHRA, supra*, s. 5

[644] *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at paras. 28-29, 32 [~~*Actions Travail*~~"]; see also *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at paras. 33-34 (per Bastarache J. for the majority).

352. Section 2 of the *CHRA* states that the purpose of the Act is:

> **2.** [… To] extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have, and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (emphasis added)

> **2.** [… De] compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.[645] (emphasis added)

353. As the Supreme Court stated in *Andrews v. Law Society of British Columbia*,[646] and later confirmed in *Canada (Attorney General) v. Mossop*,[647] "[d]iscrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality".[648] The *CHRA,* by prohibiting certain forms of discrimination, has the express purpose of promoting the value of equality which lies at the centre of a free and democratic society. Canadian society is one of rich diversity, and the *CHRA* fosters the principle that all members of the community deserve to be treated with dignity, concern, respect and consideration, and are entitled to a community free from discrimination.[649]

354. The Supreme Court has stressed that the "powerful language"[650] of section 2 of the *CHRA* must be kept in mind when interpreting the Act. In order to succeed in a true purposive approach, the Supreme Court has found that it is incumbent on decision-

[645] *CHRA, supra*, s. 2.
[646] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 ["*Andrews*"].
[647] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 ["*Mossop*"].
[648] *Andrews, supra* at p. 172; see also *Mossop, supra* at para. 97.
[649] *Mossop, supra* at para. 97.
[650] *Actions Travail, supra* at para. 25.

makers to ~~b~~breathe life, and generously so, into the particular statutory provisions".[651] Often described as ~~t~~the final refuge of the disadvantaged and disenfranchised",[652] in order to protect those most vulnerable in our society, human rights laws must be interpreted broadly and any exceptions should be narrowly construed.

355. Indeed, the Federal Court of Appeal has emphasized the public policy importance of ensuring that the test for *prima facie* discrimination under the *CHRA* does not become unduly precise, detailed or ~~l~~legalised", stating:

> ~~"~~A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the Canadian Human Rights Act, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in Shakes.
>
> To make the test of a *prima facie* case more precise and detailed in an attempt to cover different discriminatory practices would unduly ~~l~~legalise" decision-making and delay the resolution of complaints by encouraging applications for judicial review […]."[653] (emphasis added)

356. One consequence of the broad and flexible approach to the *CHRA* is that a strict or formal comparator group analysis is not a necessary component of a finding of *prima facie* discrimination under section 5 of the *CHRA*.[654] Although an analysis of comparator groups can be a useful evidentiary tool, it is not a part of the definition of a discriminatory practice under the *CHRA*.[655]

357. The Federal Court has found that the test for *prima facie* discrimination under section 5 of the *CHRA* is broad enough to allow the Tribunal to have regard for all the factors that may be relevant in a given case, including ~~h~~historic disadvantage, stereotyping, prejudice,

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[651] *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 7 [~~"G~~*Gould*"].
[652] *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321 at para. 18.
[653] *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras. 27-29; see also *Canada (Attorney General) v. Walden*, 2010 FC 490 at paras. 105-107 (quoted in *Hendershott v. Ontario (Minister of Community and Social Services)*, 2011 HRTO 482, [2011] O.H.R.T.D. No. 482 at para. 67 [~~"H~~*Hendershott*"]).
[654] *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445 at para.283 [~~"F~~*FNCFCSC – FC Decision*"].
[655] *FNCFCSC – FC Decision, supra* at para. 290.

vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment."[656]

358. With all this in mind, the Commission proceeds below to submit that a *prima facie* case of discrimination has been established, since:

- AANDC provides a "service" within the meaning of section 5 of the *CHRA*;
- AANDC denies access to or adversely differentiates in the provision of this service; and
- the denial or adverse differentiation is in whole or in part based on the prohibited grounds of race and national or ethnic origin.

B) Important Contextual Considerations

359. As a specialized Tribunal with "experience, expertise and interest in, and sensitivity to, human rights", it is open to this Tribunal to take notice of relevant contextual considerations without requiring additional proof.[657] Examining the broader context in which a complaint arises can help the analysis by identifying relevant factors for consideration that might otherwise appear neutral, without an awareness of broader societal phenomena.[658]

360. The Commission submits that the following are among the contextual considerations that the Tribunal should take into account in this case.

i) Relevant International Human Rights Law Principles

361. As previously discussed, Canada has ratified the *Convention on the Rights of the Child*, and is therefore obligated to respect and ensure the rights and requirements enunciated by the *Convention* are fulfilled. Specifically, it is appropriate to recognize that since 2003, the UNCRC has consistently recommended that Canada "strengthen [… its] efforts to fully integrate the right to non-discrimination in all" of its projects, programs and

[656] *FNCFCSC – FC Decision*, *supra* at para. 338.
[657] *Knoll North America Corp. v. Adams*, 2010 ONSC 3005 at paras. 29-30 (Div. Ct.); see also *Abbott v. Toronto Police Service Board*, 2010 HRTO 1314 at paras. 29-30; see also *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302 at para. 493.
[658] *Nassiah v. Peel Regional Police Services Board*, 2007 HRTO 14 at para. 131.

–services that have an impact on" children belonging to a minority group, including –Aboriginal children".[659]

362. In addition, the Commission submits that the Tribunal should consider the *United Nations Declaration on the Rights of Indigenous Peoples* (–*UNDRIP*"),[660] which Canada endorsed in 2010. Among other things, *UNDRIP*: (i) expresses concern that Indigenous peoples have suffered from historic injustices as a result of the colonization and dispossession of their lands;[661] (ii) affirms that –Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin and identity";[662] and (iii) calls on states to –take measures, in conjunction with [I]ndigenous peoples, to ensure that [I]ndigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."[663]

ii) The Unique Status of Aboriginal Peoples in Canada

363. The Commission submits that the Tribunal should also bear in mind established jurisprudence recognizing the specific circumstances of Aboriginal peoples in Canada. The Supreme Court has found that courts and tribunals should take a –purposive and contextual approach to discrimination analysis",[664] and established –contextual factors" that bear on this analysis, including, among other things: pre-existing disadvantage, stereotyping, prejudice or vulnerability, and the nature and scope of the interest affected by the impugned government activity, including the –economic, constitutional and societal significance of the interest adversely affected by the program in question".[665]

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[659] UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at pp. 5-6, Art. 22.
[660] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295 [–*UNDRIP*"].
[661] *UNDRIP, supra*, Annex.
[662] *UNDRIP, supra*, Art. 2.
[663] *UNDRIP, supra*, Art. 22; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 4 (National Chief Shawn A-in-chut Atleo, Assembly of First Nations ["AFN"]).
[664] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88 [–*Law*"].
[665] *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 at paras. 68, 88 [–*Lovelace*"], citing *Law, supra* at para. 74; see also *Egan v. Canada*, 2 S.C.R. 513 at paras. 63-64.

364. In *R. v. Ipeelee*,[666] the Supreme Court found that the "disadvantage of [A]boriginal people is indisputable".[667] The Court has also taken noted the "legacy of stereotyping and prejudice against Aboriginal peoples", and acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing".[668] Further, in a recent case concerning sentencing principles for Aboriginal offenders, the Court stated:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offenders. These matters [...] provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.[669] (emphasis added)

365. Given the foregoing, the Commission submits that the Tribunal ought to consider the discrimination alleged in the present complaint in the context of: (i) the legacy of IRS and historical prejudice as previously described in these submissions; and (ii) the fundamental importance of the interest affected which is, ultimately, the safety and wellbeing of First Nations children, who are one of the most vulnerable and disadvantaged groups in Canada.

366. Finally, with respect to the concept of "fiduciary duty", the Commission submits that to the extent the federal government has a fiduciary duty to First Nations children and families on reserve, such duty ought to be interpreted and fulfilled in a non-discriminatory manner.

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[666] *R. v. Ipeelee*, 2012 SCC 13 ["*Ipeelee*"].
[667] *Ipeelee, supra* at para. 60.
[668] *R. v. Kapp*, 2008 SCC 41 at para. 59, citing *Corbière v. Canada (Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203, and *Lovelace, supra* at para. 69.
[669] *Ipeelee, supra* at para. 60.

C) A *Prima Facie* Case Has Been Established

i) AANDC Provides a Service Pursuant to Section 5 of the *CHRA*

367. The Commission submits that AANDC, in its control, administration and execution of the FNCFS Program and corresponding funding formulas, is providing a service pursuant to section 5 of the *CHRA*.

368. In *Canada (Attorney General) v. Davis*,[670] the Federal Court confirmed that a service under section 5 of the *CHRA* "contemplates "something of benefit being "held out" as services and "offered" to the public" and involves something that is "the result of a process which takes place "in the context of a public relationship"",[671] citing the Federal of Appeal's decision in *Canada (Attorney General) v. Watkin*.[672] (emphasis added)

369. Courts and tribunals have found widely varying activities to be considered "services" under the *CHRA*, including:

- consideration of applications for landed immigrant status by Citizenship and Immigration Canada;[673]
- access to and participation in the big game hunting licence system;[674]
- courses offered by the military;[675]
- advance income tax rulings by Canada Revenue Agency;[676]
- the encouragement to increase physical activities by Health Canada;[677]
- publicity of weather and road conditions by Environment Canada;[678]
- mayoral proclamations of gay and lesbian pride days;[679] and
- examination at a port of entry by the Canada Border Services Agency.[680]

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[670] *Canada (Attorney General) v. Davis*, 2013 FC 40 ["*Davis*"].
[671] *Davis, supra* at paras. 32-33, citing *Canada (Attorney General) v. Watkin*, 2008 FCA 170 at para. 31 ["*Watkin*"].
[672] *Watkin, supra* at para. 31.
[673] *Gould, supra* at para. 59.
[674] *Gould, supra* at para. 59.
[675] *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 at para. 20.
[676] *Watkin, supra* at para. 28.
[677] *Watkin, supra* at para. 28.
[678] *Watkin, supra* at para. 28.
[679] *Okanagan Rainbow Coalition v. Kelowna (City)* 2000 BCHRT 21 ["*Okanagan*"]; see also *Oliver v. Hamilton (City) (1995)*, 24 C.H.R.R. D/298 (Ont. Bd. Inq.) ["*Oliver*"]; see also *Hudler v. London (City) (1997),* 31 C.H.R.R. D/500 (Ont. Bd. Inq.) ["*Hudler*"]; see also *Hill v. Woodside (1998)*, 33 C.H.R.R. D/349 (N.B. Bd. Inq.) ["*Hill*"].

370. The concept of "services" covers a broad range of activities. Dictionaries define a "service" as follows:

- a "good turn, assistance, help, advantage, benefit";[681] and
- "the act of helping or doing work for another or for a community, etc. […] work done this way […] assistance or benefit given to someone […] the provision or system of supplying a public need, e.g. transport, or (often in pl) the supply of water, gas, electricity, telephone, etc. (…)".[682]

371. What constitutes a service varies and is not limited to a traditional definition of the word. The Supreme Court has found that a number of activities that fall outside the classical definition of the word can nonetheless be considered "services" in the human rights context.[683] Services are not restricted to "market place" activities, but can extend to the provision of services by government officials in the performance of their functions.[684] Additionally, while a service involves the provision of a benefit, the beneficiaries are often unknown or considered to be the general public.[685]

372. Ultimately, whether an activity constitutes a service, or not, will turn on the facts of a particular case.[686] In making this determination, courts and tribunals can consider whether the clients or beneficiaries of the service in question would obtain some improvement, benefit or assistance from the activities to be performed.[687] In other words, whether the activity in question meets a need or want that people have in society, or assists them in accomplishing a goal.[688]

373. Therefore, the Commission submits that in order for an activity to be considered a service pursuant to section 5 of the *CHRA*, one must establish that the service in question: (i) confers a benefit, and (ii) takes place in the context of a public relationship.[689]

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[680] *Davis, supra* at paras. 39-44.
[681] Betty Kirkpatrick, *The Concise Oxford Thesaurus*, (New York: Oxford University Press, 1995) *s.v.* "service".
[682] Katherine Barber, *The Canadian Oxford Dictionary*, (Don Mills, Ontario: Oxford University Press, 1998) *s.v.* "service".
[683] *Gould, supra* at para. 59.
[684] *Watkin, supra* at para. 26; see also *Public Service Alliance of Canada and Cathy Murphy v. Canada Revenue Agency*, 2010 CHRT 9 at para. 42; see also *Singh (Re)*, [1989] 1 F.C. 430 at paras. 14-18.
[685] *Watkin, supra* at para. 28; see also *Okanagan, supra*; see also *Oliver, supra*; see also *Hudler, supra*; see also *Hill, supra*.
[686] *Gould, supra* at para. 59.
[687] *Dreaver v. Pankiw*, 2009 CHRT 8 at paras. 16-17, aff'd 2010 FC 555 ["*Dreaver*"].
[688] *Watkin, supra* at para. 31; see also *Dreaver, supra* at paras. 14, 16, 24, aff'd 2010 FC 555.
[689] *Watkin, supra* at para. 31; see also *Davis, supra* at paras. 32-33.

374. The Commission submits that in the present case, AANDC meets these requirements in that, through its FNCFS Program and on reserve funding formulas, it funds, enables, coordinates, manages and controls the availability and quality of First Nations child welfare services on reserve in Canada.

a. AANDC Provides a Benefit

375. AANDC provides a benefit to First Nations children on reserve in that it funds and manages the FNCFS Program in order to ensure that these children have access to culturally appropriate child and family services that are comparable to those available to other children living in similar circumstances off reserve in the province of reference. The name of the Program itself includes the word "services".

376. In effect, the benefit AANDC offers is set out in the stated purpose of the FNCFS Program, as described in the Program Manual at the time of the complaint:

> … [To]support culturally appropriate child and family **services** for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.[690] (emphasis added)

377. Today, the stated purpose of the FNCFS Program is as follows:

> 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.[691] (emphasis added)

378. The Program Manual also sets out AANDC's responsibilities for the FNCFS Program, which include funding eligible recipients, leading the development of policy, and providing oversight.[692] Therefore, the objective of AANDC's FNCFS Program is to support the provision of services to First Nations children and families on reserve. The beneficiaries of the service are First Nations children and families on reserve, and funding and programming are the mechanisms through which AANDC confers this

[690] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2.
[691] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1; see also e-mail from Barbara D'Amico to Beverly Lavoie dated June 11, 2010, CHRC BOD, Ex. HR-14, Tab 386.
[692] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2; see also AANDC, "Child and Family Services Program: Logic Model" (undated), CHRC BOD, Ex. HR-13, Tab 304.

benefit. It is the means by which First Nations children and families get meaningful access to the FNCFS Program and services they require.

379. Similarly, the objectives of EPFA are to ensure that families receive the support and services they need; that community-based services and the child and family services system work together so families receive more culturally appropriate services in a timely manner; that First Nations children in care benefit from permanent homes (placements) sooner by, for example, involving families in planning alternative care options; and that services and supports are co-ordinated in a way that best helps the family.[693]

380. At the time of the complaint, the FNCFS Program Manual stated:

> Protecting children from neglect and abuse is the main objective of child and family services. [The] FNCFS [Program] also provide[s] services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.[694]

381. This demonstrates the fundamental importance of child welfare and the FNCFS Program, the purpose of which is to protect First Nations children from abuse and neglect, and to address the risk factors at play in order to prevent having to bring them into care so that families can remain intact. It is an essential and necessary benefit that the federal government provides to First Nations children and families on reserve, for whom it can only be seen as a benefit.

382. In the circumstances, the Commission submits that by performing functions in furtherance of the stated purpose and objectives of the FNCFS Program, including the funding, management and oversight of the Program nationally, and by facilitating and enabling the delivery of child welfare services to First Nations children and families ordinarily resident on reserve, AANDC is providing a benefit.

[693] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 37, section 4.2.
[694] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 6, section 1.3.6.

b. The Benefit is Conferred in the Context of a Public Relationship

383. The Commission submits that in the present case, AANDC is providing a benefit in the context of a public relationship. As previously noted, AANDC is the sole funder of child welfare services for First Nations children and families on reserve. The purpose of the FNCFS Program, as described in both versions of the Program Manual, also connotes a public relationship.[695]

384. There can be multiple "clients" or beneficiaries of a service. In *University of British Columbia v. Berg*,[696] the Supreme Court held:

> […] The idea of defining a "client group" for a particular service or facility focuses the inquiry on the appropriate factors of the nature of the accommodation, service or facility and the relationship it establishes between the accommodation, service or facility provider and the accommodation, service or facility user, and avoids the anomalous results of a purely numerical approach to the definition of the public. Under the relational approach, the "public" may turn out to contain a very large or very small number of people.[697] (emphasis added)

385. In the present case, the beneficiaries are the First Nations children and families themselves, and/or the First Nations communities that benefit from the child welfare services provided on reserve pursuant to AANDC's FNCFS Program.

386. In *Attawapiskat First Nation v. Canada,*[698] the Federal Court examined the nature of funding agreements, similar to the ones at issue in the present complaint. The Attawapiskat First Nation had filed a judicial review application of a decision to appoint a Third Party Manager after its decision to declare a state of emergency over housing. The Court found that a public relationship existed and that there was a power imbalance between the First Nation and the federal government in that case:

> [… The Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement (the "CFA")] to provide essential services to its members and as a result, the CFA is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the CFA. There is no evidence of real negotiation. The power imbalance

[695] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.
[696] *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 ["*Berg*"].
[697] *Berg, supra* at para. 57.
[698] *Attawapiskat First Nation v. Canada*, 2012 FC 948 at paras. 29 and 47 ["*Attawapiskat*"].

> between government and this band dependent for its sustenance on the CFA confirms the public nature and adhesion quality of the CFA.[699]

387. The Commission submits that a similar public relationship and power imbalance exists between the federal government and First Nations child and family service agencies in the case at hand.

388. Finally, as discussed above, to the extent the federal government has a fiduciary duty to First Nations peoples, the Commission submits this would be further evidence of the ~~"p~~public" nature of the relationship between the federal government and First Nations people.

389. Based on the foregoing, the Commission submits that the benefit at issue in the present case is provided in the context of a public relationship.

c. AANDC Controls the Provision of Services on Reserve

390. A number of other considerations also support a conclusion that AANDC generally performs functions that constitute a ~~"s~~service" pursuant to section 5 of the *CHRA*.

391. The Commission submits that AANDC controls the provision of child welfare services to First Nations children and families on reserve, including: (i) the existence of these services; (ii) the extent and manner in which these services are provided; and (iii) the ongoing nature of these services by virtue of its role as manager and overseer of the FNCFS Program, which includes the conduct of compliance reviews. These administrative and enforcement activities are further evidence that AANDC is providing a ~~"s~~service" within the meaning of section 5 of the *CHRA*.

c.i. AANDC Controls the Existence of Child Welfare Services on Reserve

392. AANDC is the sole funder of child welfare services for First Nations children and families ordinarily resident on reserve. AANDC's funding of the FNCFS Program, in accordance with its funding formulas, determines an agency's budget. But for AANDC's

[699] *Attawapiskat, supra* at paras. 29, 59.

funding, these agencies would not exist and would not be able to provide culturally appropriate child welfare services to First Nations children and families on reserve.[700]

393. William McArthur, Manager of the Social Program at AANDC's British Columbia Office, testified about how dependent First Nations child and family service agencies are on AANDC's FNCFS Program and funding:

> MS. PENTNEY: Pending receipt and approval of the work plan. And is that because it's a reporting requirement under the Agency's funding agreement?
>
> MR. McARTHUR: That's correct.
>
> MS. PENTNEY: That's right. So would there be any consequences if an Agency did not comply with the reporting requirement?
>
> MR. McARTHUR: If an Agency didn't comply, you know, we do have the approval to halt funding. There are automatic halts in our system, everything is electronic.
>
> When reports come in they're uploaded to our financial system, it's called GSIMS, another acronym, and so everything's automated.
>
> So once that's received, the recipient gets an acknowledgement it's been received and it then goes through the process of -- you know, that electronic process. (…) And the system will automatically halt anything over a certain period of time, so it could be 30 days, 45 days or 60 days. If that report is not submitted, it will halt funding automatically and then I would need to do a manual override which is very difficult to do. Typically it has to deal with a health and safety issue which, depending on what the billing is for, would determine whether it's a health and safety issue.
>
> Now, obviously children in care is somewhat of an essential service, so that would be a rationale to override. The operations, that's a little more difficult because, you know, the rationale is you have to keep the doors open in order to provide the service.
>
> […]
>
> MR. McARTHUR: So within CFS it isn't as difficult to do that, but we don't want to sort of get into the habit of -- we want that to be the exception, not the rule and then I work with our Funding Services folks to make sure funding doesn't stop.
>
> MS. PENTNEY: Okay. Because the impact on the Agency if operational funding was halted would be, as you said, they would have to --

[700] Letter from Michael Wernick to Carcross Tagish First Nation (undated), CHRC BOD, Ex. HR-13, Tab 323; see also AANDC Briefing Note —016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280; see also letter from AANDC to Okanagan Nation Alliance dated March 7, 2014, CHRC BOD, Ex. HR-15, Tab 409.

> MR. McARTHUR: Exactly.
>
> MS. PENTNEY: -- possibly close their doors?
>
> MR. McARTHUR: I mean, there's some Agencies who are affiliated with, you know, large Nations, do have the ability to cash manage. So, you know, all of that is taken into consideration. But the bottom line is, you want to make sure that, you know, staff get paid, services are provided and then we can deal with the reporting outside of the priority of getting money to the Nation or to the Agency.[701] (emphasis added)

394. Therefore, if AANDC did not fund First Nations child and family service agencies, they would likely not exist. If AANDC halts funding to an agency, they may have to close their doors, which would in turn make it impossible for them to provide services to First Nations children and families on reserve.

395. Another example of the extent to which AANDC's funding impacts the very existence of culturally appropriate child welfare services on reserve are the communities across the country that are "too small or remote to operate a First Nations child and family service agency".[702] As previously noted, both Directive 20-1 and EPFA funding models include downward adjustments for agencies serving communities with a child population of less than 1,000.[703] For communities with less than 250 children on reserve, they receive $0 operations funding from AANDC; therefore, the children and families in those communities are denied culturally based services as a direct result of AANDC's prescriptive funding formulas.[704]

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[701] Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252.

[702] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 25.

[703] AANDC Briefing Note "1016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280; see also letter from AANDC to Okanagan Nation Alliance dated March 7, 2014, CHRC BOD, Ex. HR-15, Tab 409.

[704] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 25; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2; see also AANDC, "Atlantic Region Allocations by Agency 2009-2010", CHRC BOD, Ex. HR-13, Tab 331; see also Letter from New Brunswick's Minister of Family and Community Services to AANDC dated March 26, 2007, CHRC BOD, Ex. HR-14, Tab 356; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397.

c.ii. AANDC Controls the Extent and Manner in which Child Welfare Services are Provided on Reserve

396. AANDC is responsible for the design of the funding formulas (Directive 20-1, EPFA and the 1965 Agreement), which ultimately determine the amount of funding available for operations, prevention and maintenance.[705] By controlling the funding available to agencies, AANDC determines the extent and manner in which child welfare services are provided to First Nations children and families on reserve.[706]

397. For example, AANDC's funding is conditional upon terms that it sets out in its funding and other administrative agreements with the agencies.[707] These terms impose reporting and other requirements on agencies, which, if not met, can result in serious financial consequences for the agency that in turn affect their ability to provide culturally appropriate child welfare services to First Nations children and families on reserve.[708]

398. In addition, the FNCFS Program Manual sets out that an agency's expenditures are restricted to those within AANDC's authorities and mandate, as well as by the applicable provincial/territorial legislation, guidelines and rates.[709] Therefore, AANDC determines: which services are "eligible" to be reimbursed under maintenance; which services/activities are "eligible" operational expenses, and the maximum amount that can be spent on certain activities (for example, legal costs); and which services/activities are "ineligible" under both maintenance and operations.[710]

[705] AANDC Briefing Note, "Reform of FNCFS Program in Quebec" (2008), CHRC BOD, Ex. HR-15, Tab 404.
[706] E-mail from Mary Quinn to Christine Cram dated August 5, 2010, CHRC BOD, Ex. HR-15, Tab 401.
[707] Memorandum of Understanding between the Province of Manitoba and AANDC (2011), CHRC BOD, Ex. HR-08, Tab 130 at pp. 8-9; see also letter from Mamowe Opikihawasowin Tribunal Chief Child & Family Services (West) Society to AANDC dated April 23, 2012, CHRC BOD, Ex. HR-13, Tab 294; see also letter from AANDC to Mamowe Opikihawasowin Tribunal Chief Child & Family Services (West) Society dated July 23, 2012, CHRC BOD, Ex. HR-13, Tab 295.
[708] Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252.
[709] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 7, section 5.0.
[710] Eligible Maintenance Expenditures as per Provincial Policy in Alberta (2013), CHRC BOD, Ex. HR-15, Tab 451.

399. Dr. Blackstock testified about the impact AANDC's funding formulas had on her as a social worker providing child and family services on reserve:

> DR. BLACKSTOCK: But, when I was on reserve, I felt that almost the [Directive 20-1] was my supervisor because it just seemed to – it seemed to, unfortunately, always be there when I was making practice decisions.[711]

400. In addition to funding, AANDC controls the quality and quantity of child and family services available to First Nations children on reserve in other ways. For example, AANDC's decision to stop providing a cost of living adjustment in 1995 has had and continues to have considerable impacts on agencies' purchasing power, and thus on the availability and quality of culturally appropriate services on reserve.[712]

c.iii. AANDC Controls the Ongoing Nature of Child Welfare Services on Reserve by Virtue of its Role as Manager in Overseeing the FNCFS Program and Designing the Funding Formulas

401. The Program Manual sets out that AANDC is responsible for the management and oversight of the FNCFS Program.[713] As a result, AANDC conducts compliance reviews of First Nations child and family service agencies in order to ensure that "activities and expenditures comply with the program terms and conditions."[714]

402. Compliance reviews can involve on site reviews, employee interviews and discussions with individuals responsible for making decisions and/or approving program expenditures.[715] AANDC's monitoring and oversight of the FNCFS Program therefore involves regular contact and routine face-to-face interactions with First Nations child and family agencies.[716] Relationships of this kind are ones that properly fall within the scope of reviewable "services" under section 5 of the *CHRA*.

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[711] Testimony of Dr. Cindy Blackstock, Transcript Vol. 5 at p. 119; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 147.
[712] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 45-46.
[713] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2; see also AANDC, "Child and Family Services Program: Logic Model" (undated), CHRC BOD, Ex. HR-13, Tab 304.
[714] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also AANDC Power Point, "FNCFS Program: Moving Towards and Enhanced Prevention Focused Approach" (2013), Respondent's BOD, Ex. R-14, Tab 81 at p. 13.
[715] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also letter from AANDC to Mi'kmaw Family and Children's Services dated February 28, 2011, CHRC BOD, Ex. HR-12, Tab 258.
[716] AANDC, "Social Development Programs: Risk-based Audit Framework" (2003), CHRC BOD, Ex. HR-14, Tab 396 at p. 18.

403. Moreover, section 34 of the *Financial Administration Act* (the "*FAA*")[717] states:

> **34.** (1) No payment shall be made in respect of any part of the federal public administration unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister, or another person authorized by that Minister, certifies
>
> (*a*) in the case of a payment for the performance of work, the supply of goods or the rendering of services,
>
> (i) that the work has been performed, the goods supplied, or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract, is reasonable,
>
> […]
>
> **34.** (1) Tout paiement d'un secteur de l'administration publique fédérale est subordonné à la remise des pièces justificatives et à une attestation de l'adjoint ou du délègue du ministre compétent selon laquelle :
>
> *a*) en cas de fournitures, de services ou de travaux :
>
> (i) d'une part, les fournitures ont été livrées, les services rendus ou les travaux exécutés, d'autre part, le prix demandé est conforme au marché ou, à défaut, est raisonnable,
>
> […] (emphasis added)

404. Therefore, AANDC, as manager of the FNCFS Program, is accountable for the funds it spends and must ensure that the services for which funding has been provided have in fact been delivered in accordance with section 34 of the *FAA*. In this way, public funding and the provision of services are inextricably linked, and AANDC is ultimately responsible, and should be held accountable, for the services provided to First Nations on reserve.

405. AANDC's control of FNCFS Program under EPFA has been described as "more robust [… order to support] effective reform."[718] Internal AANDC documents state that First Nations child and family service agencies and their expenditures are subject to AANDC's

[717] *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 34.
[718] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at pp. 4-5.

–approval and regular monitoring".[719] In addition, under EPFA, AANDC –meets quarterly with agencies […] to assess progress in shifting programming [… and] also conducts increased compliance reviews" of agencies.[720]

406. According to the Program Manual, failure to –comply with these requirements constitutes a default of the funding agreement", and may result in –immediate cash flow restrictions [or] denial to renew an agreement or program activity".[721] These measures are terms and conditions that AANDC has imposed in order to facilitate funding and enable First Nations child and family service agencies to provide services.

407. Mr. McArthur testified about the impact any such restrictions or denial of funding could have on an agency – in many cases, it would result in an agency having to close its doors.[722] This demonstrates the extent of AANDC's control of FNCFS Program, agencies, and ultimately the services provided to First Nations children and families on reserve.

408. Pursuant to its constitutional responsibility, AANDC –acts as a province in the provision of" social programs on reserve, including the FNCFS Program.[723] Sheilagh Murphy, who was the Director General of the Social Policy and Programs Branch at AANDC at the time of her testimony, testified that AANDC's involvement in child welfare services on reserve in British Columbia, which is still under Directive 20-1, goes beyond mere funding:

> MR. CHAMP: But at the end of the day your work and your negotiations and your costing models and your discussions all really mean nothing if Cabinet doesn't decide to approve that [EPFA] rollout [in B.C.]; correct?
>
> MS. MURPHY: I wouldn't say that, I would say that there are other things that have been identified as part of our discussions with the province and with First Nation Agencies that we can actually work on that aren't necessarily connected to funding that would improve outcomes for children in B.C.
>
> […]

[719] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.
[720] Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.
[721] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also Notification of Overdue Reporting Requirements, CHRC BOD, Ex. HR-08, Tab 131.
[722] Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47.
[723] AANDC Briefing Note, –Explanations on Expenditures of Social Program" (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 1.

> MS. MURPHY: It's not just – it wouldn't necessarily all be about funding.
>
> MR. CHAMP: But yes, it's not just about funding; right. So, I mean, you're participating and [AANDC] officials are participating in those tripartite groups to assist those [First Nations child and family service agencies] in coming up with a different way to deliver the services; right?
>
> MS. MURPHY: Yes. […][724]

409. The extent of AANDC's involvement in child welfare services on reserve, through the FNCFS Program, is also evident in Ms. Murphy's curriculum vitae, which states that in her role as Director General she is responsible for:

> […] D]esigning and delivering a comprehensive reform framework for the on reserve Income Assistance program (including alternative delivery); coordinating major reform of the child welfare program with First Nations and provinces; designing and delivering a comprehensive management control framework and performance measurement strategy for all 5 programs that incentivises improved management practices, mitigates risks, generates better outcomes information and reduces recipient reporting burden; and partnering with other departments on key reform issues and improved horizontality.[725] (emphasis added)

ii) AANDC Denies and/or Differentiates Adversely in the Provision of a Service Pursuant to Section 5 of the *CHRA* based on a Prohibited Ground

410. The evidence led has shown that AANDC's funding formulas deny and/or differentiate adversely against First Nations children on reserve in the provision of a service based in whole or in part on the prohibited grounds of race and national or ethnic origin, contrary to section 5 of the *CHRA*.

a. The Prohibited Grounds of Discrimination are Race and National or Ethnic Origin

411. In denying or adversely differentiating against First Nations with respect to the provision of child and family services on reserve, AANDC has engaged in *prima facie* discrimination based in whole or in part on the prohibited grounds of race and national or ethnic origin, and/or some intersecting combination thereof.

[724] Testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 246-252.
[725] Sheilagh Murphy's Curriculum Vitae, Respondent's BOD, Ex. R-13, Tab 17.

412. The division of legislative powers between the federal and provincial governments is set out in sections 91 and 92 of the *Constitution, 1867*. Pursuant to section 91(24), the federal government has exclusive legislative authority over "Indians and lands reserved for Indians".[726]

413. Aboriginal peoples therefore occupy a unique, *sui generis*, position in Canada's constitutional and legal structure.[727] As a result, in particular when residing on reserve, they may receive a combination of services from both the provincial and federal governments.

414. As the Supreme Court stated in *NIL/TU O Child and Family Services Society v. B.C. Government and Service Employees' Union,*[728] "today's constitutional landscape is painted with the brush of co-operative federalism [… which] accepts the inevitability of overlap between the exercise of federal and provincial competencies".[729]

415. Presently, the FNCFS Program Manual defines "Eligible First Nation Child" as an "Indian Child that is registered or eligible to be registered" under the *Indian Act*.[730] The *Indian Act* defines "Indian" as a "person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."[731] The *Indian Act* also defines "registered" as being "registered as an Indian in the Indian Register".[732]

416. Therefore, in order to be eligible under AANDC's FNCFS Program, one must be a registered Status Indian or eligible to be registered as a Status Indian. In this sense, a First Nation child's entitlement, or disentitlement, to services and benefits is influenced by the effects of both statutory provisions and federal government policies that are based on their race and national or ethnic origin.

417. It bears emphasizing that AANDC has stated that Indian registration is used directly in the FNCFS Program in order to "identify and define eligibility to a service, benefit or

[726] *Constitution Act, 1867, supra*, s. 91(24).
[727] See as examples: *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 44; see also *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at para. 104.
[728] *NIL/TU O Child and Family Services Society v. B.C. Government and Service Employees Union*, [2010] 2 S.C.R. 696 ["*NIL/TU*"].
[729] *NIL/TU, supra* at para. 42.
[730] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 32, section 2.1.10.
[731] *Indian Act, supra*, s. 2.
[732] *Indian Act, supra*, s. 2.

funding."[733] Eligibility for the services and benefits provided under the FNCFS Program is ~~"p~~redicated on registration in that [AANDC] funds services for registered [Indian] children on reserve (and their families)".[734]

418. Thus, the benefits, services and funding First Nations are eligible to receive under the FNCFS Program are entirely dependent on their particular identity as registered Status Indians or as Indians eligible to be registered under the *Indian Act*. As a result, if the Tribunal agrees that there has been denial of, or adverse differentiation in the provision of services, such denial or adverse differentiation will be on the grounds of race and national or ethnic origin.

b. AANDC Denies and/or Adversely Differentiates in the Provision of Child Welfare Services on Reserve

419. First Nations children on reserve have been denied the child and family services and benefits they seek and/or require from AANDC within the meaning of section 5(*a*) of the *CHRA*. Specifically, First Nations children on reserve are precluded from accessing, or have limited access to, child and family services because of AANDC's prescriptive FNCFS Program and funding formulas, including Directive 20-1, EPFA and the 1965 Agreement.

420. Further, or in the alternative, First Nations children on reserve have been subjected to adverse differentiation with respect to a service within the meaning of section 5(*b*) of the *CHRA*. As described above, while a comparator group analysis is not required under section 5 of the *CHRA*, examining the position of an appropriate comparator can help to establish *prima facie* discrimination. In this regard, an appropriate comparator for First Nations children on reserve is First Nations or non-First Nations children resident off reserve in similar circumstances. Indeed, the mandate of AANDC's FNCFS Program, which is to provide services on reserve that are ~~"r~~easonably comparable to those available to other provincial residents",[735] supports this choice of comparator.

[733] Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector (2005), CHRC BOD, Ex. HR-13, Tab 321 at p. 6.
[734] Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector (2005), CHRC BOD, Ex. HR-13, Tab 321 at p. 6; see also e-mail from Sheilagh Murphy to Nicole Kennedy dated October 22, 2012, CHRC BOD, Ex. HR-15, Tab 407.
[735] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.

421. The Commission submits that First Nations children receive an inferior level of funding and quality of service than children resident off reserve in similar circumstances, or that in the alternative, even if the services provided on reserve are found to be comparable, they are nevertheless inequitable given the greater needs of First Nations people.

b.i. Directive 20-1 and EPFA are Designed with Flawed Assumptions and Include Perverse Incentives that Contribute to the Overrepresentation of First Nations Children in Care

422. AANDC is responsible for the design and implementation of the FNCFS Program's funding formulas, including Directive 20-1 and EPFA. The structures of both funding formulas include flawed assumptions about the levels of need in First Nations communities that are not based on, and do not reflect, the real needs of all First Nations communities or the best interests of children. The formulas are also designed with a perverse incentive toward the removal and apprehension of First Nations children on reserve. These structural deficiencies in AANDC's funding formulas are described in turn below, and are compared to those used by the provinces and territories off reserve.

b.i.i. Flawed Assumptions

On Reserve

423. Inherent in both Directive 20-1 and EPFA are two assumptions. First, that each First Nations child and family services agency has an average of 6% of the on reserve total child population in care.[736] The only exception to this assumption is the province of Manitoba, where it was modified in 2010 to an assumption that 7% of on reserve First Nations children are in care.[737] Second, that each agency has an average of 3 children per household, and 20% of on reserve families requiring services (or "classified as multi-problem families").[738]

[736] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 41-42; see also testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 24-34; Vol. 52 at pp. 8-9; see also testimony of Raymond Shingoose, Transcript Vol. 31 at p. 254.

[737] Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 19; see also testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 8-9; see also testimony of Elsie Flette, Transcript Vol. 21 at p. 4; see also AANDC Briefing Note, "Reform of FNCFS Program in Quebec" (2008), CHRC BOD, Ex. HR-15, Tab 404: AANDC would not negotiate the 6% assumption in developing EPFA in Québec.

[738] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.

424. These assumptions were initially developed by AANDC during its design of Directive 20-1 in 1988.[739] Directive 20-1 has not been significantly modified since that time, and still operates based on these assumptions.[740] EPFA preserves and adopts the structure of operations funding in Directive 20-1, including the assumptions upon which funding is largely based.[741]

425. In her 2008 report, the Auditor General concluded that these assumptions lead ~~"~~to funding inequities […] because, in practice, the percentage of children that [First Nations child and family service agencies] bring into care varies widely."[742] In other words, these assumptions (and therefore funding formulas upon which they are based) do not necessarily reflect the real and greater needs of First Nations communities.[743]

426. While some First Nations child and family service agencies benefit from these assumptions because their percentage of children in care is at or below 6%, others struggle to provide adequate services to First Nations children on reserve because their numbers of children in care exceed the 6% assumption.[744]

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[739] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.

[740] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.

[741] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-25.

[742] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

[743] Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 7, 11; see also Honourable Ted Hughes, ~~"~~The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 392; see also AANDC Briefing Note, ~~"~~Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 24-25; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 3 (Sheila Fraser, Auditor General of Canada).

[744] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 9; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 112-114; Vol. 62 at p. 32; see also Briefing Note: Kasohkowew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at p. 5 (pages unnumbered); see also letter from the Leadership of the First Nations of New Brunswick to the Honourable Ron Irwin dated June 3, 1996, CHRC BOD, Ex. HR-08, Tab 137; see also AANDC Briefing Note, ~~"~~Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 10 (Mary Quinn, Director General, Social Policy and Programs, AANDC).

427. As Dr. Blackstock testified, there is ~~n~~o accounting for those differences in the formula".[745] She went on to say:

> DR. BLACKSTOCK: […] I would agree with the [Auditor General's] assessment, that an across the board 6 percent assumption of children in care is not a good idea. It might be a good idea as a minimum standard, but there should be upward adjustments for communities of greater needs. And it does not take into full account the needs of the children themselves in the context of that particular community.[746]

428. Elsie Flette, the Chief Executive Officer of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), also described the practical effects of these assumptions on First Nations child and family service agencies:

> MS. FLETTE: […] If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by [AANDC] as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in care that you have to spend that money on and, so, you have some flexibility for how else to use that money.
>
> But <u>if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the [Southern Authority] I believe right now four Agencies that exceed those assumptions</u>. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.
>
> When we look at the families [and prevention services], I believe <u>there's about five Agencies that exceed that 20 percent</u>. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on-Reserve are getting service.
>
> They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go – they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.
>
> […]
>
> […] So, <u>it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if</u>

[745] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 43.
[746] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 135.

> you have higher than seven percent you have unfunded workload.[747] (emphasis added)

429. Dr. Loxley testified that these assumptions are perpetuated under EPFA, and noted that even as the new funding model was being developed in Alberta, the 6% assumption did not reflect the real needs of all First Nations communities in that province:[748]

> DR. LOXLEY: [… T]here are a range of numbers for children in care in different provinces and, as I mentioned, in 2005 there were I think almost -- there were a large number of Agencies, should I say, in Alberta that were well in excess of 6 percent and there would be other Agencies which would be less than 6 percent.[749]

430. The NPR and *Wen:De* reports, as well as the Auditor General's reviews of Directive 20-1 and EPFA, have found the assumption model to be flawed and inequitable.[750] Three years after EPFA was announced, AANDC contracted T.K. Gussman Associates Inc. to conduct a review of its implementation in Alberta in 2010.[751] The report cited the concerns of both the Auditor General and PAC that "continuing to use a fixed percentage as the basis for funding under the new (EPFA) formula will leave some agencies still underfunded to provide needed services to children and families."[752] Thus, the final report recommended that the "amount of funding and the formula used to determine overall FNCFS funding must be changed, as per the recommendation of the Office of the Auditor General's 2008 report."[753]

431. Notwithstanding the known shortcomings with the fixed percentage model, AANDC has not modified these assumptions in its funding formulas in any province except for Manitoba, where the assumption was adjusted by a single percentage, but nevertheless

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[747] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 143-144.
[748] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 63; see also AANDC Briefing Note, "Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at p. 41; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada).
[749] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 9.
[750] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 121; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.
[751] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0005 ["DPRA Report"].
[752] DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0024.
[753] DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0036.

remains inflexible and unable to respond to situations where agencies have in excess of 7% of their children in care.[754]

432. AANDC recognizes that funding for First Nations child and family service agencies is ―based on an average of 6% of children in care" and that ―[a]djustments are not made for agencies with a higher proportion of children in care", which constrains their ability to respond to the child and family services requirements in their communities.[755] AANDC's reluctance to modify the assumption or provide ―additional funding for [agencies with] numbers of children in alternate care beyond" the 6% is in part because it would ―set a precedent that other agencies may wish to pursue" and ―create expectations in the rest of the country that would be difficult for [AANDC] to meet given the current fiscal environment."[756]

433. With respect to the assumptions that each First Nation household on reserve has an average of 3 children, and that 20% of on reserve families require prevention services, the rationale for these assumptions is unknown.[757] Once again, these assumptions, which determine the amount of funding a First Nations child and family service agency receives for prevention services, do not necessarily reflect the real and greater needs of First Nations communities.[758]

434. While some agencies may enjoy a benefit as a result of these assumptions, others struggle to provide adequate prevention services to First Nations children and families because they have more than 20% of families on reserve accessing these services.[759] Yet, neither Directive 20-1 nor EPFA have built-in adjustments to allow funding (and therefore the agencies themselves) to better respond to situations where the number of children and/or

[754] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 143-144; see also testimony of Darin Keewatin, Transcript Vol. 32 at pp. 43-47.
[755] Briefing Note: Kasohkowew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at p. 5 (pages unnumbered).
[756] Briefing Note: Kasohkowew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at pp. 5-6 (pages unnumbered).
[757] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Elsie Flette, Transcript Vol. 20 at pp. 129-130; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 90-91, 106-107.
[758] Letter from the Leadership of the First Nations of New Brunswick to the Honourable Ron Irwin dated June 3, 1996, CHRC BOD, Ex. HR-08, Tab 137; see also see also AANDC Briefing Note, ―Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 182.
[759] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 129-130.

families accessing these services is in excess of the assumptions upon which the formulas are based.[760]

Off Reserve

435. Provincial funding for child welfare services off reserve is based on the actual number of children in care, and not on assumptions, like AANDC's funding formulas for First Nations child welfare on reserve.[761] This is true even where the province provides services on AANDC's behalf to First Nations children and families on reserves where there are no First Nations agencies.

436. For example, Alberta provides child and family services to six First Nations in that province that are not served by a delegated agency, and invoices AANDC for the actual number of children they have in care – not an assumed average number of children in care.[762]

b.i.ii. Perverse Incentives

On Reserve

437. In addition to the assumptions inherent in AANDC's FNCFS Program funding formulas, the design of Directive 20-1 and EPFA also creates an incentive towards the removal of First Nations children on reserve from their homes and communities.

438. As stated above, Directive 20-1, which came into effect on April 1, 1991 all across Canada,[763] includes two streams of funding: operations and maintenance.[764] Operations funding is meant to cover a First Nations child and family service agency's administrative costs, and is based on a fixed formula that accounts for the size of a First Nation's child population.[765]

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[760] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 129-130; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 29; see also Elsie Flette's Speaking notes for presentation of the Standing Committee on Aboriginal Affairs and Northern Development (2011), CHRC BOD, Ex. HR-08, Tab 127.
[761] Testimony of Carol Schimanke, Transcript Vol. 62 at p. 42; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 102.
[762] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 42, 47.
[763] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 9, section 16.0.
[764] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.4.1.
[765] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

439. There is a small amount of funding provided in the operations stream for "prevention" services under Directive 20-1; however, these costs are extremely limited and fixed.[766]

440. Maintenance funding, on the other hand, is intended to cover the actual costs of maintaining a child in care.[767] In other words, First Nations child and family service agencies receive "dollar-for-dollar" reimbursement of eligible maintenance costs.[768]

441. This illustrates how the very structure and design of Directive 20-1 creates a perverse incentive for First Nations child and family service agencies to remove First Nations children from their homes. Pursuant to Directive 20-1, AANDC is willing to cover the actual costs of the services and benefits a First Nations child on reserve requires once they are removed from their family home and are taken into child welfare care.[769]

442. However, AANDC will not provide funding for the actual cost of those same services as a preventative or early intervention measure in order to keep that child safely in his or her family home.[770] Dr. Blackstock testified about her experience with AANDC's funding formulas and the perverse incentives they have towards the removal of First Nations children on reserve:

> DR. BLACKSTOCK: As long as you brought the kids into care, in child welfare care, you would get reimbursed by [AANDC]. Now, we talked – there are situations where the department would disallow expenses on maintenance, but as a general rule, if you got a child into care they could pay you for the child being in care. So you could get some funds to provide services for the family, like bringing the child into care, but it was more difficult to provide prevention services to keep the child safely in their homes.

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[766] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 33.
[767] Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.
[768] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.
[769] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 99; see also AANDC Briefing Note, "Meeting of the Forum of Ministers Responsible for Social Services" (2002), CHRC BOD, Ex. HR-15, Tab 466 at Annex B; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 2.
[770] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 9 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC); see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada); see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at pp. 2, 9 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).

> So you couldn't say, for example, I might get $150 for bringing a child into care, under one of the care rates. I couldn't provide that same amount of money to keep the child in the family home because that wouldn't be considered maintenance under the definition. So it provided an incentive, really, that drove workers out of – not a desire, but under a practical reality where you would be removing children because you didn't have the range of services available that could have kept them in their homes. And there wasn't flexibility in the formula to be able to keep them in the family homes.[771]

443. Ms. Flette also testified about the sad irony of the situation created by AANDC's funding formulas, using the example of an overwhelmed mother of four with a new baby who requires prevention services in order to keep her children safely in the family home:

> MS. FLETTE: [...] For me, the irony or the -- what I believe is an imperative thing that we need to be doing is looking for ways in which funding will address those types of situations, because if I end up having to take those five kids into care, first of all, it's going to cost me a whole lot more for each child for every day of care, and if I try to keep that sibling group together in a foster home, I will be providing that foster home with respite, with a homemaker, and I will have no trouble really finding that because I can bill that through the child maintenance budget because those children are now in care.[772]

444. The EPFA funding model, which was introduced in Alberta in 2007 and currently operates in six provinces, includes the structure of operational funding under Directive 20-1, but adds "prevention services" as a new funding stream in an effort to address the shortcomings in Directive 20-1.[773] However, prevention funding is still based on a costing model and is therefore fixed under EPFA, much like operations funding.[774]

445. Additionally, the reliability of prevention funding is unknown for a First Nations child and family service agency because EPFA funding is set for a five-year term, and AANDC "re-bases" an agency's maintenance budget each year during that term.[775] That is to say that if there is a decrease in maintenance expenditures in the first year, an agency's maintenance budget will be decreased by that amount moving forward into the second year.[776]

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[771] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 99-100.
[772] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 64-65.
[773] Program Manual, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.
[774] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.
[775] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 96; Vol. 62 at pp. 122-123; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181.
[776] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98.

446. Therefore, if as a result of AANDC's re-basing, an agency's maintenance budget has decreased in the second year of EPFA funding, and if they are suddenly faced with an onslaught of child protection cases, they may need to use their operations and/or prevention dollars in order to offset their deficit in maintenance.[777]

447. Ms. Carol Schimanke, Manager of the Social Development Child and Family Services Program in the AANDC Alberta Regional Office, testified about this situation:

> MS. McCORMICK: […] In your experience, how common is it that an Agency is unable to provide prevention programs because the prevention dollars are used, for example, in operations or maintenance?
>
> MS. SCHIMANKE: […] I guess those Agencies who are showing a deficit at the end of the year may have difficulty doing those…[778]

448. Independent reviews of Directive 20-1 and EPFA have come to similar conclusions. A 2007 evaluation of the FNCFS Program by PRA Inc., conducted at AANDC's request, concluded that "Directive 20-1 creates financial incentives for using out-of-home care".[779] A separate evaluation of the FNCFS Program, also conducted in 2007, likewise found that the funding formula (which was Directive 20-1 at the time) was likely "a factor in increases in the number of children in care and Program expenditures because it has the effect of steering agencies towards in-care options […] because only these agency costs are fully reimbursed."[780]

449. Similarly, the *Wen:De* reports concluded that AANDC's funding formula provided "more incentives for taking children into care than it provides support for preventative, early intervention and least intrusive measures."[781] As a result, First Nations children "are denied an equitable chance to stay safely at home due to the structure and amount of funding under [Directive 20-1]. In this way, [Directive 20-1] really does shape [the] practice [of child welfare] – instead of supporting good practice."[782]

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[777] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 132-133.
[778] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 132.
[779] Evaluation of the First Nations Child and Family Services (FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303 at p. 55.
[780] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii.
[781] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 114.
[782] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

450. Furthermore, the perverse incentive toward the removal of First Nations children also contributes to a loss of community and culture, since children are often placed outside of their home communities. This contributes to a loss of culture, tradition, identity and language.[783]

Off Reserve

451. Off reserve, provincial social workers apprehend and remove a child from his or her family home only as a measure of last resort when "absolutely necessary".[784] Provincial child welfare legislation often includes language requiring that prevention services or early intervention measures be provided to children and families on a mandatory basis in order to try and address the risk factors at play and avoid having to remove a child from his or her home.[785]

452. In Saskatchewan, for example, section 14 of the *Child and Family Services Act*[786] requires child welfare agencies to provide in-home family services.[787] The province reimburses agencies for the cost of those prevention services "one hundred percent".[788] However, AANDC's funding formulas do not allow those services to be provided to First Nations children on reserve in the same way because prevention funding is fixed.[789]

453. First Nations are bound to comply with provincial legislation in accordance with the terms and conditions of AANDC's FNCFS Program.[790] However, AANDC's FNCFS Program and funding formulas do not provide adequate funding for prevention services

[783] UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, 10-11, Arts. 5, 48; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 9 (National Chief Shawn A-in-chut Atleo, AFN).
[784] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 150.
[785] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 57-58; see also Saskatchewan's *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98; see also Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83; see also letter from Saskatchewan Social Services to Derald Dubois dated December 19, 1996, CHRC BOD, Ex. HR-07, Tab 102; see also letter from AANDC to Saskatchewan Social Services dated March 19, 1997, CHRC BOD, Ex. HR-07, Tab 103; see also Manitoba's *The Child and Family Services Act*, CHRC BOD, Ex. HR-08, Tab 112 at pp. 28-31; see also Alberta's *Child, Youth and Family Enhancement Act*, CHRC BOD, Ex. HR-09, Tab 150 at p. 13; see also Nova Scotia's *Children and Family Services Act*, CHRC BOD, Ex. HR-10, Tab 199 at p. 6, section 9.
[786] S.S. 1989-90, c. C-7.2; see also Saskatchewan's *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98.
[787] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83.
[788] Testimony of Raymond Shingoose, Transcript Vol. 31 at p. 83.
[789] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-81.
[790] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2, p. 3, section 6.5.

or in-home supports.[791] First Nations child and family service agencies are therefore required to provide services for which they receive at best a limited and fixed amount of funding under EPFA, or at worst almost no funding under Directive 20-1.

454. Testifying about her experience as a social worker for the province of British Colulmbia, Dr. Blackstock stated that the "province would do a lot of the primary prevention" work with children and families, and that she would simply "decide what [a] child needed and then [the province] would provide that service."[792] She went on to say that concerns about the cost of necessary services or other funding issues were dealt with by the province and were "not the concern of those of us at the front line."[793]

455. In this way, the provinces adhere to the generally accepted principle that the removal of a child is meant to be a measure of last resort.[794] The United Nations and "every provincial statute in the country on child welfare, they all understand one thing and that is, that the best place for children is growing up in their families."[795] As a result of this deeply held universal truth, social workers are required by law to "undertake all measures to ensure that children can grow up [with their families]."[796]

456. Only where it is absolutely not possible for a child to remain safely in their home is the apprehension of a child to be considered – and there are certainly circumstances where the removal of a child is the best option.[797] However, it should always be the choice of last resort – not the option that provides the best opportunity for the provision of necessary services.

[791] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-81; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 178-183.
[792] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 157-158.
[793] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 158.
[794] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.
[795] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.
[796] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.
[797] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.

b.ii. AANDC's Funding Formulas do not Provide Sufficient Funding for Prevention Services and Least Disruptive Measures as Compared to the Funding Available off Reserve

457. As previously noted, the structure and design of AANDC's funding formulas (Directive 20-1, EPFA and the 1965 Agreement) at best limit, and at worst preclude entirely, the availability of prevention services and least disruptive measures for First Nations children on reserve. As a result, First Nations children on reserve are deprived of the benefit of these services, and/or are subject to adverse differentiation in accessing these services.

b.ii.i. The Importance of Prevention Services for First Nations Children and Families

458. It is well documented that First Nations children are overrepresented in child welfare all across Canada.[798] In fact, First Nations children are disproportionately represented at each stage of the child welfare process, from the initial investigation, to the substantiation of risk, to being placed in care.[799]

459. As a result, it is "estimated that there are three times as many First Nations children placed in out-of-home care today" than were placed in IRS "at the height" of that movement.[800] Therefore, the overrepresentation of First Nations children in care today has been described as the extension of the "historic pattern of removal of First Nations children from their homes which is grounded in colonial history".[801]

460. By far, the most "common form of substantiated maltreatment in First Nations child investigations" is neglect.[802] This includes "situations in which children have suffered

[798] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 1; see also FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. x; see also Canadian Incidence Study of Reported Child Abuse and Neglect (1998), CHRC BOD, Ex. HR-07, Tab 86 at pp. 85-87 ["CIS Report 1998"]; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 2; see also see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at pp. 36-42.

[799] Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 72-73; see also FNCIS Report, CHRC BOD, Ex. HR-04, Tab 33 at p. 2; see also Canadian Incidence Study of Reported Child Abuse and Neglect (2003), CHRC BOD, Ex. HR-07, Tab 105 at pp. 9, 70-71 ["CIS Report 2003"].

[800] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 16.

[801] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. 5; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 3.

[802] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24; see also CIS-2008 Major Findings Supplementary Tables, CHRC BOD, Ex. HR-07, Tab 92; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

harm, or their safety of development has been endangered as a result of the caregiver's failure to provide for or protect them."[803]

461. Neglect takes on many forms; however, the most common form of "substantiated neglect" in First Nations communities is "physical neglect".[804] This means that the "child has suffered or was at substantial risk of suffering physical harm caused by the caregiver(s) failure to care and provide for the child adequately", and includes "inadequate nutrition/clothing, and unhygienic dangerous living conditions."[805]

462. Many of these risk factors stem from the fact that First Nations families often have "limited resources" and "complex" needs.[806] The First Nations children in these families often "live in environments shaped by chronic difficulties, which research indicates can have devastating long term effects for children."[807]

463. Overall, First Nations children and families "continue to lag behind non-Aboriginal Canadians on most major economic indicators", and the "situation is worse [on] reserve".[808] For First Nations on reserve, poor economic conditions, high rates of unemployment, lack of housing, poor housing conditions and overcrowding in houses are all risk factors which contribute to the overrepresentation of children in care.[809] These risks are "compounded by the [lasting] intergenerational effects of colonial policies which dislocated entire communities, suppressed languages and cultures, disrupted functioning communal support systems, and separated generations of children from their families".[810]

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[803] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 29.
[804] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 30; see also Journal Article, "Keeping First Nations children at home" A few Federal policy changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52.
[805] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 29; see also National Aboriginal Economic Development Board, "Recommendations on Financing First Nations Infrastructure" (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9.
[806] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. xiv-xv.
[807] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. xix.
[808] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 10-11; see also AANDC Briefing Note, "Comparability of Provincial and AANDC Social Programs Funding" (2008), CHRC BOD, Ex. HR-14, Tab 351.
[809] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 10-11; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0010; see also AANDC Power Point, "First Nations Child and Family Services Program: The Way Forward" (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 18; see also National Aboriginal Economic Development Board, "Recommendations on Financing First Nations Infrastructure" (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 2.
[810] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. 11.

464. However, research shows that the primary risk factors driving First Nations children and families into the child welfare system can be addressed early and avoided through appropriate and targeted ~~"p~~prevention programs" and services.[811] AANDC's Program Manual defines prevention services as those ~~"d~~designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children" into care ~~"o~~or the amount of time a child remains" in care.[812]

465. For example, in order to address neglect, prevention programs may focus on ~~"h~~helping parents get better organized, helping them develop better habits around supervision, giving them access to services and support so that they have access to more food, better clothing, [and] better housing".[813]

466. Dr. Trocmé testified about the different types of prevention services in the child welfare context:

> DR. TROCMÉ: In child welfare the word prevention ends up being used several different ways, but I think the most important distinction to keep in mind is there's preventative services designed to prevent children from coming into the child welfare system, and then once they're in the system, there's preventative services to keep them from coming into foster care. And so the word prevention services sometimes ends up confounding the two.
>
> So prevention services to prevent children from coming in to the child welfare system are the kind of community based services designed to provide supports to children and families, and they can range from something as simple as summer camp programs [… to] parenting program[s] to help parents develop their parenting skills, [to] maybe a more targeted one that might target new parents, young parents, and help them develop some of the skills to avoid situations escalating to the point where child welfare interventions would be required. So there's those type[s] of prevention services.
>
> Once you come into contact with the child welfare system and you've – a decision is made to provide on-going services, you can either provide home-based services, so services to the child living in their home, or if you end up removing the child, you provide services then through their placement.

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[811] Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 163-164, 167-170; see also FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 14; see also FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. xii; see also The Royal Society of Canada & the Canadian Academy of Health Sciences Expert Panel, ~~"E~~Early Childhood Development Report (2012), CHRC BOD, Ex. HR-07, Tab 87 at pp. 85-105; see also Honourable Ted Hughes, ~~"T~~The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at pp. 350-351.

[812] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 51; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.17.

[813] Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at p. 160.

> The word prevention services is often used to refer to these home-based services. So one of the objectives of these home-based services is to prevent placement, and those services would be along the lines of, again, parent education, help with child management, maybe some therapeutic work with the children themselves, maybe some advocacy work to help them get better housing, to help them stability their situation, a range of services at that level that are designed to stabilize the home situation, improve parenting capacity and avoid having to place the child in out-of-home care.[814] (emphasis added)

467. The value and efficacy of prevention services at reducing the risk of maltreatment for First Nations children on reserve is evident in the success of Manitoba's West Region Child and Family Services' ("West Region") block funding arrangement. In 1992, West Region entered into a Memorandum of Understanding ("Block Funding MOU") with AANDC in which they agreed to accept a pre-determined block of funding for maintenance.[815] If their maintenance costs exceeded the block funding, the deficit would be the responsibility of West Region; however, AANDC agreed to allow the agency to keep any surplus maintenance funds they had.[816]

468. West Region was therefore able to take their surplus maintenance funding and use it to create and develop prevention services and programs to address the needs of the First Nations communities they served, and the risk factors that were driving children on reserve into care.[817] At the time they entered into the Block Funding MOU, West Region had 10% of their First Nations children in care; the increased prevention funding, services and programs ultimately helped the agency to reduce this number to 6%.[818]

469. A preliminary analysis of the Block Funding MOU found that West Region had been able to develop "holistic and community-based programs", such a "therapeutic foster family care […] treatment support services […]family counselling and reunification".[819] This innovative approach was later examined by Brad McKenzie, an independent researcher,

[814] Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 132-134.
[815] Memorandum of Understanding between West Region Child and Family Services Inc. and AANDC, CHRC BOD, Ex. HR-08, Tab 126.
[816] Memorandum of Understanding between West Region Child and Family Services Inc. and AANDC, CHRC BOD, Ex. HR-08, Tab 126.
[817] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 145-155; see also AANDC Briefing Note, "Meeting of the Forum of Ministers Responsible for Social Services" (2002), CHRC BOD, Ex. HR-15, Tab 466 at Annex B.
[818] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 145-155, 169-170; Vol. 21 at pp. 48-49.
[819] Preliminary Analysis of the Pilot Project on Block Funding for Child Maintenance at West Region Child and Family Services, CHRC BOD, Ex. HR-08, Tab 128.

who evaluated the Block Funding MOU at West Region.[820] Mr. McKenzie prepared three reports examining block funding, and found that the approach was achieving the objective of preventing children from coming into care, reducing the high numbers of children that were already in care, and ensuring predictability of funding for AANDC. Therefore, the reports recommended the expansion of block funding to other agencies.[821]

470. West Region quite successfully kept their number of children in care down under the Block Funding MOU; however, as a result of the implementation of EPFA in Manitoba, their funding was reduced.[822] They are now being forced to cut prevention programs and services which they can no longer afford to offer.[823]

471. Sylvain Plouffe, Director General of the Centre Jeunesse de l'Abitibi-Témiscamingue in Québec, testified that he uses his agency's "enveloppe globale" (i.e., block funding) in order to address the greater needs of the First Nations children and families in the communities he serves.[824] Mr. Plouffe testified that the difference between AANDC's funding under EPFA and the actual cost of providing services based on the needs of First Nations children and families on reserve is estimated at over $3.5 million. Therefore, as a result of the inadequate funding his agency receives under EPFA, Mr. Plouffe uses provincial funding and the "enveloppe globale" to maintain a level of services on reserve comparable to those his agency provides to neighbouring off reserve communities.[825]

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[820] Brad McKenzie, "Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services" (1994), CHRC BOD, Ex. HR-09, Tab 182; see also Brad McKenzie, "Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services: A Second Look" (1999), CHRC BOD, Ex. HR-10, Tab 183 at pp. 61-63; see also Brad McKenzie, "Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review" (date unknown), CHRC BOD, Ex. HR-10, Tab 184.

[821] Brad McKenzie, "Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services" (1994), CHRC BOD, Ex. HR-09, Tab 182; see also Brad McKenzie, "Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services: A Second Look" (1999), CHRC BOD, Ex. HR-10, Tab 183 at pp. 61-63; see also Brad McKenzie, "Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review" (date unknown), CHRC BOD, Ex. HR-10, Tab 184.

[822] Southern First Nations Annual Report 2011/2012, CHRC BOD, Ex. HR-08, Tab 129 at p. 94; see also testimony of Elsie Flette, Transcript Vol. 20 at pp. 155-157.

[823] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 155-157; see also testimony of Carolyn Bohdanovich, Transcript Vol. 21 at pp. 197-199; see also Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 395.

[824] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 49 and following,

[825] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 76-77.

472. Therefore, the greater the emphasis on prevention and early intervention, the more likely a policy or program is to be successful in addressing the primary risk factors which drive First Nations children into care.[826]

b.ii.ii. Directive 20-1

473. Directive 20-1 does not include explicit funding for prevention services.[827] AANDC's Program Manual states that "prevention services, including in-home services" are activities eligible to be funded out of a First Nations child and family service agency's fixed operations budget.[828]

474. Operations funding is a fixed formula-based amount[829] that is intended to cover "all aspects of the agency's operations" or administration.[830] It is primarily based on a First Nation's child population aged 0 to 18 years.[831]

475. As previously noted, in addition to prevention services, an agency's fixed operations budget must also cover a number of other costs, including salaries, benefits, rent and insurance, many of which are "fixed costs" themselves.[832]

476. Ms. Schimanke, Manager of Social Development at AANDC's Alberta Region, testified about the impact the fixed operations budget has on agencies and their ability to provide prevention services:

> MR. POULIN: Okay. And so – but there needs to be money available and there is a limit as to how much money is available [in operations], and if the limit has been hit then you cannot do anything.
>
> MS. SCHIMANKE: Yeah, the First Nation sets their budgets on that. I mean, that's the amount that's in the formula. If the First Nation Agency wants to create

[826] FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 14.
[827] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 33; see also testimony of Derald Dubois, Transcript Vol. 9, pp. 56-60; see also AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 13.
[828] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 4-5.
[829] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.
[830] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.
[831] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 88-89.
[832] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 61-62.

> their own budget and adjust that amount, that is their prerogative to do so; right? So there have been cases –
>
> MR. POULIN: I'm sorry, "prerogative to do so" –
>
> MS. SCHIMANKE: Yes.
>
> MR. POULIN: – let me jump in. I mean, if you don't have any money there is nothing you can do. You can't print it, sadly.
>
> MS. SCHIMANKE: Yes, exactly.
>
> […]
>
> MS. SCHIMANKE: But I'm just saying that this is in a formula that we come up with an amount and then they can make – they can adjust that formula or use that amount to set their budgets. We don't change [the b]udget or dictate that budget. Yes, we just give them an amount of money to work with.
>
> MR. POULIN: So for an Agency that is over 6 percent, where you need more [child] protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services [otherwise known as prevention services and in-home supports].
>
> MS. SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.
>
> MR. POULIN: That means paying – you know, that means in effect paying your workers less than what the province does.
>
> MS. SCHIMANKE: It could be, yes. That could be one example of things, yes.[833]

477. As a result of the fixed nature of the operations budget, which is inadequate to cover the real administrative costs of First Nations child and family service agencies,[834] there is effectively no funding available under Directive 20-1 to provide prevention services to First Nations children and families on reserve.[835]

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[833] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 50-52.

[834] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 24, 40-41, 45; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.

[835] Testimony of Barbara D'Amico, Transcript Vol. 50 at p. 154; see also testimony of Carol Schimanke, Transcript Vol. 61 at p. 33; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 183-184; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 20-22; see also Journal Article, "Keeping First Nations children at home" A few Federal policy changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52; see also AANDC Methodology Report, "Implementation Evaluation of the Enhanced Prevention Focused Approach in Quebec and Prince Edward Island for the First Nations Child and Family services Program (2012)", CHRC BOD,

478. AANDC's FNCFS Program Manual also acknowledges the fact that the "level of [prevention] funding [in Directive 20-1] may not provide enough resources to meet current trends."[836]

479. This situation is exacerbated in agencies where the percentage of children in care is greater than the 6% assumed average. In those circumstances, agencies are required to either sacrifice their staffing, salaries or caseloads in order to continue to provide prevention programs while addressing their pressing and immediate child protection requirements, or cut prevention services in order to better address their community's needs.

480. Barbara D'Amico, Senior Policy Manager for the FNCFS Program at AANDC Headquarters, testified about AANDC's failure to provide sufficient prevention funding under Directive 20-1:

> MS. D'AMICO: So, under Directive 20-1, it is operational funding, so operational funding, and then there is a clause in here that part of that – you could use some of that operational funding for what was termed in Directive 20-1 as least disruptive measures, which is another term for prevention, but there was no funding line for prevention and so what we found was most agencies were just using their operations dollars for operations and there wasn't enough to cover off prevention […].[837] (emphasis added)

481. Thus, the structure and design of Directive 20-1 prevents and/or strictly limits a First Nations child and family service agency's ability to provide prevention services and least disruptive measures to First Nations children.[838] As a result, First Nations children on reserve are denied or seriously deprived of the services necessary to address their greater needs and the risk factors they face, which causes them to be apprehended from their families and removed from their homes at a disproportionately high rate.[839]

Ex. HR-09, Tab 166 at p. 3; see also e-mail from Nuu-chah-nulth Tribal Council to AANDC dated December 20, 2013, CHRC BOD, Ex. HR-15, Tab 412.

[836] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 14, section 2.2.3.

[837] Testimony of Barbara D'Amico, Transcript Vol. 50 at p. 154.

[838] AANDC Briefing Note, "First Nation Child and Family Services (FNCFS) – Media Coverage" (2002), CHRC BOD, Ex. HR-15, Tab 467 at p. 4; see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at p. 11.

[839] FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 18-19; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 2 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).

482. Directive 20-1 remains in effect in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory today.[840]

b.ii.iii. EPFA

483. AANDC claims to have designed and implemented EPFA in six jurisdictions across Canada in an effort to provide the prevention funding that is so desperately lacking under Directive 20-1. To that end, AANDC has added a new stream of funding for prevention services in the provinces it has transitioned to EPFA.[841]

484. However, like operations funding, prevention funding under EPFA is based on a fixed formula that assumes that First Nations child and family service agencies have an average of 3 children per household, and 20% of on reserve families requiring services (or "classified as multi-problem families").[842] Ms. D'Amico testified that prevention funding under EPFA is fixed and final:

> MR. CHAMP: […] What about the operations and prevention streams, though?
>
> MS. D'AMICO: For the operations and prevention stream, it is based on one formula –
>
> MR. CHAMP: Yes.
>
> MS. D'AMICO: – and that number doesn't change.[843]

485. Moreover, the fixed amount of prevention funding First Nations child and family service agencies receive is set for a term of at least five years under EPFA, and perhaps even longer. In Alberta, where EPFA was first implemented in 2007, Ms. Schimanke testified that the funding model has been fixed since that time and has not been adjusted.[844]

486. Another issue that impacts the amount of funding that First Nations agencies have available for prevention under EPFA is the re-basing of yearly maintenance costs. As

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[840] AANDC Briefing Note, "How First Nation Child and Family Services (FNCFS) Works in Each Region", Respondent's BOD, Ex. R-13, Tab 5; see also AANDC Power Point, "AANDC's Role as a Funder in FNCFS" (May 2013), CHRC BOD, Ex. HR-12, Tab 246; see also e-mail from Steven Singer to Barbara D'Amico dated March 21, 2011 re: British Columbia EPFA Calculations, CHRC BOD, Ex. HR-15, Tab 405: As of 2011, B.C. would have been entitled to an additional $16,101,042 in FNCFS Program funding had AANDC decided to transition them to EPFA.

[841] Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.

[842] Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.

[843] Testimony of Barbara D'Amico, Transcript Vol. 53 at p. 16.

[844] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 160; Vol. 62 at p. 49.

previously stated, AANDC "re-bases" an agency's maintenance budget each year during the five-year EPFA term.[845] For example, if an agency's maintenance budget is $100 in year one, but their expenditures for that year total only $80, AANDC will reduce their maintenance budget in the second year to $80.[846]

487. If, for example, in the second year of EPFA that agency's number of children in care increases unexpectedly, or if a First Nations child with high-cost special needs comes into care, the agency must work within their existing budget to manage those costs in the interim. This often means that agencies have to take funds from either operations or prevention in order to meet their immediate and critical child protection needs.[847]

488. This situation illustrates the difficulties agencies face in trying to develop and maintain prevention programs given the structure of EPFA. The re-basing of maintenance costs can create a "perverse negative cycle" that contributes to the increasing number of First Nations children in care, since agencies in situations like the one described above are forced to cut either operations or prevention services in order to meet their child protection needs, consequently placing First Nations children at greater risk of coming into care due to the fact that these prevention services are lacking. Ms. D'Amico testified about this phenomenon:

> MR. CHAMP: [… Did] you ever look at models or consider what the problem might be if the opposite starts happening, the opposite of the virtuous cycle, where children in care are going up in the Agencies are stuck because they have a block of maintenance funding from the year before that was based on a lower number, but the [number of] children [in care] are going up and so, to pay for that increase in maintenance they are taking it from other streams, their prevention stream perhaps –
>
> MS. D'AMICO: M'hmm.
>
> MR. CHAMP: – and then it becomes a perverse negative cycle because then they have less money for prevention which leads to more children in care. That is a possibility under [EPFA]?

[845] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 96; Vol. 62 at pp. 122-123; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181.
[846] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98.
[847] Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 132-133; see also Kasohkowew Child Wellness Society Business Plan 2012 to 2017, CHRC BOD, Ex. HR-09, Tab 154 at pp. 45-48: The high number of children being placed in case at Kasohkowew in Alberta has put the agency in a "financial crisis", and impacted their ability to provide prevention services to the First Nation communities they serve.

MS. D'AMICO: Yes, it is.[848]

489. Ms. D'Amico went on to say that out of the six jurisdictions in which EPFA has been implemented by AANDC, it is working as intended in only one province.[849]

490. Given the foregoing, the structure and design of EPFA also limits the availability of prevention funding and services for First Nations children on reserve, who are thus deprived of the benefit of these essential services and/or subject to adverse differentiation in accessing them.[850]

b.ii.iv. Ontario's 1965 Agreement

491. Ontario's 1965 Agreement, while different in structure and design from both Directive 20-1 and EPFA, also does not provide adequate prevention funding for First Nations children and families on reserve in that province.

492. As previously described, prevention services were introduced in Ontario in the late 1970's, and are provided by fully-mandated Native child and family service agencies, pre-mandated First Nation agencies, and First Nation communities themselves.[851] AANDC provides approximately $17 million in prevention funding to the province of Ontario.[852]

493. There are a number of issues with respect to the prevention funding provided to First Nations children and families under the 1965 Agreement.

494. First, given the cost-sharing design of the 1965 Agreement, AANDC has ultimate decision-making authority with respect to which services it agrees to cost-share. In other words, if Ontario decides to "put an emphasis on prevention by making whatever legislative changes [are] necessary in order to bolster those programs, both on and off Reserves",[853] AANDC could refuse to fund or reimburse these programs or services.[854]

[848] Testimony of Barbara D'Amico, Transcript Vol. 53 at p. 79.
[849] Testimony of Barbara D'Amico, Transcript Vol. 52 at p. 151.
[850] Touchwood Child and Family Services Inc. Prevention Business Plan, CHRC BOD, Ex. HR-07, Tab 108 at p. 5.
[851] Testimony of Phil Digby, Transcript Vol. 59 at p. 98.
[852] Testimony of Phil Digby, Transcript Vol. 59 at pp. 58-59, 111.
[853] Testimony of Phil Digby, Transcript Vol. 59 at p. 74.
[854] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 54-55, 66-75, 93-94, 128-129; Vol. 60 at pp. 82-83, 88-98, 101-102, 148-164, 200-203; see also AANDC Briefing Note, "1965 Agreement Overview" (2007), CHRC BOD, Ex. HR-11, Tab 239 at pp. 4-5.

495. Second, the amount of prevention funding available depends on the nature of the ~~"p~~protocol" that operates in a given area within the province of Ontario, and does not reflect the real or greater needs of First Nations.[855]

496. For instance, in determining the prevention budget for fully-mandated Native child and family service agencies in northern Ontario, AANDC uses the ~~"r~~atio of Status Indian days of care to the total days of care as a proxy for how many people would be receiving the prevention service."[856] Ms. Stevens testified that Anishinaabe Abinoojii's prevention budget has not been substantially increased since it was initially developed in the late 1970's, and is insufficient to meet the needs of the First Nations communities she serves.[857] However, for agencies in southern Ontario, AANDC assumes that approximately 80% of the First Nations population on reserve will be eligible to access services and ~~"c~~ost-shareable".[858]

497. Finally, the 1965 Agreement does not ~~"a~~ccount for the lack of surrounding health and social services in most First Nations communities [… which] are absolutely essential to providing preventive, supportive, and rehabilitative services to children and families at risk", whereas provincial child welfare agencies already ~~"h~~ave the benefit of these programs in their communities".[859]

498. Therefore, insofar as the availability of prevention funding under the 1965 Agreement is based on assumptions and varies from region to region as a result, it is inadequate to meet the real needs of First Nations communities in Ontario.[860]

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[855] Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7; see also testimony of Phil Digby, Transcript Vol. 59 at p. 103. For example, at Anishinaabe Abinoojii, AANDC assumes that 100% of the people accessing prevention services are Status Indians; however, a proxy is used for the remaining northern Native agencies.
[856] Testimony of Phil Digby, Transcript Vol. 59 at pp. 103-104.
[857] Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 38-39, 46-47.
[858] Testimony of Phil Digby, Transcript Vol. 59 at p. 104.
[859] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-5.
[860] Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 38-41.

b.ii.v. Situation off Reserve

499. Over the past decade, the provinces have moved toward child welfare models that emphasize the importance of prevention and least disruptive measures in order to address the risk factors that make children vulnerable to being removed from their homes.[861] These types of prevention services are available in every province in Canada.[862]

500. As previously noted, provincial child welfare legislation has followed suit, and most now include language requiring that prevention services be provided to children and families by child welfare agencies (both on and off reserve) on a mandatory basis.[863] Thus, the provinces ensure that agencies are funded accordingly in order to provide these services to children and families off reserve. Dr. Blackstock testified about her experience as a social worker with the province of British Columbia:

> DR. BLACKSTOCK: [… And] it wasn't, like, a free-for-all in the province, I don't want no leave you [with] that impression, but certainly if you had to invest, for the safety and wellbeing of the child, then you spent that money, in collaboration with your supervisor, to get the family the services that they needed.
>
> And if that overspent the [child welfare] budget, then that overspent the budget, the [provincial] ministry went to [their] Treasury Board.[864]

501. Ms. D'Amico testified that the amounts First Nations child and family service agencies receive in those jurisdictions still under Directive 20-1 may not be comparable to what is provided by the province in those regions:

> MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the

[861] Testimony of Barbara D'Amico, Transcript Vol. 51 at p. 66; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii; see also AANDC Power Point, "Better Outcomes for First Nation Children" (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 5; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 7 (Mary Quinn, Director General, Social Policy and Programs, AANDC).

[862] Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 137-138.

[863] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 57-58; see also Saskatchewan's *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98; see also Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83; see also letter from Saskatchewan Social Services to Derald Dubois dated December 19, 1996, CHRC BOD, Ex. HR-07, Tab 102; see also letter from AANDC to Saskatchewan Social Services dated March 19, 1997, CHRC BOD, Ex. HR-07, Tab 103; see also Manitoba's *The Child and Family Services Act*, CHRC BOD, Ex. HR-08, Tab 112 at pp. 28-31; see also Alberta's *Child, Youth and Family Enhancement Act*, CHRC BOD, Ex. HR-09, Tab 150 at p. 13; see also Nova Scotia's *Children and Family Services Act*, CHRC BOD, Ex. HR-10, Tab 199 at p. 6, section 9.

[864] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 273.

> shortcomings in the funding formulas], there isn't comparability yet; this is something you are trying to attain?
>
> MS. D'AMICO: […] In the other jurisdictions, because we haven't moved to EPFA, the amounts that they are receiving […] I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the remaining jurisdictions and they would receive more under EPFA…[865]

502. The situation is similar in the jurisdictions that have already been transitioned to EPFA. In Saskatchewan, for example, where some First Nations child and family service agencies serve children both on and off reserve, and receive "one hundred percent" reimbursement from the provincial government for the prevention services they provide to off reserve children, as compared to the AANDC's fixed amount of prevention funding for First Nations children on reserve.[866]

503. AANDC commissioned an independent review of EPFA in Nova Scotia in 2012, focusing on the Mi'kmaw Family and Children's Services (the "Mi'kmaw Agency"). Analysing the responsiveness of EPFA, the review concluded that the "demand for protection services is so high that the [Mi'kmaw Agency] does not have the resources needed to deliver prevention services."[867] Therefore, the First Nations children and families in Nova Scotia were deprived of the benefit of prevention services because of the structure of EPFA, which does not account or adjust for the real and greater needs of First Nations.

b.iii. AANDC's Funding Formulas do not Provide Sufficient Funding for Key Elements of Child Welfare Service Delivery on Reserve

504. As was noted by the NPR,[868] the *Wen:De* reports,[869] the OAG reports[870] and the PAC reports,[871] AANDC's funding formulas, including Directive 20-1, EPFA and the 1965

[865] Testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 179-180.
[866] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-83.
[867] Auguste Solutions Report, "Implementation Evaluation of the Enhanced Prevention Focused Approach: Nova Scotia Case Study Technical Report" (2012), CHRC BOD, Ex. HR-10, Tab 204 at pp. 6-7 ["Auguste Solutions Nova Scotia Report"].
[868] NPR, CHRC BOD, Ex. HR-01, Tab 3.
[869] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6.
[870] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53.
[871] PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45.

Agreement, do not provide adequate funding for a number of key elements necessary for the provision of child welfare services on reserve, including: salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

505. The lack of funding available for these essential costs is a direct result of the structure and design of AANDC's funding formulas – particularly the operations stream.[872] Consequently, many First Nations child and family service agencies find themselves in deficit and struggle to provide services to the vulnerable First Nations children and families in the communities they serve.[873]

b.iii.i. Salaries

506. AANDC's funding formulas do not provide adequate funding for staff salaries,[874] and do not include adjustments for staff salaries.[875] Therefore, AANDC has not kept pace with provincial social worker salaries.[876]

507. Under both Directive 20-1 and EPFA, staff salaries are funded out of the operations stream. As previously discussed, AANDC has a fixed and limited budget for operations, which is largely based on the size of the First Nations child population on reserve.[877] Given that it is intended to cover "all aspects of the agency's operations" or

[872] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 7; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at p. 4.
[873] Touchwood Child & Family Services Inc. Financial Statements (2012), CHRC BOD, Ex. HR-07, Tab 99 at pp. 2, 9; see also West Region Child and Family Services Committee Incorporate Financial Statements (2013), CHRC BOD, Ex. HR-11, Tab 237 at pp. 10, 12, 14; see also Kasohkowew Child Wellness Society Financial Statements (2012), CHRC BOD, Ex. HR-09, Tab 153 at pp. 2, 10; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 14; see also Yorkton Tribal Council Child and Family Services Incorporated Financial Statements (2012), CHRC BOD, Ex. HR-09, Tab 179 at pp. 13, 17; see also Mi'kmaw Family & Children's Services of Nova Scotia's Financial Statements (2013), CHRC BOD, Ex. HR-10, Tab 198 at pp. 23, 27-28: The Mi'kmaw Agency is using their CSA to offset their operational deficit, which is a liability that is noted as a "going concern" in their Financial Statements; see also First Nation Child and Family Services Agencies – Manitoba: Results of Financial Reviews, CHRC BOD, Ex. HR-10, Tab 208 at p. 3: Five of the eight agencies reviewed were identified as operating in deficit positions, some of them incurring significant deficits […] to the point where there is a question as to whether they can continue to provide services at a level that meets reasonable standards of care."
[874] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 35-37.
[875] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 114; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.
[876] Testimony of Judy Levi, Transcript Vol. 30 at pp. 76-77.
[877] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

administration,[878] operations funding is often a source of financial pressure for many First Nation agencies.[879]

508. Staff salaries make up approximately 75% of an agency's operations costs, and given the fixed nature of both the operations budget and salary amounts, this can seriously constrain an agency's ability to provide competitive salaries.[880] This pressure is exacerbated by the fact that over time, AANDC has added certain activities to the list of "eligible operations costs" without providing a corresponding increase in operations funding for First Nations child and family services agencies to cover those costs.[881] For example, insurance, information technology equipment and janitorial services were not included in an earlier iteration of the FNCFS Program Manual, but are listed in the latest version from AANDC.[882]

509. These funding pressures are felt most especially by small agencies across Canada, whose operations budgets are subject to downward adjustments based on the size of the on reserve First Nations child populations they serve.[883]

510. Under EPFA, AANDC has attempted to bring funding for staff salaries up to a level of provincial comparability; however, the FNCFS Program has fallen short of this objective because of the structure of the EPFA funding model, which is set for a period of five years and does not include an adjustment for inflation.[884] Dr. Blackstock testified to this effect:

> DR. BLACKSTOCK: [… This] is just echoing back to my testimony of yesterday where we talked about in EPFA there is some consideration of price matching on

[878] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.
[879] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 7, 35-37.
[880] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 178.
[881] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 90-92.
[882] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 90-92.
[883] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 52-53; see also letter from New Brunswick's Minister of Family and Community Services to AANDC dated March 26, 2007, CHRC BOD, Ex. HR-14, Tab 356; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 4; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at pp. 2, 9 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).
[884] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 106; Vol. 47 at p. 40.

> salary at the outset…but those are not adjusted for [inflation] going forward. And so, you can see things change for you in terms of an upward price cost, that can be quite difficult for Agencies.[885]

511. When EPFA was initially implemented in Alberta in 2007, AANDC based its funding for staff salaries on the provincial salary grid from 2006. Since that time, staff salaries for on reserve First Nations child and family service agencies have been fixed at that level, whereas AANDC adjusts its salary funding annually for provincial social workers who provide child and family services on reserve to six First Nations in the province pursuant to the Administrative Reform Agreement.[886]

512. This exemplifies the discrimination alleged in the present complaint: AANDC funds the province of Alberta more than First Nations child and family service agencies to provide the same service to the same group of people. Ms. Schimanke testified about this situation:

> MR. POULIN: […] I believe we have always said EPFA started in [Alberta in] 2007, but the [salary] grid that was used in 2006.
>
> MS. SCHIMANKE: Correct.
>
> MR. POULIN: Okay. So it has been set since then.
>
> MS. SCHIMANKE: The salary component of that.
>
> MR. POULIN: The salary component –
>
> MS. SCHIMANKE: Yes.
>
> MR. POULIN: – has been set since then.
>
> But under the [provincial Administrative] Reform Agreement, when there are percentages reimbursed in the Billings – I have called them billings, the invoices or the billings – the percentage that's reimbursed, it's that of the provincial budget, so it is their provincial grid.
>
> MS. SCHIMANKE: Exactly correct.
>
> MR. POULIN: Again, I think you will agree with me if I were to say that it's possible that [delegated First Nations child and family service agencies] could find this […] situation quite unfair.

[885] Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 40; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.
[886] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.

MS.SCHIMANKE: Agreed.[887]

513. This situation is not unique to Alberta. Other provinces that have transitioned to EPFA are either experiencing or anticipating funding pressures as a result of the fact that staff salaries are set for a five year period without adjustments for changes in provincial pay scales or inflation.[888]

514. AANDC is aware of this discrepancy, and indeed Ms. D'Amico testified that the EPFA funding model would have to be changed in order to address the situation:

> MS. D'AMICO: […] So what we have found – this is a lesson learned as we have transitioned to EPFA – is that, of course, provinces have unionized workers, unionized workers have collective agreements, salaries go up either on a yearly basis or whatever the case may be. So to allow for this we have had to look at the EPFA formula again.[889]

b.iii.ii. Capital Infrastructure

515. Under Directive 20-1 and EPFA, AANDC does not provide funding for capital infrastructure.[890] First Nations child and family service agencies are expected to rent buildings on reserve and pay for those costs out of their fixed operations budgets.[891]

516. This has been identified as a major weakness in Directive 20-1, and continues to be a serious shortcoming in the EPFA funding model.[892]

517. As Dr. Blackstock noted, the lack of funding for capital requirements poses a significant challenge to many First Nations child and family service agencies in light of the well-documented housing crisis on reserves across Canada:

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[887] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.
[888] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 184-186; Vol. 21 at pp. 104, 107-108.
[889] Testimony of Barbara D'Amico, Transcript Vol. 51 at p. 101; see also AANDC Power Point, "First Nations Child and Family Services Program: The Way Forward" (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248.
[890] Testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 163-164; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 51-52; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.
[891] AANDC Memo, "The Use of FNCFS Funding for Capital Expenditures" (2012), CHRC BOD, Ex. HR-13, Tab 300.
[892] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 17, 21, 53-54; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 163-164; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 40-41; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 28; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

> DR. BLACKSTOCK: […] Now, what this is, is really things like offices, cars, sometimes equipment that you would require. And it is particularly important for First Nations because there is a severe housing crisis [in] many First Nations communities.
>
> So, you can't just say there's a building you can rent that would be suitable. Sometimes you need to […] build the building, particularly because, as I described yesterday, having an office for Child and Family Services requires a specific layout of the building so that we can actually support doing the work that we need to do as social workers.
>
> And make sure that all members of the public, particularly children and persons with disabilities, have safe access into that environment.
>
> Well, there was no funding in [Directive 20-1] for capital requirements so, for building buildings or buying cars […].
>
> […]
>
> But as a matter of course, if you work for the province, or even [AANDC], they provide good office space, which is the right thing to do for their employees and for visitors coming in to their space, but there's not that provision here [under Directive 20-1 …].
>
> […]
>
> [In *Wen:De*, we recommended] $10.3 million to bring some of the buildings up to standard because some of the agencies were working in substandard conditions already, and one of them particularly was working in a building that had been condemned, was beyond repair. So there had to be some upgrading of those particular capital expenses that already existed and then additional investments were needed.[893]

518. Dr. Loxley confirmed this in his testimony when discussing the surveys of First Nations child and family service agencies that were conducted as part of the *Wen:De* research, which found that "capital was a problem, [and] that space was a problem in particular", with one agency of the 12 surveyed "operating in premises that should have been condemned."[894]

519. Under EPFA, the situation remains the same. Ms. Flette confirmed that AANDC's EPFA model does not include funding for capital infrastructure in Manitoba.[895] Similarly,

[893] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 53-54, 67, 197; see also National Aboriginal Economic Development Board, "Recommendations on Financing First Nations Infrastructure" (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9.
[894] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 53.
[895] Testimony of Elsie Flette, Transcript Vol. 20 at pp. 112-113; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at pp. 23-29, 65.

Raymond Shingoose, Executive Director of the Yorkton Tribal Council Child and Family Services agency in Saskatchewan,[896] testified that there is no funding for capital expenditures under EPFA in Saskatchewan, whereas the province provides funding to its child welfare agencies off reserve for capital infrastructure and actually "build[s its] own facilities".[897]

520. Likewise, Brenda Ann Cope, Financial Comptroller for the Mi'kmaw Agency, stated that AANDC's EPFA funding model does not provide funding for capital infrastructure in Nova Scotia.[898] This is of particular concern in Nova Scotia because the province has found that the Mi'kmaw Agency, which serves all First Nation communities in the province, cannot meet the mandatory statutory requirements in terms of response times unless they acquire "another office in southwest Nova Scotia."[899] In response to this urgent request, AANDC has indicated that "they [will] think about it".[900]

521. Similarly, Mr. Plouffe's agency, which serves children both on and off reserve, operates a fleet of vehicles (cars rented for a period of three years) which he says have allowed his agency to save money.[901] He also testified that he was able to build facilities in each off reserve community he serves, and that these facilities were necessary in order to address the needs in those regions.[902]

522. Dr. Loxley also testified that lack of funding for capital infrastructure continues to be a major structural deficiency in AANDC's EPFA funding model:

> DR. LOXLEY: […] I would say that capital – lack of capital is an issue [under EPFA]. When you look at the reviews in Nova Scotia, they could use a new building, which they don't have, a third building, so that's causing all kinds of problems and added costs. In Saskatchewan, according to the reviews in Saskatchewan, money is being taken out of prevention and put into capital and into vehicles, capital, and into IT, which I think, you know, emphasized what we tried to get out in [*Wen:De*], that you need to look after these items separately, you need to look at IT and capital much more systematically as a problem in and of themselves and not put Agencies in a position where you bring in a new

[896] Raymond Shingoose's Curriculum Vitae, CHRC BOD, Ex. HR-09, Tab 158.
[897] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 130-132; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-20.
[898] Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 19.
[899] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252.
[900] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.
[901] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 70-71.
[902] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 45-47.

> approach, which is much better than the old approach, but you don't do it properly and therefore these items are being funded out of prevention dollars, which is kind of reminiscent [of] what happened [under Directive 20-1] to some degree, only I think it's more – I think it's somewhat sadder now that we do have this more enlightened approach.[903] (emphasis added)

523. The situation is similar in Ontario under the 1965 Agreement, which does not provide any funding for capital costs.[904] In fact, Ms. Stevens testified that her ~~"~~office is in a trailer".[905]

524. However, Dr. Blackstock testified that as a social worker off reserve in the province of British Columbia, she had ~~"~~a very good building that was accessible to persons with disabilities, child friendly, childproof, child safety. It also had provisions for [social work], for family conferencing, two-way mirrors […] security, secure file room."[906] In contrast, Dr. Blackstock described her working conditions as a social worker on reserve in British Columbia as follows:

> DR. BLACKSTOCK: […] When I went to my first day of work at the Squamish Nation, it was a rainy day. And the rain would drop on the high-voltage power lines above our parking lot that were strung over our office and sparks would fly.[907]

b.iii.iii. Information Technology

525. Independent reports have also found that AANDC's funding formulas do not provide adequate funding for information technology.[908]

526. Under Directive 20-1, which was developed in the late 1980's, AANDC did not provide any funding specifically for information technology.[909] These costs were, once again,

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[903] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 90.
[904] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19, COO-95/64; see also testimony of Phil Digby, Transcript Vol. 59 at p. 93.
[905] Testimony of Theresa Stevens, Transcript Vol. 25 at p. 31.
[906] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 190.
[907] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 190.
[908] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 21-27; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6.
[909] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 188; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.

intended to be covered under a First Nations child and family service agency's fixed operations budget, and were "very minimal".[910]

527. Under EPFA, the situation remains the same – funding for information technology is insufficient.[911] Carolyn Bohdanovich, Director of Operations at West Region in Manitoba,[912] testified that at her agency it was only "in the past year that [they received internet] connectivity in [their First Nation] communities".[913] Prior to that, up to 2012, their communities either had "dial-up" or did not have any internet access.[914]

528. Likewise, Ms. Cope testified that EPFA does not include "funding for capital assets" like computers, which are essential to the manner in which the Mi'kmaw Agency does business.[915] Judy Levi, who is currently a Consultant on First Nations child welfare in the province of New Brunswick, and was formerly the Coordinator of a First Nations federal and provincial tripartite committee on child welfare,[916] also testified that First Nations child and family service agencies in that province are still under Directive 20-1, and receive no funding from AANDC for capital assets or computers.[917] Mr. Plouffe testified about using his "envelope globale" in order to ensure that each worker has access to a computer terminal.[918]

529. In Ontario, the situation is the same. AANDC does not provide funding under the 1965 Agreement for the acquisition of capital assets.[919]

530. The lack of funding for information technology under Directive 20-1, EPFA and the 1965 Agreement has a real and significant impact on the ability of agency staff to properly carry out their roles and responsibilities, and also on the quantity and quality of services available to First Nations child and families on reserve. Dr. Loxley testified about the

[910] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also testimony of Dr. John Loxley, Transcript Vol. 27 at p. 51; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.
[911] Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 127-130.
[912] Carolyn Bohdanovich's Curriculum Vitae, CHRC BOD, Ex. HR-08, Tab 121.
[913] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 121.
[914] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 121.
[915] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 90-91.
[916] Judy Levi's Curriculum Vitae, CHRC BOD, Ex. HR-09, Tab 142.
[917] Testimony of Judy Levi, Transcript Vol. 30 at p. 52.
[918] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 78-79.
[919] Testimony of Theresa Stevens, Transcript Vol. 25 at p. 77.

impact AANDC's underfunding has had on First Nations child and family service agencies:

> DR. LOXLEY: [… If] insufficient provision is made for capital and for computer systems, then you get this kind of outcome, that Saskatchewan is spending prevention dollars on these items, which was not the intent of [EPFA] at all.
>
> So that's one reason why we try to separate out the issues and to provide for them systematically so that you did not have that kind of encroachment on other budget hits.
>
> […]
>
> The approach we took in [*Wen:De*] was that things have to move in lockstep, so if you are taking children into care and you are meeting provincial standards, or not meeting them, you have to report on that and you can't report on that if you don't have the technology to do so.
>
> If you are increasing your staff there is going to be an additional capital cost. If you don't have the money for that, where [are] the staff going to work?[920]

531. Notwithstanding the fact that the lack of funding for information technology and computers has been identified as a shortcoming in its funding formulas for more than a decade, AANDC maintains that they are considering what the "information management requirements" are and whether "additional funding" will be required to ensure that First Nations child and family service agencies are able to access and use the systems already available in the provinces.[921]

b.iii.iv. Legal Costs

532. Legal costs are an issue of contention between First Nations child and family service agencies and AANDC. Under Directive 20-1 and EPFA, agencies received a limited amount of funding for legal costs from their fixed operations budget.[922] According to the FNCFS Program Manual, those limited funds are intended to cover "legal services related

[920] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 114, 120-121.
[921] Testimony of Barbara D'Amico, Transcript Vol. 54 at p. 229.
[922] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also letter from AANDC (Manitoba Region) to First Nation Child and Family Service Agencies in Manitoba dated March 28, 2002, CHRC BOD, Ex. HR-08, Tab 123; see also letter from Assembly of Manitoba Chiefs to the Honourable Paul Martin dated February 20, 2004, CHRC BOD, Ex. HR-08, Tab 125; see also letter from AANDC (Atlantic Region) to 4-Directions Agency in New Brunswick dated July 11, 2001, CHRC BOD, Ex. HR-08, Tab 139; see also letter from AANDC to Mi'kmaw Family and Children's Services dated July 31, 2003, CHRC BOD, Ex. HR-12, Tab 256.

to both agency operations and court costs incurred as a result of a child's apprehension".[923]

533. As previously noted, AANDC has fixed the costs associated with eligible operations services in Directive 20-1,[924] including legal services, which are capped at $5,000 per agency.[925] Under EPFA, legal costs remain fixed under an agency's operations funding stream.[926] Dr. Blackstock described her experience as a social worker on reserve in British Columbia, and the impact this fixed funding had on First Nations child and family service agencies:

> DR. BLACKSTOCK: Well, the [Directive 20-1] provides for $5,000 in legal fees per year. That does not go very far, you know…and that does not address the needs of kids. If we had an inquest or something, that could be gone in just a consultation to the inquest. So we had no specialized legal counsel.
>
> On occasion, I would ask if we could just access the Band lawyer on occasion, but that was a person who specialized often in Aboriginal law and other areas of law, wasn't a Child and Family Service worker. And it was only available to us because the First Nation was generous enough to provide it.
>
> It wasn't – if we weren't fortunate enough to be in a nation that had their own legal counsel, we would be without legal counsel. And [the court appearances are] a situation where lawyers are expected to be a part of the process and in court…
>
> MR. DUFRESNE: Were you able to use [the province of B.C.'s] Attorney General counsel?
>
> DR. BLACKSTOCK: No.
>
> […]
>
> And in fact, I found myself – and I – you know, I did [this] out of desperation, but I would call Legal Aid and I'd see if there was somebody on the phone who could volunteer their time or a law student, someone who could tell me about this stuff so that I could try to do the best job I could.

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[923] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1.

[924] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 30.

[925] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 6; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 62-64.

[926] Testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 59-60; Vol. 53 at pp. 55-58; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 58-63; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 83-86.

> But I never had to call Legal Aid or law students when I was working [as a social worker for the province of B.C.].[927] (emphasis added)

534. Social workers across Canada – both on and off reserve – must adhere to the child welfare legislation and standards in their respective jurisdictions. In light of the fact that apprehending a child and removing them from their families and homes is such a serious ~~–in~~tervention in the freedom of a child […] and their families", provincial legislation generally requires a court appearance within a certain period of time after the child has been removed.[928] Dr. Blackstock described the importance of legal counsel in the child welfare context as follows:

> DR. BLACKSTOCK: As social workers we don't get a lot of legal training […] it's a requirement in the provincial and territorial jurisdictions that you alone don't go [to the court appearance] as a social worker…And so what you want ideally is an expert lawyer in child and family services law there with you as a social worker to present the arguments to the court [with respect to the reasons for the apprehension] and to be in receipt of the arguments presented by family counsel, or in some cases, the First Nation itself might be represented, or other parties, to be able to address those concerns. It would be inappropriate for a social worker who has done a removal to show up and represent themselves.
>
> MR. DUFRESNE: So […] could a child welfare agency operate without legal counsel?
>
> DR. BLACKSTOCK: Not in my view. Not within the provincial statute and territory statute framework.[929]

535. Since AANDC considers legal costs to be covered within a First Nations child and family service agency's fixed operations budget, it is also subject to major downward adjustments based on the size of a community's child population.[930] As noted in the *Wen:De* reports, the design of AANDC's funding model means that even a ~~–s~~light increase or decrease in child population can result […] in a huge increase or decrease in

[927] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 186-188.
[928] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 131-132; Vol. 2 at pp. 179-180; see also testimony of Derald Dubois, Transcript Vol. 9 at pp 69-70.
[929] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 131-132.
[930] Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.

overhead funding available to agencies."[931] This has a real impact on the amount of funding available for legal costs.[932]

536. In contrast, AANDC does not impose "population thresholds" on the provinces with whom they enter into agreements for the provision of child welfare services to First Nations on reserve. For example, the B.C. Service Agreement does not impose population thresholds.[933]

537. Notwithstanding AANDC's steadfast position that "the legal line in the operational formula [is] sufficient",[934] First Nations child and family service agencies have long argued that the legal costs associated with the apprehension of a child should not be "fixed" under the operations budget, but rather reimbursed as part of maintenance.[935] The *Wen:De* reports also made this recommendation.[936]

538. Ms. Cope, for example, testified that the Mi'kmaw Agency in Nova Scotia had legal fees related to children in care totalling $2 million.[937] The Agency contends, with the support of the province, that these types of legal costs should be considered eligible maintenance expenditures according to the provincial definition of maintenance.[938] Indeed, Ms. D'Amico noted as an example in her testimony that unlike AANDC, the province of Nova Scotia considers these types of costs to be reimbursable maintenance expenditures.[939]

539. Dr. Loxley also described this discrepancy in his testimony:

> DR. LOXLEY: […] The focus of our work [in *Wen:De*] was on the operations side, but inevitably maintenance was an issue. It was an issue mainly because the line between maintenance and operations is a very blurred one and the First Nations Agencies argued for many years that items that should properly have been reflected in maintenance – and, of course, maintenance is fully paid and it's a fairly automatic kind of payment and there's little dispute there in terms of relative size of payments vis-à-vis the provinces.

[931] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.
[932] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 17-18.
[933] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 22.
[934] Testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 55-58.
[935] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 57-59, 107-108, 121.
[936] *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.
[937] Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 58.
[938] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 57-59, 107-108, 121.
[939] Testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 59-60.

> So the idea is that if you [were] to put items in maintenance they tend to be funded fairly efficiently, fairly quickly.
>
> Over the years it's been argued that items that should have been in maintenance were pushed over into operations. It's a complicated field, but things like certain legal aspects of taking children into care, complicated health issues related to children going into care, assessment of children going into care, travel, legal issues and so on.
>
> So, inevitable, if items were pushed out of maintenance [and] into operations that would squeeze the operations budget.[940]

540. Mr. Plouffe testified that his agency has a number of lawyers who serve as both legal advisors and litigators, and who attend court as required. Part of his agency's budget for legal services is provided by the province.[941]

541. In her testimony, Ms. D'Amico noted that AANDC's failure to include legal costs related to the apprehension of a First Nations child was a gap in the EPFA funding model:

> MS. D'AMICO: […] <u>What is missing from the EPFA formula is a line item for legal fees related to children</u>…so that is something we will want to add to the EPFA formula.[942] (emphasis added)

542. AANDC's FNCFS Program Manual also recognizes that ~~"~~legal costs […] have become a larger issue than planned for when [Directive 20-1] was developed."[943]

b.iii.v. Travel

543. Under Directive 20-1 and EPFA, travel costs are also fixed within a First Nations child and family service agency's operations budget.[944] The challenges and problems that AANDC's fixed operations budget creates have already been explored in these submissions.

544. Travel is a necessary reality of the job for social workers, who are required to visit families and children in person within a certain period of time according to most

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[940] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 7-8.
[941] Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 40-42.
[942] Testimony of Barbara D'Amico, Transcript Vol. 52 at p. 88.
[943] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 14, section 2.2.3.
[944] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 32-33; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 17; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 74.

provincial child welfare statutes.[945] As Dr. Blackstock noted, depending on the number of First Nations communities an agency is serving, social workers ~~–c~~an spend a lot of [their] time […] travelling to these communities".[946]

545. This is especially evident in Nova Scotia, where the Mi'kmaw Agency serves all of the First Nations communities in the province.[947] The province has found that as a result, the Agency cannot meet the mandated statutory response times, which they are required to do in order to maintain their delegation and satisfy the terms and conditions of AANDC's FNCFS Program and funding.[948] Therefore, the province has recommended that AANDC provide funding for the creation of a third ~~–o~~ffice in southwest Nova Scotia."[949] In response to this request, AANDC has indicated that ~~–t~~hey [will] think about it".[950]

546. Ms. Cope testified that for the Mi'kmaw Agency, the under-staffing, combined with the broad geographical area which they serve, makes it difficult to meet the response times that are provincial statutory requirements.[951]

547. Ms. Cope also explained the importance of travel for a social worker in the performance of his or her duties:

> MS. COPE: […] I mean, certainly, one of [the] efficiencies we could see would be having a third office, which hopefully would cut down considerably on travel […].
>
> One of the questions we [get] asked is, well, why are people traveling so much? And, you know, the real answer to that is, well, you can't very well have social workers sitting at their desk, it's not very useful, they're not doing they're job [if that's the case], so obviously travel is always going to – especially when we are [delivering services to] the whole province, is always going to be an issue. Most of our travel expenses are program-related and not admin-related.[952]

548. Likewise, Ms. Bohdanovich testified about the importance of travel for First Nations child and family service agencies in Manitoba, given the types of child welfare cases that come to her agency's attention. She noted that Manitoba's child welfare legislation

[945] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.
[946] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 126.
[947] Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 40.
[948] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.
[949] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.
[950] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.
[951] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 178-179.
[952] Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 56-57.

requires that social workers –do a face-to-face visit every 30 days", and –even more often" if the case involves a high-risk child or family.[953]

549. Practically speaking, if a social worker on reserve has 30 cases, this means that out of the approximately 20 business days in a month, they are travelling to do a face-to-face visit almost every day.[954] As Ms. Bohdanovich testified, these are essential front-line services that cannot be cut and must be properly funded in order for agencies to comply with provincial legislation and standards.[955]

550. With respect to travel for purposes other than child protection, such as training and meetings, First Nations child and family service agencies are trying to find ways to reduce these costs.[956] However, as previously noted, funding for information technology and capital assets is extremely limited under both Directive 20-1 and EPFA. Therefore, agencies' internet connectivity has been very limited to date, making it difficult to participate in these types of activities via video conferencing or Skype.[957]

551. In her testimony, Ms. D'Amico acknowledged that travel is a necessary reality for First Nations child and family service agencies.[958] However, AANDC's funding formulas do not –take into account the need for [additional] staff […] because of longer travel" times,[959] even in circumstances like Nova Scotia, where Mi'kmaw Agency social workers are travelling –for up to 14 hours at a time" between communities.[960] There is no adjustment included in either funding formula to address this pressing need.

552. Dr. Loxley testified about this structural deficiency in the funding formula:

> DR. LOXLEY: […] I would say, judging by the evaluations that have been [conducted] so far [on EPFA], there are areas in which, systematically, the new approach could be improved and I would say that one of those seems to be

[953] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.
[954] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.
[955] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117, 122-123; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at p. 35; see also Minutes of Audit Meetings and Interviews – OAG Report 2008 (2007), CHRC BOD, Ex. HR-15, Tab 448 at p. CAN029350/1.
[956] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 116-118.
[957] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 116-118.
[958] Testimony of Barbara D'Amico, Transcript Vol. 51 at p. 70; Vol. 52 at pp. 64-65.
[959] Testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 163-164.
[960] Testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 163-164; see also testimony of William McArthur, Transcript Vol. 63 at pp. 87, 168.

> remoteness. Lots of complaints in the Alberta review about insufficient money for remoteness and therefore for travel, staffing.[961]

553. In contrast, provincially, the actual costs of social worker travel are generally reimbursed. Ms. Bohdanovich testified that in Manitoba, where agencies serve children both on and off reserve, they bill the province ~~"o~~n a monthly basis" and get reimbursed for the costs of their travel.[962] Likewise, Ms. Cope testified that the province of Nova Scotia funds the Mi'kmaw Agency directly for ~~"a~~ social worker's salary and travel for every 20 kids".[963]

b.iii.vi. Remoteness

554. There is a remoteness factor built into operations funding under both Directive 20-1 and EPFA. As previously noted, agencies are eligible to receive an adjustment based on the remoteness factor of each member band, which is then averaged and used to adjust funding as follows:

- the adjustment factor for remoteness is multiplied by $9,235.23;
- the remoteness factor is multiplied by $8,865.90 times the number of bands within the agency's catchment area;
- the child population (0 to 18 years) is multiplied by $73.65 times the remoteness factor.[964]

555. In his testimony, Dr. Loxley pointed out the flaws with this band-based calculation for remoteness adjustments, which does not necessarily address the real and greater needs of First Nations communities and the service deficits that so many face on reserve:

> DR. LOXLEY: […] The remoteness [adjustment has] two problems with it; one is that it [is] based on the nearest service centre, but service centres often provided no services in child welfare, so they were not centres.
>
> So what you needed was remoteness, we thought [in *Wen:De*, but] remoteness from a more meaningful centre that could provide assistance to children. That's the first problem.

[961] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 89; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48.
[962] Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 23-24.
[963] Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 142.
[964] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 22-23, section 3.2.3.

> The second problem was, again, it was very jumpy, it went up in large discrete amounts that had no rationale as far as we could see, so that the gap between the most remote and the least remote was very, very high, but in the middle there was all kinds of issues that weren't well handled by the formula.[965]

b.iii.vii. Intake and Investigation

556. First Nations child and family service agencies are responsible for the provision of prevention services as well as child protection services. Pursuant to Directive 20-1 and EPFA, funding is flowed to the agencies based on whether a First Nations child and/or family is in one stream or the other (i.e., prevention or maintenance funding). However, AANDC does not provide funding to the agencies for the "intake and investigation" work they do.

557. Intake and investigation includes the preliminary assessment of a child and/or family that has been brought to the attention of a First Nations child and family service agency. Before a child is either removed from their home and brought into child welfare care, or receives prevention services, the agency must conduct an investigation to determine the extent of the risk to the child's safety and wellbeing, and the best way forward.[966]

558. Investigations into allegations of maltreatment and neglect can take a great deal of time, especially on reserve where First Nations children and families often have multiple and complex needs. Mr. Plouffe, whose agency serves children and families both on and off reserve in Québec, testified that a greater number of employees are required to address the number of reports and greater needs of the First Nations children and families on reserve. For example, Mr. Plouffe requires the same number of social workers be devoted to a First Nations community of 1,500 on reserve, as he does a community with a population of 48,000 off reserve.[967]

559. Intake and investigation is work that the provinces do off reserve, but AANDC does not provide funding to cover these costs for First Nations child and family service agencies

[965] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 16-17, 89; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 21, 195; Vol. 3 at pp. 120-122; Vol. 4 at p. 34; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48.
[966] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 111-114.
[967] Testimony of Sylvain Plouffe, Transcript Vol. 37 at p.33.

on reserve. In her testimony, Ms. D'Amico admitted that this was one of the "major items" that AANDC had "missed" in developing the EPFA funding model:

> MS. D'AMICO: One of the major items that we missed, that didn't come out in our early tripartite discussions, was an intake and investigation [service] line.
>
> […]
>
> And that has caused a caseload issue because now we have provinces that are delegating down that responsibility to agencies – it's been happening for a while, so all of a sudden when you have, instead of a caseload of 60, because this is your children-in-care, your caseload is up in the hundreds because you are doing that preliminary piece.
>
> So this is an issue that we are trying to address, we are looking at doing all of the calculations, and I believe some of the documentation that has been disclosed, the Way Forward deck outlines why those numbers were so high. It included – so Enhanced EPFA – or EPFA-Plus…so improving on EPFA would include a line item for intake and investigation, but we would need a source of funds for that.
>
> MS. CHAN: Do you currently have that source of funds?
>
> MS. D'AMICO: No, we do not.

b.iii.viii. Cost of Living Adjustment

560. When AANDC initially developed Directive 20-1 in the late 1980's, a cost of living adjustment (otherwise known as an adjustment for inflation) was built into the funding formula.[968] Rightfully so, at the time AANDC anticipated that there "were some items in the operations formula that were cost-sensitive and that would need to be adjusted over time to keep up [with] the cost of living."[969]

561. However, in 1995, AANDC stopped providing a cost of living adjustment to First Nations child and family service agencies.[970] Since that time – almost twenty years ago – there has been no cost of living adjustment applied as part of the FNCFS Program funding formulas to First Nations agencies.[971] The only exception to this was a one-time

[968] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 33.
[969] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.
[970] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 185-186.
[971] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also Journal Article, "Keeping First Nations children at home" A few Federal policy

adjustment in 2005 of 8.24%, which still fell "far short of making up for the substantial inflation losses during that period of time [between 1995 and 2005]."[972]

562. In effect, the lack of cost of living adjustment in AANDC's funding formulas compounds the challenges they face to provide comparable levels of service to the province and territories.[973] The cost of living back in 1995 was far less than what it is today, so First Nations child and family service agencies have effectively lost their "purchasing power" because of way AANDC has chosen to apply its funding formulas on reserve.[974] The funding formulas themselves in fact call for a cost of living adjustment – AANDC has decided not to apply it to First Nations on reserve.[975]

563. This has a serious impact on the quantity and quality of services available to First Nations children on reserve, who are undoubtedly among the most vulnerable in the country.[976] As Dr. Loxley testified, AANDC's failure to adjust for inflation means that the "real value of the dollars going to First Nations Agencies [is] actually declining annually quite significantly".[977]

564. In contrast, AANDC has continued to provide a cost of living adjustment to the province of British Columbia pursuant to the former B.C. MOU and current Service Agreement.[978] First Nations child and family service agencies in British Columbia do not receive any concordant cost of living or inflation adjustment under Directive 20-1.[979]

565. AANDC's decision to halt the cost of living adjustments for First Nations child and family service agencies has been the subject of criticism in reports dating back to 2000. The NPR found that AANDC's funding formula is too "rigid and unilateral" and does not

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changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52; see also Meeting Minutes – B.C. Teleconference, Respondent's BOD, Ex. R-13, Tab 29 at p. 2.

[972] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

[973] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 27, 33-35; see also e-mail from Steven Singer to Odette Johnston dated October 8, 2012, CHRC BOD, Ex. HR-13, Tab 287; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (October 31, 2012), CHRC BOD, Ex. HR-13, Tab 288 at pp. 3, 5, 8-9; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (November 2, 2012), CHRC BOD, Ex. HR-13, Tab 289 at pp. 3-4, 8.

[974] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

[975] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

[976] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

[977] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 15.

[978] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5.

[979] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110.

allow cost of living adjustments.[980] Therefore, the report recommended that AANDC ―consider on a priority basis the reinstatement of the annual cost of living adjustments as soon as possible, and to redress the lack of any such adjustment between 1995 and 2000" (the date of the final report).[981] (emphasis added)

566. Similarly, the *Wen:De* reports concluded that the effect of AANDC's failure to provide a cost of living adjustment to First Nations agencies was a funding shortfall of 21.21% between 1995 and 2005, ―purely on account of inflation".[982] In addition, the report found that as a result of the lack of a cost of living adjustment, First Nations child and family service agencies were given $112 million less in operations funding under Directive 20-1 than they would have otherwise received.[983] The cumulative effect of these losses, according to the report, led to ―both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional".[984] (emphasis added)

567. Dr. Loxley, who examined the EPFA funding formula, testified that ―inflation has not been fully accounted for in the [EPFA] agreements so far."[985] As a result, and given that AANDC's funding for the FNCFS Program is insufficient to meet the needs of First Nations children and families on reserve, Ms. Murphy testified that the Department is forced to re-allocate funds from other areas in order to cover the costs.[986]

568. For example, AANDC has re-allocated from on reserve housing and infrastructure in order to cover deficits in the FNCFS Program.[987] This re-allocation is, at least in part,

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[980] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.
[981] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.
[982] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 26-30.
[983] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.
[984] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.
[985] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 129-130.
[986] Testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 188-191; see also AANDC ―Internal Re-allocation Requests" (2), CHRC BOD, Ex. HR-13, Tab 298; see also AANDC Power Point, ―2012-13 Main Estimates – Key Area Breakdown", CHRC BOD, Ex. HR-13, Tab 293; see also AANDC Briefing Note, ―Costs Associated with the Income Assistance and First Nations Child and Family Services Programs" (2007), CHRC BOD, Ex. HR-14, Tab 349; see also AANDC Power Point, ―Cost Drivers and Pressures – the Case for New Escalators" (2013), CHRC BOD, Ex. HR-15, Tab 413 at pp. 3-4, 6, 9-10, 17; see also AANDC Power Point, ―Sustainability of Programming" (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 6-7, 11-12, 17-18; see also AANDC Power Point, ―Cost Drivers – The Case for New Escalators" (2013), Respondent's BOD, Ex. R-13, Tab 19 at pp. 3, 5-6, 8.
[987] AANDC ―Internal Re-allocation Requests" (2), CHRC BOD, Ex. HR-13, Tab 298; see also AANDC Power Point, ―2012-13 Main Estimates – Key Area Breakdown", CHRC BOD, Ex. HR-13, Tab 293; see also AANDC Briefing Note, ―Costs Associated with the Income Assistance and First Nations Child and Family Services Programs" (2007), CHRC BOD, Ex. HR-14, Tab 349 at pp. 1-2; see also AANDC Power Point, ―Cost Drivers and

necessary because AANDC has, since 1996, had a maximum annual budgetary increase of 2% for the FNCFS Program (otherwise known as the "2% cap"). Funding available under the program is limited because the annual increase of 2% falls far short of the actual annual increases in FNCFS Program expenditures.[988] AANDC is aware that the 2% cap has resulted in growing "A-base shortfalls" because it "lags inflation and demographic-driven demand".[989]

569. This impedes the ability of First Nations child and family service agencies "to keep up' with provincial investments" in child welfare on reserve,[990] and the re-allocation from other essential services ultimately exacerbates the challenges First Nations children and families face on reserve. Re-allocation of funding to the FNCFS Program results in deficits and inequities in other areas, which also impacts the quality of life First Nations people enjoy on reserve. Using the example of re-allocation from housing and infrastructure, this may also impact the FNCFS Program since overcrowded and unsafe living conditions are factors that contribute to a First Nations child being identified as "at risk" and ultimately apprehended.[991]

570. The situation is similar in Ontario. The 1965 Agreement cost-sharing formula has been criticized for its failure to account for realistic "northern costs", including the "higher cost of services in northern and remote communities".[992]

Pressures – the Case for New Escalators" (2013), CHRC BOD, Ex. HR-15, Tab 413 at pp. 3-4, 6, 9-10, 17; see also AANDC Power Point, "Sustainability of Programming" (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 6-7, 11-12, 17-18; see also AANDC Power Point, "Cost Drivers – The Case for New Escalators" (2013), Respondent's BOD, Ex. R-13, Tab 19 at pp. 3, 5-6, 8.

[988] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

[989] AANDC Power Point, "Sustainability of Funding: Options for the Future" (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, "Is 2% Enough: AANDC Funding for First Nations Basic Services" (2007), CHRC BOD, Ex. HR-14, Tab 383 at pp. 2, 4, 8; see also AANDC Power Point, "First Nations Basic Services: Cost Drivers Project" (2005), CHRC BOD, Ex. HR-15, Tab 472 at pp. 3-4, 11, 18, 23, 32-37.

[990] AANDC Power Point, "Sustainability of Funding: Options for the Future" (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, "Cost Drivers – The Case for New Escalators" (2013), Respondent's BOD, Ex. R-13, Tab 19 at pp. 4-6, 8, 17.

[991] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8; see also National Aboriginal Economic Development Board, "Recommendations on Financing First Nations Infrastructure" (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24, 29; see also CIS-2008 Major Findings Supplementary Tables, CHRC BOD, Ex. HR-07, Tab 92; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

[992] Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/28 – CHRC650/30; see also Northern Remoteness Study and Analysis of Child Welfare Funding Model and Implications on Tikinagan Child and Family Services and Payukotayno Family Services, CHRC BOD, Ex. HR-11, Tab 219 at pp. 3-17; see also A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at

b.iii.ix. Conclusion

571. The Commission submits that in failing to provide adequate funding for the foregoing key elements of child welfare service delivery on reserve, AANDC's FNCFS Program and corresponding funding formulas adversely differentiates against First Nations children and families ordinarily resident on reserve.

572. Specifically, the lack of funding for salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living seriously limits and constrains the ability of First Nations child and family service agencies to deliver services to First Nations children on reserve in a culturally appropriate and reasonably comparable manner to those provided to children off reserve by the provinces and territories.

573. This adverse differentiation is demonstrated not only by comparing the levels of child welfare funding and services provided by AANDC on reserve and the provinces off reserve, but also by comparing the funding AANDC provides to First Nations child and family service agencies as compared to the provincial governments of British Columbia and Alberta for the provision of child welfare services on certain reserves in those regions, which will be further described below.

574. The shortcomings in AANDC's FNCFS Program and funding formulas described above, and the impacts they have on the quality and quantity of child welfare services available to First Nations children on reserve, have been well documented for more than a decade.[993] Yet, First Nations child and family service agencies continue to run deficits because AANDC's FNCFS Program and funding formulas as not sufficient to meet, and not flexible enough to adjust for, the greater needs of First Nations people on reserve. Ultimately, the effects of this underfunding are felt most pointedly by First Nations children on reserve.

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p. CHRC649/39; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-6, 11, 14-15, 23; see also Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick, CHRC BOD, Ex. HR-05, Tab 60 at pp. 17-20.

[993] NPR, CHRC BOD, Ex. HR-01, Tab 3; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45.

b.iv. AANDC has Failed to Correct the Known Flaws and Inequities in both Directive 20-1 and EPFA, and to Review the 1965 Agreement

575. The funding formulas at issue in the present complaint date back more than fifty years, starting with the 1965 Agreement, followed by Directive 20-1, which came into effect in 1990 and still operates in three provinces and the Yukon Territory today, and finally EPFA, which was introduced in 2007 and has been implemented in six provinces to date.

576. Since the implementation of the FNCFS Program in 1990, there have been a number of independent and even international reviews of the Program and its funding formulas that have found AANDC's funding for First Nations child and family services on reserve to be flawed and inequitable. These reports, along with their findings and recommendations to address the shortcomings and modify AANDC's funding formulas, have been documented throughout these submissions.[994]

577. In addition to these reports, AANDC has conducted its own reviews of both Directive 20-1 and EPFA, which have identified shortcomings, weaknesses and flaws in both formulas.[995]

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[994] NPR, CHRC BOD, Ex. HR-01, Tab 3; see also *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271; see also UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23; see also UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24; see also Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25; see also UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57; see also Auguste Solutions Nova Scotia Report, CHRC BOD, Ex. HR-09, Tab 204; see also Auguste Solutions "Implementation Evaluation of the Enhanced Prevention Focused Approach: Evaluation Technical Report" (2012), CHRC BOD, Ex. HR-09, Tab 205 ["Auguste Solutions Evaluation of EPFA"]; see also First Nations Child and Family Services Program: Risk Assessment Results (2006), CHRC BOD, Ex. HR-14, Tab 363; see also Report to the Minister of Justice and Attorney General of Alberta – Public Fatality Inquiry (June 21, 2013), CHRC BOD, Ex. HR-11, Tab 231 at p. 6; see also Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at pp. 389-395; see also Alberta Child Intervention Review Panel, "Closing the Gap between Vision and Reality: Strengthening Accountability, Adaptability and Continuous Improvement in Alberta's Child Intervention System (2010), Ex. C-2 at pp. 40-55.

[995] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at pp. ii; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. v-viii, 29-31; see also Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 1-16; see also Mid-Term National Review for the Strategic Evaluation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program (2011), CHRC BOD, Ex. HR-08, Tab 113 at pp. v-vii, 18-20, 43; see also Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247; see also Evaluation of the First Nations Child and Family Services

578. In her testimony, Ms. D'Amico recognized that AANDC's FNCFS Program and funding under Directive 20-1 may not be comparable.[996] More than two decades have passed since its implementation. During that time, AANDC has acknowledged on many occasions the perverse incentives and flawed assumptions inherent in that model that contribute to the increasing number of First Nations children in child welfare care.[997] And yet, this funding formula lives on and continues to determine the availability and quality of child and family services for thousands of First Nations children in Canada.

579. As will be described further below, while EPFA represents AANDC's attempt to redress the known flaws and inequities in Directive 20-1, it has fallen short of its objective. In fact, since AANDC kept the funding structure and flawed assumptions of Directive 20-1 as the skeleton or basis of EPFA, the new funding formula perpetuates many of the structural deficiencies and inequities of Directive 20-1.[998]

580. In her testimony, Ms. D'Amico stated that the EPFA funding model had a number of shortcomings, including the fact that it does not take into account the early intake and investigation work agencies do,[999] and does not adjust for situations where increasing numbers of children in care require agencies to use their operations and prevention funding in order to offset maintenance deficits.[1000] For example, the situation at the Mi'kmaw Agency in Nova Scotia, where high child protection caseloads have made it impossible for the Agency to provide prevention services to the First Nations on reserve in that province.[1001]

(FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303; see also Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359; see also Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38.

[996] Testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 179-180.

[997] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.

[998] DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at pp. CAN052861_0024, CAN052861_0036; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (October 31, 2012), CHRC BOD, Ex. HR-13, Tab 288 at pp. 3, 5, 8-9; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (November 2, 2012), CHRC BOD, Ex. HR-13, Tab 289 at pp. 3-4, 8.

[999] Testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 89-92; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-20.

[1000] Testimony of Barbara D'Amico, Transcript Vol. 53 at p. 79.

[1001] Auguste Solutions Nova Scotia Report, CHRC BOD, Ex. HR-10, Tab 204 at pp. 6-7; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261.

581. Dr. Loxley testified about how the problems agencies are encountering with EPFA were largely predictable, as were the fundamental flaws with the assumptions AANDC has built into the EPFA funding model.[1002]

582. Notwithstanding these known shortcomings with EPFA, Ms. Schimanke testified that the model had not been updated in Alberta since its implementation in 2007:

> MS. SCHIMANKE: We continue to use the same formula since – since 2007-08 when it was implemented, yes.[1003]

583. This is especially worrisome given that the EPFA funding model was initially set for a term of five years, which have long since passed in Alberta, and yet AANDC has not modified the model to adjust for the flaws and inequities that have been brought to its attention – both domestically and internationally – time and time again.

584. It is disappointing to note that these reports and recommendations, most of which AANDC has funded, contracted, participated in, accepted, approved and/or acknowledged, have not resulted in any meaningful or lasting change in the quality or quantity of funding and services for First Nations on reserve. AANDC is aware of the flaws and inadequacies of its own policies and funding formulas, but has failed to correct them.

585. As Dr. Blackstock noted in her opening statement before the Tribunal:

> DR. BLACKSTOCK: [… All] parents, all people expect of one another that when we know better, we will do better for children.
>
> In this case, [AANDC] knows better and didn‘t do better.[1004]

586. As well, despite the fact that many reports[1005] over the past two decades have called on AANDC to initiate a formal review of Ontario‘s 1965 Agreement in order to determine whether it is, in fact, comparable and equitable, no such review has been undertaken.[1006]

[1002] Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 139-141.
[1003] Testimony of Carol Schimanke, Transcript Vol. 62 at p. 49.
[1004] Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 45.
[1005] NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

b.v. Additional Concerns Regarding the Impact of Jurisdictional Disputes on the Availability and Accessibility of Services on Reserve

587. As previously discussed, Parliament unanimously adopted Jordan's Principle on December 12, 2007,[1007] the purpose of which is to ensure that ~~"~~First Nation children [are not] denied access to government services or delayed receipt of access for government services because of additional barriers related to them being a First Nations child."[1008]

588. Dr. Blackstock testified about the application of Jordan's Principle in the child welfare context, and noted that it is a mechanism through which existing gaps in jurisdiction and service delivery on reserve can be addressed in order to ensure that the services being provided to First Nations are reasonably comparable to those available to children living off reserve.[1009] She went on to state that Jordan's Principle is essentially ~~"~~a very simple principle of equality."[1010]

589. As a result of jurisdictional disputes, children can be ~~"~~placed into care to receive services, even though the placements often do not involve child protection issues",[1011] since the costs of maintaining a child in care are covered by AANDC.[1012] In contrast, children resident off reserve have access to the services they require through the province(s) – the services are primarily based on the needs of the child, and not the jurisdiction or authority of the responsible government.[1013]

[1006] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 89; Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

[1007] Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 15 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 148-149.

[1008] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 153-154.

[1009] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 154-155; see also AANDC Briefing Note, ~~"~~Jordan's Principle" (2008), CHRC BOD, Ex. HR-14, Tab 352; see also AANDC, ~~"~~Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302 at pp. 12-15.

[1010] Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 179.

[1011] AANDC Briefing Note, ~~"~~Jordan's Principle and Children with Life Long Complex Medical Needs" (2007), CHRC BOD, Ex. HR-14, Tab 380; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada).

[1012] As previously noted, under Directive 20-1, the actual costs of maintaining a child in care are covered by AANDC so long as they are deemed to be ~~"~~eligible" maintenance expenditures. Under EPFA, the actual eligible costs of maintaining a child in care are covered but agencies have to work within their annual maintenance allocation, which is re-based each year.

[1013] Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at pp. 195-196, 179.

590. In her 2008 report, the Auditor General found that jurisdictional disputes impact the "availability, timing and level of services [provided] to First Nations children",[1014] and that First Nations child and family service agencies were having to place children with special medical needs "outside of their" communities in order to facilitate "access to the medical services they need."[1015]

591. Similarly, the *Wen:De* reports stated that "jurisdictional disputes continue to have significant impacts on the lived experiences of First Nations children – particularly those with special needs."[1016] Attempting to resolve these disputes requires a significant amount of time and effort from First Nations child and family service agencies; *Wen:De* found that social workers spent on average 54.25 hours resolving each dispute.[1017]

592. Even after the adoption of Jordan's Principle, a 2012 study found that "First Nations children continue to be the victims of administrative impasses."[1018]

593. Disputes between levels of government and also between various government departments "about who should fund services" can result in delay, disruption and or denial of a service for a First Nations child on reserve.[1019] These issues are dealt with on an *ad hoc* case-by-case basis, and the federal government has not adopted an overarching policy to address these gaps in jurisdiction.[1020]

594. For the foregoing reasons, the Commission submits that to the extent jurisdictional disputes continue to exist and remain unresolved by AANDC's implementation of Jordan's Principle, they constitute adverse differential treatment of First Nations on reserve by delaying, disrupting and or denying them meaningful access to necessary services.

[1014] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 16-17, section 4.39.
[1015] OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 17, section 4.40.
[1016] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 16.
[1017] *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.
[1018] Canadian Paediatric Society, "Are We Doing Enough? A status report on Canadian public policy and child and youth health" (2012), CHRC BOD, Ex. HR-06, Tab 83 at pp. 28-29; see also AANDC, "Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302; see also AANDC Briefing Note, "Jordan's Principle and Children with Life Long Complex Medical Needs" (2007), CHRC BOD, Ex. HR-14, Tab 380; see also Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 390.
[1019] Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 39.
[1020] Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 193; see also AANDC Briefing Note, "Jordan's Principle and Children with Life Long Complex Medical Needs" (2007), CHRC BOD, Ex. HR-14, Tab 380.

b.vi. AANDC Reimburses the Provinces More than First Nations Child and Family Service Agencies for the Provision of Child Welfare Services on Reserve

595. As previously noted, AANDC reimburses some provinces directly for the provision of child welfare services to First Nations children on reserve, including: Ontario, pursuant to the 1965 Agreement;[1021] Alberta, pursuant to the Administrative Reform Agreement;[1022] and British Columbia, pursuant to the former B.C. MOU (1996) and now the B.C. Service Agreement (2012).[1023]

596. In Ontario, AANDC cost-shares a portion of the province's overall expenditures for child welfare services provided to First Nations children and families on reserve.[1024]

597. However, in Alberta and British Columbia, the province provides child welfare services to some First Nations communities directly, while others are served by First Nations child and family service agencies. There are approximately 72 First Nations served by the province of British Columbia, and six First Nations served by the province of Alberta.[1025] AANDC reimburses the provinces for these services in accordance with their respective agreements,[1026] while reimbursing First Nations child and family service agencies pursuant to Directive 20-1 (in British Columbia) and EPFA (in Alberta).

598. Alberta's Administrative Reform Agreement and British Columbia's Service Agreement set out the manner in which AANDC is to reimburse the provinces for the provision of child welfare services to First Nations on reserve. These funding arrangements are not

[1021] 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214.
[1022] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270.
[1023] 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also Updated B.C. Service Agreement, CHRC BOD, Ex. HR-14, Tab 399; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).
[1024] Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3; see also Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/5 – COO-102/8; see also Testimony of Phil Digby, Transcript Vol. 59 at pp. 24-28.
[1025] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 5; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.
[1026] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3; Schedule A; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264; see also 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also Updated B.C. Service Agreement, CHRC BOD, Ex. HR-14, Tab 399; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).

based on Directive 20-1 or EPFA; therefore, AANDC's reimbursement of these services is distinctly different for provinces and First Nations child and family service agencies.

599. The Commission submits that AANDC reimburses the provinces of Alberta and British Columbia for the provision of child welfare services to First Nations on reserve in excess of the funding it provides to First Nations child and family service agencies, despite the fact that both are required to provide the same services in accordance with provincial legislation and standards.

600. For example, British Columbia's Service Agreement with AANDC provided an inflation adjustment for the province in the amount of $0.4 million in 2013/14.[1027] This allows the province to maintain its "purchasing power", and accounts for the fact that some of the costs of providing child welfare services (both on and off reserve) require adjustment over time in order to keep up with the cost of living.

601. However, First Nations child and family service agencies in British Columbia do not receive any concordant cost of living or inflation adjustment under Directive 20-1.[1028] When AANDC initially developed Directive 20-1 in the late 1980's, a cost of living adjustment was built into the funding formula.[1029] In 1995, AANDC stopped providing the cost of living adjustment to First Nations child and family service agencies,[1030] and since then, there has been no cost of living adjustment,[1031] with the exception of a one-time adjustment of 8.24% in 2005, which still fell "far short of making up for the substantial inflation losses during that period of time [between 1995 and 2005]."[1032]

[1027] Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-14, Tab 399 at p. CAN027956_0007, section 7.2; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-13, Tab 275 (clearer version of Tab 399); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5.

[1028] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110.

[1029] Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 33.

[1030] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 185-186.

[1031] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also Journal Article, "Keeping First Nations children at home" A few Federal policy changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52.

[1032] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

602. This has a serious impact on the quantity and quality of services that First Nations child and family service agencies are able to provide to the First Nations children and families they serve on reserve, who are among the most vulnerable and at-risk in the country.[1033] As Dr. Loxley noted, AANDC's failure to adjust for inflation means that the "real value of the dollars going to First Nations Agencies [is] actually declining annually quite significantly".[1034]

603. Similarly, according to the Administrative Reform Agreement, AANDC reimburses the province of Alberta for the "actual expenditure[s …] in respect of Indian children and member of Indian Families ordinarily residing on a Reserve who received the service", as well as for the "actual direct administration cost to Alberta in respect of the service."[1035] In other words, the province's actual operational (or administrative) costs are reimbursed by AANDC and, unlike operations funding for First Nations child and family service agencies under both Directive 20-1 and EPFA, are not fixed.

604. The very real and serious impacts that Directive 20-1 and EPFA's fixed operations budget have on First Nations child and family service agencies have already been described in these submissions. The fixed nature of operations funding can significantly impact an agency's ability to provide necessary services to the children and families they serve on reserve, and does not allow for adjustment in communities experiencing crises, or where the number of children being brought into care is in excess of the assumed averages upon which those formulas are based. As well, First Nations child and family service agencies' operations budgets are subject to downward adjustments based on the size of their on reserve child populations.[1036]

605. Neither British Columbia's Service Agreement nor Alberta's Administrative Reform Agreement is based on any such assumptions, nor are they subject to downward adjustments if they serve a First Nations community with a population of less than 1,000.[1037] Rather, funding is calculated based on the actual number of children in care

[1033] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.
[1034] Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 15.
[1035] Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A (pages unnumbered).
[1036] Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 52-53; see also AANDC, "Atlantic Region Allocations by Agency 2009-2010", CHRC BOD, Ex. HR-13, Tab 331; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365.
[1037] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 42, 47.

from the prior year.[1038] This creates an inequitable disparity in British Columbia and Alberta, where AANDC funds both the provinces and First Nations child and family service agencies to provide child welfare services on reserve.

606. Moreover, given that many of the costs that are captured under a First Nations child and family service agency's operations budget are "fixed" themselves, the fact that they do not receive a cost of living adjustment (unlike the provinces of British Columbia and Alberta) only compounds this inequity.

607. For example, under EPFA, AANDC sets the amount of funding a First Nations child and family service agency gets for a period of five years, and does not include a cost of living adjustment.[1039] In Alberta, EPFA was implemented in 2007 and AANDC based its funding for staff salaries on the provincial salary grid from 2006 in an effort to try to bring First Nations agency staff salaries up to a comparable level as those of the province. However, given the fixed five-year structure of the EPFA funding formula, staff salaries for on reserve First Nations child and family service agencies have been fixed at the 2006 level since that time, whereas AANDC adjusts its funding for provincial social worker salaries annually in accordance with the Administrative Reform Agreement.[1040]

608. Therefore, AANDC funds the province of Alberta more than First Nations child and family service agencies to provide the same service to the same group of people.[1041]

609. AANDC's own analysis has confirmed that the cost of reimbursing First Nations child and family service agencies to provide child welfare services on reserve is *less* than it would be if the provinces were providing those same services. In fact, many internal AANDC documents have found that if the provinces were to take over the provision of child welfare services on reserve, it would likely result in "dramatic increases in [FNCFS Program] costs" for the Department.[1042]

[1038] Testimony of Carol Schimanke, Transcript Vol. 62 at p. 42; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 102.
[1039] Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 106; Vol. 47 at p. 40; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 40; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.
[1040] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.
[1041] Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.
[1042] First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Briefing Note, "Explanations on Expenditures of Social Program" (undated), CHRC BOD, Ex. HR-13, Tab

610. Furthermore, AANDC has recognized that many First Nations "children and families are not receiving services reasonably comparable to those provided to other Canadians",[1043] and that "First Nations are not receiving a fair level of services as compared to non-First Nations in Canada."[1044] The disparity in levels of service on and off reserve is, according to AANDC, because its FNCFS Program funding is insufficient "to permit First Nation communities to effectively and efficiently meet the needs of their communities and their statutory obligations under provincial legislation."[1045]

611. With respect to Directive 20-1, AANDC has recognized that the funding provided to First Nations child and family services agencies does not allow them to deliver child welfare services "on reserve to a level comparable to that provided to other children and families living off reserve."[1046] Therefore, the level of funding and quality of services provided to First Nations children and families on reserve in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory are inferior to those being provided by the province off reserve. As a result of the "weaknesses" with Directive 20-1 and this disparity in funding, First Nations children are overrepresented in the child welfare system.[1047]

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330 at p. 2; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3; see also AANDC Briefing Note, "New Brunswick First Nation Child and Family Services" (2002), CHRC BOD, Ex. HR-15, Tab 468 at p. CAN112546_002; see also AANDC, "Comparison of Manitoba, British Columbia, Alberta, AANDC Child and Family Services Expenditures per Child in Care our of the Parental Home" (undated), CHRC BOD, Ex. HR-13, Tab 306; see also AANDC Power Point, "First Nations Child and Family Services Program: The Way Forward" (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 32; see also AANDC Power Point, "First Nations Child and Family Services Program: The Way Forward" (August 22, 2012), CHRC BOD, Ex. HR-09, Tab 144 at p. 18; see also AANDC Power Point, "First Nations Child and Family Services Program: The Way Forward" (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248 at pp. 13-17; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4; see also e-mail from John Dance to Johann Gauthier et al. dated February 1, 2006, CHRC BOD, Ex. HR-15, Tab 477 at p. 1.

[1043] AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354; see also AANDC Briefing Note, "Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2.

[1044] AANDC Power Point, "Overview of Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 7.

[1045] AANDC Power Point, "Overview of Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 10.

[1046] AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391 at p. 1; see also AANDC Backgrounder "Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007", CHRC BOD, Ex. HR-14, Tab 392 at p. 1.

[1047] Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at p. ii; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 2.

612. While EPFA was intended to address the structural deficiencies and inequities caused by Directive 20-1, AANDC's evaluations and audits of the funding formula have noted concerns that funding is not sufficient to allow First Nations child and family service agencies to ~~k~~keep up with provincial changes",[1048] and that it is not ~~f~~flexible enough to accommodate the varying needs of the agencies".[1049] As previously noted, ~~s~~studies suggest that the need for child welfare services on reserve is 8 to 10 times [greater] than off reserve."[1050] However, the EPFA funding model has not been modified to address these concerns since its implementation in Alberta in 2007.[1051]

D) AANDC Has Failed to Provide a Justification for the Discriminatory Practice

613. For all the reasons above, the Commission submits that a *prima facie* case of discrimination has been established, and that the onus therefore shifts to AANDC to prove the existence of a *bona fide* justification for the discriminatory practice under section 15 of the *CHRA*.

i) The Legal Test for a *Bona Fide* Justification

614. The defence of a *bona fide* justification is established by sections 15(1)(g) and 15(2) of the *CHRA*:

> **15.** (1) It is not a discriminatory practice if .
>
> [**…**]
>
> (*g*) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto [...] or is a victim of any adverse differentiation and there is a bona fide justification for that denial or differentiation.
>
> **15.** (2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph 1(g) to be considered to have a *bona fide*

[1048] Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 14; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at pp. 30-31.
[1049] Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. 26-27.
[1050] NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 182.
[1051] Testimony of Carol Schimanke, Transcript Vol. 61 at p. 160; Vol. 62 at p. 49.

> justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.
>
> **15.** (1) Ne constituent pas des actes discriminatoires :
>
> [**…**]
>
> *g*) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destines au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.
>
> **15.** (2) Les faits prévus à l'alinéa (1)*a*) sont des exigences professionnelles justifies ou un motif justifiable, au sens de l'alinéa (1)*g*), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de couts, de santé et de sécurité. (emphasis added)

615. The Supreme Court has provided guidance on the proper interpretation and application of statutory defences like the defence of *bona fide* justification in sections 15(1)(g) and 15(2) of the *CHRA*. Stated most generally, for a service provider to make out the defence, it must prove on a balance of probabilities that: (i) it adopted the impugned standard for a purpose rationally connected to the function being performed; (ii) it adopted the impugned standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and (iii) the standard is reasonably necessary to accomplish the purpose or goal in the sense that persons who do not meet the standard cannot be accommodated without causing undue hardship.[1052]

616. When inquiring into whether a *prima facie* discriminatory standard is reasonably necessary, decision-makers may consider both (i) the procedure, if any, that was adopted to assess the issue of accommodation, and (ii) the substantive content of either a more accommodating standard that was not offered, or alternatively a respondent's reasons for not offering any such standard. Indeed, a *prima facie* discriminatory standard can only be

[1052] *British Columbia (Public Services Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 at para.54-55 [~~"*Meiorin*~~"]; see also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 19-21 [~~"*Grismer*~~"].

justified if a respondent meets its burden of proving that it considered and rejected all viable forms of accommodation, on grounds that they would have caused undue hardship.[1053]

617. Parliament specifically stated in section 15(2) of the *CHRA* that the factors to be considered in determining whether a measure would cause ~~"u~~ndue hardship" are ~~"h~~ealth, safety and cost." Emphasizing the principle that statutory defences to human rights laws are to be narrowly construed, the Federal Court recently held that Parliament intended this to be an exhaustive list of the factors that can give rise to undue hardship within the meaning of the *CHRA*. Therefore, the Commission submits that only matters which have a demonstrable impact on health, safety or cost can justify a *prima facie* case of discrimination.[1054]

618. In order to demonstrate undue hardship, a service provider must offer more than ~~"i~~mpressionistic evidence".[1055] Instead, what is required is concrete evidence not just of hardship, but of hardship that is ~~"u~~ndue" in all the circumstances.[1056] For example, with respect to allegations of financial costs, the threshold for undue hardship requires something more than mere decreased efficiency.[1057]

619. As the Supreme Court held in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*,[1058] the difficulty in attaching a monetary value to the benefits that flow from the elimination of discrimination means that it will always seem cheaper to maintain the *status quo*:

> The threshold of ~~"u~~ndue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible

[1053] *Meiorin, supra* at paras. 64-66.
[1054] *Air Canada Pilots Assn. v. Kelly*, 2011 FC 120 at paras. 386-387, 391-393 , 398-402 (reversed on other grounds, 2012 FCA 209). In the recent decision of *Adamson v. Air Canada*, 2014 FC 83, the Federal Court found that the list of factors that can give rise to undue hardship was not closed. That decision is currently under appeal.
[1055] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 109 [~~"~~*Via Rail*"], citing *Grismer, supra* at para. 41.
[1056] *Via Rail, supra* at para. 312.
[1057] *Via Rail, supra* at para. 225-229.
[1058] *VIA Rail, supra*.

> environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.[1059]

ii) There is No Evidence of Undue Hardship

620. In the present case, health and safety considerations are not triggered, and AANDC has not alleged, nor attempted to prove, that it would cause undue financial hardship to provide child welfare services to First Nations children and families on reserve in a non-discriminatory manner.

621. AANDC's witnesses made general statements in the course of their testimonies about the fact that there was no funding or that the FNCFS Program's funding authority and mandate did not cover some expenses.[1060] However, AANDC did not lead any evidence with respect to: (i) the reason funding is unavailable; (ii) the steps they have taken to secure funding; (iii) the impact providing funding would have on government operations; or (iv) whether lack of funding constitutes undue hardship.

622. While the Tribunal should show some deference to the federal government in deciding between competing interests, it should not find that a *bona fide* justification has been established in the absence of clear evidence of undue hardship.

623. AANDC did not provide any evidence or calculations with respect to the actual financial hardship they would suffer if discrimination is found. All of this evidence is in its control; therefore, failure to adduce the evidence should result in a finding that the defence was not made out.

[1059] *VIA Rail, supra* at para. 225.
[1060] Testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 57, 72-83 and following.

PART IV – CONCLUSION

624. In conclusion, the Commission submits that the evidence led by all parties established that AANDC's FNCFS Program and on reserve funding formulas, including Directive 20-1, EPFA and the 1965 Agreement, constitute a service pursuant to section 5 of the *CHRA* in that they provide a benefit that is conferred in the context of a public relationship. But for AANDC's FNCFS Program and funding formulas, First Nations child and family service agencies would not be able to exist and/or operate.

625. Furthermore, the evidence led by all parties established that the levels of funding and services provided pursuant to AANDC's FNCFS Program are inequitable, and lead to adverse differentiation in the provision, and in some cases complete denial, of child welfare services to First Nations children ordinarily resident on reserve based in whole or in part on the prohibited grounds of race and national or ethnic origin, contrary to section 5 of the *CHRA*.

626. Finally, AANDC has failed to establish a *bona fide* justification for the discrimination under section 15 of the *CHRA*. Therefore, the Complainants are entitled to relief.

627. Between 1981 and 2012, First Nations children spent cumulatively 66 million nights in care, away from their homes and away from their families.[1061] The Commission submits that the First Nations children on behalf of whom this complaint has been brought before the Tribunal are entitled to at least the same child welfare funding and services as those provided to all other children in Canada. This case offers an opportunity to give meaning to the promise and purpose of the *CHRA* by ensuring that First Nations children on reserve, who are undoubtedly one of the most vulnerable groups in Canada, are protected, given an equal chance to succeed, and are able to make for themselves the lives they are able and wish to have free from discrimination.

[1061] Chart: First Nations Child and Family Services (FNCFS) – Total Number of Children in Care (2012), CHRC BOD, Ex. HR-13, Tab 297.

PART V – REMEDIES

A) Tribunal's Remedial Authority

628. The remedial powers of the Tribunal are set out in section 53 of the *CHRA*, the following provisions of which are relevant to this case:

> **53.** (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member of panel may … make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (*a*) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future […];
>
> (*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> […]
>
> **53.** (2) À l'issue de l'instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l'article 54, ordonner, selon les circonstances, à la personne trouvée coupable d'un acte discriminatoire
>
> *a*) de mettre fin à l'acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables […];
>
> *b*) d'accorder à la victime, dès que les circonstances le permettent, les droits, chances sou avantages dont l'acte l'a privée;
>
> […][1062]

[1062] *CHRA, supra*, s. 53.

B) Remedies Requested in the Present Case

628. Taking all the foregoing into consideration, the Commission asks that the Tribunal grant the following remedies in this case:

(1) a finding that AANDC's FNCFS Program and funding formulas, including Directive 20-1, EPFA and the 1965 Agreement, are discriminatory and inconsistent with section 5 of the *CHRA*;

(2) an order that AANDC cease and desist from applying the discriminatory aspects of its FNCFS Program and funding formulas, in accordance with section 53(2)(*a*) of the *CHRA*;

(3) an order directing AANDC to take steps within a period of 12 months, in consultation with the Commission, to redress and remedy the discriminatory aspects of its FNCFS Program and funding formulas, in order to prevent the same or similar practices from occurring in the future, in accordance with sections 53(2) of the *CHRA*; and

(4) an order that the Tribunal will remain seized of this matter to supervise the implementation of the remedy, for a period of 18 months, or such further time as the Tribunal may by subsequent order direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 25, 2014

Philippe Dufresne / Daniel Poulin
Sarah Pentney / Samar Musallam

Canadian Human Rights Commission

PART VI – LIST OF AUTHORITIES

Legislation

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 2, 5, 51 and 53

Child and Family Service Act, R.S.O. 1990, c. C-11

Child, Youth and Families Enhancement Act, R.S.A. 2000, c. C-12

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App. II, No 5, s. 91(24), s. 92(7)

Financial Administration Act, R.S.C. 1985, c. F-11, s.34

Indian Act, R.S.C. 1985, c. I-5, s. 2 and s. 88

Caselaw

Abbott v. Toronto Police Service Board, 2010 HRTO 1314

Adamson v. Air Canada, 2014 FC 83

Air Canada Pilots Assn. v. Kelly, 2011 FC 120

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143

Attawapiskat First Nation v. Canada, 2012 FC 948

British Columbia (Public Services Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.), [1999] 3 S.C.R. 3

British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights), [1999] 3 S.C.R. 868

Canada (Attorney General) v. Davis, 2013 FC 40

Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554

Canada (Attorney General) v. Rosin, [1991] 1 F.C. 391

Canada (Attorney General) v. Walden, 2010 FC 490

Canada (Attorney General) v. Watkin, 2008 FCA 170

CN v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114

Commission des droits de la personne et des droits de la jeunesse c. Montreal (Service de police de la ville de) (SPVM) (re Rezko), 2012 QCTDP 5

Council of Canadians with Disabilities v. VIA Rail Canada Inc., 2007 SCC 15

Dreaver v. Pankiw, 2009 CHRT 8

Egan v. Canada, 2 S.C.R. 513

First Nation Child and Family Caring Society v. Canada (Attorney General), 2012 FC 445

Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571

Guerin v. The Queen, [1984] 2 S.C.R. 335

Hendershott v. Ontario (Minister of Community and Social Services), 2011 HRTO 482, [2011] O.H.R.T.D. No. 482

Hill v. Woodside (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.)

Hudler v. London (City) (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.)

Knoll North America Corp. v. Adams, 2010 ONSC 3005 (Div. Ct.)

Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497

Lovelace v. Ontario, [2000] 1 S.C.R. 950

McAllister-Windsor v. Canada (Human Resources Development), [2001] C.H.R.D. No. 4

Moore v. British Columbia (Education), 2012 SCC 61

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

Nassiah v. Peel Regional Police Services Board, 2007 HRTO 14

NIL/TU O Child and Family Services Society v. B.C. Government and Service Employees Union, [2010] 2 S.C.R. 696

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This is Exhibit "N" to the Affidavit of
DEBORAH MAYO
sworn before me this 1st day of
October, 2019.

Commissioner for Taking Affidavits
Hannah Johnson

Docket: T1340 / 7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

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

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PART I - OVERVIEW

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

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

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

> [it] remove[d] and isolate[d] children from the influence of their homes, families, traditions and cultures, [...] to assimilate them into the dominant culture. [...] We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow and we apologize for having done this.[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART II - ISSUES

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

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

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

c) Have the Complainants established prima facie discrimination?

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

PART III - FACTS

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

PART IV - SUBMISSIONS

PRELIMINARY ISSUES

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

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

1. Basic Principles and Interconnectedness of Human Rights

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

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

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

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

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

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

[34] *Ibid*.

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

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

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

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

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

2. The Honour of the Crown and Fiduciary Duties

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

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

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

larger and more explosive controversies.[40]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Fiduciary Duties in this Case

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

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

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

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

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

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

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

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

> [...] it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.[57]

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

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

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

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

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

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

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

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

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

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[58] Derald Richard Dubois Examination in Chief, April 8, 2013 (Vol 9, p 54, lines 6-15) [emphasis added].
[59] AANDC, *Comprehensive Program Assessment Template, First Nations Child and Family Services Program*, Canada's Disclosure, CAN113113 (CBD, Vol 15, Tab 478, p 13).

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

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

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

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

> The parties to this case do not dispute that the relationship between the government and foster children is fiduciary in nature. This Court has held that parents owe a fiduciary duty to children in their care: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. Similarly, the British Columbia Court of Appeal has held that guardians owe a fiduciary duty to their wards: *B. (P.A.) v. Curry* (1997), 30 B.C.L.R. (3d) 1. The government, through the Superintendent of Child Welfare, is the legal guardian of children in foster care, with power to direct and supervise their placement. The children are doubly vulnerable, first as children and second because of their difficult pasts and the trauma of being removed from their birth families. The parties agree that, standing in the parents' stead, the Superintendent has considerable power over vulnerable children, and that his placement decisions and monitoring may affect their lives and well-being in fundamental ways.[63]

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

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

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

B. Federalism and the Canadian Human Rights Act

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

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

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

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

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

1. Federalism, Public Services and Equality of Opportunity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Federalism and Comparison

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Canadian Bill of Rights.[86]

4. Federalism and Jordan's Principle

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

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

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

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

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

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

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

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

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

on a prohibited ground of discrimination.

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

A. Funding is a service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Respondent Is More Than a Funder

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

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

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

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

1. Assertions of control by the Respondent

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

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

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

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

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

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

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

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

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

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

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

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

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

2. AANDC does not fund according to provincial legislative standards

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[155] First Nations Child and Family Caring Society of Canada, *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 21) [*Wen:de We Are Coming to the Light of Day*] [emphasis added]. See also Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 122-123).
[156] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 40-41, lines 17-25, 1-9).
[157] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, pp 130-131, lines 4-25, 1-5).

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

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

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

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

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

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

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

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

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

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

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

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

reserve.[162]

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

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

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

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

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

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

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

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

4. The Respondent mandates reporting from FNCFSA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[194] S. Grammond *supra* note 187 at paras 53-56.
[195] Socio-Economic Policy and Regional Operations Sector, *Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector*, July 2005 (CBD, Tab 321, p 4).
[196] *Ibid*.
[197] Socio-Economic Policy and Regional Operations Sector, *Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector*, July 2005 (CBD, Tab 321, p 6); See also the email dated October 22, 2012 authored by AANDC Director General Sheilagh Murphy which emphasized that "Only the CFS program makes the distinction that the child and his/her family members have to be registered Status Indians in order for the agency to be reimbursed by AANDC" (Vol 15, Tab 407, p 1).

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

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

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

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

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

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

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

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

ISSUE 3: The Complainants Have Established Prima Facie Discrimination

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

181. A *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent.[205] If the respondent provides no justification, the Complaint is substantiated.

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

> A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative

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

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

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

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

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

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

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

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

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

1. The Goal of the Comparison: Evidence of Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[TRANSLATION]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the selected provinces.[230]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

would have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. AANDC Has Failed to Justify Its Discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. First Nations children have been subjected to historic disadvantage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Can anyone the imagine what it must have been like for little children to be ripped away from their families when the Residential School era came on, from the comfort of their families and communities and cultures.
>
> It was crushing and devastating. It was unimaginable to go from being the centre of life itself to being a non-entity with no value whatsoever in a Residential School. That was my experience.[332]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of their patience.[344]

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

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

285. In light of the serious problems he witnessed in the prairie residential schools, Dr. Bryce recommended that "the health interests of the pupils be guarded by a proper medical inspection and that the local physicians be encouraged through the provision at each school of fresh air methods in the care and treatment of cases of tuberculosis."[347]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The persistently woeful condition of the school system and the too often substandard care of the children were rooted in a number of factors: in the government's and churches' unrelieved underfunding of the system, in the method of financing individual schools, in the failure of the department to exercise adequate oversight and control of the schools, and in the failure of the department and the churches to ensure proper treatment of the children by staff. Those conditions constituted the context for the neglect, abuse and death of an incalculable number of children and for immeasurable damage to Aboriginal communities.[363]

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

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

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

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

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

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

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

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

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

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

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[366] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 148-149, lines 22-25, 1-10).
[367] Exhibit AFN-1, *A National Crime: The Canadian Government and the Residential School System 1879 to 1986* at 171, citing J Barman, Y Hébert, and D McCaskill, eds, *Indian Education in Canada*, vol 1: *The Legacy* (Vancouver: University of British Columbia Press, 1986) at 9.
[368] George Caldwell (The Canadian Welfare Council), *Indian Residential Schools: A research study of the child care programs of nine residential schools in Saskatchewan*, January 31, 1967 (CBD, Vol 12, Tab 268, p 151).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

community has suffered greatly.[381]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> get there.[391]

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

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

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

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

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

> We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children

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

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

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

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

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

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

> As the Auditor General's report noted, numerous studies have linked the difficulties faced by many Aboriginal families to historical experiences and poor socio-economic conditions. The Report of the Royal Commission on Aboriginal Peoples in 1998 linked the residential school system to the disruption of Aboriginal families. Data from the 2003 *Canadian Incidence Study of Reported Child Abuse and Neglect* link poverty and inadequate housing on many reserves to the higher substantiated incidence of child abuse and neglect occurring on reserves compared to off reserve.[396]

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

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

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

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

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

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

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

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

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

> This research also points to the fact that residential schools have resulted in an increased need on-reserve and off-reserve for prevention and intervention efforts targeting future parents

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

> because they are the ones who are, you know, really responsible and can protect children from the exposure to negative experiences. And, as well, because there are these high rates already of trauma faced by children, interventions need to be implemented to protect these children against the negative effects of these stressors and trauma.
>
> Considering the collective effects that this experience has produced in communities, in addition to these interventions targeting individuals, this research also suggests that there needs to be some communitywide interventions to address these community level effects, and that might be better addressed through alternative more community-level healing interventions.[400]

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

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

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

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

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

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

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

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

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

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

practice.[404]

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

> This research also suggests that the negative cycles that have been catalyzed by residential schools and by other historical traumas will continue and have been continuing unless we do something to stop it through targeted efforts to put an end to the cycle.
>
> The continued removal of First Nations children from parents as a result of the consequences of residential schools, such as the poor health in parents, other social and socioeconomic consequences of the residential schools, these consequences really just serve to propagate these cycles, and so something else is really needed in order to stop this from continuing.[405]

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

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

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[404] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 995), citing Joan Glode, quoted in Patricia E. Doyle-Bedwell, "Reclaiming Our Children: Mi'kmaq Family and Children Services", research study prepared for RCAP (1994).
[405] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 85-86, lines 17-25, 1-6).
[406] Dr. Cindy Blackstock Cross-examination, February 13, 2014 (Vol 49, p 76, lines 8-24).

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

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

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

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

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

12. Defining the Scope of Culturally-Appropriate Services

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[420] *Convention on the Rights of the Child* supra note 183, art 8(1).
[421] *Declaration on the Rights of Indigenous Peoples* supra note 35, preamble.
[422] NPR, June 2000 (Vol 1, Tab 3, pp 120-121).
[423] NPR, June 2000 (Vol 1, Tab 3, p 122).

appropriate services.[424] Indeed, these FNCFSA indicated a "clear and critical need for upgrading of funding to support culturally based standards and practice in First Nations child and family service agencies".[425] As the Caring Society noted in *Wen:de* We are Coming to the Light of Day:

> [t]he formula does reimburse for services once a child is removed from the family home. This means that, in practice, there are more resources available to children who are removed from their homes than for children to stay safely in their homes. Focus group participants echoed this finding and urged strategic and sustained investments in prevention services which would provide families the best opportunity to have their children remain safely in their homes. These services, however, must be reflective of local culture and context and also consider the broader structural risks that impact on child safety such as community poverty, lack of infrastructure and inadequate or overcrowded housing [emphasis in original].[426]

355. In 2008, the Auditor General identified a number of serious concerns with the FNCFS Program, including the shortcomings of its failure to provide culturally-appropriate services. Moreover, as the Auditor General noted in her 2008 report:

> [t]he formula is not adapted to small agencies. Consistent with the federal policy, the funding formula was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. This was considered the minimum client base an agency could have and still provide services economically and effectively, although exceptions could be made.[427]

356. In her 2011 follow-up report, the Auditor General recalled that:

> In 2008, we audited INAC's program for child and family services on reserves. We found that INAC had not defined key policy requirements related to culturally appropriate child and family services and comparability of services with those provided by provinces. Moreover, the Department had no assurance that its First Nations Child and Family Services Program funded child welfare services that were culturally appropriate or reasonably

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[424] *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 38).
[425] *Ibid* (CBD, Vol 1, Tab 5, p 38); see also AANDC, *Canada's New Government, Treaty 6, Treaty 7 and Treaty 8 First Nations and Alberta Embark on New Approach to Child Welfare on Reserve*, April 27, 2007 (CBD, Vol 9, Tab 170, p 1).
[426] *Wen:de Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 19).
[427] OAG Report 2008 (CBD, Vol 3, Tab 11, p 21, sec 4.55).

> comparable with those normally provided off reserves in similar situations.[428]

357. As Dr. Blackstock summarized in her evidence, the lack of culturally appropriate First Nations child and family services is a perennial issue, which has faced Canada for many years:

> [The EPFA] was -- as you mentioned in your comments, Mr. Tarlton, was implemented in Alberta in 2007.
>
> The Auditor General reviews it in 2008 and finds it to be -- in paragraph 4.64, to be an improvement on the Directive but to incorporate some of the fundamental flaws of the Directive and finds it to be flawed and inequitable.
>
> The Auditor General -- then the Standing Committee on Public Accounts takes a further look and finds that those problems still remain.
>
> The Auditor General takes a look in 2011 and says that this is -- there is unsatisfactory progress on the issue of comparability in cultural programs.
>
> The Standing Committee on Public Accounts takes another look at that and agrees with those findings.
>
> And then the United Nations Committee on the Rights of the Child finds that there has been unsatisfactory progress towards the implementation of an Auditor General's report.
>
> If we were looking at something like -- that's static, that's not as critical as child development – we've been at this, as you quite rightly said, you know, just my own personal involvement, we've been trying to get the children to a place of culturally based equity, at least on the Directive, since my early involvement in 1997.[429]

358. Individuals who work on the ground with present-day First Nations children and families have echoed the view that Canada's First Nations child and family services are not culturally appropriate. Ms. Kennedy's evidence before the Tribunal is representative of the perceptions of many front-line workers:

> MS. KENNEDY: Well, I mean, the bottom line is we keep losing our

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[428] OAG Report 2011 (CBD, Vol 5, Tab 53, p 23).
[429] Dr. Cindy Blackstock Cross-examination, March 1, 2013 (Vol 5, pp 84-85, lines 15-25, 1-21).

> kids to a system that can't meet their needs [...] -- and so we feel that it is imperative that we retain the right to care for our own children, whether it is in care or out of care.
>
> MR. POULIN: Why do you think that -- why is it felt that the system cannot meet their needs? [...]
>
> MS. KENNEDY: Well, you know, one of the main reasons is the fact that they don't provide services in a culturally appropriate way.
>
> You know, our children lose their relationship to their communities in many cases, to their language, you know, to the whole culture and, you know, resulting in that whole loss of cultural identity.[430]

359. In her examination-in-chief, Ms. Stevens echoed the concerns raised by Ms. Kennedy and provided an summary of the challenges facing First Nations children and families who are engaged in the child and family services sector:

> I would also say that <u>because of mainstream service providers not necessarily being able to operate of offer services in a culturally appropriate way, that their services aren't necessarily accessible to the need that's out there</u>, and I would say that the First Nations service providers on Reserve are underfunded and under resourced and the volume of need that's out there that they don't have you know, the bodies and the manpower and the resources to be able to provide services to the level of need.[431]

360. AANDC's failure to provide child and family services to First Nations communities on a basis of substantive equality appears more egregious in light of the reality, acknowledged by Mr. McArthur under cross-examination that provincial agencies, which are not tailored to provide culturally-appropriate services to First Nations communities, receive more funding than FNCFSA.[432]

361. In spite of the crucial importance of delegated FNCFSA's, Canada's limiting the provision of culturally appropriate services to circumstances where delegation is possible leaves a number of communities unserved. As Dr. Blackstock noted in her evidence before the Tribunal:

> [...] the Department does not provide funding for communities that

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[430] Elizabeth Ann Kennedy Examination in Chief, September 4, 2013 (Vol 24, p 21, lines 1-22).
[431] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 26, pp 42-43, lines 19-25, 1-4) [emphasis added].
[432] William McArthur Cross-examination, May 29, 2014 (Vol 64, pp 101-103, lines 22-25, 1-25, 1-14).

> have less than 250 First Nations children in care, except in a couple of circumstances, and there are occasions, for a variety of reasons, a First Nations may not want to establish an agency.
>
> But it's still clear that First Nations children on reserve in those circumstances require culturally based services, and although it's acknowledged that an agency may not be the mechanism to do that, there should be some funds available for those communities to do things like foster home recruitment, make cultural support services, to help those communities participate in a more active way in the lives and plans of care of children who are removed from their communities or families, who are going through difficult circumstances and are having contact with a local child protection authority.[433]

362. Dr. Blackstock's evidence on this point is not conjectural. She also stated that:

> What is not clear is that there is actual -- that INAC said this to the Standing Committee on Public Accounts, too. They said that, really, they were going to leave it up to the First Nations to determine what is culturally appropriate.
>
> What's not clear is if there's any funding for First Nations to actually implement their views of what's culturally appropriate.
>
> I've not seen any documents that suggest that there's actual funding beyond that's targeted. So, that if I, as a First Nations, say that this specific element is culturally appropriate for us, that there's actual funding tied to that. I have not seen that.[434]

363. Moreover, AANDC's failure to provide First Nations children with culturally appropriate child and family services is discriminatory, not only due to the fact that it perpetuates the historic disadvantage imposed by residential schools, but also as it is based on the arbitrary assumption that First Nations children can be assisted by the same types of services that meet the needs of non-Aboriginal children, which simply is not the case.

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[433] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 194-195, lines 12-25, 1-5).
[434] Dr. Cindy Blackstock Examination in Chief, February 27, 2013 (Vol 3, pp 103-104, lines 18-25, 1-7).

14. The Impact of AANDC's Failure to Provide Culturally-Appropriate Services

364. AANDC's failure to provide and support culturally-appropriate services for First Nations children served by the FNCFS Program has and continues to have an adverse and detrimental impact.

365. The consequences of failing to provide culturally appropriate services to First Nations children in care ought to be obvious, as they reflect those which occurred in residential schools. In his evidence, Dr. Milloy reflected on the failure of residential schools to provide culturally appropriate education:

> If you keep on that track, if you do not produce a curriculum that meets the needs and experiences and beliefs of the children and their communities, the educators are saying, you're going to get the same results as you always got, right?
>
> What did Einstein say? Stupidity is doing the same thing over and over again and expecting a different result and that's what they're doing. They're doing the same thing over and over again, not changing and they will get the same result in terms of under-achievements, yes.[435]

366. The reality is that without culturally-appropriate services, more First Nations children are removed from their homes, families and communities. This dislocation disrupts and often severs a child's connection with their culture, identity, language, and ultimately, their sense of self. As the Royal Commission on Aboriginal Peoples noted in its 1996 report:

> The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart. Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy.[436]

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[435] Dr. John Sheridan Milloy Examination in Chief, October 29, 2013 (Vol 34, pp 190-191, lines 17-25, 1-3).
[436] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 986), citing Patrick Johnston, *Native Children and the Child Welfare System* (Toronto: Canadian Council on Social Development in association with James Lorimer & Company, 1983) at 60-61.

367. This dislocation was discussed by Dr. Bombay, who in her evidence before the Tribunal provided the following recounting of the experience of one of her research participants:

> My mother was taught to be ashamed of her Aboriginal identity. This caused her to struggle for some sense of belonging… She even talked down about Aboriginal people, because of their misfortunes. As a kid, I remember being ashamed when my mother came to school, because I was often called names such as wagon-burner and savage… Today, I am so ashamed of the shame I experienced a child, and I'm so angry that my parents never taught me to be proud of who I was.[437]

368. The thought that the only way for certain First Nations children to obtain services is to be taken into care outside of the community is particularly disturbing, as it pits quality of service against the cultural appropriateness of that service. These two items are linked. Dr. Blackstock explained the conundrum when she was re-called by the Commission:

> So kids are really in a Catch-22: You either get culturally-based services from a First Nations agency to a lesser level and standard […] or you get services from the province that might be at a higher level of service, but they are not going to be culturally-appropriate and represent who you are.
>
> And of course, a directive requires both of the federal government. They are supposed to be culturally-based and comparable according to its own authorities.[438]

369. Ms. Stevens in her evidence described the impact of not providing culturally appropriate services:

> It also has to do with the issue of cultural safety. So even though they might have accessibility and maybe even ability to get into town to receive those services, whether it's those services are received or interpreted to them as being culturally safe.
>
> So they have to come off of their Reserve, into an urban centre that may or may not be foreign to them, may or may not be their first language, go to a strange building with a cultural group that may not be of their own cultural group, be intake in the manner that's foreign to them, so they might have to do a telephone intake, be

[437] Dr. Amy Bombay Examination in Chief, January 9, 2014 (Vol 40, pp 164-165, lines 18-25, 1-9).
[438] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 170 lines 9-19).

> assessed by tools which may or may not be culturally appropriate, and then again see a counsellor who may or may not be from their cultural group or be able to relate to them in a culturally safe manner.
>
> So, you know, it's debatable whether people who want to receive or access those services when they aren't culturally safe.[439]

370. Giving non-culturally-appropriate service providers greater funding than culturally-appropriate service providers is a self-defeating exercise, particularly as it disregards the expertise and capacity that can be developed on the part of a culturally-appropriate service-provider like a FNCFSA. Indeed, much as section 23 of the *Charter* has ensured that "French as a first language" education has been entrusted to minority French-language school boards, the promise of substantive equality enshrined in section 5 of the quasi-constitutional *CHRA* ought to privilege the provision of First Nations child and family services by FNCFSA.

15. The FNCFS Program Must Provide Culturally-Appropriate Services

371. Entrenching a system that is not substantively equal due to its failure to recognize the unique needs of the individuals it serves infringes the *CHRA* by as such a system cannot reflect the actual needs, capacities, and circumstances of First Nations children and families. The FNCFS Program must provide and support culturally-appropriate services.

372. In order to provide culturally appropriate child and family services to First Nations communities, AANDC must not only ensure that all First Nations children are reached (as opposed to only those in a jurisdiction with a FNCFSA), but must also ensure that First Nations child and family services are addressed to all stages at which a First Nations child requires assistance. In the First Nations context, there is an essential link between home and culture, and anything that puts the child's ability to remain in the home in question jeopardizes the cultural appropriateness of services.

373. As the Royal Commission on Aboriginal Peoples noted in its 1996 report, First Nations families are a key component of improving outcomes for First Nations children:

> We begin our discussion of social policy with a focus on the family

[439] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 25, pp 64-65, lines 8-25, 1-3).

> because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life.[440]

374. Mr. Digby provided a clear vision of what is required in order to truly provide culturally relevant services that follow a child throughout his or her interaction with the child and family services sector:

> […] it's important whenever an aboriginal child comes into care that a determination would be made, do they have a link to a First Nations community, and that that First Nations community would be notified and then that First Nations community would be a party to any proceedings with respect for the placement of the child in care, and very much encouraging that close relationship between societies and First Nation communities.[441]

375. This pro-active tendency when First Nations are truly involved was echoed by Mr. Dubois:

> […] social work in Indian country is different, we are more – we want to be more proactive. Like I said, historically our families have been ripped apart by the church, by state and we want to change that, we want to heal. You know, like prison systems are not working for us so we want to design our own systems.[442]

376. As Ms. Stevens noted in her evidence, a holistic approach is required in order to address this issue:

> I think we all share that responsibility. I believe the government, because of their own promises, or obligations that they have made themselves through agreements, so under '65, that they have made a commitment to ensure that there are culturally appropriate

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[440] *Report of the Royal Commission on Aboriginal Peoples*, *Vol 3*, October 1996 (CBD, Vol 2, Tab 7, p 966).
[441] Phil Digby Cross-Examination, May 8, 2014 (Vol 60, p 85, lines 13-22).
[442] Derald Richard Dubois Examination in Chief, April 8, 2013 (Vol 9, p 64, lines 6-13).

> services available to First Nations people.
>
> I know our Elders and our leaders have a responsibility to ensure that and they take that responsibility very seriously. And then, as service providers or a social workers, you know, ethically, morally, I feel obligated that I am not just an Executive Director of a Children's Aid Society, I have spiritual responsibilities.[443]

377. With respect to the issue of small agencies and small communities, the solution ought not to involve "mixing and matching" between communities of comparable size. As Dr. Blackstock noted in her evidence, "it would be very difficult for one community, say the Coast Salish, to deliver culturally relevant services to the community in the interior because they will often speak very different languages, they will have very different social structures." [444]

378. Indeed, the solution will likely involve engaging the provinces' child welfare system. As Elder Joseph noted during his evidence:

> I know that ministries that aren't Aboriginal are going to be taking our kids and, at a minimum, we should be demanding some kind of cultural competency level for those outside people who don't understand culture and history, they should be provided a level of orientation, education that allows them to respond in the very best ways that they can. I don't think we can rebuild Aboriginal families without that.[445]

379. Finally, provincial legislation that FNCFSA are required to follow pursuant to the FNCFS Program must be considered. Indeed, Provincial child and family services legislation, policies and directives have typically been enacted without consulting First Nations and without considering the differential impacts of certain rules on First Nations. This is even true of recent amendments.[446] Thus, provincial legislation, policies and directives cannot be said to be fully responsive to the specific needs of First Nations children.

380. In certain provinces, child and family services legislation requires that notice be given to a First Nation where one of its children is apprehended; it also provides for placement preferences

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[443] Theresa Stevens Examination in Chief, September 6, 2013 (Vol 25, pp 48-49, lines 19-25, 1-7).
[444] Dr. Cindy Blackstock Examination in Chief, February 10, 2014 (Vol 46, p 47, lines 1-6).
[445] Chief Robert Joseph Examination in Chief, January 13 2014 (Vol 42, p 94, lines 13-22).
[446] C Guay and S Grammond, "À l'écoute des peuples autochtones? Le processus d'adoption de la Loi 125" (2010) 23:1 Nouvelles pratiques sociales 99 at 108.

aimed at keeping a child within his or her community.[447] However, the legislation of other provinces is silent on the issue.[448] Even where the legislation contains specific directives aimed at improving its cultural appropriateness, these provisions are often disregarded by the courts.[449]

381. In contrast, certain recent self-government regimes empower First Nations to enact their own legislation with respect to child welfare.[450] The only limitation is that the legislation's guiding principle must be the best interests of the child.[451] This gives First Nations a wider latitude to adapt child and family services legislation to First Nations cultural needs.

382. While the First Nations' subjection to provincial child and family services legislation may be inevitable pending the full realization of self-government in this field, a blanket rule that forbids adaptations that would enhance the compatibility of the legislation with First Nations' needs, circumstances and culture is discriminatory. Indeed, a rule that forbids accommodations that are required in order to achieve substantive equality is, in and of itself, discriminatory.

383. As discussed above, and as made clear by the Supreme Court in *Withler*, substantive equality requires the consideration and a "full account of social, political, economic and historical factors concerning the group".[452] First Nations children face a multitude of unique social, political, economic and historical factors that must be redressed, in part, through culturally-appropriate services. AANDC recognizes this essential issue, as reflected in its own policy under the FNCFS Program. Failure to implement and provide culturally-appropriate services, as AANDC has acknowledged it ought to, is discriminatory under s. 5 of the *CHRA* as this failure serves to continue the history of marginalizing and prejudicing First Nations children.

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[447] See for example the Ontario *Child and Family Services Act*, RSO 1990, c C.11, ss 37(4), 57(5).
[448] See for example the Quebec *Youth Protection Act*, CQLR c P-34.1, s 2.4(5º), which merely provides that the Act must be applied having regard to the characteristics of aboriginal communities.
[449] Sonia Harris-Short, *Aboriginal Child Welfare, Self-Government and the Rights of Indigenous Children* (Farnham (UK): Ashgate, 2012) at 103-107; see for example *H (D) v M (H)*, 1998 CanLII 4431 (BC CA), 156 DLR (4th) 548 (BCCA), rev'd [1999] 1 S.C.R. 328; *Directeur de la protection de la jeunesse c JK*, 2004 CanLII 60131 (QC CA), [2004] 2 CNLR 68.
[450] *Nisga'a Final Agreement Act*, RSBC 1999, c 2, ch 11, ss. 89-93; *Yukon First Nations Self-Government Act*, SC 1994, c 35, Sch. III, Part II, ss. 6-7.
[451] *Nisga'a Final Agreement*, RSBC 1999, c 2, ch 11, s 96.
[452] *Withler* supra note 90 at para 39.

16. AANDC has failed to Justify its failure to provide culturally-appropriate First Nations child and family services

384. AANDC has attempted to explain its failure to provide culturally-appropriate First Nations child and family services as an attempt to receive adequate input from First Nations communities with regard to what would be required for services to be culturally appropriate. Indeed, Ms. D'Amico's evidence was that AANDC was looking

> to ensure that the leadership in the community is in agreement with the objectives of the Agency. So this becomes to the cultural appropriateness piece. We want to make sure that whatever services are being delivered on reserve are services that are respectful of the community.[453]

385. Ms. D'Amico's explanation for AANDC's failure to act has been echoed at the highest levels of AANDC. As the House of Commons Standing Committee on Public Accounts recounted in its 2009 report:

> [w]hen asked whether the Department had defined "culturally appropriate services," the Deputy Minister somewhat flippantly replied, "Culturally appropriate services are not really something that I, as a white bureaucrat in Ottawa, can define for a First Nations agency operating in a particular community."[454]

386. The Public Accounts Committee's response to such an excuse is to-the-point, and bears repeating:

> The Committee was not expecting the Deputy Minister to provide the definition, but instead he should have had a clear grasp of what progress the Department has made in working with its partners to develop a definition, especially as the Department's response to the OAG's recommendation states, "Definitions of culturally appropriate services will be developed through discussions with the various First Nations based upon community circumstances, and are targeted for completion in 2012."[455]

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[453] Barbara D'Amico Examination in Chief, March 17, 2014 (Vol 50, p 149, lines 12-22).
[454] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, p 6).
[455] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 6-7).

387. However, there has been a failure to provide adequate implementation support. As Dr. Blackstock noted in her evidence before the Tribunal:

> […] in some regions, there was a one-time provision, like, a grant, like, a project almost given by the Department for collective standards to be developed but many communities wanted to develop their own standards instead of having to use the provincial ones and they had no staff to do this.
>
> So, this was about let's make funds available so culturally-based standards that take into account the needs of kids in that community can be provided for.[456]

388. This failure to implement standards was identified in the *Wen:De* report in 2005:

> Culturally based practice pivots on culturally based operational and practice standards. Therefore, having child welfare standards that meet the needs of the clients is of utmost importance to the First Nations child and family agencies. However, there is minimal funding to develop and maintain culturally appropriate child welfare standards. The child welfare standards utilized by First Nation agencies across Canada are very diverse, as are the communities they serve. This diversity requires the development and maintenance of standards that are appropriate and applicable to the people each agency serves. This request applies not only to First Nations agencies serving First Nations but also to First Nations communities being served by non-First Nations agencies.
>
> The development of standards for First Nation's agencies is critical to the delivery of culturally based services. As one is required to follow the other, financial support is mandatory to adequately meet the needs of the First Nation's clients. The development of culturally based standards by First Nation's agencies particular to their clientele can contribute to the overall impact and success of the agency, children and families.[457]

389. Even where there has been some measure of implementation of culturally-sensitive services for First Nations children and families, there remain a number of hoops for FNCFSA to jump through. As Ms. D'Amico observed under cross-examination:

> MR. CHAMP: You indicated in your first testimony that the First

[456] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 54, lines 10-20).
[457] *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 30).

Nations Agencies themselves determine what is culturally-appropriate services and that's why you don't come up with the definition.

MS. D'AMICO: That's right. […]

MR. CHAMP: If an Agency determines that a culturally-appropriate -- they would say here is a culturally-appropriate service from our perspective --

MS. D'AMICO: M'hmm.

MR. CHAMP: -- if that falls under a category for the government that is an ineligible expense, is it fair to say that the Agency can't get funding for it?

MS. D'AMICO: They would get funding from a different source.

MR. CHAMP: So in short, AANDC -- or the program will not necessarily fund what an Agency describes or defines -- or identifies, pardon me, as a culturally-appropriate service?

MS. D'AMICO: The First Nation Child and Family Services Program has Terms and Conditions. AANDC has other programs so, for example, you didn't give me an example of culturally-appropriate.

MR. CHAMP: Yes, that's what I was going to go to next.

MS. D'AMICO: But a culturally-appropriate service could be education-type something because it's specific to that child. So maybe it's their cultural learning for that child or that family to support them.

If it would fall under education, we would tell the Agency, go to education, to that pot, and use that money.

MR. CHAMP: Yes.

MS. D'AMICO: If it doesn't fall under education, then we would pay for it. So where another program doesn't cover it, then we would pay for it.[458]

[458] Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, pp 114-116).

390. Indeed, this demonstrates that where First Nations communities jump through the hoops laid out by AANDC, culturally-appropriate services can be available, under the right conditions. This availability speaks to the fact that AANDC's financial circumstances do not render the provision of culturally-appropriate services impossible.

391. In any event, the provision of culturally-appropriate services through FNCFSA appears to be a fiscally feasible course for Canada. As AANDC has noted in an internal Q & A document, obtained by Dr. Blackstock through an Access to Information request, and which Dr. Blackstock spoke to during her evidence:

> If First Nations child and family service agencies were to withdraw service delivery as a result of inadequate funding, consequences could be severe. Pursuant to an 18-month long review involving the Province of Alberta, INAC and one First Nations agency, it was determined that expenses would likely double if the province were to assume responsibility for service delivery. In addition, escalating child welfare costs for INAC culturally appropriate services would be compromised.[459]

E. Evidence of discrimination: Failing to implement Jordan's Principle

392. Canada's failure to fully implement Jordan's Principle amounts to *prima facie* discrimination under s. 5 of the *CHRA*. Indeed, First Nations children are denied basic public services or experience detrimental delay in receiving such services for no reason other than their status as First Nations peoples.

393. Jordan's Principle is a child first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province / territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government / department after the child has received the service.

394. Jordan's Principle was conceived of as a means to prevent First Nations children from being denied essential public services, or experiencing delays in receiving them, as a result of

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[459] AANDC, *First Nations Child and Family Services (FNCFS) Q's and A's* (CBD, Vol 6, Tab 64, p 6); Dr. Cindy Blackstock Examination in Chief (Vol 3, p 34, lines 3-21).

jurisdictional disputes, and is a procedural mechanism by which First Nations children living on reserve can exercise and vindicate their rights to substantive equality. Jordan's Principle is built upon the fundamental premise that all children, including First Nations children living on reserve, are entitled to be equal before and under the law and are fully entitled to the protections and benefits of the rights and freedoms afforded in our democratic society.

395. Although Jordan's Principle was unanimously adopted by the House of Commons[460], and is meant to include basic public services available to all Canadian children, the federal government has narrowly restricted the principle to apply only to situations that involve a "dispute" between government and to First Nations children with complex medical needs and/or multiple disabilities. Indeed, its formulation is so narrow that by AANDC's own reckoning, not a single true Jordan's Principle case has ever been brought forward.

396. To ensure that First Nations children in the child welfare system are not discriminated against by Canada's delay in providing services readily available to other children, or indeed the outright denial of such services, the Caring Society submits that this Tribunal must supplement a remedy relating to the funding formula with a remedy giving full effect to Jordan's principle for First Nation child and family services.

17. Background

397. Jordan's Principle is a child-first principle. It is named for Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had medical conditions that necessitated his stay in a Winnipeg hospital for the first two years of his life. Shortly after his second birthday in 2001, Jordan's doctor told his family that he could leave the hospital and live with a specialized foster family close to the medical facilities in Winnipeg. Jordan never saw this family home. For the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's home care. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in a hospital.

[460] *Vote No 27*, 39th Parl, 2nd Sess, Sitting No 36, Wednesday, December 12, 2007 (CBD, Vol 3, Tab 20, p 15).

398. Jordan's story is indicative of a wide-scale problem that was identified by UNICEF in the spring of 2005[461] and during the research and publication of the Wen:de Report. The report explained the problem as follows:

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children (McDonald, 2005; Lavalee, 2005). Survey results in Phases 2 and Phase 3 indicate that the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.[462]

399. In memory of Jordan and in an attempt to ensure that all First Nations children have equitable access to public services, in March 2007, Ms. Jean Crowder, Member of Parliament for Nanaimo-Cowichan, introduced a motion regarding Jordan's Principle before the House of Commons. Motion no. 296, which was approved on December 12, 2007 with 262 votes in favour, and none opposed, stated:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.[463]

400. In introducing the motion, Ms. Crowder specifically cited the finding of the *Wen:de* report that of the jurisdictional disputes over the costs of caring for First Nations children, "[t]he vast majority of those disputes were between two federal government departments or between the federal government and the provincial-territorial government."[464] The debates on the motion demonstrate that there was no suggestion that Jordan's Principle should only apply when the disputing government entities are from different levels of government, federal and provincial, nor was any rational basis for such a narrow reading of the Principle advanced. Equally, the

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[461] Dr. Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, pp 219-220, lines 4-7).
[462] *Wen:de The Journey Continues*, 2005 (CBD, Vol 1, Tab 6, p 16).
[463] *Vote No 27*, 39th Parl, 2nd Sess, Sitting No 36, Wednesday, December 12, 2007 (CBD, Vol 3, Tab 20, p 15).
[464] Hansard, 39th Parl, 2nd Sess, No 12, October 31, 2007 (CBD, Vol 3, Tab 20, p 3).

motion was framed broadly in terms of services needed by children, without a narrow emphasis on children with multiple disabilities. The breadth of the vision for Jordan's Principle emerges from these extracts of the debates:

> Jordan's Principle proposes a direct approach to ensuring that First Nations children get the care they need. By putting the needs of children first, it advances a straightforward solution which should ensure that services are delivered in a timely fashion.[465]
>
> Jordan's Principle calls on all government agencies to provide the services first and resolve the paperwork later. This government supports Jordan's Principle and is committed to making improvements in the lives of First Nations and Inuit children, women and families.[466]
>
> As we saw during the previous debate, the government must immediately adopt a child first principle for resolving jurisdictional disputes involving the care of First Nations children. This approach, known as Jordan's Principle, forces those involved to set aside any jurisdictional disagreements between two governments, two departments or organizations with respect to payment for services provided to First Nations children.
>
> In other words, when a problem arises in a community regarding a child, we must ensure that the necessary services are provided and only afterwards should we worry about who will foot the bill. Thus, the first government or department to receive a bill for services is responsible for paying, without disruption or delay.[467]

401. As Corinne Baggley, the Senior Policy Manager in the Children and Family Directorate of the Social Policy and Programs Branch at AADNC from 2007 to 2014, responsible for Jordan's Principle, testified before this Tribunal, the House of Commons motion placed the "prime responsibility"[468] for the implementation of Jordan's Principle on AANDC, as was reflected in the statement on the motion released by the Minister of AANDC and the Minister of Health.[469]

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[465] Hansard, 39th Parl, 1st Sess, No 157, May 18, 2007, Conservative Member of Parliament, Harold Albrecht.
[466] Hansard, 39th Parl, 2nd Sess, No 12, October 31, 2007, Conservative Member of Parliament, Steven Fletcher.
[467] Hansard, 39th Parl, 2nd Sess, No 31, December 5, 2007, Conservative Member of Parliament, Steven Blaney [emphasis added].
[468] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, pp 35-36, lines 21-25, 1-6).
[469] Hon. Chuck Strahl and Hon. Tony Clement, *Statement from the Federal Minister of Health and Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians regarding Motion 296, Jordan`s Principle*, December 12, 2007 (CBD, Vol 3, Tab 22, p 1).

Moreover, as noted by Justice Mandamin of the Federal Court in the case of *Pictou Landing Band Council v. Canada (Attorney General)*, the federal government "has undertaken to implement this important principle," and "took on the obligation espoused in Jordan's Principle." [470]

18. First Nations Children Are Denied Basic Services

402. The Tribunal heard extensive evidence that demonstrates that First Nations children continue to be denied basic public services after a significant and detrimental delay.

403. Indeed, this Tribunal heard how even relatively mundane yet necessary services have been denied to children in care.

> DR. BLACKSTOCK: I remember one child who required Ensure. He had a severe medical condition. And the government, federal government wouldn't pay for it because they said it didn't have -- it wasn't within the definitions that they have.
>
> And the province was saying, well, it's a federal responsibility. They should be paying for it. This is a child in care.
>
> And the child needed this to be able to eat. How long do you wait? How many phone calls do you make before you do what I did and that is personally go to the local store and buy the Ensure so the child can eat.[471]

404. Raymond Shingoose provided another example where his Agency was faced with the situation of a child who was ineligible for a needed wheelchair:

> MR. SHINGOOSE: [...] An example is we had to fundraise for a wheelchair for one of our paraplegic -- we have a child with cerebral palsy, but she wasn't eligible for a wheelchair under the INAC or the Health, so we had to do some fundraising, and they are very costly, but we -- the staff went out in the community and we raised the money.
>
> MS PENTNEY: And that child, was it a child in care?
>
> MR. SHINGOOSE: A child in care.
>
> MS PENTNEY: But providing them with a wheelchair was not --

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[470] *Pictou Landing* supra note 16 at paras 106, 111.
[471] Dr. Cindy Blackstock Examination in Chief, February 25, 2013 (Vol 1, p 199-200, lines 18-25, 1-6).

> you weren't able to do so?
>
> MR. SHINGOOSE: No.
>
> MS PENTNEY: Why not? Were you ever given an explanation as to why that's not an eligible expense?
>
> MR. SHINGOOSE: We were told we had to approach Health Canada and we had to have -- I believe at that time I think it was a letter or a number of letters, I can't recall though, but of refusal. I think it was about three letters of refusal, but by that time the child would be grown up.
>
> It kind of takes -- the way the system is it takes about maybe six months to a year to receive a response from these entities.
>
> MS PENTNEY: So the Agency decided to fundraise
>
> MR. SHINGOOSE: Yes.
>
> [...]
>
> MS PENTNEY: And if they hadn't done so, what would've happened to that child?
>
> MR. SHINGOOSE: Well, the child would have went without.
>
> [...]
>
> MS PENTNEY: [...] And at the time of reconciliation, when the Agency is informed that an expense they have claimed is ineligible for reimbursement, what is the Agency's response?
>
> MR. SHINGOOSE: We swallow it. We just -- we just do what we can.[472]

405. In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition.[473]

> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that

[472] Raymond Shingoose Examination in Chief, September 25, 2013 (Vol 31, pp 143-145, lines 2-25, 1-13, 2-7).
[473] AANDC, *Jordan's Principle Chart Documenting Cases*, October 6, 2013 (CBD, Vol 15, Tab 422, p 2).

correct?

MS BAGGLEY: Well, it said the summer of 2008.

MR. WUTTKE: Okay.

MS BAGGLEY: "Tomatoe / tomato".

MR. WUTTKE: Between half a year and three quarters of a year?

MS BAGGLEY: Yes, yes.

MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?

MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons.[474]

406. The evidence also demonstrated that finding information about how to access services under AANDC's formulation of Jordan's Principle can be challenging. For example, Ms. Baggley's testimony indicated that it would be very difficult to know how to access the process or find a focal point within the Department.[475] Moreover, Ms. Cope testified about her own difficulties in confirming funding for a disputed service.[476]

19. Jordan's Principle and child welfare

407. Jordan's Principle is relevant to First Nations child welfare in at least two ways. First, First Nations children are being denied child welfare services and related services due to jurisdictional disputes. Unless the current funding formulas can be replaced by one that itemizes the funding available for every conceivable need of a child that may arise (which may not be possible) there will inevitably arise situations where Canada and provincial governments and their relevant departments and ministries cannot immediately agree on who has the responsibility to fund a particular service for a child. This is a result of the unique apportionment of federal and provincial government responsibility for First Nations in our constitutional system.

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[474] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).
[475] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 30-32).
[476] Brenda Ann Cope Examination in Chief, September 23, 2013 (Vol 29, pp 161-162, lines 14-25, 1-15).

A proper implementation of Jordan's principle is needed in order to make sure that in such situations, the child's access to the service is never denied or delayed. The most equitable funding formula will not help a child if the funding it allows for is held back until government officials can decide amongst themselves whether it applies to the particular service.

408. The second connection between Jordan's Principle and First Nations child welfare stems from the unfortunate reality that some First Nations children continue to be placed in care, not because they are in need of protection, but because this is the only way for them to access needed services. This phenomenon was noted in the Auditor General's report.

> Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need.[477]

409. This phenomenon has also been noted by the Terms of Reference Officials Working Group of the Canada / Manitoba Joint Committee on Jordan's Principle, in its Preliminary Report[478], and by AANDC in a briefing note prepared by Betty-Ann Scott for Parliamentary Secretary Rod Bruinooge.[479] The former document explained that this was a problem that the Federal definition of Jordan's Principle could not adequately address, while the latter explained that:

> Limited progress has been made in support of Jordan's Principle and issues related to First Nations with disabilities, including children. These issues often fall outside of existing authorities and policies of both governments. Current practice results in the children being placed into care to receive services, even though the placements often do not involve child protection issues.[480]

410. The rationale for putting a child who is not in need of protection into care is that not only is more funding likely available off reserve, but there is no ambiguity over who has jurisdiction

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[477] OAG Report 2008 (CBD, Vol 3, Tab 11, p 17).
[478] TOROWG Preliminary Report, supra at note 17, (CBD, Vol 13, Tab 302, p 14).
[479] Betty-Ann Scott, *Briefing Note on Jordan's Principle and Children with Life Long Complex Medical Needs*, December 6, 2007 (CBD, Vol 14, Tab 380, p 2).
[480] Betty-Ann Scott, *Briefing Note on Jordan's Principle and Children with Life Long Complex Medical Needs*, December 6, 2007 (CBD, Vol 14, Tab 380, pp 2-3). See also Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 170, lines 1-9) and February 11, 2014 (Vol 47, pp 193-194, lines 18-25).

to provide needed services. This puts children and their families on the horns of an unacceptable dilemma, forced to choose between keeping the child in contact with community and culture, or leaving in order to access more equitable services. A full implementation of Jordan's Principle, under which jurisdictional confusion would never lead to a denial or delay in providing a service to a child on-reserve, is thus necessary to prevent children unnecessarily entering the child welfare system and being taken away from their families and communities simply in order to access needed services.

20. Canada's narrow interpretation of Jordan's Principle is discriminatory

411. Canada will only apply "Jordan's Principle" when two narrow and limiting categories exist: (i) when there is a jurisdictional dispute; and (ii) when the child in need has complicated medical needs. This restrictive and inequitable definition was developed without meaningful involvement of First Nations:

> MR. POULIN: -- so I couldn't find any references to discussions, to agencies, or even to First Nations at large.
>
> Am I right?
>
> MS BAGGLEY: At the time that we were developing the federal response, as I explained, it was a process that was internal to government and it involved the policy process that was secret and subject to Cabinet confidence.
>
> We had to seek the mandate to engage, and once we received that mandate we did engage with provinces, initially from Minister to Minister, but part of that engagement process did include First Nations where there was a willingness to do so, and an interest to do so.
>
> And you can see through some of the agreements that we have developed and some of the work that we have done, that we do have First Nations participating in some of those processes.
>
> MR. POULIN: But there is no First Nation -- my understanding is there is no First Nation agreement on the definition that is used by the federal government.
>
> MS BAGGLEY: Well, it's a federal definition, as I have explained, and we didn't go out seeking agreement with our definition, and we certainly do acknowledge in any documents that we develop

> through the agreements for example, if there are other definitions that the parties are working with, we do acknowledge and reference those.[481]

412. Thus, while First Nations who were "willing" and "interested" may have been engaged by AANDC, they were not asked to contribute to the development of the scope of Jordan's Principle nor was specific funding allocated to support their meaningful engagement. The extent of the "engagement" of First Nations by AANDC is unclear, since it seems that it was left to the provinces to communicate with First Nations:

> MR. WUTTKE: [...] And where there is no involvement or little involvement with First Nation communities in various jurisdictions, has the Department initiated a sort of call out asking them to engage in the Jordan's Principle process?
>
> MS BAGGLEY: There has been no national call out. Any efforts to engage First Nations are very much driven by the province that we're working in. So there has been no national call out on engagement, although we have engaged bilaterally with the Assembly of First Nations on Jordan's Principle where we have had -- I think I've been at two or three meetings where we have presented the Respondent's approach and outlined our implementation efforts at that point that we were at.[482]

413. When discussions with stakeholders did occur, Ms. Baggley would report on these discussions to senior management within AANDC.[483] She did not recall ever recommending in these reports that the Respondent's definition of Jordan's Principle should be modified,[484] nor did she have any reason to believe that Canada is contemplating changing the definition. Indeed, she suggested that Canada is not motivated to modify its approach to Jordan's principle:

> MEMBER LUSTIG: So the people that you report up to would, therefore, know that there was disagreement among various groups in the provinces and First Nations with the position that the federal government has taken, but you're not aware that anyone has reacted to that to change anything?
>
> MS BAGGLEY: Well, it's quite possible that that has

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[481] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 10-11, lines 18-25, 1-24) [emphasis added].
[482] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 109-110, lines 16-25, 1-6).
[483] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 121, lines 20-25).
[484] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 126, lines 4-14).

> happened and we're just not privy to those discussions that may happen between, say, our Deputy and the Minister. So those discussions could have occurred, but we wouldn't be part of those.
>
> But I think it has to be balanced against that, from, you know, if I were to stand in my Deputy Minister's shoes and look down, yes, there are challenges and issues, but we are still kind of carving a path forward. So they're seeking that we are making some progress at the same time that we're encountering challenges.
>
> […] So I think all along it's been more of a wait and see approach […][485]

414. The origins and justification for the narrow definition of Jordan's Principle that the Respondent eventually adopted are not clear. In a September 2008 presentation entitled "Social Policy and Programs," AANDC rooted its implementation of Jordan's Principle in the Parliamentary Motion of December 2007, and presented a proposed two-fold approach:

> 1. In the short-term, the concept of case conferencing has been presented as a mechanism to provide a focal point for multiple providers to coordinate and determine cost-sharing service plans for children with complex medical needs.
> 2. In the long term, INAC and Health Canada could use the results from the interim approach along with other research to undertake a comprehensive assessment of service gaps, roles and responsibilities, as well as costs of services. INAC and Health Canada could then develop a joint submission to Cabinet to address the gaps identified within federal responsibilities.[486]

The presentation also notes that a joint Health Canada and AANDC Ministerial letter had been sent to all provinces requesting input on the federal implementation of Jordan's Principle.

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[485] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 122-3, lines 14-25, 1-13).
[486] AANDC, *Social Policy and Programs – Working Together for a Better Future*, September 2008 (CBD, Vol 14, Tab 355, p 15).

415. Already at this stage, AANDC seems to have been narrowly focused on children with "complex medical needs", without any explanation for this deviation from the broad language of Motion no. 296. It is interesting to note, however, that the only service gaps specifically mentioned by AANDC are those *within* federal responsibilities, between AANDC and Health Canada.

416. The Ministerial letter received responses from a number of provinces and territories. A common thread in these responses was the provinces' "sincere hope that government and First Nations can reach a common understanding that will serve the interests of First Nations children today and for generations to come."[487] The response from British Columbia's Ministers of Health Services and of Children and Family Development stressed that:

> implementation of Jordan's Principle must include a full range of health and social services so that First Nations children will be provided the same care that all British Columbia children are entitled to, regardless of jurisdiction as contemplated by the House of Commons motion…[488]

417. Unfortunately, rather than seeking a "common understanding" with First Nations and the provinces on a broad, principled scoped for Jordan's Principle, Canada decided to advance a restricted definition. Canada's definition was framed in the following terms in a June 2011 presentation, used to brief senior management, Jordan's Principle regional focal points, and the provinces[489]:

> Our response focuses on:
>
> i. *Continuity of care* – care of the child will continue even if there is a dispute about responsibility
> ii. *Cases involving a jurisdictional dispute* – between a provincial government and the federal government

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[487] Hon. June Draude, Hon. Don McMorris and Hon. Donna Harpauer, *Letter to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle*, July 11, 2008 (CBD, Vol 14, Tab 364, p 2); see also BC, PEI and NWT Letters to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle (CBD, Vol 14, Tab 364, pp 5-12).
[488] Hon. Tom Christensen and Hon. George Abbott, *Letter to Hon. Chuck Strahl and Hon. Tony Clement Regarding Jordan's Principle*, July 30, 2008 (CBD, Vol 14, Tab 364, pp 5-7) [emphasis added].
[489] Corrine Baggley, Examination in Chief, April 30, 2014 (Vol 57, p 18, lines 1-13).

iii. *First Nations children ordinarily resident on reserve with multiple disabilities* – assessed by health and social service professionals and require services from multiple providers

iv. *Comparable services* – a child ordinarily resident on reserve receives the same level of care as a child with similar needs living off reserve in a similar geographic location (normative standards of care)[490]

418. The notes accompanying this presentation acknowledge that "there are differing views regarding Jordan's Principle",[491] but, as discussed below, the Respondent was not open to re-evaluating its definition in spite of strenuous objections from the provinces and First Nations.

419. AANDC has been unresponsive to calls from the provinces and from First Nations to revise the narrow federal definition of Jordan's Principle. While federal-provincial agreements on the implementation of Jordan's Principle do acknowledge differences in the definitions and approaches to the Principle, the narrow federal definition will always ultimately determine whether Jordan's Principle applies, because the relevant federal and provincial Assistant Deputy Ministers both have to agree that the Principle is engaged in order for a payment to be made.[492]

420. As outlined in these submissions, in November 2009, the British Columbia Ministers of Children and Family Development, and Aboriginal Relations and Reconciliation, wrote to Minister of Indian Affairs and Northern Development Chuck Strahl. In addition to asking for the immediate implementation of the EPFA funding formula in BC, the Ministers asked that the Canada "implement Jordan's Principle based on the broad definition originally accepted by your government."[493] They explained that they were in full agreement with First Nations in seeking the "full implementation" of Jordan's Principle.[494] Minister Strahl responded two months later,

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[490] Health Canada, *Update on Jordan's Principle: The Federal Government Response*, June 2011 (RBA, R14, Tab 39, p 6).
[491] Health Canada, *Update on Jordan's Principle: The Federal Government Response*, June 2011 (RBA, R14, Tab 39, p 6).
[492] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 17, lines 11-19).
[493] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69, p 1).
[494] *Ibid* (CBD, Vol 6, Tab 69, p 1).

refusing the BC Ministers' request to meet, and reiterating the narrow federal response to Jordan's Principle.

421. British Columbia's concerns about the federal definition were reiterated by the Honourable Mary Polak, BC Minister of Child and Family Development, in her appearance before the Standing Committee on Aboriginal Affairs and Northern Development in February, 2011.

> Hon. Mary Polak: We were in fact the first province in Canada to adopt Jordan's Principle. We do have agreements with the federal government. There is right now, though, a very narrow definition, and I know these things are up for dialogue and discussion as we all grow and learn about them. But it's our feeling that the definition currently utilized is too narrow to really respond to the overall intent of Jordan's Principle. I think we also believe and have the confidence that it is the desire of the federal government, and it's certainly ours, to work together to effectively broaden that definition.
>
> Mr. Todd Russell: So right now it's just basically on the complex, multiple needs. Is that the definition you're using?
>
> Hon. Mary Polak: Not from our perspective, but of course we have to work in agreement with the federal government [...][495]

422. Minister Polak also explained that while there was a working agreement in place with the federal government, the narrow definition of Jordan's Principle remained a barrier to a formal agreement: "[t]he reason we have not reached the position where we have actually signed off on a formal agreement is the issue of the definition."[496]

423. Similar objections to the Respondent's definition, and invitations to discuss an implementation of Jordan's Principle more in line with the original House of Commons motion, have been voiced by First Nations groups.[497]

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[495] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 40th Parl, 3rd Sess, Sitting No 46, February 8, 2011 (CBD, Vol 13, Tab 276, p 10).
[496] *Evidence of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development*, 40th Parliament, 3rd Session, Sitting No. 46, February 8, 2011 (CBD, Vol 13, Tab 276, p 14).
[497] See for example British Columbia First Nations Leadership Council, *Letter Regarding the Implementation Strategy for Jordan's Principle*, November 14, 2008 (CBD, Vol 14, Tab 378), which proposed a broader definition of Jordan's Principle for discussion.

21. Canada's failure to implement Jordan's Principle perpetuates discrimination

424. For First Nations children, Jordan's Principle is a means to attain the substantive equality that the *CHRA* functions to protect. As discussed above, Canada's constitutional architecture has given rise to a unique arrangement of overlapping responsibilities over First Nations individuals on reserves, shared between departments and ministries in two levels of government. The overarching purpose of Jordan's Principle is to prevent First Nations children from being denied prompt and equal access to benefits and services available to other Canadian children as a result of their Aboriginal status.

425. Where jurisdictional disputes lead to the delay or denial of services for First Nations children, this amounts to discrimination on the prohibited ground of race and national or ethnic origin, in violation of s. 5 of the *Act*. This discrimination, which is independent of the discrimination caused by underfunding of child and family services, can only be prevented by full implementation of Jordan's Principle such that the Principle applies to any jurisdictional dispute over any service.

426. The Respondent's implementation of Jordan's Principle, in failing to meet this standard, is *prima facie* discriminatory. The Respondent's definition of the Principle is too narrow, in that it fails to address jurisdictional disputes between departments or agencies of the federal government, and only applies to children with multiple disabilities. The *CHRA* does not limit the right to freedom from discrimination to only individuals with complex medical needs and multiple disabilities. All individuals have to the right to freedom from discrimination. Likewise, all First Nations children, not just those with complex medical needs and multiple disabilities, should be covered by Jordan's Principle.

427. Canada has provided no evidence or argument to demonstrate either that there is a rational justification for its narrow definition of Jordan's Principle, or that further accommodating First Nations children by applying the Principle to all jurisdictional disputes would cause Canada undue hardship.[498] Canada's case conferencing approach for cases falling outside its definition of Jordan's Principle is an insufficient response that does not address the discriminatory effects

[498] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 SCR 3 at para 54 [*Meiorin*].

of its implementation of the Principle. Further, the flow of information about the initiative to the families and FCNFSA affected by it has not allowed it to take full effect even within the limited scope provided for by Canada.

22. The Respondent's Implementation of Jordan's Principle Significantly Delays Service Delivery

428. The first fundamental flaw with Canada's definition of Jordan's Principle, even before considering all those whom it excludes, is that it has a perverse effect on process. The entire purpose of Jordan's Principle is to ensure that when a child is in need of a service, funding is provided first, and inter-governmental discussions on recovering the cost from the appropriate department or ministry happens second.

429. In Canada's incarnation of Jordan's Principle, however, AANDC first undertakes an evaluation process to determine whether the child's needs meet Canada's arbitrary eligibility requirements. Delay is therefore inherently part of the process – the very delay which Jordan's Principle is meant to redress. As Ms. Baggley explained, in the context of the Joint Statement on the Implementation of Jordan's Principle in New Brunswick[499], the service a child needs will not be funded until it is determined, through case conferencing, that the federal definition of Jordan's Principle is met:

> MS ARSENAULT: And are only formal Jordan's Principle cases brought forward to these case conferencing?
>
> MS BAGGLEY: No, no. We encounter a whole range of cases. In order for us to respond to them or address them they don't have to meet the federal definition. And so, all cases are looked at, it's just that it reaches a certain point if it becomes clear that there is a disputed service between the federal and provincial government, then as per our definition we are committed to making sure that we fund the service in question and then work with the provincial government to figure out the process and the ultimate responsibility at the end of the day.[500]

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[499] First Nations' Chiefs in New-Brunswick, Government of New-Brunswick and Government of Canada, *Joint Statement on the Implementation of Jordan's Principle in New-Brunswick*, December 2011 (Respondent's BOD [RBD], R14, Tab 46).

[500] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, p 43, lines 8-23) [emphasis added].

430. In some cases, the service a child needs will fall into a service gap between two federal departments, and so funding is not released. In other cases, such as the situation at issue in the *Pictou Landing* decision, the Canadian and provincial governments may decide there is no disputed service between them based on an erroneous understanding of the normative standard of care. Both of these situations are addressed below; but it is crucial to emphasize at the outset that *even in cases that end up being accepted as true Jordan's Principle cases* under Canada's definition, the spirit of the Principle is not observed, because a child must wait for officials to "check the boxes" of Canada's definition before the service he or she needs is funded. This delay does not exist for other children in Canada. As such, the Caring Society submits that manner in which Canada is currently implementing Jordan's Principle causes First Nations children to experience discrimination on the basis of their race and national or ethnic origin.

23. Canada's definition of "dispute" violates Jordan's Principle

431. Canada's view is that only disputes between governments (as opposed to interdepartmental disputes) will qualify under Jordan's Principle. This arbitrary criteria not only violates Jordan's Principle but it serves to deny many First Nations children equitable access to services available to other Canadian children.

432. The evidence gathered in the *Wen:de* reports demonstrates that jurisdictional disputes between departments impair access to services for First Nations children in the child welfare system:

> As this report notes, the lack of non-judicial forums for the resolution of jurisdictional disputes is a problem. This is also evident in the First Nations agency survey which indicated that the 12 agencies had experienced 393 jurisdictional disputes this past year requiring an average of 54.25 person hours to resolve each incident. The most frequent types of disputes were between federal government departments (36%), between two provincial departments (27%) and between federal and provincial governments (14%).[501]

433. Corinne Baggley estimated that approximately half of the cases tracked by AANDC using the tracking tool developed under the department Jordan's Principle initiative involved

[501] *Wen:de We Are Coming to the Light of Day*, 2005 (CBD, Vol 1, Tab 5, p 17) [emphasis added].

jurisdictional disputes between federal departments.[502] She was asked on cross-examination how the federal definition of Jordan's Principle squares with this research:

> MR. POULIN: So the research – so my understanding of the research that was done on Jordan's Principle is that it describes in details -- sorry, let me rephrase that. It describes that the most frequent disputes that take place are between federal departments.
>
> If the federal government's approach was informed by research, I am at a loss to understand why it concentrates on the smaller -- on the smallest number of disputes in order to create the Jordan's Principle approach.
>
> MS BAGGLEY: So it was based on research, but other things, too, I said; right? It wasn't just solely based on what the research is saying because one research is going to say something and another piece of research will say something else.
>
> And we also -- as I explained, we looked at Jordan's case because the federal response to Jordan's Principle, the aim was to take a very practical and measured response to addressing cases, and the way to do that was to take Jordan's case and build the response around him.
>
> Certainly, research informs all of that, but it doesn't define or drive that. It is one piece of information that we use in developing the policy response.[503]

434. Canada is fully aware of the types of jurisdictional disputes that are excluded by its narrow definition of Jordan's Principle. In the Preliminary Report of the Terms of Reference Officials Working Group of the Canada / Manitoba Joint Committee on Jordan's Principle, senior officials from Health Canada and AANDC listed a number of "service disparities" that "are not the result of a dispute between the Federal and Provincial jurisdictions" over responsibility for funding, and therefore "do not relate to Jordan's Principle" as defined by the Respondent.[504] One example of such a disparity in service involves mobility equipment:

> Service Example: A child with multiple disabilities and / or complex medical needs requires a wheelchair and stroller and requires that

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[502] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p. 24-25).
[503] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 40-41, lines 2-25, 1-4).
[504] TOROWG Preliminary Report *supra* note 17 at 15.

> a lift and tracking device be installed in his/her family home. The Non-Insured Health Benefits Program (NIHB) will provide children with only one item, once every five years. If the item is a wheelchair, NIHB supports the provision of manual wheelchairs only, which must be fitted with seating inserts in order to accommodate small children. If the item is a ceiling mounted lift and tracking device, funding is not provided by NIHB to install the device in the family home. If these same children were to reside off reserve, they would be eligible to receive more than one mobility device (if needed) and any installation costs would be borne by the provincial program providing the mobility device.[505]

435. Because no one in this example alleges that the province is responsible for funding the mobility device, there is no federal-provincial dispute. The federal definition of Jordan's Principle thus would not apply to a child in need of a second wheelchair, a non-manual wheelchair, or the installation of a ceiling mounted lift and tracking device. Instead, such a child is faced with the challenge of obtaining funding from either AANDC or Health Canada. The case conferencing approach that Canada applies to cases falling outside its definition would not assist this child:

> MR. POULIN: And so that would form -- but the problem, of course, I can see right now, is none of them could be found to be a Jordan's Principle case if it is a dispute between the two departments; none of them could -- and therefore any payments would need to be within your authorities.
>
> MS BAGGLEY: That's correct.[506]

436. There is no formal dispute resolution process in place between AANDC and Health Canada.[507] AANDC will not fund services outside of its authorities, and maintains that it does not have the authority to fund services that are covered by Health Canada.[508] In order to be satisfied that a disputed service is not covered by Health Canada's Non-Insured Health Benefits Program (NIHB), AANDC requires that a claimant exhaust the three-part NIHB appeal process.[509]

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[505] TOROWG Preliminary Report *supra* note 17 at 13 [emphasis added]. See also Debra Gillis Examination in Chief, May 2014 (CBD, Vol 64, p 214-219), and Health Canada, *Provider Guide for Medical Supplies and Equipment (MS&E) Benefits: Non-Insured Health Benefits*, April 2009 (CBD, Vol 15, Tab 459, p 9).
[506] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, pp 23-24, lines 22-25, 1-4).
[507] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 23, lines 5-9); see also Debra Gillis Examination in Chief, May 29, 2014 (Vol 64, pp 194-195, lines 21-25, 16-22).
[508] OAG Report 2008 (CBD, Vol 3, Tab 11, pp 16-17).
[509] See Health Canada, *First Nations & Inuit Health: Procedures for Appeals*, July 10, 2012 (CBD, Vol 15, Tab 462), and Debra Gillis Examination in Chief, May 29, 2014 (Vol 64, pp 186-187, lines 13-25, 1-2).

As explained by Debra Gillis, each of the three appeals can take up to a month, or more if the committee requires further information.[510] Payment to the service provider can take a further month.[511] Barbara D'Amico confirmed that "it takes a considerable amount of time and effort and paperwork" for a FNCFSA to go through this appeals process in order to get reimbursed for a child's medical expense not covered by Health Canada, such as a new wheelchair.[512]

437. Orthodontic benefits provide another illustrative example of the service gap between AANDC and Health Canada. Of 532 appeals for orthodontic benefits under NIHB documented in the 2012/2013 fiscal year, 83% were first appeals, of which only 20% were approved. Of the only 80 second appeals during this period, a mere 1% were approved. None of the 12 third level appeals were approved.[513] Not only was the appeals process unlikely to result in Health Canada reimbursing the expense, but the ever smaller number of claimants at each level of appeal demonstrate the discouraging effect of having to jump through so many hoops simply in order to receive reimbursement. One of Canada's documents, highlighting gaps between the services provided by AANDC and Health Canada to First Nations children and families in British Columbia, notes how this very issue impacts children in care:

> Orthodontia: there is some limited accessibility for CIC [children in care] but the process is cumbersome and often requires agency to appeal 2 times, and full coverage is rarely provided over the full plan of care.[514]

438. Very often the significant delay is a direct result of matters going "back and forth between HC and INAC".[515] Moreover, as emerged in the testimony before this Tribunal, the result of this service gap between Health Canada and AANDC is a completely arbitrary deficiency in the services available to First Nations children as compared to their counterparts off-reserve:

> THE CHAIRPERSON: If we go back to page 13 with the example, the child with multiple disabilities and complex medical needs, I

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[510] Debra Gillis Cross Examination, May 29, 2014 (Vol 64, pp 225-226, lines 18-25 and 1-4).
[511] *Ibid* (Vol 64, pp 229-230, lines 22-25, 1-7).
[512] Barbara D'Amico Cross Examination, March 20, 2014 (Vol 53, p 197, lines 13-15).
[513] Health Canada, *Summary note – LOP-NIHB Appeals*, Caring Society Disclosure (CBD, Vol 15, Tab 479); Health Canada, *LOP Request June 2014*, Caring Society Disclosure (CBD, Vol 15, Tab 480).
[514] *INAC and Health Canada First Nations Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, June 2009 (CBD, Vol 6, Tab 78, p 3).
[515] AAND, *Jordan's Principle Chart Documenting Cases*, October 6, 2013 (CBD, Vol 15, Tab 422, p 2).

> was wondering, if the child needs three devices [...] what is the rationale for paying only one –
>
> DR. BLACKSTOCK: I don't know.
>
> THE CHAIRPERSON: -- and if they pay for one, there must be another provision for the rest of the devices, or what is, in your view, the rationale behind that?
>
> DR. BLACKSTOCK: I know of no rationale that would really concord with the children's best interest [...] this is a very clear example where just across the reserve line the children would be entitled to this – to multiple devices. I don't know the reasoning behind that.[516]

439. As mentioned above, the Preliminary Report explains that this kind of service gap for First Nations children on reserve creates an incentive to place children who are not in need of protection into care off-reserve, in order to receive a needed service.[517]

440. The *Pictou Landing* case is another example of the problematic application of Canada's "dispute" criteria. The *Pictou Landing* case is illustrative of this problem. That case centered on the story of Jeremy, a young man with multiple disabilities, and his mother, who assisted him with all facets of his personal care, and who herself had limited mobility after suffering a stroke. Both were members of the Pictou Landing First Nation, whose Band Council received funding from AANDC and Health Canada for personal and home care services. Finding that 80% of the First Nation's total allotment were going towards the $8,200 cost per month of assisting Jeremy, the Band Council contacted Health Canada to request case conferencing, because it was of the view that this was a Jordan's Principal case.

441. AANDC and Health Canada participated in the conferencing, but disagreed that Jordan's Principle was engaged. Based on discussions with provincial officials, the federal view was that a family living off reserve could receive no more than $2,200 per month in respite services. The departments therefore took the view that "there was no jurisdictional dispute in this matter as

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[516] Cindy Blackstock Examination in Chief, February 11, 2014 (Vol 47, pp 265-266, lines 18-25 and 1-13).
[517] TOROWG Preliminary Report *supra* note 17 at 14.

both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve."[518]

442. In the *Pictou Landing* case, Canada did not contest who should pay for Jeremy's Assisted Living services. Rather, Canada contested the normative standard of care available off reserve with the Pictou Landing Band Council, despite a recent Supreme Court of Nova Scotia court ruling clarifying the standard.[519] Because a dispute over *how much* funding it had to provide did not fit the narrow category of disputes that the Respondent's definition of Jordan's Principle implicates, Canada denied that this was a Jordan's Principle case. The Court disagreed.

> I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The SAA and Regulations require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.[520]

443. Justice Mandamin correctly recognized that a live dispute between levels of government over who should pay cannot be the proper litmus test for whether Jordan's Principle applies:

> I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.[521]

444. Both the province and the federal departments had erred in assessing the amount of funding that would be available off reserve, by failing to take into account an allowance for more

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[518] *Pictou Landing* supra note 16 at para 23.
[519] See *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126 (CanLII), 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].
[520] *Pictou Landing* supra note 16 at para 111.
[521] *Pictou Landing* supra note 16 at para 86.

funding in exceptional cases under provincial law, as had been recognized in *Boudreau*. In reaching this decision, Justice Mandamin articulated the essence of Jordan's Principle:

> Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.[522]

24. Canada's Medical Requirements Violate Jordan's Principle

445. Canada's definition of Jordan's Principle also narrowly applies only to children with multiple disabilities or complex medical issues. There is nothing in the language or application of Jordan's Principle that limits its scope to these particular children. The Principle is meant to apply to all First Nations children.

446. Canada's medical requirements present a number of significant problems. First, the standard of what constitutes a complex medical issue is not defined, leading to unnecessary ambiguity. Second, the definition fails to provide an expedient mechanism for children in urgent need of a service or medical device or intervention. Third, the rationale for this focus is unclear. The only justification presented for the focus on complex medical issues, aside from the fact that this reflects Jordan's own situation, is that

> Jurisdictional disputes are more likely to happen when children with multiple disabilities require a comprehensive suite of services from a variety of providers who may be in different jurisdictions to meet their physical, social and educational needs.[523]

447. While it may be true that the more medical issues faced by a child, the more likely it is that multiple service providers will be implicated and a jurisdictional issue will arise, it does not follow that Jordan's Principle ought only to apply to children with complex medical needs and / or multiple disabilities. Indeed, Canada's definition ignores the reality that a child can be in need of a service even if it is not related to a medical condition. That the federal definition of Jordan's Principle is overly narrow is confirmed by the fact that, amongst this group in which jurisdictional

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[522] *Pictou Landing* supra note 16 at para 18 [emphasis added].
[523] AANDC, *Questions & Answers (Qs & As) Jordan's Principle*, March 10, 2010 (CBD, Vol 14, Tab 377, p 2).

disputes "are more likely to happen", not a single Jordan's Principle case has been recognized by Canada to date.

448. In the conclusion to the Preliminary Report, the Terms of Reference Officials Working Group stated the following:

> The best interests of First Nations children with multiple disabilities and/or complex medical needs must remain the priority of all: the federal government, the provincial government, and First Nations communities. We accept that the history of Canada and the development of our social services and health services have created a complex environment within which all endeavour to meet the needs of these children. Children should not continue to pay the price for this history.[524]

449. The Caring Society is in wholehearted agreement that children should not pay the price for the historical artifact of the arbitrary division of services for First Nations amongst various governmental departments and ministries. However, confining services under the rubric of Jordan's Principle only to those children with complex medical needs and/or multiple disabilities serves to compound the historical ramifications of excluding First Nations children from equality of services. There simply is no reason why a First Nations child in need of a service available to other Canadian children should be denied that service.

25. Canada's Implementation of Jordan's Principle Violates the Substantive Equality Rights of First Nations Children

450. At the heart of Jordan's Principle is the commitment to ensuring that the government pays for a child's service *first*, and determines the proper funding source later. *Pictou Landing* supports the proposition that Canada should pay for the service upon receiving the funding request, backed by the First Nation or Agency's view as to why the service would be available to a child off-reserve. Then, once the service has been paid for by Canada, the process of determining the proper payer, and how much ought to be paid, can proceed.

451. The necessity of this adjustment to Jordan's Principle is evident from the facts of *Pictou Landing*. While awaiting an answer from AANDC, and then until the litigation was resolved, the

[524] TOROWG Preliminary Report *supra* note 17 at 28.

Pictou Landing Band Council continued to cover the cost for Jeremy's care. As explained in email from Wade Were, the Jordan's Principal focal point for Health Canada in the Atlantic Region, the options for the Pictou Landing Band Council to the refusal of funding were unpromising:

> We don't know how the community will react to the news of no funding. They have options (1) keep paying for 24/7 care using their own source revenue, (2) continue service and arrange for facility placement on a temporary/respite or long term basis depending on how the needs evolve, (3) discontinue service thus requiring Child and Family Services (protection) intervention and emergency placement.[525]

452. In other words, until it could establish the error of both governments as to the normative level of care off-reserve, the community would have to either stretch its resources to continue to pay for Jeremy's care, or Jeremy would have to leave his family and his community. If the latter had occurred, then even once the Band Council's understanding of the law was vindicated by the courts, there would have been an irreversible impact on Jeremy. This approach is antithetical to putting the child first.

453. Canada's approach to Jordan's Principle violates the substantive equality right of First Nations children. Pursuant to Canada's approach, on-reserve First Nations children are not entitled to equality before and under the law and are being denied the right to receive the same services provided to all other Canadian children. The criteria established and enforced by AANDC lead to the conclusion that because of their First Nations status, they will not be guaranteed the same rights, benefits and protections afforded to other Canadian children. This is a direct violation of s. 5 of the *CHRA*.

454. Moreover, the effect of the Respondent's position suggests that while the government has no obligation to provide on-reserve First Nations children with the services that are available to other children, the government will nonetheless provide some services to some children in some limited circumstances.

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[525] Health Canada, *Email Correspondence Regarding the Pictou Landing Case*, May 2011 (CBD, Tab 423, p 2-3).

455. It could not have been Parliament's intention to exclude First Nations children living primarily on reserve from human rights and equality protections when it unanimously passed Jordan's Principle in the House of Commons. It is the Caring Society's position that Jordan's Principle ought to be interpreted as it was intended: to ensure that First Nations children who primarily live on reserve have access to public services on the same terms as all other Canadian children.

456. Failing to protect substantive equality and afford human rights protections to all on-reserve First Nations children would further marginalize a community that has already been affected by a legacy of stereotyping and prejudice, and who already face serious social disadvantages. Conversely, protecting a procedural mechanism designed to safeguard the rights of on-reserve First Nations children is consistent with and promotes *Charter* values.

26. Canada has advanced no reasonable justification for the discrimination

457. Given that Canada's implementation of Jordan's Principle is *prima facie* discriminatory, it has the onus of justifying its approach. The only explanation advanced before this Tribunal for the narrowness of the federal definition of Jordan's Principle was given by Corinne Baggley.

> [T]he policy response that we were mandated to implement was based on Jordan, and my role is to provide that analysis and advice, and we had to start with Jordan's case and look at those particulars and implement, to ensure that if there are other children like Jordan out there that the federal response as our very first step that we could actually address those cases.[526]

458. It has been seven years since Motion No. 296 was unanimously passed in the House of Commons, without the restrictive definition of Jordan's Principle that Canada has adopted. To date, there has been no sign that Canada is contemplating moving past the "very first step" that it decided on. The *CHRA* does not simply require service providers to take procedural "first steps" to ensure non-discrimination. Rather, the right to non-discrimination is a substantive one.[527] As such, the Respondent has an obligation to take all necessary steps, short of undue

[526] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, p 13, lines 14-22).
[527] (*Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131 (CanLII) at para 9.

hardship, to ensure that First Nations children are not denied services that other children take for granted.

459. Canada has provided no evidence as to why it has failed to take all of the steps necessary to ensure that First Nations children do not experience discrimination. In the absence of such evidence, Canada's narrow and improper application and implementation of Jordan's Principle amounts to a breach of the *CHRA*.

27. The federal emphasis on case conferences does not make up for its narrow definition of Jordan's Principle

460. The existence of a case conferencing procedure for cases that do not meet Canada's criteria for recognition as a formal Jordan's Principle case does not balance out the negative impacts of the narrow definition, described above.

461. Case conferencing, no matter how prompt and inclusive, simply does not address the problem that Jordan's Principle was conceived of to solve. Indeed, it is difficult to see how the case conferencing approach differs from the discussion that was carried on at the government level for two years, while Jordan River Anderson waited for the chance go home. As Dr. Blackstock testified:

> Again, I just want to remind everybody that the case conferencing approach was what was used in Jordan's case. There were numerous meetings there to try and resolve the jurisdictional issues and we all know the sad outcome of that case. And it's difficult to understand how this approach would be differentiated from that approach.[528]

462. Corinne Baggley was asked about the gaps in services between Health Canada and AANDC, which the federal definition of Jordan's Principle does not cover. Her response illuminates the troubling uncertainty of relying on case conferencing as a way for children to obtain needed services:

> MS ARSENAULT: Can Jordan's Principle be used to fix these gaps identified?

[528] Dr. Cindy Blackstock Examination in Chief, February 12, 2014 (Vol 48, p 104, lines 4-11).

> MS BAGGLEY: [...] We have seen cases that come up to us as -- labelled as Jordan's principle, that don't meet the criteria, but we have found solutions to providing that needed service.
>
> MS ARSENAULT: What kind of solutions?
>
> MS BAGGLEY: Well sometimes, you know, we see under the Non Insured Health Benefits Program that exceptions are made to policy. Sometimes Aboriginal Affairs will provide the service based on compassionate or ethical grounds. There is a whole -- I think that what has helped with Jordan's Principle is that we have found creative solutions. And it's not always necessarily finding the money to pay for the service, a lot of cases that we see under Jordan's Principle are really about a navigation and awareness issue as well, where sometimes we need to help point the service provider or the family to a range of other possible services that they could access, and it really, really helps when we have the province at the table because they have a whole range of services that, perhaps, for that case, they could ensure that the child can access.
>
> [...] under Jordan's Principle, we have a mandate to identify the issues that come up through the cases. So we have a mandate to track and analyze the issues that come forward. We are not mandated to fix the gaps in the sense that we are going to go off and create a new program to fill those gaps. [529]

463. What emerges from this description is that case conferencing perpetuates a culture of *ad hoc* solutions. While case conferencing may help create dialogue between government departments and ministries, it does not provide children, their parents, or the FNCFSA responsible for them with a predictable framework on which they can confidently act to provide needed services. Even under the most robust case conferencing regime, a service provider comes to the table, unsure of whether they will be pointed to "a whole range of services" that the province may have available, or whether, instead, they will have to argue for an exception to an NIHB policy, or even rely on the compassion of AANDC to provide a service to which they are not otherwise considered entitled. For an FNCFSA dealing with a large caseload of evolving circumstances, trying to plan for how to provide a contested service to a child is like building on quicksand. In any event, even if individual cases are tracked by AANDC, case conferences cannot

[529] Corinne Baggley Examination in Chief, April 30, 2014 (Vol 57, pp 96-98, lines 13-25, 1-22, 1-7) [emphasis added].

address the gaps that emerge as cases are considered, such that greater certainty would be provided for those who may face the same issue later.

464. The inadequacy of the case conferencing approach can be seen in some of the cases tracked by AADNC. In one, case conferencing proceeded around a request for services, until the child aged out and was no longer eligible to receive services.[530] Another case involved a child who had suffered cardiac arrest and an anoxic brain injury during a routine dental examination, becoming totally dependent for all activities of daily living. The child was assessed as requiring "significant medical and equipment [sic] before she can be discharged from the Health Sciences Centre."[531] Amongst the equipment the child needed was a specialized bed and mattress. Case conferencing over who would provide the equipment began on November 29, 2012. The notes on the case conferencing indicate "NIHB response of "absolutely not" to request for specialized bed and mattress."[532] This refusal came on December 4, 2012. On December 19, 2012, the child was discharged from the Health Sciences Center, and returned home to the Sandy Bay First Nation. According to the notes, it was not until January 22, 2013, that the specialized bed and mattress were provided for the child. The notes indicate:

> Please Note: The bed was provided by the Medical Director, HSC but wants to remain anonymous. This was confirmed in discussion with the Social Worker, HSC.

465. Having gone without the much-needed bed and mattress for over a month at home, this seriously disabled child had to rely on the kindness of a third party to finally get the equipment she needed. When asked about this case, Corinne Baggley explained that "this was a good outcome that the child got the service they required."[533] It is certainly a good thing that the Medical Director bought the bed and mattress for the child, since it was not at all clear that the child would otherwise have received it through funding from any government. However, it is impermissible and unconscionable that a child in this situation should have to rely on a third party for such a vital service. The federal enactment of Jordan's Principle has not taken the Parties

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[530] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 68, lines 4-16).
[531] *Jordan's Principle – Case Conferencing to Case Resolution – Federal/Provincial Intake Form*, November 21, 2012 (CBD, Vol 15, Tab 420, p 1) [emphasis added].
[532] *Ibid* (CBD, Vol 15, Tab 420, p 7).
[533] Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 70, lines 11-12).

out of the paradigm in which, as discussed above, a social worker has to personally buy Ensure for a child in care because no government is willing to pick up the tab.

466. For Jordan's Principle to properly fulfill its role, the federal definition must be extended to give immediate funding to those cases that currently only qualify for case conferencing.

ISSUE 4: The Appropriate Remedy

> *[T]here are a huge amount of goodwill in the Aboriginal community to do what it can if it has – if it can find a way to bring that about by resourcing various things, training, teaching, money or whatever it is, there's a huge desire.*
>
> Chief Joseph [534]

A. General Principles

467. Section 53(2) of the *CHRA* grants this Tribunal a considerable degree of discretion in crafting human rights remedies where a complaint is substantiated. In *Doucet-Boudreau*, Justices Iacobucci and Arbour, writing for the majority, provided guidance to courts and tribunals regarding their remedial decision-making powers when fundamental rights are at stake. According to them, remedial powers, such as those conferred by section 53(2) of the *CHRA*, ought to be exercised in a purposive manner so as to provide "a full, effective and meaningful remedy" to those whose fundamental rights have been violated. The majority said this purposive approach to remedial discretion gives "modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy." The Justices went on to specify the requirements to ensure that remedial powers are exercised in a manner meaningful to those whose rights have been violated. They wrote:

> First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies (original emphasis).[535]

468. In keeping with the majority's direction in *Doucet-Boudreau*, the Caring Society seeks remedies that are both responsive and effective. Seeing as the CHRA protects substantive and not

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[534] Chief Robert Joseph Examination in Chief, January 13, 2014 (Vol 42, p 70, lines 2-7).
[535] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62, [2003] 3 SCR 3 at para 25 [*Doucet-Boudreau*].

merely formal equality, a responsive remedy will ensure equal funding will be allocated to First Nations child and family services and that these services will be delivered in a culturally appropriate manner. This will require negotiations between the parties, with the help of declarations and under the continuing supervision of the Tribunal. Remedies must also be effective, which, in this case, means putting an immediate end to certain discriminatory aspects of the FNCFS program. Immediately effective orders to cease discriminatory conduct will be required to achieve this purpose. Moreover, the need for an effective remedy calls for an innovative approach to monetary redress.

469. Sections B to E below contain the Caring Society's submissions on the legal basis and need for the types of remedies sought. The specific remedies sought by the Caring Society are listed in section F below.

B. Immediate Relief for First Nations Children

1. Declaratory relief

470. The Caring Society respectfully requests that several declarations be made by the Tribunal in order to clarify which aspects of the Respondent's FNCFS Program are discriminatory. As explained by Professor Kent Roach, declaratory relief serves the useful purpose of clarifying and settling the legal relations in issue.[536] In this case, the Caring Society is seeking declaratory relief, in addition to other remedies that will provide immediate relief to First Nations children and create a consultative process that will ensure that substantive equality is achieved.

471. Human rights tribunals may provide successful complainants declaratory relief as well as other remedies listed in section 53(2) of the *CHRA.* Nothing in the wording of section 53(2) precludes the Tribunal from ordering more than one of the remedies available to successful complainants. As such, this Tribunal routinely provides declaratory relief, in the form of findings of discrimination, coupled with individuals and systemic remedies.[537] The Caring Society respectfully requests that declaratory relief be granted, in addition to the remedies sought below.

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[536] Kent Roach, *Constitutional Remedies,* 2nd Ed (Toronto : Canada Law Book, 2013) at 12-70 [Kent Roach].
[537] *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10 (CanLII) at paras 18, 43, 48, 54, 58, 76-78, 223, 253. Varied on other grounds in *Tahmourpour v. Canada (Attorney General),* 2010 FCA 192 (CanLII).

472. It must be emphasized, however, that the Caring Society is of the view that declaratory relief alone would not be appropriate in this case. As emphasized by Professor Roach,

> Declaratory relief is not appropriate when it is no longer reasonable to expect voluntary compliance from the government. A governmental defendant may be unwilling to comply with the *Charter* rights of unpopular or marginal groups or in some cases, the defendant may simply lack the capacity or competence to comply.[538]

473. As argued above, it is no longer reasonable to expect Canada to voluntary comply with the *CHRA*. Canada has known about the adverse impact of its FNCFS Program for nearly 15 years and has failed to take meaningful action to remedy this situation. In light of this longstanding knowledge, the Caring Society also asks that Canada be ordered to provide immediate relief to First Nations agencies and establish a process to ensure that First Nations children receive culturally appropriate welfare services that are reasonably comparable to those provided to other children and that take into account the unique needs of First Nations children.

474. The declarations sought by the Caring Society aim at identifying the main aspects of the current FNCFS program that result in discrimination. These declarations will guide the parties in their subsequent negotiations and will identify the precise issues that need to be addressed if discrimination is to be eradicated.

2. Orders to Cease Discriminatory Conduct

475. Section 53(2) of the *CHRA* confers on this Tribunal the remedial powers to order respondents to cease their discriminatory conduct. In certain jurisdictions such orders are mandatory in cases where discrimination has been found.[539] These orders are consistent with the *CHRA*'s objectives to eradicate discrimination. However, this Tribunal has emphasized that in order for such orders to be effective and meaningful, they must be enforceable without delay. In *Doucet-Boudreau*, the majority explained:

> An ineffective remedy, or one which was "smothered in procedural delays and difficulties" is not a meaningful vindication of the rights

[538] Kent Roach, *Constitutional Remedies in Canada*, 2nd Ed (Toronto : Canada Law Book, 2013) at 12-49.
[539] *Human Rights Code,* RSBC 1996, c 210, s 37(2)(a).

and therefore not appropriate and just[540]

476. Because a remedy smothered in procedural delays does not provide a meaningful vindication of rights, the Caring Society respectfully submits that the remedy awarded in this complaint must provide some form of immediate relief to First Nations children. In particular, the Caring Society respectfully requests that Canada be ordered to immediately provide levels of service under the FNCFS Program that are comparable to those provided to other Canadian children, based on the best evidence available before the Tribunal.

477. In the Caring Society's view, this can be accomplished by ordering the Respondent to remove the most discriminatory factors from the formulas it uses to fund First Nations agencies.

478. The orders sought by the Caring Society are based on the evidence before the Tribunal and relate to the flawed assumptions, perverse incentives and shortcomings that most obviously contribute to the presence of systemic discrimination. Those factors have been specifically identified in part III.C.ii.b of the Commission's written submissions, which the Caring society adopts. The Caring Society submits that Respondent should be ordered to eliminate the flawed assumptions and perverse incentives in its FNCFS system, and to rectify the shortcomings in this system. This measure of relief would significantly contribute to the elimination of discrimination.

479. An analogy may be drawn with the remedies ordered by this Tribunal, and confirmed by the Supreme Court of Canada, in *Action Travail des Femmes*.[541] In that case, the Tribunal issued a multi-faceted order which included a number of directions to cease specific practices that contributed significantly to the presence of systemic discrimination against women. Recognizing that this afforded only a partial solution, the Tribunal also ordered a systemic remedy, namely an affirmative action program. Likewise, as will be explained below, the Caring Society is asking, beyond orders to cease certain specific practices, a more systemic remedy.

480. It is expected that the elimination of the flawed assumptions, perverse incentives and shortcomings in Canada's FNCFS system will require an immediate increase of approximately

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[540] *Doucet-Boudreau* supra note 535 at para 55.
[541] *Action Travail* supra note 89.

$108.13 million in annual funds provided to FNCFSA's,[542] plus a 3% escalator as adjusted from 2012 values to the date of the order.

481. It is also important that the amount of money that Canada will have to provide to FNCSFA's or otherwise spend to comply with the Tribunal's order should not be arbitrarily capped or subject to AANDC's other budgetary constraints. Canada has not submitted any evidence that the provision of equal child and family services to First Nations would result in undue financial hardship and should not be excused on that basis from fully achieving equality.

482. Likewise, in much the same way that pay equity should not be achieved through the reduction of the salary of other employees,[543] the Respondent should not be permitted to reduce the funds allocated to other First Nations programs in order to recuperate the cost of complying with the Tribunal's order. For reasons similar to those that apply in this case, the reduction of the funding allocated to other essential public services that the Respondent is providing to First Nations, either directly or through intermediaries, would result in discrimination. The long-standing discrimination that has been inflicted on First Nations children should not be eliminated at the expense of creating or aggravating discrimination against other First Nations groups, or to First Nations at large.

483. The Caring Society also seeks an order declaring Canada's Federal Response to Jordan's Principle discriminatory and requiring the Respondent to fully and properly implement Jordan's Principle in keeping with Motion no. 296 and the judgment of the Federal Court in the *Pictou Landing* case.[544] Proper implementation of Jordan's Principle includes immediately applying the principle to all First Nations children (not just those with multiple disabilities and multiple service providers) and the inclusion of all educational, health and social services customarily available to children within the ambit of Jordan's Principle.

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[542] This figure comes from a presentation by Odette Johnston to Assistant Deputy Minister Françoise Ducros, August 29, 2012 (CBD, Vol 12, Tab 248, p 13). The presentation involved a calculation of the cost of applying an improved EPFA program across the country. It should be noted that at page 17 of (CBD, Vol 12, Tab 248), it is said that transferring FNCFS to provinces and territories, which would presumably provide at least formal equal services to First Nations children, would have a "potential for dramatic increases in costs."

[543] See for example Quebec's *Pay Equity Act*, CQLR, c E-12.001, s 73.

[544] *Pictou Landing* supra note 16.

484. The scope of Jordan's Principle must address disputes between federal government departments and ensure the receipt of needed services by the First Nations child takes precedence over government processes to classify or resolve disputes.

485. The proper implementation of Jordan's Principle will require AANDC to become the payor of first resort to ensure children receive immediate relief. This requirement recognizes that AANDC is in the best position to engage other federal government departments or provincial/territorial governments that it seeks reimbursement from in the dispute classification or dispute resolution process. Requiring AANDC to assume the role of payor of first resort will significantly advance the progress of First Nations children in benefitting from formal equality. However, in order to ensure the fullest measure of formal equality, Canada must be compelled to enter into negotiations with the Complainants and the Commission to fund a new Jordan's Principle definition, dispute resolution process, appeal mechanism and related public education campaign.

486. The Caring Society believes that the specific orders to cease discrimination that it is seeking all relate to issues that are easily delineated and ascertainable, and that they provide sufficient guidance to Canada as what is required for compliance. Should the Tribunal be of the view that the order is not sufficiently specific, the Caring Society asks, in the alternative, that the Tribunal issue a declaration that Canada's current practices regarding the FNCSF system and the implementation of Jordan's Principle are discriminatory.

C. Measures to achieve substantive equality

487. While section 53(2)(a) empowers the Tribunal to order respondents to cease their discriminatory practices, measures aiming to prevent similar practices from occurring in the future may also be ordered. The Tribunal's broad remedial powers to prevent future violations of the *CHRA* are in keeping with the legislation's overarching purpose of eradicating discrimination.[545] In fact, the Supreme Court of Canada has stated that, in certain cases, systemic remedies are the only means by which the *CHRA's* objectives can be met.[546]

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[545] *Hughes v Election Canada*, 2010 CHRT 4 (CanLII) at para 50.
[546] *Action Travail* supra note 89 at 1141-1142.

488. Due to the fact that the causes of discrimination are often multi-facetted, complex, and deep-rooted, the Supreme Court of Canada has directed human rights tribunals to ensure that their systemic remedies are creative and responsive to the fundamental rights at stake.[547] As explained by the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*:

> Despite occasional disagreements over the appropriate means of redress, the case law of this Court […] stresses the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights […]. [I]n the context of seeking appropriate recourse before an administrative body or a court of competent jurisdiction, the enforcement of this law can lead to the imposition of affirmative or negative obligations designed to correct or bring an end to situations that are incompatible with the *Quebec Charter*.[548]

489. In accordance with the Supreme Court of Canada's decision in *Communauté urbaine de Montréal*, human rights tribunals have ordered a wide range of novel and expansive remedies to stop ongoing discrimination and prevent recurrence. By way of example, human rights tribunals across Canada have ordered various remedies such as: (1) the creation of educational and training programs on discrimination; (2) the implementation of independent review procedures for requests for accommodation;[549] (3) the review of policies on human rights; (4) the hiring of an independent consultant to advise on human rights matters;[550] and (5) consultations with various equality seeking groups on how to prevent future discrimination.[551] Such measures are aimed to "strike at the heart of the problem, to prevent its recurrence and to require that steps be taken".[552]

1. Designing a Non-Discriminatory FNCFS Program

490. As argued above, the Caring Society submits that substantive equality will only be achieved when First Nations children receive culturally appropriate services that take full

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[547] *Ibid* at 1145-6.
[548] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 SCR 789 at para 26 [*Communauté urbaine de Montréal*]. This decision was applied in *Ball v. Ontario (Community and Social Services)* supra note 112 at para 164.
[549] Upheld in *Canada (Attorney General) v Green,* 2000 CanLII 17146 (FC), [2000] 4 FC 629 at paras 79-80.
[550] *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 (CanLII) at para 165. Appeal allowed in part on other grounds in *Adga Group Consultants Inc v Lane,* 2008 CanLII 39605 (ON SCDC).
[551] *Hughes v Election Canada* supra note 545 at paras 79-80.
[552] *Robichaud v Canada (Treasury Board)* supra note 123 at p 94.

account of the greater needs caused by their historic disadvantage. Given that the *CHRA* provides a guarantee of substantive, and not formal equality, the Caring Society respectfully requests further remedies that will ensure that First Nations children receive substantively equal child welfare services over the long term. Due to Canada's incapacity to address the serious inequities in its FNCFS system on its own, as evidenced by Canada's lack of action over the last 15 years, the Caring Society submits that it is necessary to create a mechanism that will guide Canada through the process of achieving substantive equality for First Nations children.

491. A collaborative mechanism that involves the Commission, the Complainants and is broad enough to include the Caring Society's member agencies is particularly apposite given Canada's admitted lack of knowledge and expertise regarding culturally appropriate child and family services for First Nations.

492. Moreover, such a mechanism would give effect to the right of First Nations to participate and to consent freely to legislative and administrative measures affecting them, such as the parameters of a child and family services program. Those rights are imposed on Canada by the Honour of the Crown, and are also set forth in articles 18 and 19 of the United Nations *Declaration on the Rights of the Indigenous Peoples*:

> Article 18
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

493. To achieve substantive equality for First Nations children, the Caring Society seeks a three-step remedy.

494. First, AANDC must fund and reconvene the National Advisory Committee, with representation from the Commission and the Complainants to identify discriminatory elements in AANDC's provision of First Nations Child and Family Service Agencies.

495. Second, AANDC must fund tri-partite regional tables with representation from the Complainants and the possibility of participation by First Nations Child and Family Service Agencies to negotiate (not discuss) the implementation of equitable and culturally based funding mechanisms and policies for each region having the benefit of guidance from the National Advisory Committee.

496. Third, in partnership and consultation with the Complainants and the Commission, Canada must develop an independent expert structure with the authority and mandate to ensure that Canada maintains non-discriminatory and culturally appropriate First Nations Child and Family Services. This body must also be adequately and sustainably funded by Canada.

497. Section 53(2)(*a*) of the *CHRA* provides that the Tribunal may order the Respondent to take measures "in consultation with the Commission." As the Supreme Court held in *Action Travail des Femmes*,[553] this remedial power must be given a broad interpretation that provides the flexibility required to address complex situations of systemic discrimination. Moreover, as noted above, the *CHRA* must be interpreted in light of the particular legal status of First Nations. "Consultation," in this regard, must be understood in light of Articles 18 and 19 of the UN Declaration, quoted above, as well as in light of the decisions of the Supreme Court explaining how consultation must take place in order to maintain the honour of the Crown.[554] It is increasingly recognized that consultation, in this context, means that the government must engage in discussions with the aim of obtaining the consent of First Nations. In the Supreme Court's recent *Tsilhqot'in Nation* decision, reference is repeatedly made to the fact that the consultation process aims at obtaining the consent of the First Nation involved.[555]

498. In this context, the reference to "consultation with the Commission" in section 53(2)(*a*) should be considered as a threshold and not a ceiling. It is certainly open to the Tribunal to order

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[553] See generally *Action Travail* supra note 89 at p 1134.
[554] See especially *Haida Nation v British Columbia (Minister of Forests)* supra note 41.
[555] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, especially at paras 90, 92, 97.

the Respondent to consult with parties other than the Commission, especially the Complainants, in order to design a non-discriminatory FNCFS program. In any event, nothing would prevent the Commission from consulting the Complainants before discussing with the Respondent, and the language of the CHRA does not prevent the Tribunal from recognizing this reality. Most importantly, the principle of the honour of the Crown has been elevated to the status of underlying constitutional principle.[556] While such principles may not always give rise to enforceable duties, decision-makers must always exercise their discretion in light of them, and a discretionary decision made in disregard of a constitutional principle may be struck down.[557] The crafting of a proper remedy to eradicate discrimination lies at the heart of the Tribunal's discretion and expertise and that discretion must take the honour of the Crown into account. The Caring Society submits that, in light of the principle of the honour of the Crown and the ensuing duty to consult, the Tribunal should order Respondent to engage in a consultation process, involving the Complainants and other First Nations child and family services organizations, with the aim of achieving consensus on the measures that are required to eliminate discrimination and to realize substantive equality.

499. Practical considerations also call for such a process. If the Respondent is directed to consult with only the Commission, the latter will certainly want to consult with the Complainants before it engages in discussions with the Respondent, and this will likely slow down the process considerably. The Commission might even be required by the honour of the Crown to do so. Moreover, one crucial aspect of the remedies sought by the Caring Society is the adaptation of child and family services to the cultural needs and the historical disadvantage of First Nations. These needs and circumstances vary across the country. With all due respect, the Commission does not possess the cultural knowledge required to craft a program that ensures substantive equality. The Caring Society submits that the three-part remedy it is seeking is the most efficient manner of integrating these considerations into a non-discriminatory program, by having all the parties at the same table.

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[556] *MMF* supra note 43 at para 70 ("The Constitution [...] is at the root of the honour of the Crown").
[557] *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 (ON CA), 208 DLR (4th) 577 (Ont CA) at paras 176-180.

500. There is no doubt that, in the end, the Tribunal is empowered to order Respondent to adopt specific measures aimed at providing substantively equal child and family services to First Nations. What is at stake is the design of such measures. If, following a process in which the Complainants and other First Nations representatives are not involved, the Respondent proposes measures that do not achieve substantive equality, it is inevitable that further requests to order specific measures will be brought before the Tribunal. The Caring Society submits that a process of consultation, in which the government genuinely seeks to achieve consensus, is a more efficient alternative.

501. The Caring Society seeks an order that Canada provide reasonable funding for the expenses of the Complainants in the course of the National Advisory Committee and regional table process, as well as those of the First Nations Child and Family Services Agencies who choose to participate in this process.[558] The Caring Society and its member agencies are non-profit organizations with very limited resources. While their involvement in the proposed process would certainly contribute to the elimination of discrimination, it would also impose a significant burden upon them, which should be supported by Canada, who is the perpetrator of the discrimination that needs to be remedied. By way of analogy, it is common practice for the government to fund the costs of First Nations who are consulted according to the *Haida Nation* framework, and the presence of such funding is a factor that courts take into account in assessing whether sufficient consultation has taken place.[559] Put simply, the Caring Society and its members should not bear the cost of eliminating discrimination.

2. Training

502. Human rights tribunals have a broad discretion to promote the overarching objectives of the CHRA by ordering respondents who have been found in breach of their human rights obligations to implement training programs to prevent further discrimination from occurring in the future.[560] Such orders are one of the ways that human rights tribunal can ensure that

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[558] *Hughes v Election Canada* supra note 545 at paras 71, 79-80.

[559] *Tsuu T'ina Nation v Alberta (Minister of the Environment)*, 2010 ABCA 137 (CanLII), [2010] 2 CNLR 316 (Alta CA) at para 130; *Ka'a'Gee Tu First Nation v Canada (AG)*, 2012 FC 297 (CanLII) at paras 45-46, 113; *Conseil des Innus de Ekuanitshit v. Canada (AG)*, 2013 FC 418 (CanLII) at paras 125-129.

[560] *Pchelkina v Tomsons,* 2007 HRTO 42 (CanLII) at para, 32. *Vallee v Fairweather Ltd*, 2012 HRTO 325 (CanLII) at paras 7, 36.

discrimination will not reoccur and the underlying policies or behaviour that resulted in the discrimination are removed.[561] Accordingly, human rights tribunals have ordered respondents to create and implement training and education programs for their employees on a wide range of issues, including accessibility, sexual harassment, human rights and cultural sensitivity.[562]

503. The Caring Society submits that an order for Canada, in partnership with the Complainants and Commission to create and implement a training program would be appropriate in this case. It is submitted that one of the causes of the discrimination experienced by First Nations children through the FNCFS Program is the lack of training and knowledge regarding First Nations culture and historic disadvantage, human rights, social work and the FNCFS Program of AANDC's administration and staff. The Caring Society seeks the implementation of a training program so that behaviors that have resulted in the discrimination are remediated and do not reoccur.

504. As demonstrated by the evidence in this case, most of AANDC's administration and program staff do not have an educational background or training regarding First Nations peoples or social work. AANDC witnesses testifying for Canada had educational credentials in fields ranging from business administration, to forestry,[563] criminology,[564] and tourism. While these credentials have merit in related professions, they are unrelated to qualifications in social work, econometrics and Aboriginal studies that are directly relevant to the FNCFS Program. Sheilagh Murphy testified that she was not sure if any of her staff had any formal training in social work but recognized it would be good to have staff with social work qualifications.[565] The Caring Society submits that the lack of proper educational requirements among AANDC administrators and program staff were exacerbated by a lack of work experience in fields related to children, youth and families.

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[561] *Heintz v Christian Horizons*, 2008 HRTO 22 (CanLII) at para 242 [*Heintz* HRTO], varied on other grounds, *Ontario (Human Rights Commission) v. Christian Horizons*, 2010 ONSC 2105, [2010] O.J. No. 2059 (QL) (Div. Ct.) at paras 242-243 [*Heintz* ON Div Ct].
[562] A Akgungar, ed, *Remedies in Labour, Employment and Human Rights Law*, (Toronto: Carswell, 2014) at 6, 41-43.
[563] Carol Schimanke Examination in Chief, May 14, 2014 (Vol 61, pp 21-25).
[564] Barbara D'Amico "did a sociology course" but studied criminology and political sciences: Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 20, lines 14-20).
[565] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol. 55, pp 70-72).

505. Moreover, even after joining AANDC, new staff are not required to undergo training on the key reports and events shaping the AANDC FNCFS Program. For example, when asked whether she was familiar with the Joint National Policy Review commissioned by the Respondent in 2000, Barbara D'Amico testified that she was "supposed to say" that she had read it in great detail but that she had actually just skimmed through it.[566] The apparent lack of formal training for new staff working within the FNCFS Program is all the more troubling when considering what appears to be a common practice within AANDC to conduct its business mostly verbally. Ms D'Amico testified that the record keeping practice within the FNCFS Program were "not very diligent".[567] She explained :

> And no, a lot of it is verbal and I apologize, we don't have a lot of time to write things down, even though it looks like we write a lot of things down, but a lot of the stuff is done verbally. [568]

506. The potential value of having at least some AANDC staff trained in First Nations social work was also confirmed in the evidence presented to the Tribunal. It was established that the lack of training among AANDC staff caused Canada to underfund First Nations agencies based on false and unfounded assumptions about how these agencies operated. For example, Barbara D'Amico testified that when developing EPFA, she did not include a funding allocation for legal fees for children when taken into care because she had wrongly assumed that these were covered by the provinces.[569] Likewise, the same AANDC staff person was unaware that First Nations agencies were responsible for intake and investigations, one of their key functions, and consequently did not confer funding to First Nations agencies for this.[570]

507. The importance of having staff trained in social work was also demonstrated by the fact that AANDC staff occasionally second-guessed or sought to challenge the decisions of social workers providing on the ground services for FNCFSA's.[571] For example, Ms. D'Amico testified

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[566] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 169, lines 9-13).
[567] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 141, lines 1-2).
[568] Barbara D'Amico Cross-Examination, March 19, 2014 (Vol 52, p 141, line 1-5).
[569] Barbara D'Amico Cross-Examination (Vol 52, p 175, lines 12-23). Ms. Sheilagh Murphy also testified that agencies in Alberta were requesting more funding because "certain functions" were not included in the costing model. See Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, pp 74-75, lines 18-25, 1-3).
[570] Barbara D'Amico Cross-Examination (Vol 52, p 32). The witness testified that she was not made aware of this. However, the *Wen:de* reports clearly indicate that First Nations agencies are responsible for intake and investigations.
[571] Barbara D'Amico Cross-Examination (Vol 52, p 61, lines 20-25).

that she was of the opinion that among FNCFSA's "drug testing is taken too far on the pendulum to overcompensating."[572]

508. The Tribunal was also presented with evidence that First Nations Peoples reasonably believe that AANDC administrators and staff making decisions that affect First Nations children and families must understand First Nations histories and cultures. Chief Joseph summarized his community's view as follows:

> I know that ministries that aren't Aboriginal are going to be taking our kids and, at a minimum, we should be demanding some kind of cultural competency level for those outside people who don't understand culture and history, they should be provided a level of orientation, education that allows them to respond in the very best ways that they can. I don't think we can rebuild Aboriginal families without that.[573]

509. Individuals working within the FNCFS Program make decisions that impact the lives of over 163,000 First Nations children across our country.[574] Yet, the evidence in this case demonstrates that individuals working within the FNCFS Program generally have no formal education or training relating to First Nations culture or social work.[575] Moreover, at least one of Canada's witnesses testified that AANDC staff working in the FNCFS Program were not diligent in record keeping and conducted its business verbally. In the absence of accurate and consistent written documentation regarding AANDC's policies and practices, formal training for new staff is essential.

3. Public posting of AANDC policy, practices and other information relating to the FNCFCS Program

510. Human rights remedies can also have an important educational value, both for the parties to a complaint, and for the broader public.[576] As such, human rights tribunals have ordered

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[572] Barbara D'Amico Cross-Examination (Vol 56, p 62, lines 3-17). During her cross-examination, Ms. D'Amico acknowledged that some of these drug tests may have been ordered by a Family Court as a condition of the child returning to his or her home: Barbara D'Amico Cross-Examination, March 20, 2014 (Vol. 53 pp 193-194, lines 24-25, 1-2).
[573] Chief Robert Joseph Examination in Chef, January 13, 2013 (Vol. 42, p 94, lines 12-22).
[574] Dr. Cindy Blackstock, February 11, 2014 (Vol 47, pp 143-144, lines 12-22).
[575] The training program sought be the Caring Society is described in Appendix A.
[576] *Heintz* HRTO *supra* note 561 at para 242, varied on other grounds *Heintz* ON Div Ct *supra* note 561 at paras 242-243.

respondents to publicize information regarding a human rights case to help prevent future discrimination and to empower individuals who may experience discrimination. For example, in *Ontario (Ministry of Correctional Services),* the Ontario Human Rights Board ordered the respondent to publicize its decision by directing the preparation of a summary of both the 1998 and 2002 decisions for general circulation and a précis to be read at parade by senior officials.[577] Similarly, human rights tribunals have ordered to post Commission "Code Cards" in prominent locations that are accessible to all employees, to provide information about its willingness to provide accommodation in letters to job applicants and to post the human rights legislation or other information on human rights.

511. The Caring Society submits that the lack of information provided to FNCFSA's about Canada's policies, directives and practices, as well as data regarding children in care, is one of the causes of the discrimination experienced by First Nations children. For example, Ms. Murphy testified about the lack of consistency between regions and their use of the National Manual.[578] She went on to explain that AANDC could confer additional funding to agencies for maintenance in exceptional circumstances even though this information was not in the National Manual.[579] When asked about whether First Nations agencies were aware of this, she testified:

> Well, I don't know whether they are using old material or not, I can't speak to what regions are doing, that's not my -- I mean my staff could, but I can't.[580]

512. In order to promote First Nations children's best interests and right to be free from discrimination, the Caring Society seeks an order that Canada be ordered to post publicly all policies, directives and practices regarding its FNCFS Program and Jordan's Principle.[581] The Caring Society also asks that Canada be ordered to submit hard copies of this information annually to all First Nations agencies.

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[577] A stay of this order was lifted while the respondent sought to appeal this decision: *Ontario v McKinnon,* 2003 CanLII 32438 (ON SCDC), 2003 CarswellOnt 6167 (Ont Div Ct). The Ontario Divisional Court held that the cost of such orders was likely scant compared to the potential harm of allowing racism to persist within the Ministry.
[578] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 120, lines 9-14).
[579] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 120, lines 20-25).
[580] Sheilagh Murphy Cross-Examination, April 4, 2014 (Vol 55, p 123, lines 15-18).
[581] The information which the Caring Society asks that the Respondent be ordered to post is found in Appendix to these submissions.

D. Monetary Award

1. Human Rights Damages for Recognition of the Discrimination Experienced by First Nations Children

513. In addition to the broader social objective of eradicating discrimination in the present and the future, human rights remedies must provide victims of discrimination with some measure of recognition of the harm done to them. This recognition can be achieved in a variety of ways. Given several aspects of the complexity and novelty of this case, this Tribunal should heed the Supreme Court of Canada's call to show "flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[582] First, the individual victims of discrimination, First Nations children, are not complainants in this case. Second, this complaint is a systemic one that addresses a discriminatory program that has affected tens of thousands of First Nations children, if not more. Third, this Tribunal has not received evidence about the precise nature and extent of the harm suffered by each individual child; as this would have been an impossible task for the Commission and the Complainants. Fourth, the harm suffered by First Nations children follows on the heels of, and is intertwined with, other harms suffered by First Nations over time as a result of Canada's colonial policies. These harms cannot be compensated simply by an award of money.

514. Given those constraints, the Caring Society asks this Tribunal to use its power under section 53(3) of the *CHRA* to grant "special compensation" for Canada's wilful and reckless discriminatory conduct with respect to each First Nations child taken in out of home care since 2006. Due to the voluntary and egregious character of Respondent's omission to rectify discrimination against First Nations children, the Caring Society submits that the maximum amount, $20,000 per person, should be awarded. The amount awarded should be placed into an independent trust that will fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services. Several aspects of this request are explained below.

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[582] *Communauté urbaine de Montréal* supra note 548 at para 26.

2. Standing

515. Although the Complainants in this case are not "individuals" whose rights under the *CHRA* have been violated, the Caring Society submits that First Nations children who received discriminatory child welfare services are entitled to compensation for the pain and suffering they have experienced.[583] Nothing in the language of section 53(3) prevents this Tribunal from awarding compensation to "victims" who personally experienced discrimination where a complaint is substantiated, even if they did not personally lodge the complaint. In the absence of specific language, the Supreme Court of Canada has held that human rights tribunals and courts cannot limit the meaning of terms meant to advance the purpose of human rights legislation. [584]

516. Moreover, in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* the Supreme Court of Canada cautioned courts not to allow the fundamental rights of a vulnerable population to be violated without recourse due to the vulnerable population's lack of capacity, resources or expertise.[585] On the issue of standing, it wrote that

> Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected.[586]

517. As in *Downtown Eastside,* public interest litigants initiated this case on behalf of a disadvantaged population whose legal rights are at stake. The evidence presented by the Commission and the Complainants clearly established that First Nations children are amongst the most vulnerable segments of Canada's population.[587] The Caring Society submits that the fact that First Nations children do not have the resources or capacity to file individual complaints should not bar them from receiving human rights damages under the CHRA.

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[583] It is noted that the Respondent has not challenged the standing of the Complainants in this complaint.
[584] *Vaid* supra note 62 at para. 81
[585] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 51 [*Downtown Eastside Sex Workers*].
[586] *Downtown Eastside Sex Workers* supra note 585 at para 51.
[587] OAG Report 2011 (CBD, Tab 53, p 23). In her testimony, Dr. Blackstock also described First Nations children as the most vulnerable children in the country: Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 200, lines 19-24). See also *Mactavish J's Reasons* supra note 32 at para 334.

3. Wilful and Reckless Discrimination

518. Section 53(3) of the *CHRA* provides for awards of "Special Compensation" for wilful and reckless conduct, to a maximum of $20,000.00. This Tribunal has held that such damages are justified in cases where a respondent's conduct has been found to be "rash, heedless or wanton."[588] An award under section 53(3) may be likened to an award of exemplary damages and should be governed by similar rules. In particular, an award of exemplary damages does not depend on proof of prejudice. Exemplary damages may be awarded as a stand-alone remedy, even in the absence of compensatory damages.[589]

519. In a decision recently upheld by the Federal Court of Appeal, this Tribunal ordered a respondent to pay the maximum award under this heading due to its failure to take measures to change its discriminatory conduct despite its knowledge of its impact on the complainants. The Tribunal wrote:

> This Tribunal finds that CBSA, by ignoring so many efforts both externally and internally to bring about change with respect to its family status policies of accommodation has deliberately denied protection to those in need of it.[590]

520. The Tribunal also took issue with the fact that the Canada Border Services Agency, the respondent in *Johnstone,* had apologized for similar conduct in the past, yet had done little to remedy the situation. It wrote:

> CBSA, and its organizational predecessor's lack of effort and lack of concern takes many forms over many years including: disregard for the *Brown* decision after writing a letter of apology; developing a model policy and then burying it (some management knew of it, some did not); pursuing arbitrary policies that are unwritten and not universally followed; lack of human rights awareness training even at the senior management level; the proffering of a floodgates argument 5 years after the complaint with the Respondent giving insufficient time and data to its own expert to enable him to provide a helpful expert opinion; and no attempt to inquire of Ms. Johnstone as to her particular circumstances or inform her of

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[588] *Brown v. Canada (Royal Canadian Mounted Police),* 2004 CHRT 24 (CanLII) at para 16.
[589] *De Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64.
[590] *Johnstone v Canada Border Service Agency,* 2010 CHRT 20 (CanLII) at para 380.

> options to meet her needs.[591]

521. As was the case in *Johnstone,* the Respondent in this complaint has a long history of discriminatory treatment, despite repeated internal and external efforts to bring about change. According to the evidence before the Tribunal, Canada was formally made aware of its discriminatory treatment as early as 2000, through a report it commissioned entitled the Joint National Policy Review.[592] Amongst other things the NPR found that Directive 20-1, which the Respondent continues to apply in three provinces and the Yukon Territory and which forms the basis of EPFA, was outdated.[593] The report also presented Canada with comparative evidence indicating that First Nations children were receiving lower levels of service when compared to non-First Nations children. Dr. Blackstock explained the findings of the NPR as follows:

> There were significant concerns about the comparability of the funding. The report says that there was 22 percent less funding for First Nations Children and Family Services.[594]

522. The report also raised concerns about the impact of jurisdictional disputes on First Nations children. Dr Blackstock summarized the NPR's finding in that regard in the following manner:

> Given that we had jointly decided, around this table, that the paramount consideration was the child, any differences between or within governments or any inconsistencies of government policy to what is in the best interests of the child needed to be sorted out because, at that point, there was a shared recognition that these inconsistencies of these disputes between governments about who should fund services were getting in the way and were creating denials of service or unequal service or unequal access to service.[595]

523. In a letter dated August 7, 2001, the then Minister of Indian and Northern Affairs, confirmed that he had reviewed the draft final report of the NPR. He went on to state that he hoped to implement the report's recommendations and stated that the argument for additional

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[591] *Johnstone v Canada Border Service Agency,* supra note 590 at para 381.
[592] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 28). The NPR was formed of representatives of the then Department of Indian and Northern Affairs, the Assembly of First Nations and First Nations agencies and was funded by the Respondent.
[593] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 32, lines 18-25).
[594] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, p 32, lines 21-25). See also *NPR*, June 2000 (CBD, Vol 1, Tab 3, p 14).
[595] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 39, lines 10-21). See also NPR (CBD, Vol 1, Tab 3, p 120).

funding would be "very strong".[596] Despite this, and the creation of an implementation review committee, very few of the NPR's recommendations were actually implemented.[597]

524. In 2004, Canada again undertook an extensive study that made it aware of the discriminatory manner in which it was treating First Nations children. What would become a series of three reports confirmed many of the NPR findings, particularly in relation to the treatment of small agencies, the lack of prevention services, the need for increased investments in capital, and legal expenses and to restore inflation losses, and finally the need to recognize the higher needs of First Nations children and the adverse impact of jurisdictional disputes between different level of government.[598] The last report, *Wen:de: the Journey Continues*, recommended an evidence-informed funding formula for First Nations agencies that would allow for equitable and culturally appropriate services that take into account the greater needs of First Nations children as well as mechanisms to regularly review and update the formula.[599]

525. Canada itself has recognized that its FNCFS Program does not provide equal child welfare services to First Nations children. In 2007, the following text appeared on INAC's own website:

> the current federal funding approach to child and family services has not let First Nations Child and Family Service agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding of First Nations Child and Family Service Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for agencies to meet their mandated responsibilities[600]

526. In addition to this, internal AANDC staff working within the FNCFS Program acknowledged and voiced concerns about the unequal level of services provided to First Nations

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[596] Hon. Robert D Nault, *Letter Regarding the Final NPR Report* (CBD, Vol 6, Tab 76, p 2).
[597] Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, p 89-90, lines 4-25, 1-12). Dr. Blackstock testified that one of the recommendations "moved forward".
[598] These reports are Bridging Econometrics with First Nations Child and Family Services (CBD, Vol 1, Tab 4); *Wen:de: We are coming to the light of day* (CBD, Vol 1, Tab 5); *Wen:de The Journey Continues* (CBD, Vol 1, Tab 6). See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol 2, pp 121-126).
[599] See Dr. Cindy Blackstock Examination in Chief, February 26, 2013 (Vol. 2, pp. 127-128).
[600] AANDC, *Fact Sheet - First Nations Child and Family Services*, October 2006 (CBD, Vol 4, Tab 38, p 2).

children. An undated internal document described the circumstances for First Nations agencies as "dire."[601] In a paper examining the issue of provincial comparability of the FNCFS Program, Vince Donoghue, former INAC staff, called the level of funding "woefully inadequate."[602] His paper also recognized that the inequitable services available through the FNCFS Program was one of the "important contributing factors" to the disproportionate number of First Nations children in care.[603] One government official testified that child welfare workers are perceived as "baby snatchers" or "bad guys" in many First Nations communities.[604]

527. As in *Johnstone*, external actors also voiced repeated concerned about the Respondent's discriminatory treatment. From 2000 to 2012, Canada received letters from representatives of the provinces of New Brunswick, Nova Scotia, Alberta, Saskatchewan and British Columbia expressing concerns that the FNCFS Program was not comparable to the child welfare services available off-reserve and did not meet the needs of First Nations children.[605] In 2009, the Minister of Children and Family Development and the Minister of Aboriginal Relations and Reconciliation for the Province of British Columbia, wrote to then-INAC Minister Strahl to express their concerns about Direction 20-1 and urged the Respondent to take measures to ensure equity in child welfare services to First Nations children.[606]

528. In 2008, the Auditor General of Canada undertook an extensive review of the FNCFS Program. The key findings of the Auditor General were summarized as follows:

- The funding INAC provides to First Nations child welfare

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[601] *First Nations Child and Family Services (FNCFS): Q's and A's* (CBD, Vol 6, Tab 64, p 1).
[602] Vince Donoghue, *Issue : To ensure that First Nations families and children on reserve have access to provincially comparable Child and Family Services*, September 24, 2010 (CBD, Vol 11 Tab 234, p 2).
[603] *Ibid* (CBD, Vol 11 Tab 234, p 2).
[604] Barbara D'Amico Examination in Chief, March 18, 2014 (Vol 51, p 94, lines 1-13).
[605] Hon. Joanne Crofford, *Letter to the Hon. Andy Scott Regarding Upcoming Amendments to the Child and Family Services Act*, January 17, 2005 (CBD, Vol 10, Tab 207); Hon. Iris Evans, *Letter to the Hon. Robert D. Nault Regarding Federal Funding of Child and Family Services*, March 15, 2000 (CBD, Vol 14, Tab 370); Hon. Iris Evans, *Letter to Hon. Jane Stewart Regarding Delay in Announcing Release of Early Childhood Development Funding for Aboriginal Peoples in Alberta*, March 11, 2003 (CBD, Vol 14, Tab 371); Hon. Heather Forsyth, *Letter to the Hon. Andy Scott Seeking a Federal Commitment to Include Early Intervention Funding in Anticipated On-Reserve Funding Model*, August 19, 2005 (CBD, Vol 14, Tab 373); Hon. Stephanie Cadieux, *Letter to the Hon. Bernard Valcourt and the Hon. Rona Ambrose Regarding the Enhanced Prevention Funding Agreement*, February 5, 2014 (CBD, Tab 416).
[606] Hon. Mary Polak and Hon. George Abbott, *Letter to the Hon. Chuck Strahl Regarding the Implementation of Jordan's Principle*, November 17, 2009 (CBD, Vol 6, Tab 69). The then Minister of Indian and Northern Affairs declined the request for a meeting stating he did not have time in the near future: Hon. Chuck Strahl, *Letter of Reply to the Hon. Mary Polak and the Hon. George Abbott Regarding Jordan's Principle*, January 21, 2010 (CBD, Vol 6, Tab 70).

> agencies for operating child welfare services is not based on the actual cost of delivering those services. It is based on a funding formula that the Department applies nationwide. The formula dates from 1988. It has not been changed to reflect variations in legislation and in child welfare services from province to province, or the actual number of children in care. The use of the formula has led to inequities. Under a new formula the Department has developed to take into account current legislation in Alberta, funding to First Nations agencies in that province for the operations and prevention components of child welfare services will have increased by 74 percent when the formula is fully implemented in 2010.
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> • The Department has not defined key policy requirements related to comparability and cultural appropriateness of services. In addition, it has insufficient assurance that the services provided by First Nations agencies to children on reserves are meeting provincial legislation and standards.
>
> • INAC has not identified and collected the kind of information it would need to determine whether the program that supports child welfare services on reserves is achieving positive outcomes for children. The information the Department collects is mostly for program budget purposes.[607]

529. The Auditor General also noted that Canada had known about the shortcomings of the formula for years.[608] The Standing Committee on Public Accounts, for its part, examined Canada's response to the Auditor General's report regarding the FNCFS Program. In a March 2009 report, the Committee criticized Canada for failing to take measures to remedy the deficiencies identified by the Auditor General the year prior. The report stated:

> The work for the audit on the First Nation Child and Family Services Program was completed on 9 November 2007, and the audit was tabled in Parliament on 6 May 2008. However, the Deputy Minister and Accounting Officer for INAC, Michael Wernick, only provided vague generalities in his opening statement about the Department's actions in response to the audit; though, he did commit to providing a follow-up report to the Committee in April. When asked if he had a concrete and specific action plan to provide to the Committee, Mr. Wernick said "we have an action plan in the sense that we're pursuing these various

[607] OAG Report 2008 (CBD, Vol 3, Tab 11, p 6).
[608] *Ibid* (CBD, Vol 3, Tab 11, p 21).

> initiatives. That was the undertaking I made at the beginning: that it would be going to my audit committee in the month of April and we'd provide it to the committee. It will go through each recommendation and give more specifics on what we're doing or what we already have done.
>
> While the Deputy Minister verbally committed to providing an action plan and follow-up report to the Committee in April, the Committee is very concerned that there is no evidence of an action plan currently in plan, and that it would take too long to finalize an action plan.[609]

530. The Auditor General of British Columbia also brought the inequalities in Canada's FNCFS Program to Canada's attention in 2008. In his report, he confirmed what the Auditor General of Canada had concluded. He wrote:

> Neither government takes policy requirements sufficiently into account when establishing levels of funding for child welfare services. Under federal and provincial policies, Aboriginal children, including First Nations children, should have equitable access to a level and quality of services comparable with those provided to other children. Funding for the services needs to match the requirements of the policies and also support the delivery of services that are culturally appropriate — which is known to take more time and resources. Current funding practices do not lead to equitable funding among Aboriginal and First Nations communities. [610]

531. The report also reiterated the findings of the NPR and the Wen:de reports regarding the perverse outcomes of the inequitable child welfare services provided through the Respondent's FNCFS Program. The report stated:

> The federal funding formula does not limit the options for services a delegated Aboriginal agency may provide; however, in the view of the delegated agencies the amount of funding was insufficient to cover the cost of providing out-of-care options (such as placing a child at risk with extended family). Furthermore, both the National Policy Review in 2000 and the Wen:de report in 2005 concluded that federal funding rates are insufficient to pay for providing services

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[609] House of Commons Standing Committee on Public Accounts, *Report on Chapter 4 of the May 2008 Report of the Auditor General*, March 2009 (CBD, Vol 3, Tab 15, pp 3-4).

[610] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 2).

> comparable with those for non-First Nations children. The unintended consequence was that children were removed from their families (taking the child into care), as the funding for this option was being covered by INAC.[611]

532. The BC Representative for Youth and Children also took issue with Canada's lack of leadership and failure to take an active role in ensuring that the needs of First Nations children are met. She wrote:

> In terms of silence, the absence of any real effort by Aboriginal Affairs and Northern Development Canada (AANDC) to take an active role in fulfilling its fiduciary role to children and youth with special needs or mental health needs living on-reserve is deafening. Even in terms of ensuring that the child welfare system operates – a system it funds and endorses – this investigative report found no concern or leadership by the federal department. That standard is too low given the known risk of harm to girls such as this one.[612]

533. Canada has also been faced with international pressure to address the inequalities in its FNCFS Program. In particular, the United Nations Committee on the Rights of the Child expressed concerns regarding Canada's lack of action following the Auditor General's 2008 report regarding the FNCFS Program and urged the government to address the inequalities in children welfare services available to First Nations children.[613]

534. External child rights experts also called on Canada to put an end to jurisdictional disputes that caused First Nations children to experience delays or to be denied essential government services. In a 2010 report, the New Brunswick Youth and Child Advocate recognized that such disputes were systemic, rather than isolated incidents. The 2010 report stated:

> When one reviews the saga of these lengthy, plodding federal-provincial-First Nations negotiations against the backdrop of rampant rates of teen suicides, Fetal Alcohol Spectrum Disorder, youth incarceration and low scholastic achievement, it is hard to escape the conclusion that what is happening here is a Jordan's

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[611] Office of the Auditor General of British Columbia, Management of Aboriginal Child Protection Services, May 2008 (CBD, Vol 5, Tab 58, p 32).
[612] British Columbia Representative for Children and Youth, *Lost in the Shadows: How a Lack of Help Meant a Loss of Hope for One First Nations Girl*, February 2014 (RBD, R13, Tab 24).
[613] UN Committee on the Rights of the Chid, *Consideration of reports submitted by State parties under article 44 of the Convention – Concluding Observations: Canada*, October 5, 2012 (CBD, Vol 5, Tab 57, p 9, para 42).

> Principle scenario played out on a systemic scale.[614]

535. Canada has provided no reasonable explanation as to why it has failed to take measures to remedy the numerous inequities identified by both internal and external experts and reports since 2000. When asked why Canada continued to determine levels of funding to agencies based on the assumption that only 6% of children were in care, after the Auditor General found that this led to inequities in services, Barbara D'Amico replied that she did not know.[615] Sheilagh Murphy was also questioned about the Auditor General's conclusion that the child welfare services on reserves were not comparable to those provide off-reserve. She simply replied "it's an observation by the Auditor General."[616] On the subject of the flaws identified by the Auditor General regarding EPFA, she testified that she was not sure about the specifics that she was pointed to or whether any changes had been made.[617]

536. Ms. Murphy was also cross-examined regarding the 14-year delay in implementing the recommendations made by the NPR in British Columbia. She provided the following response:

> Yes, B.C. is still waiting for the EPFA. As I said yesterday, we have tried to work with them, we have given -- there are some transitional dollars, but certainly, until you have EPFA, you are not going to be a will to do all of the prevention work that other jurisdictions who have transitioned are undertaking.[618]

4. Amount of "special compensation" damages

537. According to the language of section 53(3), "special compensation" damages are awarded where the discriminatory practice is willful or reckless. It follows logically that the gravity of the willful or reckless character of Canada's conduct is the main factor to be taken into account in order to determine the amount of the award. The foregoing discussion highlights the fact that Canada has known for many years that its funding of First Nations child and family services was inadequate and discriminatory, and yet has taken very few steps to stop the crisis in its FNCFS

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[614] Office of the Ombudsman and Child and Youth Advocate (New-Brunswick), *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick*, February 2010 (CBD, Vol 5, Tab 60, p 21).
[615] Barbara D'Amico Cross-Examination, March 20, 2014 (Vol 53, p 129, lines 9-10).
[616] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 141, lines 4-5).
[617] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 147, lines 15-19).
[618] Sheilagh Murphy Cross-Examination, April 3, 2014 (Vol 55, p 145, lines 11-19).

system, despite having been urged to do so by a wide array of Canadian and international bodies or officials.

538. Canada's conduct is even more serious when considered in light of the fact that child and family services are an essential public service; inadequacies in this essential public service hampers the development of children and may even put their lives in jeopardy. Moreover, the cultural inadequacy of the FNCFS program breaches Canada's fiduciary duty not to put obstacles to the transmission of First Nations cultures, as noted in the introductory section of this factum. Indeed, in light of the reality that First Nations children are particularly vulnerable to Canada's actions, Canada's failure to rectify its conduct is only the more reckless.

539. As in *Johnstone,* the Respondent in this case has not provided a rational explanation for its continuous failure to respond to internal and external efforts to end the discrimination to which First Naitons children have been subjected in the context of the FNCFS system. Also, much like the respondent in *Johnstone,* the Respondent in this case has apologized for past discriminatory conduct, yet has continuously showed a lack of effort and concern when similar allegations of discrimination have been made against it.[619] In that case, the maximum amount of $20,000 was awarded. In light of the similarities with *Johnstone*, the Caring Society seeks an award granting $20,000 per child in care for the Respondent's willful and reckless discriminatory conduct.

540. It should also be emphasized that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. In that context, it is certainly not unjust or exaggerated to require the federal government pay an amount of $20,000 in respect of each First Nation child taken in care since 2006, that is, one year before the Complaint was filed.

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[619] The Right Hon. Stephen Harper On Behalf of the Government of Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008 (CBD, Vol 3, Tab 10). See also Dr. Amy Bombay, Dr. Kim Matheson and Dr. Hymie Anisman, *Expectations Among Aboriginal Peoples in Canada: The Influence of Identity Centrality and Past Perceptions of Discrimination*, 2013 (CBD, Vol 14, Tab 341) where the AFN's expert witness discussed the impact of the apology on perceived discrimination.

5. Award for willful and reckless discrimination to be put into a Trust to provide redress to First Nations children who experienced discrimination

541. Considering the willful and reckless character of Canada's conduct, the Caring Society seeks an award of $20,000 per First Nations child who was in care from February 2006 to the date of the award.[620] The Caring Society asks that these damages be paid into an independent Trust Fund that will ensure that the damages are used to the benefit of First Nations children who have experienced pain and suffering as a result of Canada's discriminatory treatment. In particular, the objective will be to allow First Nations children to access services, such as language and cultural programs, family reunification programs, counselling, health and wellness programs and education programs

542. While conferring individual remedies under 53(2)(e) into a Trust may be an uncommon approach to compensation under the *CHRA*, the Caring Society submits that such a remedy is appropriate and just in light of the unique circumstances of this case, and would give effect to the Supreme Court of Canada's recognition of "the need for flexibility and imagination in the crafting of remedies for infringements of fundamental human rights."[621] Put simply: the magnitude and multi-faceted nature of the prejudice suffered by First Nations children requires an innovative remedy.

543. The Caring Society submits that an in-trust remedy that will lead to the establishment of a program of healing measures directed at persons who have been subjected to substandard child and family services is better suited to offering the children who have been taken into care since 2006 a meaningful remedy than awards of individual compensation could ever be. In this regard, an analogy may be drawn to the component of the Indian Residential Schools Settlement that provided for the payment of amounts to a healing foundation for the purpose of setting up healing programs for the benefit of survivors. A similar approach has also been used in certain class actions where the distribution of money to individual victims is unfeasible or

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[620] The Caring Society seeks compensation for all children who were affected by the Respondent's discriminatory conduct within one year of the filing of its complaint and onwards. An estimation of the number of children involved may be found in CBD, Vol 13, Tab 296.
[621] *Communauté urbaine de Montréal* supra note 548 at para 25.

impractical.[622] Moreover, unlike most human rights complaints, this case involves children. Paying the compensation to which they are entitled into a Trust will help ensure that the award is used in a manner that will redress the harms that these children have suffered and, in light of the intergenerational impacts of such harms, will be of benefit to generations of First Nations children yet to come. As such, the Caring Society submits that conferring the compensation to a Trust is the approach most consistent with the spirit of the CHRA and the objectives of section 53(3).

E. Retaining jurisdiction

544. The Caring Society respectfully requests that the Tribunal retain jurisdiction over this matter until the parties have agreed that the FNCFS Program provides reasonably comparable and culturally appropriate services that take into account the unique needs of First Nations children and that effective mechanisms are in place to prevent the recurrence of discrimination. The Caring Society submits that, given Canada's past inaction when confronted with well-founded allegations of discrimination, the ongoing involvement of the Tribunal is necessary to ensure the full and timely implementation of the Tribunal's orders.

545. In cases where there is evidence that there may be delays or complications in implementing an order, human rights tribunals have accepted to retain jurisdiction over a complaint after issuing an order. In *Ontario (Ministry of Correctional Services),* for example, the Board initially made an extensive remedial order in 1998 based on a finding of racial discrimination that included amongst other things, the publication of the Board's order and the establishment of a human rights training program. The Board retained jurisdiction "until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of any aspect of them". Four years later, the complainant returned to the Tribunal to seek to enforce aspects of the order that had not been complied with.[623] Likewise, the Ontario Human Rights Tribunal, for example, has ordered its members to monitor the implementation of systemic remedies, such as the development and

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[622] In *Sutherland v Boots Pharmaceutical PLC*, [2002] OJ No 1361 (Ont SCJ) (QL) at para 9, the Ontario Superior Court of Justice approved a class action settlement according to which an aggregate amount was to be distributed to non-profit organizations rather than individuals. See also *Clavel c Productions musicales Donald K Donald Inc*, JE 96-582, [1996] JQ no 208 (CSQ)(QL) at paras 43-45.

[623] *Ontario v McKinnon* supra note 577 at para 10; affirmed [2004] OJ No 5051, 2004 CarswellOnt 5191 (Ont CA).

implementation of an accessibility plan.[624] More recently in *Hughes*, this Tribunal accepted to remain seized of a matter, although the evidence established that the respondent in that case was already attempting to address many of the systemic problems regarding accessibility that had been identified in the Complaint.[625]

546. The Caring Society submits that the Respondent in this case has not demonstrated the goodwill to meaningfully address known problems in its FNCFS Program that cause First Nations children to experience discrimination and to suffer irreparable harm. As demonstrated by the evidence, the Respondent was first formally made aware that it was not providing equal child and family services to First Nations children in 2000. Nearly 15 years later, numerous individuals within the Respondent's staff, First Nations governments, FNCFSA, provincial governments, youth advocates and international child rights experts continue to voice concerns regarding Canada's discriminatory First Nations child welfare services. Canada has provided no reasonable justification as to why it has not remedied this situation. The evidence has also established that the consequences of this discrimination are grave for the over 163,000 children the FNCFS Program currently serves. Given that this case involves vulnerable children and their families, the Caring Society respectfully requests the Tribunal remain seized of this matter to ensure that its orders are fully implemented in a timely manner.

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[624] *Lepofsky v TTC,* 2007 HRTO 23 (CanLII), 61 CHRR 511 at paras 12-14.
[625] *Hughes v Election Canada* supra note 545 at para. 99. It is noted however, that all of the parties had agreed upon this.

F. Specific Remedies Sought

DECLARATORY RELIEF

Pursuant to s. 53(2) of the *CHRA* the Caring Society seeks the following declarations with regard to the Respondent's discriminatory practices in its provision of the First Nations child and family services program:

General

1) The *Canadian Human Rights Act* requires the Respondent to provide First Nations child and family services that (a) are culturally appropriate; (b) take into account the unique needs and historic disadvantage of First Nations communities; and (c) are funded to a level that ensures the provision of services in a manner that is reasonably comparable to services offered off-reserve, and that the Respondent has failed to fulfill that duty;

2) The Respondent's failure to provide adequate and sustained levels of funding for primary, secondary and tertiary prevention services to maintain children safely in their family homes is discriminatory on the basis of race and national or ethnic origin contrary to section 5 of the CHRA;

3) The Respondent's failure to coordinate services with other Federal Departments to ensure First Nations children and families are not denied, delayed or adversely affected in the access to services available to the public is discriminatory on the basis of race and national or ethnic origin contrary to section 5 of the CHRA;

4) The Respondent's failure to fund all child and family services mandated by provincial/territorial legislation is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

5) The Respondent's practice of providing higher levels of funding with fewer reporting requirements and more flexibility to non- Aboriginal recipients than it provides to First

Nations child and family service agencies is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

6) The Respondent's failure to provide funds for culturally based standards and program development, operation and evaluation is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

7) The Respondent's failure to adjust its practices to ensure children served by a First Nations child and family service agency serving less than 1000 eligible children on reserve receive comparable and culturally appropriate services is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;

8) The Respondent's failure to fund costs related to First Nations child and family service agencies with multiple offices is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA;

9) The Respondent's failure to adequately fund First Nations child and family service agency staff salaries, benefits and training at levels comparable to those received by non-Aboriginal child and family service agency staff is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA; and

10) The Respondent's failure to fund capital costs for First Nations child and family service agencies to ensure buildings, computers and vehicles meet building codes, are child safe, accessible by persons with disabilities and support comparable child and family services is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA.

Jordan's Principle

1) The Respondent's current definition of Jordan's Principle causes First Nations peoples to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA; and

2) The Respondent's current implementation of Jordan's Principle causes First Nations peoples to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA.

Directive 20-1

1) Directive 20-1 causes First Nations children in need of child welfare services to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA; and

2) Directive 20-1 disadvantages First Nations families by providing a differential level of service and denial of services, contrary to section 5 of the CHRA.

EPFA

1) The Respondent's current structure and implementation of EPFA causes First Nations children in need of child welfare services to experience discrimination on the basis of their race and national or ethnic origin, contrary to section 5 of the CHRA.

Ontario

1) The Respondent's failure to comply with all provisions of Ontario's *Child and Family Services Act* is discriminatory on the basis of race and national or ethnic origin, contrary to section 5 of the CHRA;
2) The Respondent's failure to provide prevention services to all First Nations children and families on reserve in Ontario is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA; and

3) The Respondent's failure to provide funding that takes into account increased costs in remote areas is discriminatory on the basis of race and national or ethnic origin and contrary to section 5 of the CHRA.

ORDERS TO CEASE DISCRIMINATORY CONDUCT

Pursuant to s. 53(2)(b), the Caring Society seeks orders that the Respondent make available to First Nations children the rights, opportunities and privileges that are being denied to First Nations children as a result of the Respondent's discriminatory practices in its provision of the First Nations Child and Family Services program by:

General

1) Fully reimbursing maintenance costs related to children in care in the year in which they are incurred;

2) Fully reimbursing all legal and staffing costs related to child welfare statutes and inquiries as maintenance, including legal costs related to child welfare investigations, child removals and the application of ongoing orders;

3) Providing upwards adjustments according to real figures for agencies where the proportion of children in care exceeds Respondent's assumption of 6% and where the proportion of families receiving services exceeds Respondent's assumption of 20%;

4) Using the Consumer Price Index, immediately increasing the rates for the reimbursement of expenses to take into account the lost purchasing power resulting from the Respondent's cessation of inflation adjustments since 1996;

5) Providing annual inflation adjustments based on the Consumer Price Index on an ongoing basis;

6) Immediately increasing the rates for costs included in the operations base amount currently valued at $143,000 per annum according to the formula as set out in *Wen:de: the Journey Continues* (CHRC Documents, Tab 6, pages 24-25) that were established in 1989 to take into account current cost values;

7) Fully reimbursing corporate legal costs and ceasing to cap those costs at $5000;

8) Providing adjustments for taking into account the remoteness factor in the reimbursement of costs according to the formula set out in *Wen:de, the Journey Continues* (CHRC Documents, Tab 6, pages 25-26);

9) Funding emergency repairs and routine maintenance for buildings to ensure child and family services offices maintain compliance with building codes and maintain reasonable comparability to child and family services facilities off reserve;

10) Ceasing reducing operations funding by 25% quantums pursuant to AANDC's arbitrary population thresholds of 251, 501, 801;

11) Allowing First Nations Child and Family Services Agencies to retain the CSA for quality of life programs for children and cease any reductions in funding allocations for First Nations child and family service agencies related to the CSA;

12) Ceasing the practice of recovering program cost over-runs from other programs for First Nations Peoples;

13) Examining requests for new First Nations child and family service agencies that meet the exception criteria set out in the 2012 AANDC policy and approving them if they meet the criteria;

14) Reimbursing costs for the participation of band representatives in child protection legal proceedings where that participation is provided for in provincial or territorial legislation; and

15) Ensuring that all funding increases pursuant to these orders are made with new funding, and not through reallocation of existing funding within the department.

Jordan's Principle

1) Applying Jordan's Principle to disputes between federal government departments;

2) Applying Jordan's Principle to all First Nations children and with respect to all educational, health and social services customarily available to children;

3) Becoming the payer of first resort in all cases covered by Jordan's Principle; and

4) Gathering and publicly listing the names and contact details of the Jordan's Principle focal point in every region and at headquarters.

Directive 20-1

1) Ceasing to apply Directive 20-1 within six months; and

2) Transitioning the jurisdictions currently regulated by Directive 20-1 to EPFA within six months, subject to the orders requested above. The value and structure of this initial transition from Directive 20-1 to EPFA is further subject to the recommendations of the National Advisory Committee and regional tables described below.

EPFA

1) Discontinuing the practice of requiring agencies to draw on their operations and prevention budgets to make up for increases in maintenance activities.

Ontario

1) Performing, within one year, a special study of the application of FNCFS in Ontario, through a mechanism developed through the agreement of the parties and with accompanying funding that allows for the meaningful participation of First Nations child and family service agencies, First Nations governments, AANDC, and the Province of Ontario to determine the adequacy of the 1965 Agreement in achieving: 1) comparability

of services; 2) culturally appropriate services; and 3) ensuring the best interests of the child are paramount;

2) Providing full reimbursement of activities that are mandated by the Ontario *Child and Family Services Act*; and

3) Providing an additional 5 million dollars for prevention services to First Nations child and family service agencies in Ontario.

NATIONAL ADVISORY COMMITTEE, REGIONAL TABLES AND PERMANENT MONITORING

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent take the following measures, in consultation with the Commission and the Complainants, to redress the Respondent's discriminatory practices in relation to its provision of Jordan's Principle and the First Nations child and family services program and to prevent the same or similar discriminatory practices from occurring in the future:

1) Establish and fund meaningful participation in a National Advisory Committee composed of staff from AANDC Headquarters, AANDC regional offices, the Complainants, and which allows for equal participation of First Nations child and family services regional representatives (including funding to support the meaningful participation of First Nations child and family services regional representatives) to examine, make recommendations and monitor the implementation of a funding formula that ensures that First Nations children receive child welfare services that are reasonably comparable, culturally appropriate, and that take into account the unique needs of First Nations children, in all regions;

2) Participate in a negotiation process in which the above-mentioned National Advisory Committee examines, makes recommendations to the Respondent, and monitors the implementation of recommendations regarding, the following:

General

a) General funding structure, stacking provision considerations and considerations of eligible costs;
b) Provisions for First Nations children not served by a First Nations child and family services to ensure comparable and culturally appropriate services;
c) Provisions for extraordinary costs related to unusual occurrences that engage higher child welfare costs such as natural disasters, substantial increases in mental health or substance misuse, and unusual requirements for mandatory staff participation in inquiries;
d) Provisions for organizational networking and learning to promote the sharing of research and best practices amongst First Nations child and family service agencies;
e) A process for economically modelling revisions to funding policy and formula and evaluating the efficacy of such changes on an ongoing basis to ensure they are non-discriminatory and safeguard the best interests of the children;
a) A funding structure that takes into account costs related to historic disadvantage; and
b) Staff salaries, benefits, and training.

Maintenance

a) Calculation of yearly maintenance;
b) Appeal mechanisms regarding eligible maintenance expenses;
c) Reimbursement of legal costs; and
d) Funding of support services intended to reunite children in care with their family.

Operations

a) Baseline assumptions of children in care for funding of agencies;
b) Inflation losses and annual adjustment;
c) Corporate legal costs;
d) Funding of remote agencies;

e) Funding for records management, policy development and human resources management, liability insurance, audits, janitorial services and security;
f) Funding of costs related to the receipt, assessment and investigation of child welfare reports for all agencies that hold delegation for these functions including costs for after-hours service delivery;
g) Funding of capital costs that takes into account increased need due to augmentation of prevention staff, services and programs;
h) Funding of emergency repairs and maintenance of buildings;
i) Funding for staff travel and travel costs related to children and families receiving child welfare services;
j) Definition of eligible child; and
k) Any changes to the funding structures to FNCFSA or their reporting requirements.

Prevention Funding

a) Funding for the adequate and sustained provision of primary, secondary and tertiary prevention services; and
b) Funding for the development and evaluation of culturally based prevention programs.

Jordan's Principle

a) The implementation of an inclusive definition of Jordan's Principle;
b) The creation of a non-discriminatory and transparent process for reporting Jordan's Principle cases;
c) The creation of non-discriminatory and transparent assessment criteria and assessment processes for reports of Jordan's Principle cases; and
d) The creation and implementation of an appeal process for Jordan's Principle cases.

Accountability

a) Funding for the periodic assessment of each agency's program; and

b) The creation of publicly funded mechanism to act as a national and publicly accessible repository for all non-privileged information relevant to First Nations child welfare services.

3) Establish and meaningfully fund participation in regional tables to complement the National Advisory Committee, to be composed of regional representatives of the Respondent and the Complainants, and which allow for the equal participation of the First Nations child and family services agencies of the region concerned, with the mandate of reaching agreement on a non-discriminatory funding formula for First Nations child and family services in the region concerned, taking into account the specific situation and cultural needs of the region concerned. The Respondent will provide adequate and sustained funding to enable the meaningful participation of the Complainants and First Nations child and family service agencies;

4) In a spirit of reconciliation and in accordance with international standards, the foregoing measures must be applied in good faith and with the objective of reaching agreement on the measures that need to be taken to ensure a non-discriminatory provision of First Nations child and family services; and

5) The creation of an independent permanent expert structure with the authority, resources and mandate to monitor and publicly report on the Respondent's performance in maintaining non-discriminatory and culturally appropriate First Nations child and family services and in fully implementing Jordan's Principle. This independent structure will provide a detailed public report on at least an annual basis.

POSTING OF INFORMATION

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent cease its discriminatory practices in relation to its First Nations child and family services system and take the following measures:

1) Without delay, and on an annual basis thereafter, post non-identifying data on the number of children in care and the number of days of care by region and nationally;

2) Without delay, post and keep up-to-date all funding formulas, policies, manuals, directives and appeal mechanisms and distribute electronic and hard copies of such information to all First Nations child and family service agencies;

3) Without delay, post and keep up-to-date information regarding its implementation of Jordan's Principle, including its definition of Jordan's Principle, assessment criteria and process, remediation and appeal mechanism;

4) Without delay, and on an annual basis thereafter, post non-identifying data on the number of Jordan's Principle referrals made, the disposition of those cases and the time frame for disposition as well as the result of independent appeals; and

5) Without delay, provide all First Nations and First Nations child and family agencies the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and First Nations child and family agencies in question of any changes of such.

TRAINING

Pursuant to s. 53(2)(a) of the *CHRA*, the Caring Society seeks an order that the Respondent cease its discriminatory practices in relation to its provision of the First Nations child and family services program and take the following measures:

1) Develop and implement, in consultation with the Commission and the Complainants and within six (6) months of the Tribunal's Order a training program for all AANDC staff working within the First Nations child and family services program on the following issues:

   a) First Nations' culture and history;
   b) Factors causing over-representation of First Nations children in child welfare, including the intergenerational impacts of Residential Schools; and
   c) The history of AANDC's First Nations child and family services program, including the reviews and evaluations conducted from 2000 to 2011 and the findings of the Tribunal.

2) Develop and implement, in consultation with the Commission and the Complainants and within six (6) months of the Order a training program for all Jordan's Principle focal points on the following issues:

   a) The story of Jordan River Anderson; including a description of the child's needs, hospital discharge plan, the nature of the jurisdictional disputes; parties to those disputes; the nature of the dispute resolution processes engaged in the case and the result of those dispute processes and the effect on the child and his family;
   b) The history of Jordan's Principle including the definition documented in the Wen:de reports, Motion-296, the Federal Response to Jordan's Principle, independent commentary and reviews of the Federal Response to Jordan's Principle, the *Pictou Landing v. Attorney General of Canada* case, First Nations and provincial/territorial views on Jordan's Principle and the findings of the Tribunal; and
   c) Services relating to child welfare available on and off reserve in every region.

MONETARY ORDERS

Pursuant to s. 53(3) of the *CHRA*, the Caring Society seeks an order that the Respondent:

1) Pay an amount of $20,000 as damages under section 53(3) of the CHRA, plus interest pursuant to s. 53(4) of the CHRA and Rule 9(12) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child on reserve and in the Yukon Territory that has been taken into out-of-home care since 2006;

2) Provide to the Tribunal and the parties a detailed account of the number of First Nations children taken into out-of-home care on reserve and in the Yukon Territory since 2006; and

3) Pay these damages, plus interest, into a trust fund that:

    a) will be used to the benefit of First Nations children who have experienced pain and suffering as a result of the Respondent's discriminatory treatment;
    b) will provide First Nations children with access to services, such as culture and language programs, family reunification programs, counselling, health and wellness programs and education programs; and
    c) will be administered by a board of seven Trustees appointed jointly by the Complainant, the Commission and the Respondent or, if the latter fail to agree, by the Tribunal.

MONITORING BY THE TRIBUNAL

Pursuant to the Tribunal's jurisdiction by necessary implication, the Caring Society requests that the Tribunal retain jurisdiction over the Complaint and hold reporting hearings involving the Commission, the Complainants, and any relevant Interested Parties to receive reports of the following information from the Respondent within six (6) months following the date of the Order and every six (6) months thereafter until the Tribunal is satisfied, based on submissions from all parties, that substantive equality has been achieved in the Respondent's First Nations child and family services system:

1) The Respondent's actions to ensure that the services provides by the Respondent's First Nations child and family services program meet or beat provincial standards in all provinces and territories;

2) The Respondent's actions to ensure that the First Nations child and family services program reflects any changes in provincial statutes, salaries and generally accepted social work practices;

3) The Respondent's actions to ensure that Jordan's Principle is implemented in a way that ensures that First Nations children are able to access services normally available to the public on the same terms as other children;

4) The Respondent's actions to ensure that all of its staff working within the First Nations child and family services program are receiving appropriate training as ordered by this Tribunal;

5) The Respondent's actions to implement the recommendations of the National Advisory Committee and Regional Tables in good faith; and

6) The Respondent's actions to ensure that any changes made to the First Nations child and family services program are consistent with the CHRA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 29, 2014

for Robert W. Grant / Sébastien Grammond
Anne Levesque / Sarah Clarke
Michael A. Sabet / David Taylor

Counsel, First Nations Child and Family
Caring Society of Canada

PART V - LIST OF AUTHORITIES

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