Docket: T1810/4012

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

Complainant

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

BOOK OF AUTHORITIES
Of the Proposed Interested Party First Nations Child Family Caring Society of Canada ("Caring Society")

Motion for Interested Party Status

Schedule A, Tab 1

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 2
Date: January 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon and Edward Lustig

Table of Contents

À la douce mémoire de Réjean Bélanger

In loving memory of Réjean Bélanger

I. Acknowledgement

[1] This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.

[2] These proceedings included extensive evidence on the history of Indian Residential Schools and the experiences of those who attended or were affected by them. The Tribunal also heard heartfelt testimony from someone who attended and was directly impacted by attending a residential school. At the outset of these reasons, the Panel Members (the Panel) believe it important to acknowledge the suffering of all residential school survivors, their families and communities. We recognize the courage of those who have spoken about their experiences over the years and before this Tribunal. We also wish to honour the memory and lives of the many children who died, and all who were harmed, while attending these schools, along with their families and communities. We wish healing and recognition for all Aboriginal peoples across Canada for the individual and collective trauma endured as a result of the Indian Residential Schools system.

II. Complaint and background

[3] Child welfare services, or child and family services, are services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect (see Annex, ex. 1 *s.v.* “child welfare”). Hence the **best interest of the child** is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children.

[4] Each province and territory has its own child and family services legislation and standards and provides those services within its jurisdiction. However, the provision of child and family services to First Nations on reserves and in the Yukon is unique and is the subject of this decision.

[5] At issue are the activities of Indian and Northern Affairs Canada (INAC), known at the time of the hearing as Aboriginal Affairs and Northern Development Canada (AANDC), in managing the First Nations Child and Family Services Program (the FNCFS Program), its corresponding funding formulas and a handful of other related provincial and territorial agreements that provide for child and family services to First Nations living on reserve and in the Yukon Territory. Pursuant to the FNCFS Program and other agreements, child and family services are provided to First Nations on-reserve and in the Yukon by First Nations Child and Family Services Agencies (FNCFS Agencies) or by the province/territory in which the community is located. In either situation, the child and family services legislation of the province/territory in which the First Nation is located applies. AANDC funds the child and family services provided to First Nations by FNCFS Agencies or the province/territory.

[6] Pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*), the Complainants, the First Nations Child and Family Caring Society of Canada (the Caring Society) and the Assembly of First Nations (the AFN), allege AANDC discriminates in providing child and family services to First Nations on reserve and in the Yukon, on the basis of race and/or national or ethnic origin, by providing inequitable and insufficient funding for those services (the Complaint). On October 14, 2008, the Canadian Human Rights Commission (the Commission) referred the Complaint to this Tribunal for an inquiry.

[7] In a decision dated March 14, 2011 (2011 CHRT 4), the Tribunal granted a motion brought by AANDC for the dismissal of the Complaint on the ground that the issues raised were beyond the Tribunal's jurisdiction (the jurisdictional motion). That decision was subsequently the subject of an application for judicial review before the Federal Court of Canada.

[8] On April 18, 2012, the Federal Court rendered its decision, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (*Caring Society FC*), setting aside the Tribunal's decision on the jurisdictional motion. The Federal Court remitted the matter to a differently constituted panel of the Tribunal for redetermination in accordance with its reasons. The Respondent's appeal of that decision was dismissed by the Federal

Court of Appeal in *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (*Caring Society FCA*).

[9] A new panel, composed of Sophie Marchildon, as Panel Chairperson, and members Réjean Bélanger and Edward Lustig, was appointed to re-determine this matter (see 2012 CHRT 16). It dismissed the Respondent's motion to have the jurisdictional motion re-heard, and ruled the Complaint would be dealt with on its merits (see 2012 CHRT 17).

[10] The Complaint was subsequently amended to add allegations of retaliation (see 2012 CHRT 24). In early June 2015, the Panel found the allegations of retaliation to be substantiated in part (see 2015 CHRT 14).

[11] The present decision deals with the merits of the Complaint. During deliberations our friend and colleague, Tribunal Member Réjean Bélanger, passed away. Despite his valued contributions to the hearing and consideration of this matter, he sadly was not able to see the final result of his work. While this decision is signed on behalf of the remaining Members of the Panel, **we dedicate it in his honour and memory**.

III. Parties

[12] The Caring Society is a non-profit organization committed to research, policy development and advocacy on behalf of First Nations agencies that serve the well-being of children, youth and families. The AFN is a national advocacy organization that works on behalf of over 600 First Nations on issues such as Treaty and Aboriginal rights, education, housing, health, child welfare and social development. The Commission, in appearing before the Tribunal at a hearing, represents the public interest (see section 51 of the *CHRA*). AANDC is the federal government department primarily responsible for meeting the Government of Canada's obligations and commitments to Aboriginal peoples.

[13] Additionally, two organizations were granted "Interested Party" status for these proceedings: Amnesty International and the Chiefs of Ontario (COO). Amnesty International is an international non-governmental organization committed to the advancement of human rights across the globe. It was granted interested party status to

assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. The COO is a non-profit organization representing the 133 First Nations in the Province of Ontario. It was granted interested party status to speak to the particularities of on-reserve child welfare services in Ontario.

IV. The hearing, disclosure and admissibility of documents

[14] The hearing of the Complaint spanned 72 days from February 2013 to October 2014. Throughout the hearing, documentary disclosure and the admissibility of certain documents as evidence became an issue.

[15] All arguably relevant documents were not disclosed prior to the commencement of the hearing. Despite agreeing to complete its disclosure prior to the start of the hearing, and subsequently confirming that it had, AANDC knew of the existence of a number of arguably relevant documents in the summer of 2012 and yet failed to disclose them prior to the hearing. Only after the completion of an *Access to Information Act* request made by the Caring Society, and shortly before the third week of hearings, did AANDC inform the parties and the Tribunal of the existence of over 50,000 additional documents and an unspecified number of emails, which were potentially relevant to the Complaint, but had yet to be disclosed. As a result, the Tribunal vacated hearing dates in June 2013, re-arranged the proceedings to hear the allegations of retaliation in July and August 2013, and, following a deadline for AANDC to complete its disclosure by August 31, 2013, resumed the hearing on the merits on dates from August 2013 to January 2014 (see 2013 CHRT 16).

[16] Following the disclosure of over 100,000 additional documents by AANDC, the hearing resumed. However, AANDC did not complete the disclosure of all arguably relevant documents until August 2014 due to an objection under section 37(1) of the *Canada Evidence Act*. Specifically, certain documents were characterized as being subject to Cabinet confidence privilege. All the parties agreed to have the Clerk of the Privy Council review the documents to determine if the privilege applied. This review process was completed fairly quickly once the Clerk was provided with the documents.

[17] An issue arose as to how the 100,000 additional documents could be admitted into evidence. The Caring Society requested an order that any additionally disclosed documents upon which it wished to rely be admitted as evidence for the truth of their contents, regardless of whether or not the author or recipient of the document was called as a witness, and whether or not they were put to any other witness. For reasons outlined in 2014 CHRT 2, the Panel ruled as follows:

> a. Rule 9(4) of the Tribunal's Rules of Procedure will continue to apply. As such, documents will continue to be admitted into evidence, on a case-by case basis, once they are introduced during the hearing and accepted by the Panel;
>
> b. There will be no need to call witnesses for the sole purpose of authenticating documentary evidence. Any issues raised relating to authentication will be considered by the Panel at the weighing stage;
>
> c. For the purposes of Rule 9(4), a document has not been fully "introduced" at the hearing until counsel or a witness for the party tendering it has indicated:
>
> i. which portions of the document are being relied upon; and
>
> ii. how these portions of the document relate to an issue in the case.
>
> d. Should a party wish to rely on evidence during its final argument that was not introduced according to the procedure above (either prior to or subsequent to this order), appropriate curative measures may be taken by the Panel, and in particular, the opposing party may be allotted additional time to adequately prepare a response, including calling additional witnesses and bringing forward additional documentary evidence, in accordance with the principles of procedural fairness. This may result in an adjournment of the proceedings.

[18] Following the completion of the hearing, further issues arose as to which documents ought to form part of the record before the Tribunal. AANDC raised concerns regarding the admissibility of documents relied on by counsel for the Complainants and Commission, but not referred to orally during the hearing. In 2015 CHRT 1, the Panel ordered:

> Documents listed in Appendix B of the Commission's December 1, 2014 letter (including Documents Referred to Only in Final Written Submissions

> (which were Adopted Orally) found at page 9) will be considered as forming part of the evidentiary record. The Respondent will be granted an opportunity to respond to the Complainant's documents listed in Appendix B and supporting submissions with the exception of tab-66. Should the Respondent decide to benefit from this opportunity, the Respondent is to advise the parties and the Tribunal of its intention and form of response by no later than January 21, 2015, following which the Respondent will have until February 4, 2015 to file its response.

[19] In response to the Panel's order, AANDC provided written representations with respect to the documents at issue. According to AANDC, the Panel should place little, if any, weight on those documents in determining the merits of the Complaint. It also provided a chart summarizing its position on each of the documents.

[20] AANDC's submissions on the documents subject to the Panel's order in 2015 CHRT 1, along with its other submissions regarding the weight to ascribe to the evidence in this matter, have been taken into consideration by the Panel, together with the submissions of the other parties, in making the findings that follow.

V. Analysis

[21] As mentioned above, the present Complaint alleges the provision of child and family services in on-reserve First Nations communities and in the Yukon is discriminatory. Namely that there is inequitable and insufficient funding for those services by AANDC. In this regard, the Complainants have the burden of proof of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (see *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para. 28).

[22] In the context of this Complaint, under section 5 of the *CHRA*, the Complainants must demonstrate (1) that First Nations have a characteristic or characteristics protected from discrimination; (2) that they are denied services, or adversely impacted by the provision of services, by AANDC; and, (3) that the protected characteristic or

characteristics are a factor in the adverse impact or denial (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[23] The first element is relatively simple in this case: race and national or ethnic origin are prohibited grounds of discrimination under section 3 of the *CHRA*. There was no dispute that First Nations possess these characteristics.

[24] The second element requires the Complainants to establish that AANDC is actually involved in the provision of a "service" as contemplated by section 5 of the *CHRA*; and, if so, to demonstrate that First Nations are denied services or adversely impacted by AANDC's involvement in the provision of those services.

[25] For the third element, the Complainants have to establish a connection between elements one and two. A "causal connection" is not required as there may be many different reasons for a respondent's acts. That is, it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue (see *Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 44-52 [*Bombardier*]).

[26] In this regard, it should be kept in mind that discrimination is not usually practiced overtly or even intentionally. Consequently, direct evidence of discrimination or proof of intent is not required to establish a discriminatory practice under the *CHRA* (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT); and; *Bombardier* at paras. 40-41).

[27] In response to the Complaint, AANDC led its own evidence and arguments to refute the Complainants' claim of discrimination. It did not raise a statutory exception under sections 15 or 16 of the *CHRA*. Therefore, the Tribunal's task is to consider all the evidence and argument presented by the parties to determine if the Complainants have proven the three elements of a discriminatory practice on a balance of probabilities (see *Bombardier* at paras. 56 and 64; see also *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 80-90).

[28] It is through this lens, and with these principles in mind, that the Panel examined the evidence and arguments advanced by the parties in this case. For the reasons that follow, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon; that First Nations are adversely impacted by the provision of those services by AANDC, and, in some cases, denied those services as a result of AANDC's involvement; and; that race and/or national or ethnic origin are a factor in those adverse impacts or denial.

A. AANDC is involved in the provision of child and family services to First Nations on reserves and in the Yukon

i. Meaning of "service" under section 5 of the *CHRA*

[29] Section 5 of the *CHRA* provides:

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

[30] Pursuant to the wording of this section, the Complainants must establish that the actions complained of are "…in the provision of…services…customarily available to the general public". The first part of this analysis involves determining what constitutes the "service" based on the facts before the Tribunal (see *Gould v. Yukon Order of Pioneers*, 1996 CanLII 231 (SCC) per La Forest J. at para. 68 [*Gould*]). In other words, what is the "benefit" or "assistance" being held out (see *Watkin v. Canada (Attorney General)*, 2008 FCA 170 at para. 31 [*Watkin*]; and, *Gould* per La Forest J. at para. 55). In making this determination, "[r]egard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are "services" (see *Watkin* at para. 33). In this respect, it may be useful to inquire whether the benefit or assistance is the

essential nature of the activity (see *Canada (Canadian Human Rights Commission) v. Pankiw*, 2010 FC 555 at para. 42).

[31] The next step requires a determination of whether the service creates a public relationship between the service provider and the service user. The fact that actions are undertaken by a public body for the public good is not determinative. In fact, no one factor is determinative. Rather, in ascertaining whether a service creates a public relationship, the Tribunal must examine all relevant factors in a contextual manner (see *Gould* per La Forest J. at para. 68; and, *Watkin* at paras. 32-33). As part of this determination, the Tribunal must decide what constitutes the "public" to which the service is being offered. A public is defined in relational as opposed to quantitative terms. That is, the public to which the service is being offered does not need to be the entire public. Rather, clients of a particular service could be a very large or very small segment of the "public" (see *University of British Columbia v. Berg*, [1993] 2 SCR 353 at pp. 374-388; and, *Gould* per La Forest J. at para. 68). A public relationship is created where this "public" is extended a "service" by the service provider (see *Gould* per La Forest J. at para. 55).

ii. Evidence indicating AANDC provides a "service"

[32] Both the Commission and the Caring Society characterize the FNCFS Program, its corresponding funding formulas and the related provincial/territorial agreements as a service provided by AANDC to First Nations children and families on reserves and in the Yukon.

[33] On the other hand, AANDC submits that its role in the provision of child and family services to First Nations is strictly limited to funding and being accountable for the spending of those funds. According to AANDC, funding does not constitute a "service". Furthermore, AANDC argues the funding it provides is not "customarily available to the general public". Rather, it is provided on a government to government; or, government to agency basis.

[34] In AANDC's view, the benefit held out as a service is the provincially mandated child welfare services provided to First Nations by the FNCFS Agencies or the

provinces/territory. AANDC does not exert control over the services and programs provided. Rather, decisions as to which services to provide, how they will be provided and whether the delivery is in compliance with statutory and regulatory requirements rests with the agencies and the provinces/territory. In this regard, AANDC relies on *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), to argue that child welfare services are a matter within provincial jurisdiction and that it only became involved in First Nations child and family services as a matter of social policy under its spending power. According to AANDC, its funding does not change the provincial/territorial nature of child and family services.

[35] As explained in the following pages, the Panel finds AANDC is involved in the provision of child and family services to First Nations on reserves across Canada and in the Yukon. Specifically, AANDC offers the benefit or assistance of funding to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserves and in the Yukon. With specific regard to the FNCFS Program, the objective is to ensure the delivery of culturally appropriate child and family services, in the best interest of the child, in accordance with the legislation and standards of the reference province/territory, and provided in a reasonably comparable manner to those provided to other provincial/territorial residents in similar circumstances and within FNCFS Program authorities. This benefit or assistance is held out as a service by AANDC and provided to First Nations in the context of a public relationship.

a. Jurisdiction of the *CHRA* over the activities of AANDC

[36] With regard to the *NIL/TU,O* decision, the question in that case was whether the labour relations of a FNCFS Agency should be regulated under provincial or federal jurisdiction. Labour relations are presumptively a provincial matter. In this regard, the Supreme Court found the NIL/TU,O Agency was a child welfare agency regulated by the province in all aspects. Neither the fact that it received federal funding, the Aboriginal identity of its clients and employees, nor its mandate to provide culturally appropriate services to Aboriginal clients, displaced the operating presumption that labour relations are provincially regulated.

[37] The present case raises human rights issues in the context of AANDC's activities. As opposed to labour relations matters, human rights matters are not presumptively provincial. The *CHRA* applies to "…matters coming within the legislative authority of Parliament" (see *CHRA* at s. 2). While the activities of FNCFS Agencies and provincial governments may well be within provincial jurisdiction for labour relations purposes, this does not have any bearing on the Tribunal's jurisdiction over AANDC's activities in this case.

[38] The Complaint is filed against, and is focused upon, the activities of AANDC. AANDC is a federal government department created by Parliament through the *Department of Indian Affairs and Northern Development Act*. Its mandate is derived from a number of federal statutes, including the *Indian Act*. Therefore, any actions taken by AANDC come within the legislative authority of Parliament and could be subject to the *CHRA*.

[39] The issue in this case is not whether AANDC's activities fall outside the jurisdiction of the *CHRA* because they do not come within the legislative authority of Parliament. Rather, it is whether the *CHRA* applies to AANDC's activities because its actions are in the provision of a service. The fact that other actors, including provincial actors, may be involved in the provision of the service is not determinative and does not necessarily shield AANDC from human rights scrutiny (see for example *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*]). As mentioned above, it is for the Tribunal to consider all relevant factors to determine the nature and extent of AANDC's involvement and whether that involvement rises to the status of a "service" under section 5 of the *CHRA*.

b. Funding can constitute a service

[40] Similarly, even if AANDC's role in the child and family welfare of First Nations is limited to funding, there is nothing in the *CHRA* that excludes funding from the purview of section 5. That is, funding can constitute a service if the facts and evidence of the case

indicate that the funding is a benefit or assistance offered to the public pursuant to the criteria outlined above.

[41] A similar argument to the one advanced by AANDC was rejected by the British Columbia Human Rights Tribunal in *Bitonti et al. v. College of Physicians & Surgeons of British Columbia et al.*, (1999) 36 CHRR D/263 (BCHRT) (*Bitonti*). Among other things, the complainants in that case argued that the allocation of funding provided by the Ministry of Health did not provide foreign medical school graduates with a real opportunity to obtain internships. The Ministry of Health responded that the expenditure of funds by the provincial government was a legislative act that was immune from the Tribunal's review. While the BCHRT ultimately found there was no service relationship between the Ministry of Health and the complainants, at paragraph 315 it was not prepared to accept the Ministry's argument regarding immunity for funding:

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

[42] Similarly, in *Kelso v. The Queen*, [1981] 1 SCR 199 at page 207 (*Kelso*), the Supreme Court stated (**emphasis added**):

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

[43] Indeed, the Supreme Court has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 (*Robichaud*); *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81 (*Vaid*); and, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). It expresses fundamental values and pursues fundamental goals for our society, such as the fundamental Canadian value of equality (see s. 2 of the *CHRA*; see also *Mowat* at para. 33; and, *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 at p. 615, per Justice L'Heureux-Dubé).

Therefore, the *CHRA* is to be interpreted in a broad, liberal, and purposive manner befitting of this special status (see *Mowat* at para. 62).

[44] Conversely, any exemption from its provisions must be clearly stated (see *Vaid* at para. 81). Again, there is no indication in the *CHRA* or otherwise that Parliament intended to exclude funding from scrutiny under the *Act*, subject of course to the funding being determined to be a service. In line with *Kelso*, where the Government of Canada is involved in the provision of a service, including where the service involves the allocation of funding, that service and the way resources are allocated pursuant to that service must respect human rights principles.

[45] Therefore, the Panel dismisses the argument that funding cannot constitute a "service" within the meaning of section 5 of the *CHRA*. In any event, as will be examined in the following pages, the evidence in this case indicates the essential nature of the "assistance" or "benefit" offered by AANDC for the provision of child and family services on First Nations reserves is something more than funding.

c. The "assistance" or "benefit" provided by AANDC

[46] AANDC's FNCFS Program applies to FNCFS Agencies in all provinces and the Yukon Territory, except Ontario. In Ontario, AANDC has a cost-sharing agreement with the province for the provision of child and family services on First Nations reserves. AANDC also has agreements with the provinces of Alberta and British Columbia to provide child and family services to certain First Nations reserves. A similar agreement is also in place with the Yukon Territory. The provision of child and family services to First Nations in the Northwest Territories and Nunavut were not the subject of this Complaint.

[47] The FNCFS Program were developed to address concerns over the lack of child and family services provided by the provinces to First Nations reserves. Traditionally, assistance to First Nations children and their families was provided informally, by custom, within the network of their extended family. However, over time, this informal assistance became insufficient to meet the needs of children and families living on First Nations reserves.

[48] The Joint Committees of the Senate and the House of Commons in 1946-1948 and again in 1959-1961 urged provinces to increase their involvement in providing services to First Nations people in order to fill in the gaps resulting from disruptions to traditional patterns of community care. However, provincial governments were reluctant to provide those services for financial concerns and given federal jurisdiction over "Indians, and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. This led to disparity in the quantity and quality of services provided to First Nations children and families on reserve from province to province, where some provinces only provided services if they were compensated by the federal government or only in life-and-death situations (see Annex, ex. 2 at p. 39 [the *NPR*]).

[49] In 1965, Canada entered into the agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations children and families on reserve. Other provinces entered into bilateral agreements whereby AANDC would reimburse them for the delivery of child and family services (see Annex, ex. 3 at ss. 1.1.2 - 1.1.3 [*2005 FNCFS National Program Manual*]).

[50] In the 1970's and early 1980's, concerns began being raised over the child and family services being provided to First Nations by the provinces. Namely, the services were minimal, not culturally appropriate and there were an alarming number of First Nations children being removed from their communities. This started a move towards the creation of community-specific FNCFS Agencies. AANDC funded these agencies through *ad hoc* arrangements, but authorities for doing so were unclear and funding was inconsistent (see the *NPR* at p. 24).

[51] In 1986, AANDC put a moratorium on the *ad hoc* arrangements for the development of FNCFS Agencies. This moratorium remained in place until 1990 when AANDC implemented the FNCFS Program (see *2005 FNCFS National Program Manual* at s. 1.1.6; and, the *NPR* at p. 24).

[52] At section 1.3 of the *2005 FNCFS National Program Manual*, the objective and principles of the FNCFS Program are outlined and include:

> 1.3.2 The primary objective of the FNCFS program is to support culturally appropriate child and family services for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.
>
> […]
>
> 1.3.4 FNCFS will be managed and operated by provincially mandated First Nations organizations (Recipients), which provide services to First Nations children and families Ordinarily Resident On Reserve. FNCFS Recipients will manage the program in accordance with provincial or territorial legislation and standards. INAC will provide funding in accordance with its authorities.
>
> 1.3.5 The child and family services offered by FNCFS on reserve are to be culturally relevant and comparable, but not necessarily identical, to those offered by the reference province or territory to residents living off reserve in similar circumstances.
>
> 1.3.6 Protecting children from neglect and abuse is the main objective of child and family services. FNCFS also provide services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.
>
> 1.3.7 First Nation agencies and other Recipients will ensure that all persons Ordinarily Resident On Reserve and within their Catchment Area receive a full range of child and family services reasonably comparable to those provided off reserve by the reference province or territory. Funding will be provided in accordance with INAC authorities.

[53] In 2012, following the filing of the Complaint, the wording of the objective of the FNCFS Program was modified, but is still similarly described as follows:

> 1.1 Objective
>
> The FNCFS program provides funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.
>
> These services are to be provided in accordance with the legislation and standards of the province or territory of residence and in a manner that is

> reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities.
>
> (see Annex, ex. 4 at p. 30 [*2012 National Social Programs Manual*])

[54] The other provincial and territorial agreements for the provision of child and family services in First Nations communities have a similar purpose to the FNCFS Program. In Ontario, the *Memorandum of Agreement Respecting Welfare Programs for Indians* (see Annex, ex. 5 [the *1965 Agreement*]), at page 1, provides:

> WHEREAS the 1963 Federal-Provincial Conference, in charting desirable long-range objectives and policies applicable to the Indian people, determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities;
>
> AND WHEREAS Canada and Ontario in working towards this objective desire to make available to the Indians in the Province the full range of provincial welfare programs;

[55] In Alberta, the *Arrangement for the Funding and Administration of Social Services* (see Annex, ex. 6 [the *Alberta Reform Agreement*]) at page 1 states:

> *WHEREAS:*
>
> *Canada continues to have a special relationship with and interest in the Indian people of Canada arising from history, treaties, statutes and the Constitution;*
>
> *Canada and Alberta recognize and agree that this arrangement will not prejudice the treaty rights of Indian people, nor alter any obligations of Canada to Indian people pursuant to treaties, statutes and the Constitution, including any rights protected by section 35 of the Constitution Act, 1982, nor affect any self-government rights that may be negotiated in future constitutional negotiations;*
>
> *Canada and Alberta recognize that Indians and Indian Families should be provided with Social Services which take into account their cultures, values, languages and experiences;*

> *Canada and Alberta are desirous of developing an arrangement in respect of the funding and administration for Social Services which would be applicable to Indians in the Province of Alberta; and*
>
> *Canada and Alberta acknowledge that Indians have aspirations towards self-government and both therefore wish to support the establishment, management, and delivery by Indians and Indian organizations of child and family services and other community-based Social Services for Indians in Alberta.*

[56] At section 3 of the *Alberta Reform Agreement*, Canada's role is described as:

> 3. Canada will by this arrangement and in accordance with Appendix II:
>
> (a) arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a Reserve; and
>
> (b) fund Social Services for Indians and Indian Families ordinarily residing on a Reserve comparable to those provided by Alberta to other residents of the Province; and in particular, reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve.

[57] In British Columbia, the *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve* (see Annex, ex. 7 [the *BC Service Agreement*]), which in 2012 replaced a previous memorandum of understanding between the two parties (see Annex, ex. 8 [the *BC MOU*]), provides:

> **1.0 Vision**
>
> Governments working together in British Columbia to ensure that First Nation children, youth and their families live in strong, healthy families and sustainable communities where they are connected to their culture, language and traditions.
>
> DIAND and MCFD will contribute to this vision through a strong focus on providing funding and effective services respectively, to achieve meaningful outcomes for vulnerable First Nations children, youth and their families ordinarily resident on reserve.

[58] Finally, in the Yukon, there is the *Funding Agreement* (see Annex, ex. 9 [the *Yukon Funding Agreement*]). The *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Pursuant to Schedule "DIAND-3" of the *Yukon Funding Agreement*, "[t]he Territory will administer the First Nation Child and Family Services Program in accordance with DIAND's First Nation Child and Family Services Program – National Manual or any other program documentation issued by DIAND as amended from time to time".

[59] The history and objectives of the FNCFS Program and other related provincial/territorial agreements indicate that the benefit or assistance provided through these activities is to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations children and families on reserve and in the Yukon. Without the FNCFS Program, related agreements and the funding provided through those instruments, First Nations children and families on reserve and in the Yukon would not receive the full range of child and family services provided to other provincial/territorial residents, let alone services that are suitable to their cultural realities. The activities of the provinces/territory alone were insufficient to meet the child and family services needs of First Nations children and families on reserve and in the Yukon.

[60] Therefore, the essential nature of the FNCFS Program is to ensure First Nations children and families on reserve and in the Yukon receive the "assistance" or "benefit" of culturally appropriate child and family services to that are reasonably comparable to the services provided to other provincial residents in similar circumstances. The other related provincial/territorial agreements provide a similar "assistance" or "benefit". AANDC extends this "assistance" or "benefit" to First Nations children and families on reserves and in the Yukon Territory.

d. First Nations children and families are extended the "assistance" or "benefit" by AANDC

[61] First Nations and, in particular, First Nations on reserve, are a distinct public. AANDC extends the assistance or benefit of the FNCFS Program and other related

provincial/territorial agreements to this public through FNCFS Agencies and/or the provinces/territory.

[62] Section 1.5 of the *2005 FNCFS National Program Manual* defines the roles and responsibilities of AANDC's headquarters and regional offices in ensuring the safety and well-being of First Nations children ordinarily resident on reserve. At section 1.5.2, the role of Headquarters includes: "to provide […] funding on behalf of children and families as authorized by the approved policy and program authorities"; "to lead in the development of FNCFS policy"; and, "to provide oversight on program issues related to the FNCFS policy and to assist regions and First Nations in finding solutions to problems arising in the regions".

[63] The role of AANDC's regional offices is outlined at section 1.5.3 of the *2005 FNCFS National Program Manual* and includes: "to interact with Recipients, Chiefs and Councils, Headquarters, the reference province or territory"; "to manage the program and funding on behalf of Canada and to ensure that authorities are followed"; "to assure Headquarters that the program is operating according to authorities and Canada's financial management requirements"; and, "to establish, in cooperation with Recipients, a process for dealing with disputes over issues relating to the operation of FNCFS".

[64] The role of the FNCFS Agencies is, among other things, "to deliver the FNCFS program in accordance with provincial legislation and standards while adhering to the terms and conditions of their funding agreements" (*2005 FNCFS National Program Manual* at section 1.5.4). The provinces mandate, regulate and oversee the FNCFS Agencies (see *2005 FNCFS National Program Manual* at section 1.5.5).

[65] In a more summary fashion, the *2012 National Social Programs Manual* defines the differing roles of AANDC, the provinces/territory and the FNCFS Agencies as follows, at page 30:

> 1.2 Provincial Delegations
>
> Child welfare is an area of provincial responsibility whereby each province, in accordance with their legislation, delegates authority to FNCFS agencies to manage and deliver child welfare services on reserve.

> The FNCFS agencies, delegated by the province, provide protection services to eligible First Nation children, ordinarily resident on-reserve in accordance with provincial legislation and standards.
>
> The Program funds FNCFS agencies to deliver protection (out of the home) and prevention services (in-home) to First Nation children, youth, and families ordinarily resident on reserve.

[66] AANDC has a "Shared Responsibility for Child Welfare" with the FNCFS Agencies and the provinces/territory (see the *NPR* at p.88). It not only provides funding, but policy and oversight as well. It works as a partner with the FNCFS Agencies and provinces/territory to deliver adequate child and family services to First Nations on reserves. It is not a passive player in this partnership, whereby it only provides funding: it strives to improve outcomes for First Nations children and families. In this regard, Ms. Sheilagh Murphy, Director General of the Social Policy and Programs Branch of AANDC, testified about the goal of AANDC social programs:

> Well, I mean we have this broad objective or goal to make sure that First Nations on Reserve -- men, women, and children -- are safe, that they are healthy and that they have the means to become productive members of their communities and can contribute to those communities and to Canada more generally as citizens.
>
> (StenoTran Services Inc.'s transcript of *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* (CHRT), Ottawa, Vol. 54 at pp. 17-18 [*Transcript*])

[67] The FNCFS Program is one of the social programs meant to achieve this objective. A "Fact Sheet" developed in October 2006 and previously posted on AANDC's website (see Annex, ex. 10 [*Fact Sheet*]), demonstrates how the department previously held out the FNCFS Program:

> **The First Nations Child and Family Services Program** is one component of a suite of Social Programs that addresses the well-being of children and families. The main objective of the Program is to assist First Nations in providing access to culturally sensitive child and family services in their communities, and to ensure that the services provided to them are comparable to those available to other provincial residents in similar circumstances.

[68] AANDC works directly with its partners, including First Nations, to ensure the objectives of the FNCFS Program and other related provincial/territorial agreements are being met. The *2005 FNCFS Program Manual* provides for consultation among AANDC and First Nations communities with regard to disputes over the program (see ss. 1.5.2-1.5.3). The *Alberta Reform Agreement* specifically provides for consultation with First Nations communities in reviewing the effectiveness of the arrangement (see ss. 13-14). Similarly, the agreements in British Columbia and the Yukon provide for evaluation and review by AANDC of the effectiveness of the programs, services and activities it funds (see ss. 9.2 and 10.1 of the *BC Service Agreement*; and, s. 13.4.1 of the *Yukon Funding Agreement*).

[69] In its previous website *Fact Sheet*, AANDC held out this partnership as follows:

> The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.

[70] Ms. Murphy provided some insight into the nature of AANDC's role and partnership in ensuring adequate child and family services to First Nations reserves:

> I mean, we continue to be a funder, we don't espouse to be experts in the area of child welfare practice. I mean, our role I think has changed in some ways in that when you look at the progression of this program -- we do audits and we do evaluations, the Auditor General looked at this program in 2008 and again in 2011. We do need to have – we don't just want to be writing cheques, we actually do have a genuine interest in making sure that First Nation Agencies are delivering the program according to the legislation and regulation, that they have the capacity to do that, that we are getting to outcomes.
>
> So we are not a passive player in terms of being interested in how First -- I mean, it's program risk management, it is financial risk management, to make sure that they are delivering the program that is within the authorities, that they are paying for the right things that we have been given the money for.
>
> (*Transcript* Vol. 54 at pp. 51-52)

[71] As the above indicates, AANDC plays a significant role in the effort to improve outcomes for First Nations children and families residing on reserve. While AANDC argues that it does not control services, the manner and extent of AANDC's funding significantly shapes the child and family services provided by the FNCFS Agencies and/or the provinces/territory. This will be further elaborated upon in section B of this Analysis below. For the purposes of this "service" analysis, suffice it to say AANDC's involvement in the FNCFS Program and other related provincial/territorial agreements determines whether and to what extent child and family services are provided to First Nations reserves and in the Yukon.

[72] For example, a document entitled *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* authored by three AANDC employees and signed by the Assistant Deputy Minister at the time, Ms. Christine Cram (see Annex, ex. 11), at page 2, explains the ultimate consequence that AANDC's funding can have on FNCFS Agencies:

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

[73] It is AANDC that created the FNCFS Program and its corresponding funding formulas, and who negotiated and administers the provincial/territorial agreements. While the FNCFS Program is set up to work in a tripartite fashion, and the other agreements in a bilateral fashion, at the end of the day it is AANDC's involvement that is needed to improve outcomes for First Nations on reserves and in the Yukon. AANDC holds a considerable degree of control in this regard. Again, this will be elaborated upon in section B of this Analysis. However, by way of example, in a document entitled *Reform of the FNCFS Program in Québec (Information for the Deputy Minister)*, at pages 1-3 (see Annex, ex. 12), two AANDC employees explain the Department's decision not to transition Québec to a new funding methodology:

> INAC has been in discussion with the First Nations of Québec and Labrador Health and Social Services Commission (Commission) and Québec's Ministry of Health and Social Services since June, 2007 regarding

> transitioning the Quebec FNCFS Agencies to an enhanced prevention approach.
>
> The three parties have developed a Partnership for Results Framework that outlines the strategic direction, key outcomes and performance indicators for FNCFS on reserve in Québec. Both the First Nations leadership and the Province have submitted letters of endorsement for this initiative.
>
> In November of 2007, a number of issues were raised by the First Nations of Québec and Labrador Health and Social Services Commission. The issues largely pertain to the overall funding formula that was proposed as a model for the Québec First Nations agencies (See Annex A for detailed list of concerns and our proposed action).
>
> A decision was made in December 2007, to move forward in the transition to the enhanced prevention focused approach without Québec in order to give the Department time to address First Nations' concerns with the transition process.
>
> The Department has not yet informed Québec First Nations and the Province of Québec of the decision to delay the transition to the Enhanced Prevention Focused Approach in Québec.
>
> […]
>
> There is a risk that once the Commission and Québec First Nations are informed of the decision that was made; they will not want to proceed with the transition to the new enhanced prevention-focused approach. It is hoped that the delivery of messaging from a senior official will reassure the First Nations of the Department's commitment and enable the working level to address concerns raised and move the transition forward.

[74] This document is an official position to be adopted by AANDC's Deputy Minister, informed by high level AANDC employees. It illustrates that, despite a tripartite relationship where its partners support a new funding approach, AANDC is the one who controls the process and makes the final decision in determining the approach to be taken.

[75] Furthermore, AANDC has the power to withhold funds if FNCFS Agencies and/or the provinces/territory do not comply with its funding requirements. This could result in agencies closing their doors and, as a consequence, inadequate child and family services being provided to First Nations children and families on reserves and in the Yukon (see

testimony of William McArthur, Manager, Social Programs, British Columbia Regional Office, AANDC, *Transcript* Vol. 64 at pp. 45-47).

[76] All the above indicates a public relationship between AANDC and First Nations children and families in the provision of child and family services. In sum, AANDC extends the FNCFS Program and other related provincial/territorial agreements as a partnership, including with First Nations, to improve outcomes for First Nations children and families on reserve. Ultimately, through the FNCFS Program, its funding formulas and the related provincial/territorial agreements, AANDC has a direct impact on the child and family services provided to First Nations children and families living on reserves and in the Yukon Territory.

[77] This public relationship between AANDC and First Nations on reserves and in the Yukon in the provision of child and family services is reinforced by the federal government's constitutional responsibilities and its special relationship with Aboriginal peoples.

e. Section 91(24) of the *Constitution Act, 1867*

[78] The fact that AANDC does not directly deliver First Nations child and family services on reserve, but funds the delivery of those services through FNCFS Agencies or the provincial/territorial governments, does not exempt it from its public mandate and responsibilities to First Nations people. AANDC argues that child welfare services fall within provincial jurisdiction and that it only became involved as a matter of social policy to address concerns that the provinces were not providing the full range of services to First Nations children and families living on reserves. However, that position does not take into consideration Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act, 1867*.

[79] In Canada, legislative power is divided between the federal government and the provincial/territorial governments. As stated by the Supreme Court in *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paragraph 22 (*Central Western Bank*):

> …federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[80] The Supreme Court also noted that "the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society" (*Central Western Bank* at para. 23). This is referred to as the "living tree" doctrine.

[81] The legislative powers defined in the *Constitution Act, 1867* are deemed to be exclusive to the extent that, even if Parliament does not legislate in its fields of jurisdiction, the provinces/territories are not allowed to do so (see *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.) at p. 588). However, the Court has indicated clearly that this doctrine of inter-jurisdictional immunity is to be construed narrowly, among other reasons, so as not to allow any legal vacuum. It is used "…to protect that which makes certain works or undertakings, things (e.g., Aboriginal lands) or persons (e.g., Aboriginal peoples and corporations created by the federal Crown) specifically of federal jurisdiction" (*Central Western Bank* at para. 41). As also noted in *Central Western Bank* at paragraph 42:

> Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly.

[82] Despite the doctrine of inter-jurisdictional immunity, cooperative federalism can exist in situations where federal and provincial authorities connect. In the recent case of *Quebec (A.G.) v. Canada (A.G.)*, 2015 SCC 14 (*Canadian Firearms Registry*), where

Quebec challenged the constitutionality of the federal government's decision to destroy the firearms registry, the Supreme Court found itself divided on the scope of cooperative federalism. Nonetheless, the majority in *Canadian Firearms Registry* held that cooperative federalism cannot override or modify the constitutional division of powers:

> [17] Cooperative federalism is a concept used to describe the "network of relationships between the executives of the central and regional governments [through which] mechanisms are developed, especially fiscal mechanisms, which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process […] From this descriptive concept of cooperative federalism, courts have developed a legal principle that has been invoked to provide flexibility in separation of powers doctrines, such as federal paramountcy and interjurisdictional immunity. It is used to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action […] With respect to interjurisdictional immunity, for example, the principle of cooperative federalism has been relied on to explain and justify relaxing a rigid, watertight compartments approach to the division of legislative power that unnecessarily constrains legislative action by the other order of government: "In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (*Canadian Western Bank*, at para. 37).
>
> [18] However, we must also recognize the limits of the principle of cooperative federalism. The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 53. This is especially the case with regard to the division of powers:
>
> > . . . the text of the federal constitution as authoritatively interpreted in the courts remains very important. It tells us who can act in any event. In other words, constitutionally it must always be possible in a federal country to ask and answer the question — What happens if the federal and provincial governments do not agree about a particular measure of co-operative action? Then which government and legislative body has power to do what?
>
> (Emphasis added; footnote omitted)

[83] Instead of legislating in the area of child welfare on First Nations reserves, pursuant to Parliament's exclusive legislative authority over "Indians, and lands reserved for

Indians" by virtue of section 91(24) of the *Constitution Act, 1867*, the federal government took a programing and funding approach to the issue. It provided for the application of provincial child welfare legislation and standards for First Nations on reserves through the enactment of section 88 of the *Indian Act*. However, this delegation and programing/funding approach does not diminish AANDC's constitutional responsibilities. In a comparable situation argued under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the Supreme Court stated in *Eldridge* at paragraph 42:

> …the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[84] Similarly, AANDC should not be allowed to evade its responsibilities to First Nations children and families residing on reserve by delegating the implementation of child and family services to FNCFS Agencies or the provinces/territory. AANDC should not be allowed to escape the scrutiny of the *CHRA* because it does not directly deliver child and family services on reserve.

[85] As explained above, despite not actually delivering the service, AANDC exerts a significant amount of influence over the provision of those services. Ultimately, it is AANDC that has the power to remedy inadequacies with the provision of child and family services and improve outcomes for children and families residing on First Nations reserves and in the Yukon. This is the assistance or benefit AANDC holds out and intends to provide to First Nations children and families.

[86] Parliament's constitutional responsibility towards Aboriginal peoples, in a situation where a federal department dedicated to Aboriginal affairs oversees a social program and negotiates and administers agreements for the benefit of First Nations children and families, reinforces the public relationship between AANDC and First Nations in the provision of the FNCFS Program and the related provincial/territorial agreements.

f. The Crown's fiduciary relationship with Aboriginal peoples

[87] Furthermore, AANDC's commitment to ensuring the safety and well-being of children and families living on reserves and in Yukon must be considered in the context of the special relationship between the Crown and Aboriginal peoples.

[88] The Complainants submit that the relationship between the Crown and Aboriginal peoples is a fiduciary relationship that gives rise to a fiduciary duty in relation to the FNCFS Program. While AANDC acknowledges there is a general fiduciary relationship between the federal Crown and the Aboriginal peoples of Canada, it argues that fiduciary duty principles are not applicable to the Complaint.

[89] It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16 [*Haida Nation*]). It is also well established that there exists a special relationship between the Crown and the Aboriginal peoples of Canada, qualified as a *sui generis* relationship. This special relationship stems from the fact that Aboriginal peoples were already here when the Europeans arrived in North America (see *R. v. Van der Peet*, [1996] 2 SCR 507, at para. 30).

[90] In 1950, in a case about the application of section 51 of the *Indian Act, 1906* and concerning reserve lands, the Supreme Court stated that the care and welfare of First Nations people are a "political trust of the highest obligation":

> The language of the statute embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.
>
> (*St. Ann's Island Shooting And Fishing Club v. The King*, [1950] SCR 211 at p. 219 [per Rand J.])

[91] However, this "political trust" was not enforceable by the courts. This changed when the Supreme Court moved away from the political trust doctrine. In the context of a case dealing with the sale of surrendered land at conditions quite different from those agreed to

at the time of the surrender, the Supreme Court qualified the relationship between the Crown and Aboriginal peoples as a fiduciary relationship in *Guerin v. The Queen*, [1984] 2 SCR.335, at page 376 (*Guerin*):

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.

[92] This special relationship is also rooted in the large degree of discretionary control assumed by the Crown over the lives and interests of Aboriginal peoples in Canada:

> English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation: see, e.g., the *Royal Proclamation* of 1763, R.S.C. 1985, App. II, No. 1, and *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1103. At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown: *Sparrow*, *supra*. With this assertion arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as "fiduciary" in *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
>
> (*Mitchell v. M.N.R.*, 2001 SCC 33, at para. 9)

[93] After the entry into force of section 35 of the *Constitution Act, 1982*, in *R.* v. *Sparrow*, [1990] 1 SCR 1075, at page 1108, the Supreme Court further confirmed and defined the duty of the Crown to act in a fiduciary capacity as the "general guiding principle" for section 35:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial and, contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

[94] This general guiding principle is not limited to section 35(1) of the *Constitution Act, 1982*, but has broader application as confirmed by the Supreme Court in *Wewaykum Indian Band* v. *Canada*, 2002 SCC 79, at paragraph 79 (*Wewaykum*).

[95] First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (*Wewaykum* at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in *Haida Nation*, at paragraph 17:

> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[96] That being said, it is also well established that this fiduciary relationship does not always give rise to fiduciary obligations. While the fiduciary relationship may be described as general in nature, requiring that the Crown act in the best interest of Aboriginal peoples, fiduciary obligations are specific, related to precise aboriginal interests:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically […]
>
> But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
>
> (*Wewaykum* at paras. 80-81)

[97] The Supreme Court has relied on private law concepts to define circumstances that can give rise to a fiduciary obligation because, although the Crown's obligation is not a

private law duty, it is nonetheless in the nature of a private duty, susceptible of giving rise to enforceable obligations :

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> (*Guerin* at p. 385)

[98] *Guerin* stands for the principle that a fiduciary obligation on the Crown towards Aboriginal peoples arises from the fact that their interest in land is inalienable except upon surrender to the Crown. In another case where the Supreme Court found that the Crown has a fiduciary obligation to prevent exploitative bargains in the context of a surrender of reserve land, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paragraph 38, it referred to private law criteria to define a situation that could give rise to a fiduciary obligation:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[99] The present case does not raise land related issues. The Panel is aware that fiduciary obligations have yet to be recognized by the Supreme Court in relation to Aboriginal interests other than land outside the framework of section 35(1) of the *Constitution Act, 1982* (see *Wewaykum* at para. 81). However, the Panel is also aware that in *Frame v. Smith*, [1987] 2 SCR 99, at paragraph 60, Wilson J. held that fiduciary duties did not apply only to legal and economic interests but could extend to human and personal interests:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.

[100] In fact, in *Wewaykum* the Supreme Court noted that since the *Guerin* case the existence of a fiduciary obligation has been argued in a number of cases raising a variety of issues (see at para. 82). While it did not comment on these cases, the Court in *Wewaykum*, at paragraph 83, did state that a case by case approach would have to focus on the specific interest at issue and whether or not the Crown had assumed discretionary control giving rise to a fiduciary obligation:

> I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature […], and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[101] Recent case law from the Supreme Court confirms that a fiduciary obligation may also arise from an undertaking. The following conditions are to be met:

> In summary, for an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in Frame: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 36 (*Elder Advocates Society*); see also *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para. 50 [*Manitoba Metis Federation*])

[102] AANDC argues that there must be an undertaking of loyalty by the Crown to the point of forsaking the interests of all others in favour of those of the beneficiaries for a fiduciary obligation to apply (see *Elder Advocates Society* at para. 31; and, *Manitoba Metis Federation* at para. 61).

[103] However, in *Elder Advocates Society*, at paragraph 48, it should be noted that the Supreme Court held that the necessary undertaking was met with respect to Aboriginal peoples:

> In sum, while it is not impossible to meet the requirement of an undertaking by a government actor, it will be rare. The necessary undertaking is met with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1) to the *Constitution Act, 1982* and considerations akin to those found in the private sphere.

[104] In view of the above and the evidence presented on this issue, the relationship between the federal government and First Nations people for the provision of child and family services on reserve could give rise to a fiduciary obligation on the part of the Crown. Arguably the three criteria outlined in *Elder Advocates Society* have been met in this case.

[105] The FNCFS Program and other related provincial/territorial agreements were undertaken and are controlled by the Crown. This undertaking is explicitly intended to be in the best interests of the First Nations beneficiaries, including that the "best interests of the child" and the safety and well-being of First Nations children are objectives of the program. The Crown has discretionary control over the FNCFS Program through policy and other administrative directives. It also exercises discretionary control over the application of the other related provincial/territorial agreements as First Nations are not party to their negotiation. The FNCFS Program and other related provincial/territorial agreements also have a direct impact on a vulnerable category of people: First Nations children and families in need of child and family support services on reserve.

[106] The legal and substantial practical interests of First Nations children, families, and communities stand to be adversely affected by AANDC's discretion and control over the FNCFS Program and other related provincial/territorial agreements. The Panel agrees with the AFN, Caring Society and the COO that the specific Aboriginal interests that stand to be adversely affected in this case are, namely, indigenous cultures and languages and their transmission from one generation to the other. Those interests are also protected by section 35 of the *Constitution Act, 1982*. The transmission of indigenous languages and cultures is a generic Aboriginal right possessed by all First Nations children and their families. Indeed, the Supreme Court highlighted the importance of cultural transmission in *R. v. Côté*, [1996] 3 SCR 139 at paragraph 56:

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

[107] Similarly, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraph 26 (*Doucet-Boudreau*), the Supreme Court stated the following with regard to the relation between language and culture:

> This Court has, on a number of occasions, observed the close link between language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:
>
> > . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[108] In certifying a class action based on the operation of the child welfare system on reserve in Ontario, Justice Belobaba on the Ontario Superior Court of Justice, in *Brown v. Canada (AG)*, 2013 ONSC 5637 at paragraph 44, expressed his views on the existence of a fiduciary duty based on the discretionary Crown control over Aboriginal interests in culture:

> it is at least arguable that a fiduciary duty arose on the facts herein for these reasons: (i) the Federal Crown exercised or assumed discretionary control over a specific aboriginal interest (i.e. culture and identity) by entering into the 1965 Agreement; (ii) without taking any steps to protect the culture and identity of the on-reserve children; (iii) who under federal common law were "wards of the state whose care and welfare are a political trust of the highest obligation"; and (iv) who were potentially being exposed to a provincial child welfare regime that could place them in non-aboriginal homes.

[109] The Panel agrees with the Caring Society that it is not necessary for the purposes of this case to further define the contours of Aboriginal rights in language and culture or a fiduciary duty related thereto. It is enough to say that, by virtue of being protected by section 35 of the *Constitution Act, 1982* indigenous cultures and languages must be considered as "specific indigenous interests" which may trigger a fiduciary duty. Accordingly, where the government exercises its discretion in a way that disregards indigenous cultures and languages and hampers their transmission, it can breach its fiduciary duty. However, such a finding is not necessary to make a determination regarding whether or not AANDC provides a service; or, more broadly, to determine whether there has been a discriminatory practice under the *CHRA*.

[110] Suffice it to say, AANDC's development of the FNCFS Program and related agreements, along with its public statements thereon, indicate an undertaking on the part of the Crown to act in the best interests of First Nations children and families to ensure the provision of adequate and culturally appropriate child welfare services on reserve and in the Yukon. Whether or not that gives rise to a fiduciary obligation, the existence of the fiduciary relationship between the Crown and Aboriginal peoples is a general guiding principle for the analysis of any government action concerning Aboriginal peoples. In the current "services" analysis under the *CHRA*, it informs and reinforces the public nature of the relationship between AANDC and First Nations on reserves and in the Yukon in the provision of the FNCFS Program and other provincial/territorial agreements.

iii. Summary of findings

[111] Overall, the Panel finds the evidence indicates the FNCFS Program and other related provincial/territorial agreements are held out by AANDC as assistance or a benefit

that it provides to First Nations people. The FNCFS Program and other provincial/territorial agreements were created and negotiated on behalf of First Nations by AANDC, a federal government department with the mandate and mission to do so. First Nations are a distinct public, served by AANDC in the context of a unique constitutional and fiduciary relationship. AANDC has undertaken to ensure First Nations living on reserve receive culturally appropriate child and family services that are reasonably comparable to the services provided to other provincial residents in similar circumstances. Therefore, the Panel finds there is a clear public nature and relationship with First Nations in AANDC's provision of the FNCFS Program and other related provincial/territorial agreements.

[112] This finding is similar to the one made by the Federal Court in *Attawapiskat First Nation v. Canada*, 2012 FC 948. In discussing the nature of funding agreements similar to the ones at issue in the present Complaint, the Federal Court stated at paragraph 59:

> the [Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement] to provide essential services to its members and as a result, the [Comprehensive Funding Agreement] is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the [Comprehensive Funding Agreement]. There is no evidence of real negotiation. The power imbalance between government and this band dependent for its sustenance on the [Comprehensive Funding Agreement] confirms the public nature and adhesion quality of the [Comprehensive Funding Agreement].

[113] As a result, and for the reasons above, the Panel finds AANDC provides a service through the FNCFS Program and other related provincial/territorial agreements. In the following pages, the Panel will examine the impacts of AANDC's service and, specifically, how AANDC's method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

B. First Nations are adversely impacted by the services provided by AANDC and, in some cases, denied services as a result of AANDC's involvement

[114] Before dealing with how the FNCFS Program and other related provincial/territorial agreements are funded, it is helpful to have a basic understanding of how child welfare services are provided in Canada. Dr. Cindy Blackstock, Executive Director of the Caring Society, provided helpful testimony in this regard (see *Transcript* Vol. 1 at pp. 110, 112, 124-129, 132-136, 138-142 and 151; see also Annex, ex. 1).

i. General child welfare principles

[115] As indicated earlier, child welfare in Canada includes a range of services designed to protect children from abuse and neglect and to support families so that they can stay together. The main objective of social workers is to do all they can to keep children safely within their homes and communities. There are two major streams of child welfare services: prevention and protection.

[116] Prevention services are divided into three main categories: primary, secondary and tertiary. Primary prevention services are aimed at the community as a whole. They include the ongoing promotion of public awareness and education on the healthy family and how to prevent or respond to child maltreatment. Secondary prevention services are triggered when concerns begin to arise and early intervention could help avoid a crisis. Tertiary prevention services target specific families when a crisis or risks to a child have been identified. As opposed to separating a child from his or her family, tertiary prevention services are designed to be "least disruptive measures" that try and mitigate the risks of separating a child from his or her family. Early interventions to provide family support can be quite successful in keeping children safely within their family environment, and provincial legislation requires that least disruptive measures be exhausted before a child is placed in care.

[117] Protection services are triggered when the safety or the well-being of a child is considered to be compromised. If the child cannot live safely in the family home while measures are taken with the family to remedy the situation, child welfare workers will make

arrangements for temporary or permanent placement of the child in another home where he or she can be cared for. This is called placing the child “in care”. The first choice for a caregiver in this situation would usually be a kin connection or a foster family. Kinship care includes children placed out-of-home in the care of the extended family, individuals emotionally connected to the child, or in a family of a similar religious or ethno-cultural background.

[118] The child welfare system is typically called into action when someone has concerns about the safety or well-being of a child and reports these concerns to a social worker. The first step is for the social worker to do a preliminary assessment of the report in order to decide whether further investigation is called for. If the social worker concludes that an investigation is warranted, he or she can meet with family members and can interview the child. The child is not removed from the home during the investigation unless his or her safety is at risk. The social worker will develop a plan of action for the child and his or her family in coordination with the child’s extended family and professionals such as teachers, early child care workers and cultural workers. A whole range of services may include personal counselling, mentoring by an Elder, access to childhood development programs or to programs designed to enhance the homemaking and parental skills of the caregiver.

[119] There are circumstances, however, when the risk to the child’s safety or well-being is too great to be mitigated at home, and the child cannot safely remain in his or her family environment. In such circumstances, most provincial statutes require that a social worker first look at the extended family to see if there is an aunt, an uncle or a grandparent who can care for the child. It is only when there is no other solution that a child should be removed from his or her family and placed in foster care under a temporary custody order. Following the issuance of a temporary custody order, the social worker must appear in court to explain the placement and the plan of care for the child and support of the family. The temporary custody order can be renewed and eventually, when all efforts have failed, the child may be placed in permanent care.

[120] The major categories of child maltreatment are: sexual, physical, or emotional abuse, or exposure thereto, and neglect. For First Nations, the main source of child maltreatment is neglect in the form of a failure to supervise and failure to meet basic

needs. Poverty, poor housing and substance abuse are common risk factors on reserves that call for early counselling and support services for children and families to avoid the intervention of child protection services.

ii. The allocation of funding for First Nations child and family services

[121] AANDC funds child and family services on reserves and in the Yukon in various ways. At the time of the complaint, there were 105 FNCFS Agencies in the 10 provinces across Canada (104 at the time of the hearing). The FNCFS Program, applies to most of the FNCFS Agencies in Canada, uses two funding formulas: Directive 20-1 and the Enhanced Prevention Focused Approach (the EPFA). In Ontario, funding is provided through the *1965 Agreement*. In certain parts of Alberta and British Columbia, funding is provided through the *Alberta Reform Agreement* and the *BC MOU* and, since 2012, the *BC Service Agreement*. Finally, in the Yukon funding is allocated pursuant to the *Yukon Funding Agreement* (see testimony of Ms. Barbara D'Amico, Senior Policy Analyst at the Social and Policy Branch of AANDC, *Transcript* Vol. 50 at p. 141). Each method of funding is addressed in turn.

a. The FNCFS Program

[122] Beginning with the FNCFS Program, AANDC's authorities require that, before entering into a funding arrangement with an FNCFS Agency (or Recipient), an agreement be in place between the province or territory and the agency that meets the requirements of AANDC's national FNCFS Policy (see *2005 FNCFS National Program Manual* at s. 4.1). Thereafter, funding is provided through a comprehensive funding arrangement (CFA), which is "…a program-budgeted funding agreement that [AANDC] enters into with Recipients…" (*2005 FNCFS National Program Manual* at s. 4.4.1). According to the *2005 FNCFS National Program Manual* at section 4.4.1:

> [A CFA] contains components funded by means of a Contribution, which is a reimbursement of eligible expenses and Flexible Transfer Payments, which are formula funded. Surpluses from the Flexible Transfer Payment may be retained by the Recipient provided the terms and conditions of the CFA have

> been fulfilled. The FNCFS program expects that all surplus money will be used for FNCFS. It is also expected that Recipients will absorb any deficits.

[123] Funding for FNCFS Agencies is determined in accordance with AANDC "authorities" (see *2005 FNCFS National Program Manual* at s. 1.4). Those "authorities" are obtained from the federal government through Cabinet and Treasury Board and "…are reflected in the […] Program Directive" (*2005 FNCFS National Program Manual* at s. 1.4.5). The Program Directive, also called Directive 20-1 and found at Appendix A of the *2005 FNCFS National Program Manual*, "…interprets the authorities and places them into a useable context" (*2005 FNCFS National Program Manual* at s. 1.4.5). Directive 20-1 is AANDC's "…national policy statement on FNCFS" (see definition of "Program Directive 20-1 CHAPTER 5 (Program Directive)", *2005 FNCFS National Program Manual* at s. 7, p. 51). It is also:

> …a blueprint on how INAC will administer the FNCFS program from a national perspective, it is also intended to be a teaching document, for new staff at both INAC Headquarters and Regions. The combination of the national manual and the regional manuals should create a clear picture of INAC's role in FNCFS in Canada
>
> (*2005 FNCFS National Program Manual* at Introduction, p. 2)

[124] Prior to 2007, around the time of the Complaint, all provinces and the Yukon, except Ontario, functioned under Directive 20-1. Currently, New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon are subject to the application of Directive 20-1.

[125] In line with the FNCFS Program, the principles of Directive 20-1 include a commitment to "…expanding First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances […] in accordance with the applicable provincial child and family services legislation" (see *2005 FNCFS National Program Manual* at Appendix A, ss. 6.1 and 6.6). Furthermore, Directive 20-1 supports "…the creation of First Nations designed, controlled and managed services" (see *2005 FNCFS National Program Manual* at Appendix A, s. 6.2). Under Directive 20-1, funding for FNCFS agencies is determined through two separate categories: operations and maintenance.

[126] Operational funding is intended to cover operations and administration costs for such items as salaries and benefits for agency staff, travel expenses, staff training, legal services, family support services and agency administration, including rent and office expenditures (see *2005 FNCFS National Program Manual* at s.2.2.2 and at Appendix A, s. 19.1). It is calculated using a formula based on the on-reserve population of children aged 0-18 as reported annually by First Nations bands across Canada. The calculation of the operations funding is done annually by AANDC as of December 31 of each year, based on the population statistics of the preceding year (see *2005 FNCFS National Program Manual* at s. 3.2). FNCFS Agencies are eligible to receive a fixed administrative allocation pursuant to the following formula:

> A fixed amount $143,158.84 per organization + $10,713.59 per member band + $726.91 per child (0-18 years) + $9,235.23 x average remoteness factor + $8,865.90 per member band x average remoteness factor + $73.65 per child x average remoteness factor + actual costs of the per diem rates of foster homes, group homes and institutions established by the province or territory.
>
> (see *2005 FNCFS National Program Manual* at Appendix A, s. 19.1(a); see also *2005 FNCFS National Program Manual* at ss. 3.2.1-3.2.3)

[127] The adjustment factor is multiplied by $9,235.23, the remoteness factor is multiplied by $8,865.90 times the number of bands within the agency's catchment area and the child population (0 to 18 years) is multiplied by $73.65 times the remoteness factor (see *2005 FNCFS National Program Manual* at s. 3.2.3). The remoteness factor takes into account such things as the distance between the First Nation and a service centre, road access, and availability of services. It can range from 0 to 1.9. If multiple communities are served by an FNCFS Agency, the remoteness factors of each of the communities is averaged to come to the 'average remoteness factor' (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 28-29).

[128] The amounts in the operational funding formula are based on certain assumptions emanating from the time it was put in place in the early 1990's:

- On average, 6% of the on reserve child population is in care;

- On average, 20% of families on reserve require child and family services or are classified as multi-problem families;
- One child care worker and one family support worker for every 20 children in care;
- One supervisor and one support staff for every 5 workers;
- Wages based on average salaries in Ontario and Manitoba

(see Annex, ex. 13 at pp. 7-8 [*Wen:De Report One*]).

[129] According to Ms. D'Amico, the 6% assumption regarding children-in-care is based on the 2007 national average and it provides FNCFS Agencies with stability. That is, even if an agency has or later achieves a smaller percentage of children-in-care, their budget is not affected. The 20% of families requiring services is determined using an assumption that there are on-average three children per family. By dividing the total on-reserve child population by three, AANDC arrives at the number of families it believes would normally be served by the applicable FNCFS Agency. It then takes 20% of that population calculation as a variable in determining the FNCFS Agency's budget (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 25-31).

[130] In the first four years of operation of a new FNCFS Agency, the funding formula is gradually implemented at a rate of 75% in the first year, 85% the second year, 95% the third year and 100% in the fourth year [see *2005 FNCFS National Program Manual* at section 3.2.1 and Appendix A, s. 19.1(c)]. Furthermore, for agencies that serve less than 1,000 children, the fixed maximum amount of $143,158.84 is decreased as follows: $71,579.43 (501-800 children); $35,789.10 (251-500); and, regions with a child population of 0 to 250 receive no administrative allocation [see *2005 FNCFS National Program Manual* at Appendix A, s. 19.2(b)]. However, in British Columbia, the full allocation for population begins with at least 801 children (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 23).

[131] Maintenance funding is intended to cover the actual costs of eligible expenditures for maintaining a First Nations child ordinarily resident on reserve in alternate care out of parental home. Children must be taken into care in accordance with provincially or

territorially approved legislation, standards and rates for foster home, group home and institutional care. FNCFS Agencies are required to submit monthly invoices for children in care out of the parental home and are to be reimbursed on the basis of actual expenditures (see *2005 FNCFS National Program Manual* at ss. 3.3.1-3.3.2 and Appendix A, s. 20.1).

[132] Until 2011, FNCFS Agencies in British Columbia were funded on a per diem structure, but have since transitioned to reimbursement for maintenance expenses based on actual costs. However, if funding based on actuals provides for less funding, the previous per diem funding levels are maintained as part of a plan to eventually transition FNCFS Agencies in that province to the EPFA (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 35-36; and, testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 150-151).

[133] FNCFS Agencies also have the option of applying for "flexible" funding for maintenance under Directive 20-1 (see *2005 FNCFS National Program Manual* at Appendix A, s. 20.2). This option allows agencies to receive a payment of their total operational funding allocation, along with a historically based estimate of their maintenance costs. This flexible funding option is meant to provide FNCFS Agencies with increased flexibility to re-profile maintenance funding to provide increased resources for prevention. To access this flexible funding option an FNCFS Agency must undergo an assessment and receive approval from AANDC's regional office, along with approval from AANDC Headquarters. In 2006, only 7 out of 105 FNCFS Agencies utilized the flexible funding option (see Annex, ex. 14 at p. 5 [*2007 Evaluation of the FNCFS Program*]).

[134] The monetary amounts reflected in Directive 20-1 reflect 1995-1996 values and have not been significantly modified since that time, despite the directive providing for them to be increased by 2% every year, subject to the availability of resources (see *2005 FNCFS National Program Manual* at Appendix A, s. 22.00; and, testimony of W. McArthur, *Transcript* Vol. 64 at pp. 3-4). Furthermore, maximum funding by AANDC is 100 percent of eligible costs. FNCFS Agencies may be required to repay funds to AANDC if their total funding from all sources, including from voluntary sector sources, exceeds eligible expenditures and when AANDC's contribution thereto is in excess of $100,000 (see *2012 National Social Programs Manual* at p. 10, s. 11.0 [the stacking provisions]).

[135] Since 2005, an 8.24 percent increase has been applied to each FNCFS Agency's total allocation under Directive 20-1 (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 32; and, testimony of B. D'Amico, *Transcript* Vol. 51 at p. 17). Additional funding is also provided in New Brunswick for the Head Start program and for in-home care as a precursor to the transition to the EPFA (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 169-173).

[136] That is, since 2007, AANDC has transitioned the funding model for certain provinces under the FNCFS Program from Directive 20-1 to the EPFA. An agreement was reached to implement the EPFA in Alberta and Saskatchewan in 2007, Nova Scotia in 2008, Québec in 2009, Prince Edward Island in 2009 and Manitoba in 2010.

[137] Under EPFA, prevention is included as a third funding stream to operations and maintenance. Prevention services are "…designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care or the amount of time a child remains in Alternate Care" (*2012 National Social Programs Manual* at p. 33, s. 2.1.17; see also p. 38, s. 4.4.1). Eligible expenses under this prevention funding stream include: salaries and benefits for prevention and resource workers, travel, paraprofessional services, family support services, mentoring services for children, home management services, and non-medical counselling services not covered by other funding sources (see *2012 National Social Programs Manual* at p. 38, s. 4.4.2).

[138] Implementation of the EPFA begins with tri-partite discussions between the province, First Nation community and AANDC. From the tripartite discussions, a Tripartite Accountability Framework is developed outlining the goals, objectives, performance indicators, and roles and responsibilities of the parties. Using the Tripartite Accountability Framework as a benchmark, the FNCFS Agency prepares an initial 5-year business plan, which is subject to AANDC review and acceptance by the province. The business plan is a pre-requisite in order to receive funding under the EPFA (see *2012 National Social Programs Manual* at p. 37, s. 4.3; see also testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 146-152).

[139] Once the framework and business plan are in place, the costing discussions take place. According to the *2012 National Social Programs Manual*, funding for operations and prevention services are based on a cost-model developed at regional tri-partite tables and are consistent with reasonable comparability to the respective province within AANDC's program authority (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). That is, the EPFA is to be tailored to each jurisdiction using a formula made-up of line-items that are identified at tripartite tables. The determination of staffing numbers and which line items to include in the formula, and the dollar values assigned to each of those line items, is based on variables provided by the province (for example staffing ratios, caseload ratios, and salary grades). Those amounts are then worked into AANDC's operations and prevention cost-model. A cost-model is utilized because the provinces do not always use a funding formula that AANDC can replicate (see testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 56, 150-151; and, Vol. 51 at pp.18-66, 153-154).

[140] Similar to Directive 20-1, the formula for the EPFA is based on the child population served by the FNCFS Agency and the assumptions that a minimum of 20% of families are in need of child and family services and that 6% of children are in care (although in Manitoba an assumption of 7% of children in care is used in the EPFA formula). The prevention focused services component of the EPFA formula is largely based on the salaries needed for service delivery staff, where the amount of staff needed is calculated based on the assumed amount of children in care and families in need of services. The estimated amount of children in care is calculated by multiplying the child population served by the FNCFS Agency by the assumed percentage of children in care. As mentioned above, the number of families in need of services is calculated by taking the total child population served by the FNCFS Agency, dividing it by the average amount of children per First Nation family (3), and then multiplying that number by the assumed percentage of families in need of prevention services (20%) (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 24-31).

[141] The calculated estimates of children in care and families in need of care are then used to determine the amount of service delivery staff needed for the FNCFS Agency. Similar to Directive 20-1, provincial ratios in terms of social workers per children in care or

families in need, supervisors per amount of socials workers, and support staff per amount of workers are used to estimate the staff needed for specific positions. The average salaries for those positions within the province, at the time EPFA is implemented, then make up the bulk of funding provided for the prevention focused services component of the funding formula (see testimony of B. D'Amico, *Transcript* Vol. 51 at pp. 32-79). As Ms. Murphy explained:

> We are from a funding perspective, so how the provinces fund is what we want to stay comparable with, not the types of services that the province funds -- or provides, excuse me.
>
> […]
>
> And the only way that we could find that, a way to be comparable, was to identify the variables, those calculation variables; so the salary grids, the ratios – the staffing ratios, the caseload ratios. Those were the only funding tools that we could find to be comparable, and that is why we had incorporated that into the EPFA formula.
>
> (*Transcript* Vol. 51 at pp. 178-179)

[142] Eligible expenditures for maintenance and operations under the EPFA are outlined at sections 3.4 and 3.5 of Directive 20-1 (see *2012 National Social Programs Manual* at p. 38, s. 4.4.1). AANDC expects FNCFS Agencies to manage their operations and prevention costs within the budgets they have (see testimony of S. Murphy, *Transcript* Vol. 54 at p. 170). However, the EPFA does allow agencies flexibility in moving funding from one stream (operations, maintenance or prevention) to another "…in order to address needs and circumstances facing individual communities" (*2012 National Social Programs Manual* at p. 38, s. 4.4.1).

[143] Under EPFA, funding for prevention and operations is determined at the beginning of a five year period on a fixed cost basis (see testimony of B. D'Amico, *Transcript* Vol. 53 at p.16). EPFA funding is then rolled-out over a 3-4 year period, where the FNCFS Agency receives 40% of funding in year 1, 60% in year 2 and between 80% and 100% in year 3. The full funding amount is provided by year 4 (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 145-146). Once EPFA is fully implemented, the only revision in the funding formula from year to year is to account for the child population served by the FNCFS

Agency. EPFA does not provide additional funding for increases in operations or prevention costs over time, such as for changes to professional services rates or incremental increases in salaries (see testimony of B. D'Amico, *Transcript* Vol. 52 at pp. 147-150; see also *2012 National Social Programs Manual* at p. 37, s. 4.1)

[144] For example, in Alberta, where the EPFA was first implemented in 2007, the average salaries for service delivery staff from that initial implementation of the EPFA, based on 2006 values, are still being applied eight years later to the calculation of 2014 budgets (see testimony of B. D'Amico, *Transcript* Vol. 52 at p. 153; and, testimony of Ms. Carol Schimanke, Manager of Social Development, Child and Family Services Program, AANDC Alberta Regional Office, *Transcript* Vol. 61 at pp. 115-116). According to Ms. D'Amico, the rationale behind this is as follows:

> Because what the idea of EPFA was that if you placed more money in prevention and did a lot more early intervention work, your maintenance costs would go down. When those maintenance costs go down, that money could be reinvested into operations.
>
> So the idea -- and this is not in practice, but the idea behind this was for it -- for the Agencies to be self-sufficient and be able to move the monies from one stream to another. So that's why there was no escalator included in here.
>
> This is an issue we are now reviewing about what happens after year five if the maintenance isn't supplying the operations anymore, or never did, so, what if that theory doesn't work?
>
> (*Transcript* Vol. 52 at pp. 150-151)

[145] Ms. D`Amico specified that in practice, given that some FNCFS Agencies are doing more intake and investigations as part of their prevention strategies, this has led to more kids in care and no reduction in maintenance costs (see *Transcript* Vol. 51 at pp. 91-92). The EPFA funding formula also does not include funds for intake and investigation.

[146] Maintenance funding under the EPFA is budgeted annually based on actual expenditures from the previous year (see *2012 National Social Programs Manual* at p. 38, section 4.4.1). AANDC "re-bases" an agency's maintenance budget each year. For example, if an agency's maintenance budget is $100 in year one, but its expenditures for

that year total only $80, AANDC will reduce its maintenance budget in the second year to $80. If in the second year that agency's number of children in care increases unexpectedly, the agency must work within its existing budget to manage those costs in the interim.

[147] In other words, if maintenance costs are greater than the set amount of maintenance funding, the FNCFS Agency must recover the deficit from its operations and/or prevention funding streams. If there is still a deficit in maintenance, AANDC has some funds that it holds back centrally at the beginning of each fiscal year to help manage those types of situations. When that fund is depleted, AANDC reallocates money from other programs within AANDC to cover the maintenance costs. If an FNCFS Agency has a surplus from its maintenance budget, the agency can keep it and re-apply it to other eligible expenses (see testimony of C. Schimanke, *Transcript* Vol. 61 at pp. 91, 96-98; testimony of B. D'Amico, *Transcript* Vol. 50 at pp. 174-181; and, testimony of S. Murphy, *Transcript* Vol. 54 at pp. 167-168, 172-174).

[148] AANDC receives a 2% increase in its budget for Social Programs every year. However, for the FNCFS Program, that 2% increase is calculated based on the budget of the FNCFS Program prior to the implementation of the EPFA, at about $450 million. Ms. Murphy estimated the current budget of the FNCFS Program, with the implementation of the EPFA, to be approximately $627 million. In her words:

> So the difference in that, between that 450 million has been made up of some of the two percent -- the portion of growth, some of it's the incremental investments that have come to the Department through the EPFA for those six jurisdictions and the rest of it is resource re-allocations.
>
> (*Transcript* Vol. 54 at pp. 177, 189-191; see also, Vol. 55 at pp. 188-189)

b. Reports on the FNCFS Program

[149] The FNCFS Program has been examined in multiple reports: the First Nations Child and Family Services Joint National Policy Review, referred to above as the *NPR*, in 2000; three related studies from 2004-2005 referred to as the Wen:De reports; and, two

Auditor General of Canada reports in 2008 and 2011, along with follow-up reports thereon by the House of Commons Standing Committee on Public Accounts.

First Nations Child and Family Services Joint National Policy Review Final Report

[150] The *NPR* was published in 2000. It is a collaborative report by AANDC and the Assembly of First Nations. Although the *NPR* pre-dates the complaint by about 8 years, its study of the impacts of Directive 20-1 is still relevant given that the funding formula still applies to many FNCFS Agencies and in the Yukon. The report also outlines a rigorous methodology and consultation in arriving at its conclusions. The Panel finds this early study of Directive 20-1 informative and a useful starting point in understanding the impacts of AANDC's funding formula on First Nations children and families on reserves.

[151] The *NPR* describes the context of First Nations child and family services as including several experiences of massive loss, resulting in identity problems and difficulties in functioning for many First Nations and their families. These experiences include the historical experience of residential schools and its inter-generational effects, and the migration of First Nations out of reserves causing disruption to the traditional concept of family (see *NPR* at pp. 32-33). As the *NPR* puts it at page 33:

> First Nation families have been in the centre of a historical struggle between colonial government on one hand, who set out to eradicate their culture, language and world view, and that of the traditional family, who believed in maintaining a balance in the world for the children and those yet unborn. This struggle has caused dysfunction, high suicide rates, and violence, which have had vast inter-generational impacts.

[152] According to the NPR, "Program Directive 20-1 was developed to provide equity, predictability and flexibility in the funding of first nations child and family services agencies" (at p.10). A principle of Directive 20-1 is that AANDC is committed to the expansion of child and family services on reserve to a level comparable to the services off reserve in similar circumstances (see *NPR* at p. 20). This is AANDC's own standard and it expects FNCFS Agencies to abide by it:

> FNCFS Agencies are expected through their delegation of authority from the provinces, the expectations of their communities and by DIAND, to provide a

> comparable range of services on reserve with the funding they receive through Directive 20-1.
>
> (*NPR* at p. 83, emphasis added)

[153] However, the *NPR* found the funding formula under Directive 20-1 inhibited FNCFS Agencies' ability to meet the expectation of providing a comparable range of child and family services on reserve for a number of reasons:

- The formula provides the same level of funding to agencies regardless of how broad, intense or costly, the range of service is (at p. 83).
- Variance in the definition of maintenance expenses from region to region, resulting in AANDC rejecting maintenance expenses that ought to have been reimbursed in accordance with provincial/territorial legislation and standards (at pp. 13-14, 84).
- Insufficient funding for staff and not enough flexibility in the funding formula for agencies to adjust to changing conditions (increases in number of children coming into care; development of new provincial/territorial programs; or, routine price adjustments for remoteness) (at pp. 13-14, 65, 70, 92-93, 96-97).
- There has not been an increase in cost of living since 1995-1996 (at pp. 18, 26).
- Funding only provided to new FNCFS agencies for 3 year and 6 year evaluations; however, provincial legislation requires on-going evaluations (at p. 11).
- First Nations have to comply with the same administrative burden created by change in provincial legislation but have not received any increased resources to meet those responsibilities, contradicting the principle of Directive 20-1 (at p. 12).
- Unrealistic amount of administration support to smaller agencies, often compounded by remoteness (at pp. 14, 97).
- The maximum annual budgetary increase of 2% did not reflect the average annual increase of 6.2% in the FNCFS Agencies (at p. 14).

- The average per capita per child in care expenditure was 22% lower than the average in the provinces (at p. 14).

- The formula does not provide adequate resources to allow FNCFS Agencies to do legislated/targeted prevention, alternative programs and least disruptive/intrusive measures for children at risk (at p. 120).

[154] The *NPR* made 17 recommendations to address these areas of concern with respect to Directive 20-1, including investigating a new methodology for funding operations. It was recommended that the new funding methodology consider factors such as work-load case analysis, national demographics and the impact on large and small agencies, and economy of scale (see *NPR* at pp. 119-121). A further recommendation was to develop a management information system in order to ensure the establishment of consistent, reliable data collection, analysis and reporting procedures amongst AANDC, FNCFS Agencies and the provinces/territory (see *NPR* at p. 121).

The Wen:De Reports

[155] The *NPR* led to the establishment of the Joint National Policy Review National Advisory Committee (the NAC) in 2001. The NAC involved officials from AANDC, the AFN and FNCFS Agencies. One of the tasks of the NAC was to explore how to change parts of Directive 20-1 in line with the *NPR* recommendations. Funded by AANDC, the NAC commissioned further research in order to establish that revisions of the FNCFS Program and Directive 20-1 were warranted. Three reports were produced on the subject: the Wen:De Reports. Each of the three reports outlines clearly the methodology used to arrive at its findings and explains those findings in great detail. Three important contributing authors of the Wen:De reports, Dr. Cindy Blackstock, Dr. John Loxley, and Dr. Nicolas Trocmé testified at length about the reports at the hearing and confirmed the findings in these reports.

[156] The objective of the first Wen:De report in 2004 was to identify three new options for FNCFS Agency funding and the research agenda needed to inform each of those options (see *Wen:De Report One* at p. 4). The authors explain how they reviewed pertinent literature from Canada and abroad; conducted interviews with informed

observers and participants, including the Operations Formula Funding Design Team; and met with six FNCFS Agencies representing differing agency sizes, service contexts, regions and cultural groups (see *Wen:De Report One* at p. 6).

[157] The authors noted that the concerns and challenges expressed by the FNCFS Agencies that it interviewed were in line with the *NPR* findings and recommendations, such as the lack of funding for prevention services, legal services, capital costs, management information systems, culturally based programs, caregivers, staff salaries and training, and costs adjustments for remote and small agencies (see *Wen:De Report One* at pp. 6, 8).

[158] Notably, the report found FNCFS Agencies "…are not funded on the basis of a determination of need but rather on population levels" resulting in "…significant regional variation in the implementation of Directive 20-1 as funding officials within the department adapted to their local context" (*Wen:De Report One* at p. 5). As a result, it concluded:

> Overall, our findings affirm that the findings and recommendations of the NPR which was completed in June of 2000 continue to be reflective of the concerns that FNCFSA are experiencing today. […] All agencies agreed that immediate redress of inadequate funding was necessary to support good social work practice in their communities.
>
> (*Wen:De Report One* at p. 6)

[159] *Wen:De Report One* presents three options to address this conclusion: (1) redesign the existing funding formula; (2) follow the funding model of the province/territory in which the agency is located; or, (3) a new First Nations based funding formula that funds agencies on the basis of community needs and assets, along with the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve (see *Wen:De Report One* at pp. 7-13).

[160] The second Wen:De report analyzed the three options presented in the first report (see Annex, ex. 15 [*Wen:De Report Two*]). To do so, the various authors of the report conducted literature reviews and key informant interviews with twelve sample FNCFS Agencies. A key method was to conduct detailed case studies of the twelve sample agencies and the provinces using standardized questionnaires administered by regional

researchers. The research approach involved specialized research projects on the incidence and social work response to reports of child maltreatment respecting First Nations children, prevention services, jurisdictional issues, extraordinary circumstances, management information services and small agencies (see *Wen:De Report Two* at pp. 7, 9-11).

[161] *Wen:De Report Two* begins by examining the experience of First Nations children coming into contact with the child welfare system in Canada. It notes that the key drivers of neglect for First Nations children are poverty, poor housing and substance misuse. The report underscores that two of those three factors are arguably outside the control of parents: poverty and poor housing. As such, parents are unlikely to be able to redress these risks and it can mean that their children are more likely to stay in care for prolonged periods of time and, in some cases, permanently (see *Wen:De Report Two* at p. 13). On this issue, *Wen:De Report Two* indicates:

- There are approximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940s (see at p. 8).
- Aboriginal children are more than twice as likely to be investigated compared to non-Aboriginal children (see at p. 15).
- Once investigated, cases involving Aboriginal children are more likely to be substantiated and more likely to require on-going child welfare services (see at p. 15).
- Aboriginal children are more than twice as likely to be placed in out of home care, and more likely to be brought to child welfare court (see at p. 15).
- The profiles of Aboriginal families differ dramatically from the profile of non-Aboriginal families (see at p. 15).
- Aboriginal cases predominantly involve situations of neglect where poverty, inadequate housing and parent substance abuse are a toxic combination of risk factors (see at p. 15).

[162] Overall, with regard to funding under the FNCFS Program, at page 7, *Wen:De Report Two* found that:

> First Nations child and family service agencies are inadequately funded in almost every area of operation ranging from capital costs, prevention programs, standards and evaluation, staff salaries and child in care programs. The disproportionate need for services amongst First Nations children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.

[163] Based on its research findings, the report indicates that Directive 20-1 would need substantial alteration in order to meet the requirements of the FNCFS Program and to ensure equitable child welfare services for First Nations children resident on reserve. There are a number of issues causing an inadequacy in funding. The lack of an adjustment to funding levels for increases in the cost of living is identified as one of the major weaknesses of Directive 20-1. Although Directive 20-1 contains a cost of living adjustment, it has not been implemented since 1995. According to *Wen:De Report Two*, not adjusting funding for increases in cost of living "…leads to both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional (at p. 45). *Wen:De Report Two* calculates prices increased by 21.21% over the ten year period since Directive 20-1 was last adjusted for cost of living (see a p. 45). To restore the loss of purchasing power since 1995, it found $24.8 million would be needed to meet the cost of living requirements for 2005 alone (see *Wen:De Report Two* at p. 51).

[164] Similarly, Directive 20-1 contains no periodic reconciliation for inflation. For example, since Directive 20-1 was introduced in 1990, there has been no adjustment for salary increases. Two thirds of FNCFS Agencies participating in *Wen:De Report Two* reported funding for salaries and benefits was not sufficient (see at pp. 35, 57). *Wen:De Report Two* estimates the loss of funds due to inflation for the operations portion of Directive 20-1 to be $112 million (at p. 57). It adds, any increases in funding only come with increases in the number of children served. Therefore, in the circumstances, "either the quality of services must have declined if child and family needs grew proportionately

with population or, increases in costs of services can have been covered, if at all, only from a reduction in the proportion of children or families receiving services" (at p. 121).

[165] The population thresholds were also found by all agencies to be an inadequate means of benchmarking operations funding levels. Approximately half of the respondents to the study stated funding should be based on community needs not child population. Some added that the entire community population should be taken into account, not just that of children, since it is the entire family that needs support when a child is at risk or is unsafe. In fact, small agencies (those serving child populations of less than 1,000) represent 55% of the total number of FNCFS Agencies. According to 75% of the small agencies who participated in *Wen:De Report Two*, their salary and benefits levels for staff were not comparable to other child welfare organizations (see at pp. 46-48, 213).

[166] In addition, Directive 20-1 provides no adjustment for the different content of provincial/territorial legislation and standards. While the FNCFS Program includes a guiding principle that services should be reasonably comparable to those provided to children in similar circumstances off reserve, it contains no mechanism to ensure this is achieved (see *Wen:De Report Two* at p. 50).

[167] Aside from the above, *Wen:De Report Two* found consensus among FNCFS Agencies it canvassed that Directive 20-1 makes inadequate provision for travel, legal costs, front-line workers, program evaluation, accounting and janitorial staff, staff meetings, Health and Safety Committee meetings, security systems, human resources staff for large agencies, quality assurance specialists and management information systems. Furthermore, *Wen:De Report Two* comments that funding has not reflected the significant technology changes in computer hardware and software over the past decade. Moreover, liability insurance premiums have increased substantially over that same period and are not reflected in Directive 20-1 (see at p. 122). *Wen:De Report Two* also identified management information systems as not meeting minimum standards in the vast majority of cases (see at p. 57).

[168] Of particular note, funds for prevention and least disruptive measures were identified as inadequate, along with 84% of reporting FNCFS Agencies feeling that current

funding levels were insufficient to provide adequate culturally based services (see *Wen:De Report Two* at p. 57). In this regard, the report found that "the present funding formula provides more incentives for taking children into care than it provides support for preventive, early intervention and least intrusive measures" (*Wen:De Report Two* at p. 114). This is because the funding formula provides dollar-for-dollar reimbursement of "maintenance" expenditures and prevention services are often not deemed to fall under "maintenance" (see *Wen:De Report Two* at p. 19-21). As a result, prevention funding was identified as being inadequate, in spite of the fact that such services are mandated under most provincial child welfare legislation (see *Wen:De Report Two* at p. 91). On this basis, the report states:

> This means that agencies in this situation effectively have no money to comply with the statutory requirement to provide families with a meaningful opportunity to redress the risk that resulted in their child being removed. More importantly, the children they serve are denied an equitable chance to stay safely at home due to the structure and amount of funding under the Directive. In this way the Directive really does shape practice – instead of supporting good practice.
>
> (*Wen:De Report Two* at p. 21)

[169] *Wen:De Report Two* concludes option three, a new First Nations based funding formula that funds agencies based on needs and assets, is the most promising way to address these deficiencies because of the "…possibility of re-conceptualizing the pedagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children" (*Wen:De Report Two* at p. 9). In sum, *Wen:De Report Two* recommends: targeted funding for least disruptive measures; funds for adequate culturally based policy and standards development; ensure that human resources funds are sufficient; increased investment in research to inform policy and practice for FNCFS Agencies; and, introduce financial review and adjustment to account for changes to provincial child welfare legislation (see *Wen:De Report Two* at p. 56).

[170] The third Wen:De report involved the development and costing of the recommended changes arising from the second report (see Annex, ex. 16 [*Wen:De Report Three*]). A national survey instrument was developed and sent out to 93 FNCFS

Agencies. Thirty-five surveys were completed, representing 32,575 children, 146 First Nations and $28.6 million in operating funds. This covered 38% of all FNCFS Agencies, 49% of all bands, 31.4% of all children 0-18 and 28.7% of all funding for operations (see *Wen:De Report Three* at pp. 9-10).

[171] *Wen:De Report Three* reiterates the weaknesses in Directive 20-1 as follows at pages11-12:

> 1) uncertainty in what the original rationale was underlying the development of the formula 2) regional interpretations of sometimes vaguely worded guidelines, 3) a failure to implement certain elements of the formula such as the annual inflation adjustment and 4) a failure of the policy to keep pace with advances in social work evidence based practice, child welfare liability law and the evolution of management information systems and 5) the policy appeared to leave out some child welfare expenses altogether or fund them inadequately such as the failure of the policy to support agencies to provide in home interventions to abused and neglected children to keep them safely at home as opposed to bringing them into care.

[172] Despite these weaknesses, *Wen:De Report Three* also indicates Directive 20-1 has some positive features, including that it is national in scope, has undergone two national studies, has enabled the development of FNCFS Agencies throughout Canada, and offers a baseline for judging the impacts of possible changes to the current regime.

[173] These reasons were the principle basis forming the recommendation in *Wen:De Report Three* to implement both options 1 and 3. That is, redesign Directive 20-1 now, with a priority on funding prevention services and providing redress for losses in funding due to inflation, while providing a foundation for the development of a First Nations based formula over time (see *Wen:De Report Three* at pp. 11-12). In also pursuing option 1, the report noted the development of a First Nations funding model would not provide a quick fix to the problems with the existing funding formula (see *Wen:De Report Three* at p. 14).

[174] Option two, tying FNCFS Agency funding to provincial formulae, was found to be the least promising option, notably because in several provinces it is not clear what their formula is and First Nation communities do not have the same degree of infrastructure of programs, services and volunteer agencies. Moreover, provincial funding traditions are not based on the particular needs and conditions faced by First Nation families living on

reserve, including that it costs more to service First Nations children and families due to their high needs levels (see *Wen:De Report Three* at p. 13).

[175] In recommending reforms to Directive 20-1, *Wen:De Report Three* noted that "[a] shift in funding mentality is vital" (at p. 20). That is, as stated at page 20 of *Wen:De Report Three*:

> An approach that invests in the community and engages the community at all levels – children, adolescents, youth, parents and Elders means directing resources at growth and development of the people rather than the breakdowns of the people in the community. This approach demonstrates long term commitment to the growth of a child and family and invests in the future of contributing members to society.

[176] Furthermore, at page 15, *Wen:De Report Three* provides the following caution:

> Although each suggested change element is presented as a separate item, it is important to understand that these elements are interdependent and adoption in a piece meal fashion would undermine the overall efficacy of the proposed changes. For example, providing least disruptive measures funding for at home child maltreatment interventions without providing the cost of living adjustment would result in agencies not having the infrastructure and staffing capacity to maximize outcomes. Similarly, these recommendations assume that there will be no reductions in the First Nations child and family service agency funding envelope. Situations where funds in one area are cut back and redirected to other funding streams in child and family services should be avoided as our research found that under funding was apparent across the current formula components.

[177] *Wen:De Report Three* recommends certain economic reforms to Directive 20-1, along with policy changes to support those reforms. The recommended economic reforms from *Wen:De Report Three*, include: a new funding stream for prevention/least disruptive measures (at pp. 19-21); adjusting the operations budget (at pp. 24-25); reinstating the annual cost of living adjustment on a retroactive basis back to 1995 (at pp. 18-19); providing sufficient funding to cover capital costs (buildings, vehicles and office equipment) (at pp. 28-29); and, funding for the development of culturally based standards by FNCFS Agencies (at p. 30).

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

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

[179] For small agencies the report found that the fixed amount per agency or the provision for overhead did not provide realistic administrative support for two reasons. The first is that no agency representing communities with a combined total of 250 or fewer children receives any overhead funding whatsoever. The second problem is that available funding is currently fixed in three large blocks: 251-500 = $ 35,790; 501-800 = $ 71,580; and, 801 and up = $143,158. A slight increase or decrease in child population can result in a huge increase or decrease in overhead funding available to an agency (see *Wen:De Report Three* at p. 23).

[180] Therefore, *Wen:De Report Three* recommends two reforms. First, that overhead funding be extended to agencies serving populations of 125 and above. The report proposes a minimum of $20,000 be made available to the smallest agency representing 125 children. Thereafter, the second proposal is to give agencies additional funding for every 25 children in excess of 125. Under this approach, 6 agencies would still be too small to receive any fixed amount; 8 small agencies which never before received a fixed amount of overhead funding would now do so; 23 agencies of medium size would receive funding increases; and, 56 large agencies would receive no change in their funding. In the future, *Wen:De Report Three* believes a minimum economy of scale for small agencies will be required to provide a basic level of child and family services (see at p. 23-24).

[181] In terms of the remoteness factor in Directive 20-1, *Wen:De Report Three* identified a number of weaknesses, including that the average adjustment is considered by 90% of the agencies canvassed to be too small to compensate for the actual costs of remoteness; and, that the remoteness index is usually based on accessibility to the nearest business centre, which are not necessarily able to offer specialized child welfare services. According to *Wen:De Report Three*, these weakness have led to some communities receiving less than their population warrants and some receiving more. As such, it proposes an across the board increase in remoteness allowances and to adjust the index from the current service centre base to a city centre base (see at pp. 25-26).

[182] Other policy recommendations from *Wen:De Report Three* include: that AANDC clarify that legal costs related to children in care are billable under "maintenance"; that support services related to reunifying children in care with their families be eligible "maintenance" expenses, since they are mandatory services according to provincial child welfare statutes; validation of the need for research and mechanisms to share best practices at a regional and national level; and, that AANDC clarify the "stacking provisions" in Directive 20-1 in order to make it easier for First Nations to access voluntary sector funding sources (at pp. 16-18).

[183] Finally, *Wen:De Report Three* found jurisdictional disputes between federal government departments and between the federal government and provinces over who should fund a particular service took about 50.25 person hours to resolve, resulting in a significant tax on the limited resources of FNCFS Agencies. As a result, it recommends the immediate implementation of Jordan's Principle for jurisdictional dispute resolution and its integration into any funding agreements between AANDC and the provinces. Jordan's Principle asserts that the government (federal or provincial) or department that first receives a request to pay for a service must pay for the service and resolve jurisdictional issues thereafter (see *Wen:De Report Three* at p. 16).

[184] Total costs of implementing all the reforms recommended in *Wen:De Report Three* were estimated at $109.3 million, including $22.9 million for new management information systems, capital costs (buildings, vehicles and office equipment) and insurance premiums; and, $86.4 million for annual funding needs (see at p. 33).

[185] The EPFA was designed in an effort to address some of the shortcomings of Directive 20-1 identified in the *NPR* and the Wen:De reports. However, despite *Wen:De Report Three*'s caution that the recommended changes are interdependent and adoption in a piece meal fashion would undermine the efficacy of those proposed changes, this is in fact the approach AANDC took. This becomes clear in reviewing the Auditor General of Canada's 2008 report on the FNCFS Program and AANDC's corresponding responses, along with the rest of the evidence to follow.

2008 Report of the Auditor General of Canada

[186] Following a written request from the Caring Society, the Auditor General of Canada initiated a review of AANDC's FNCFS Program and reported the findings to the House of Commons in 2008 (see Annex, ex. 17 [*2008 Report of the Auditor General of Canada*]). The purpose of the review was to examine the "…management structure, the processes, and the federal resources used to implement the federal policy…" on reserves (*2008 Report of the Auditor General of Canada* at p.1).

[187] The *2008 Report of the Auditor General of Canada* echoed the findings of the *NPR* and Wen:De reports. Namely, that "[c]urrent funding practices do not lead to equitable funding among Aboriginal and First Nations communities" (*2008 Report of the Auditor General of Canada* at p.2). The findings of the *2008 Report of the Auditor General of Canada* include:

- The funding formula is outdated and does not take into account any costs associated with modifications to provincial legislation or with changes in the way services are provided (see at p. 20, s. 4.51),
- AANDC has limited assurance that child welfare services delivered on reserves comply with provincial legislation and standards. Funding levels are pre-determined without regard to the services the agency is bound to provide under provincial legislation and standards (see at pp.14-15, ss. 4.30, 4.34).
- There is no definition of what is meant by reasonably comparable services or way of knowing whether the services that the program supports are in fact reasonably

comparable. Furthermore, child welfare may be complicated by other social problems or health issues. Access to social and health services, aside from child welfare services, to help keep a family together differs not only on and off reserves but among First Nations as well. AANDC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services (see at pp. 12-13, ss.4.20, 4.25).

- There are no standards for FNCFS Agencies to provide culturally appropriate child welfare services that meet the requirements of provincial legislation. The number of FNCFS Agencies being funded is the main indicator of cultural appropriateness that AANDC uses. According to AANDC, the fact that 82 First Nations agencies have been created since the current federal policy was adopted means there are more First Nations children receiving culturally appropriate child welfare services. However, the Auditor General found that many agencies provide only a limited portion of the services while provinces continue to provide the rest. Further, AANDC does not know nationally how many of the children placed in care remain in their communities or are in First Nations foster homes or institutions (see at p. 13, ss. 4.24-4.25).

- The formula is based on the assumption that each FNCFS Agency has 6% of on-reserve children placed in care. This assumption leads to funding inequities among FNCFS Agencies because, in practice, the percentage of children that they bring into care varies widely. For example, in the five provinces covered by the report, that percentage ranged from 0 to 28% (see at p. 20, s. 4.52).

- The funding formula is not responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by FNCFS Agencies (see at p. 20, s. 4.52).

- The formula is not adapted to small agencies. It was designed on the basis that First Nations agencies would be responsible for serving a community, or a group of communities, where at least 1,000 children live on reserve. The Auditor General found 55 of the 108 agencies funded by AANDC were small agencies serving a population of less than 1000 children living on reserve who did not always have the funding and capacity to provide the required range of child welfare services (see at p. 21, ss. 4.55-4.56).

- The shortcomings of the funding formula have been known to AANDC for years (see at p. 21, s. 4.57).

[188] As certain provinces were transitioned to the EPFA at the time of the report, the *2008 Report of the Auditor General of Canada* also comments on the new funding formula. It found that while the new funding formula provides more funds for the operations of FNCFS Agencies and offers more flexibility to allocate resources, it does not address the inequities noted under the current formula. It still assumes that a fixed percentage of First Nations children and families need child welfare services and, therefore, does not address differing needs among First Nations (see *2008 Report of the Auditor General of Canada* at p. 23, ss. 4.63-4.64).

[189] Overall, the Auditor General of Canada was of the view that:

> the funding formula needs to become more than a means of distributing the program's budget. As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.
>
> (*2008 Report of the Auditor General of Canada* at p. 23, s. 4.66)

[190] The Auditor General further noted that because the FNCFS Program's expenditures were growing faster than AANDC's overall budget, funds had to be reallocated from other programs, such as community infrastructure and housing. This means spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate. In the Auditor General's view, AANDC's

budgeting approach for the FNCFS Program is not sustainable and needs to minimize the impact on other important departmental programs (see *2008 Report of the Auditor General of Canada* at p. 25, ss. 4.72-4.73).

[191] The Auditor General of Canada made 6 recommendations to address the findings in its report. AANDC agreed with all the recommendations and indicated the actions it has taken or will take to address the recommendations (see *2008 Report of the Auditor General of Canada* at p. 6 and Appendix). AANDC's response to the *2008 Report of the Auditor General of Canada* demonstrates its full awareness of the impacts of its FNCFS Program on First Nations children and families on reserves, including that its funding is not in line with provincial legislation and standards. Furthermore, despite the flaws identified with the new funding formula, AANDC still viewed EPFA as the answer to the problems with the FNCFS Program:

> 4.67 **Recommendation.** Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.
>
> **The Department's response.** Indian and Northern Affairs Canada's current approach to Child and Family Services includes reimbursement of actual costs associated with the needs of maintaining a child in care. The Department agrees that as new partnerships are entered into, based on the enhanced prevention approach, funding will be directly linked to activities that better support the needs of children in care and incorporate provincial legislation and practice standards.
>
> (*2008 Report of the Auditor General of Canada* at pp. 23-24, s. 4.67)

[192] The flaws with Directive 20-1 and the EPFA would subsequently be scrutinized by the Standing Committee on Public Accounts.

2009 Report of the Standing Committee on Public Accounts

[193] In February 2009, the House of Commons Standing Committee on Public Accounts held a hearing on the *2008 Report of the Auditor General of Canada*. This hearing was held with officials from the Office of the Auditor General of Canada and AANDC "[g]iven

the importance of the safety and well-being of all Canadian children and the disturbing findings of the audit" (Annex, ex.18 at p.1 [*2009 Report of the Standing Committee on Public Accounts*]).

[194] The Committee noted the *2008 Report of the Auditor General of Canada* made 6 recommendations and that it fully supports those recommendations. As AANDC agreed with all the recommendations, "the Committee expects that the Department will fully implement them" (*2009 Report of the Standing Committee on Public Accounts* at p. 3).

[195] AANDC's Deputy Minister Michael Wernick acknowledged the flaws in the older funding formula and pointed to the new approach:

> What we had was a system that basically provided funds for kids in care. So what you got was a lot of kids being taken into care. And the service agencies didn't have the full suite of tools, in terms of kinship care, foster care, placement, diversion, prevention services, and so on. The new approach that we're trying to do through the new partnership agreements provides the agencies with a mix of funding for operating and maintenance--which is basically paying for the kids' needs--and for prevention services, and they have greater flexibility to move between those.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 7-8 [footnote omitted])

[196] Assistant Deputy Minister Christine Cram's testimony before the Standing Committee echoed that of the Deputy Minister:

> We currently have two formulas in operation. We have a formula for those provinces where we haven't moved to the new model. Under that formula, we reimburse all charges for kids who are actually in care, and that's why the costs have gone up so dramatically over time. There were comments made about the fact that under the old formula there wasn't funding provided to be able to permit agencies to provide prevention services. That's a fair criticism of the old formula. Under the new formula, as the deputy was mentioning, we have three categories in the funding formula. We have operations, prevention, and maintenance. So those are each determined on a different basis.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 8 [footnote omitted])

[197] With regard to the continued application of Directive 20-1 in many provinces and in the Yukon, the Standing Committee expressed concern:

> The Committee is quite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed. According to the Joint National Policy Review, "The funding formula inherent in Directive 20-1 is not flexible and is outdated." The 2005 Wen:de report, which undertook a comprehensive review of funding formulae to support First Nations child and family service agencies, found that the current funding formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures. The report writes, "The lack of early intervention services contributes to the large numbers of First Nations children entering care and staying in care." An evaluation prepared in 2007 by INAC's Departmental Audit and Evaluation Branch recommended that INAC, "correct the weaknesses in the First Nations Child and Family Service Program's funding formula." The OAG concluded, "As currently designed and implemented, the formula does not treat First Nations or provinces in a consistent or equitable manner. One consequence of this situation is that many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves."
>
> Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same, preventative services aren't funded, and all these children are being put into care."
>
> While the Committee appreciates the efforts the Department is making to develop new agreements based on the enhanced prevention model, the Committee completely fails to understand why the old funding formula is still in place. Moving to new agreements should in no way preclude making improvements to the existing formula, especially as it may take years to develop agreements with the provinces. In the meantime, many First Nations children are taken into care when other options are available. This is unacceptable and clearly inequitable.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 9-10 [footnotes omitted])

[198] With regard to the new EPFA funding formula, the Standing Committee agreed with the Auditor General's comments regarding the fact that this new formula does not address

the inequities of Directive 20-1 (i.e. the assumptions built into the formula regarding the percentage of first nations children and families in need of care):

> The Committee could not agree more, especially as the Department has known about this problem in the old formula yet has repeated it in the new formula. The Committee is very disturbed that the Department would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed. The result of this approach is that communities that need funding the most, that is, where more than six percent of the children are in care, will continue to be underfunded and will not be able to provide their children the services they need. The Committee strongly believes that INAC needs to develop a funding formula that is flexible enough to provide funding based on need, rather than a fixed percentage.
>
> (*2009 Report of the Standing Committee on Public Accounts* at p. 10)

[199] Finally, with regard to the Auditor General's finding that AANDC has not analyzed and compared the child welfare services available on reserves with those in neighbouring communities off reserve, the Standing Committee made the following observations:

> Nonetheless, it should be possible to compare the level of funding provided to First Nations child and family services agencies to similar provincial agencies, and given their unique and challenging circumstances, it would be reasonable to expect First Nations agencies to receive a higher level of funding. Yet, when asked how the funding for First Nations child and family service agencies compares to agencies for non-natives, the Assistant Deputy Minister said, "I'm sorry, but we don't know the answer." The same question was put to the Deputy Minister and he replied, "Our accountability is for the services delivered by those agencies to the extent that we fund them."
>
> The Committee finds these responses quite disappointing. The Deputy Minister's response was unsatisfactory because the issue under discussion is the extent to which the agencies are funded. Also, to not know how the funding compares to provincial agencies makes the Committee wonder how the level of funding is determined, and how the Department can be assured that it is treating First Nations children equitably.
>
> […]
>
> As the policy requires First Nations child welfare services to be comparable with services provided off reserves and the Committee believes that First Nations children should be treated equitably, the Committee

> believes that INAC must have comprehensive information about the funding level provided to provincial child welfare agencies and compare that to the funding of First Nations agencies. This does not mean that INAC should adopt provincial funding formulae for First Nations agencies as the needs for First Nations agencies are unique and often greater. Nonetheless, at the very least, INAC should be able to compare funding.
>
> (*2009 Report of the Standing Committee on Public Accounts* at pp. 5-6 [footnotes omitted])

[200] After hearing from the officials of the Office of the Auditor General of Canada and AANDC, including Sheila Fraser, the Auditor General of Canada, Michael Wernick, Deputy Minister of AANDC, and Christine Cram, Assistant Deputy Minister of AANDC, the Standing Committee on Public Accounts made 7 recommendations of its own. Those recommendations include: that AANDC provide a detailed action plan to the Public Accounts Committee on the implementation of the recommendations arising out the *2008 Report of the Auditor General of Canada*; that AANDC conduct a comprehensive comparison of its funding under the FNCFS Program to provincial funding of similar agencies; that AANDC immediately modify Directive 20-1 to allow for the funding of enhanced prevention services; that AANDC ensure its funding formula is based upon need rather than an assumed fixed percentage of children in care; that AANDC determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements; and, that AANDC develop measures and collect information based on the best interests of children for the results and outcomes of its FNCFS Program (see *2009 Report of the Standing Committee on Public Accounts* at pp. 4-12).

[201] In response to the Standing Committee's report, presented to the House of Commons on August 19, 2009, AANDC generally accepted the recommendations, although with some nuances (see Annex, ex. 19 [*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*]). For example, AANDC generally responded:

> The Standing Committee on Public Accounts' recommendations speak to the link between provincial comparability, revising Directive 20-1, moving to a needs based formula and to determining the full costs of the FNCFS Program nationally. This suggests INAC should undertake a one-time simultaneous reform of the program in all provinces. INAC is in fact

> undertaking similar steps towards reform, however, it is being done province-by-province. Rather than taking a one-size-fits all approach that would overlook community level needs and compromise partnerships and accountability, INAC is addressing provincial comparability, including a needs component in the formula and finalizing the process with a full costing analysis for each jurisdiction. All of this is done at tripartite tables ensuring buy-in by all partners, reasonable comparability with the respective province and sound accountability aimed at achieving positive outcomes for children and their families. As well, INAC is committing to review Directive 20-1.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Introduction)

[202] With regard to the recommendation that AANDC conduct a comprehensive comparison of its funding to provincial funding, AANDC responded:

> INAC agrees with this recommendation on the understanding that a comparative analysis can only be provided with the limited data we have access to and on a phased basis. This review will require a substantial amount of time and work with the provinces and First Nations. The information available in provincial annual reports is general and the funding provided under their children's services often includes programs beyond child and family services. Overall, these provincial reports do not contain the level of detail required to make the kind of comprehensive comparison expected by the Committee. Relationships must be strengthened with provincial partners as they are key in providing INAC with the necessary information concerning the funding of their child welfare programs. This is what INAC is doing as it proceeds with the Enhanced Prevention Focused Approach. Provinces must also agree to allow INAC to make this information available to the public.
>
> It should also be noted that due to the complexity of child welfare service delivery across the country, comparability between FNCFS agencies and provincial child welfare providers on-reserve, is challenging. Specifically, child welfare services in the provinces are delivered in a variety of ways. The services can vary by jurisdiction based on need; be provided directly by the province; or by provincially delegated authorities or regional/districts. A province can also fund agencies to deliver the services and/or contract third parties.
>
> Therefore, INAC cannot commit to conducting such a comprehensive review nor can it be done for all jurisdictions by the timelines required by the Committee. INAC would be able to provide a basic comparison of jurisdictions that are currently under the Enhanced Prevention Focused Approach and where INAC has basic information on salary rates and

> caseload ratios. INAC expects to complete this first phase by or before December 31, 2009.
>
> As INAC moves forward on transitioning other jurisdictions and as relationships are built with each province at the tripartite tables, INAC will be in a better position to conduct a comparison of funding between FNCFS agencies and provincial systems. This phase will consist of the provinces with whom INAC has not yet developed or completed tripartite accountability frameworks. This phase is expected to be completed by 2012.
>
> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 2 – Provincial Comparison)

[203] In response to the recommendation that AANDC revise the funding formula to provide funding based on need, AANDC responded:

> It is important to note that the 6% average number of children in care calculation is one of many factors used only to model operations funding which includes the number of protection workers. This is then translated into a portion of the operations funding that agency receives. This 6% number was arrived at through discussions with First Nations Agency Directors and provincial representatives, and was thought to be fairly representative of the overall needs of the communities. Under the Enhanced Prevention Focused Approach, FNCFS agencies have the flexibility to shift funds from one stream to another in order to meet the specific needs of the community. This costing model provides all FNCFS agencies under the new approach with the necessary resources to offer a greater range of child and family services.
>
> Through discussions with provincial and First Nations partners, it is clear that they preferred to create a costing model that would provide recipients stable funding for operations. The majority of partners indicated they would not be supportive of a model that generated more resources for Recipients based upon a higher percentage of children in care. Also, this model ensures that FNCFS agencies supporting communities with lower populations are provided with sufficient funding to operate both prevention and protection programs. Without the fixed percentage formula used to calculate and fund Operations, agencies with a very low percentage of children in care would not have the necessary resources to operate. Moreover, if the operations budget were based upon need rather than a fixed percentage, the agencies could find themselves with widely fluctuating operations budgets year to year which would hamper their ability to plan and provide services. The new costing models provide a stable operating and prevention budget that does not rely on the number of children in care as one of its determinants.

> (*AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts* at Recommendation 5 – Funding Formula based on Need)

[204] AANDC's response to the recommendations of the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* would be revisited in 2011 by the Auditor General.

2011 Status Report of the Auditor General of Canada

[205] In 2011, the Auditor General of Canada assessed AANDC's progress in implementing the recommendations from the *2008 Report of the Auditor General of Canada* and the *2009 Report of the Standing Committee on Public Accounts* (see Annex, ex. 20 [*2011 Status Report of the Auditor General of Canada*]).

[206] With regard to comparability of services, the Auditor General noted that while AANDC had agreed to define what is meant by services that are reasonably comparable, it had not done so. The Auditor General stated that "[u]ntil it does, it is unclear what is the service standard for which the Department is providing funding and what level of services First Nations communities can eventually expect to receive" (see *2011 Status Report of the Auditor General of Canada* at pp. 23-24, s. 4.49). In addition, the Auditor General found AANDC had not conducted a review of social services available in the provinces to assess whether the services provided to children on reserve are the same as what is available to children off reserve (see *2011 Status Report of the Auditor General of Canada* at p. 24, s. 4.49).

[207] Concerning the new EPFA funding formula, the Auditor General reiterated its previous finding that it did not address all of the funding disparities that were noted in the *2008 Report of the Auditor General of Canada*. While the Auditor General acknowledged that the EPFA enables additional services beyond those offered by Directive 20-1, it noted that:

> without having defined what is meant by comparability, the Department has been unable to demonstrate that its new Enhanced Prevention Focused Approach provides services to children and families living on reserves that are reasonably comparable to provincial services.

> (*2011 Status Report of the Auditor General of Canada* at p. 24, ss. 4.50-4.51)

[208] With respect to the recommendation that AANDC determine the full costs of meeting the policy requirements of the FNCFS Program, the Department agreed to regularly update the estimated cost of delivering the program with the new EPFA funding approach on a province-by-province basis and to periodically review the program budget. The Auditor General reported that AANDC had identified the costs it would have to pay for services in each province before transitioning to EPFA. AANDC determined that it needed an increase of between 50 and 100% in its funding for operations and prevention services in each of the provinces that transitioned to EPFA. With all cost components taken into consideration, on average, EPFA led to an increase of over 40% in the cost of the FNCFS Program in the participating provinces (see *2011 Status Report of the Auditor General of Canada* at pp. 24-25, ss. 4.53-4.54). In this regard, the Auditor General noted the FNCFS Program budget has increased by 32% since the 2005-2006 fiscal year, partly reflecting the increased funding levels needed to implement EPFA (see *2011 Status Report of the Auditor General of Canada* at p. 25, s. 4.55).

[209] On the comprehensive comparison of funding to FNCFS Agencies with provincial funding to similar agencies requested by the Standing Committee on Public Accounts, the Auditor General reported that AANDC had compared some elements of child and family services programs on and off reserve, such as social workers' salaries and benefits in preparation for framework negotiations with the provinces. However, AANDC did not provide any information about social workers' caseloads, stating that it is not public information. In addition, AANDC asserted certain services provided by the provinces, such as services related to health issues and youth justice, were not within AANDC's mandate (see *2011 Status Report of the Auditor General of Canada* at p. 25, ss. 4.56- 4.57).

[210] In general, the Auditor General's review of programs for First Nations on reserves, including its follow-up on the status of AANDC's progress in addressing some of the recommendations from the *2008 Report of the Auditor General of Canada*, was as follows:

> Despite the federal government's many efforts to implement our recommendations and improve its First Nations programs, we have seen a

> lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. Change is needed if First Nations are to experience more meaningful outcomes from the services they receive. We recognize that the issues are complex and that solutions will require concerted efforts of the federal government and First Nations, in collaboration with provincial governments and other parties.
>
> We believe that there have been structural impediments to improvements in living conditions on First Nations reserves. In our opinion, real improvement will depend on clarity about service levels, a legislative base for programs, commensurate statutory funding instead of reliance on policy and contribution agreements, and organizations that support service delivery by First Nations. All four are needed before conditions on reserves will approach those existing elsewhere across Canada. There needs to be stronger emphasis on achieving results.
>
> We recognize that the federal government cannot put all of these structural changes in place by itself since they would fundamentally alter its relationship with First Nations. For this reason, First Nations themselves would have to play an important role in bringing about the changes. They would have to become actively engaged in developing service standards and determining how the standards will be monitored and enforced. They would have to fully participate in the development of legislative reforms. First Nations would also have to co-lead discussions on identifying credible funding mechanisms that are administratively workable and that ensure accountable governance within their communities. First Nations would have to play an active role in the development and administration of new organizations to support the local delivery of services to their communities.
>
> Addressing these structural impediments will be a challenge. The federal government and First Nations will have to work together and decide how they will deal with numerous obstacles that surely lie ahead. Unless they rise to this challenge, however, living conditions may continue to be poorer on First Nations reserves than elsewhere in Canada for generations to come.
>
> (*2011 Status Report of the Auditor General of Canada* at pp. 5-6)

2012 Report of the Standing Committee on Public Accounts

[211] In February 2012, the Standing Committee on Public Accounts issued a report following the *2011 Status Report of the Auditor General of Canada* (see Annex, ex. 21 [*2012 Report of the Standing Committee on Public Accounts*]).

[212] Deputy Minister of AANDC, Michael Wernick, testified before the Committee and "…agreed, without reservation, with the OAG's diagnosis of the problem…" (*2012 Report of the Standing Committee on Public Accounts* at p. 3). Mr. Wernick stated to the Committee:

> One of the really important parts of the Auditor General's report is that it shows there are four missing conditions. The combination of those is what's likely to result in an enduring change. You could pick any one of them, such as legislation without funding, or funding without legislation, and so on. They would have some results, but they would probably, in our view, be temporary. If you want enduring, structural changes, it's the combination of these tools." He also said, "With all due respect, I want to send the message that, if Parliament demands better results, it has to provide us with better tools.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 3 [footnotes omitted])

[213] With specific regard to the FNCFS Program, the Deputy Minister stated:

> We have fixed the funding formula. We make sure resources are available for prevention services. And we've put in place these kinds of tripartite agreements, because these are creatures of the provincial child protection statutes. In six of the provinces, I think it is, we have $100 million or more in funding over several budgets. They go at the pace at which we can conclude agreements with the provinces--I can certainly provide the list--but we're now covering about 68% of first nations kids with this prevention approach.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 9 [footnote omitted])

[214] The Standing Committee concluded its report with the following statements:

> The Committee notes that the government is taking a number of concrete actions to improve conditions for First Nations on reserves, and the Deputy Minister of AANDC expressed his commitment to address the structural impediments identified by the OAG. Like the Deputy Minister, the Committee is optimistic that progress can be made, but it will require significant structural reforms and sustained management attention. The Committee believes that AANDC, in coordination with other departments, needs to develop and commit to a plan of action to take the necessary steps, and the Committee intends to monitor the government's progress to

> ensure that First Nations on reserves experience meaningful improvements in their social and economic conditions.
>
> (*2012 Report of the Standing Committee on Public Accounts* at p. 12)

[215] The then Minister of AANDC, Mr. John Duncan, responded to the *2012 Report of the Standing Committee on Public Accounts* (see Annex, ex. 22 [*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*]). Of note, Minister Duncan acknowledged the following:

> I would also like to acknowledge the work of the Office of the Auditor General in providing Parliament, the Government of Canada, and Canadians with valuable insights into Canada's approach to program delivery for First Nations on reserves. I consider the six-page preface to Chapter 4 of the 2011 Status Report of the Auditor General of Canada to be an important roadmap for Parliament in moving forward on First Nation issues.
>
> […]
>
> I agree that many of the problems faced by First Nations are due to the structural impediments identified – the lack of clarity about service levels, lack of a legislative base, lack of an appropriate funding mechanism, and a lack of organizations to support local service delivery.
>
> […]
>
> Through the Enhanced Prevention Focused Approach for First Nations Child and Family Services clarity about service levels and comparability of services and funding levels have been addressed at tripartite tables with the six provinces that have transitioned to the new approach.
>
> […]
>
> The Office of the Auditor General observed that there are challenges associated with the use of contribution agreements to fund programs and services for First Nations. For instance, agreements may not always focus on service standards or the results to be achieved; agreements must be renewed yearly and it is often unclear who is accountable to First Nations members for achieving improved outcomes. In addition, contribution agreements involve a significant reporting burden, and communities often have to use scarce administrative resources to respond to the numerous reporting requirements stipulated in their contribution agreements.

> The Government of Canada recognizes that reliance on annual funding agreements and multiple accountabilities when funding is received from multiple sources can impede the provision of timely services and can limit the ability of First Nations to implement longer term development plans.
>
> To address these concerns, Aboriginal Affairs and Northern Development Canada is implementing a risk-based approach to streamlining funding agreements, and reporting requirements. The General Assessment tool supports increased flexibility by assessing the capacity of recipients to access a wider range of funding approaches, including multi-year funding agreements. In addition, a pilot initiative with 11 First Nations communities is currently being implemented using a new approach to reporting which is increasing transparency and accountability at the community level by using the First Nations website as a reporting tool and addressing capacity issues created by the reporting burden.
>
> (*AANDC's Response to the 2012 Report of the Standing Committee on Public Accounts*)

[216] The *NPR*, Wen:De reports and the Auditor General and the Standing Committee reports all have identified shortcomings in the funding and structure of the FNCFS Program. This was further demonstrated in other evidence presented to the Tribunal and to which the Panel will return to below. First, however, we will outline the evidence advanced with regard to the funding of child and family services under the *1965 Agreement* in Ontario, along with the other provincial agreements in Alberta and British Columbia.

c. 1965 Agreement in Ontario

[217] There is also evidence indicating shortcomings in the funding and structure of the *1965 Agreement* in Ontario.

[218] In 1965, the federal government entered into an agreement with the Province of Ontario to enable social services, including child and family services, to be extended to First Nations communities on reserve. Around the same time, child welfare authorities in Ontario began the large-scale removal of Aboriginal children from their homes and communities, commonly referred to as part of the "Sixties Scoop". Ms. Theresa Stevens, Executive Director for Anishinaabe Abinoojii Family Services in Kenora, Ontario, described

how buses would drive into communities and take all the children away (see *Transcript* Vol. 25 at pp. 28-30). As will be explained in more detail below, the collective trauma experienced by many First Nations in Ontario as a result of the Sixties Scoop informs the climate for the provision of child and family services in the province. The Panel acknowledges the suffering of Aboriginal children, families and communities as a result of the Sixties Scoop.

[219] The *1965 Agreement* is a cost-sharing agreement where Ontario provides or pays for eligible services up front and invoices Canada for a share of the costs of those services pursuant to a cost-sharing formula. Eligible services for cost sharing under the *1965 Agreement* are described in its Schedules. Mr. Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, testified at the hearing and explained how the *1965 Agreement* works. At the beginning of each fiscal year, Ontario provides AANDC with a cash flow forecast. Once approved, AANDC provides Ontario with a one-month cash advance, followed by monthly instalments. There is a 10% holdback on the payments, which is paid out (with any adjustments) at the end of the year after an audit. There is no overall cap on expenditures under the *1965 Agreement*.

[220] The cost-sharing formula is set out at clause 3 of the *1965 Agreement* and is based on two elements: the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to persons other than Indians with Reserve Status in Ontario"; and, the "per capita cost of the Financial Assistance Component of the Aggregate Ontario Welfare Program provided to Indians with Reserve Status in Ontario".

[221] According to Mr. Digby, social assistance is the area where there was the best data that gave a good proxy for the proportionate share of costs and relative share of costs in First Nations communities vis-à-vis the rest of Ontario. As of 2011-12 the average cost of providing social assistance to persons living off reserve was approximately $200. For First Nations living on reserve it was about $1,200. AANDC's share of the costs is calculated by taking 50% of the average cost of providing social assistance to persons living off reserve (200 x 0.50 = 100) and dividing it by the average cost of providing social assistance to persons living on reserve (100/1200 = 0.0833); subtracting the average cost of providing social assistance to persons living off reserve from the average cost of providing social

assistance to persons living on reserve (1200 – 200 = 1000) and dividing that amount by the average cost of providing social assistance to persons living on reserve (1000/1200 = 0.8333); and then, adding those two numbers together to arrive at the cost-sharing ratio (0.0833 + 0.8333 = 0.9166). Pursuant to these numbers, AANDC paid approximately 92% of the eligible costs under the 1965 Agreement in 2011-12. According to Mr. Digby, the *1965 Agreement* cost-sharing formula recognizes the higher per capita costs of providing social assistance to First Nations on reserves and AANDC's agreement to take the financial responsibility for these additional costs (see testimony of P. Digby, *Transcript* Vol. 59 at pp. 24-28).

[222] There are two mechanisms used by the province of Ontario to provide child welfare services on reserve: (i) child welfare societies, including provincial child welfare agencies and FNCFS Agencies; and (ii) service contracts for prevention services. There are seven fully-mandated FNCFS Agencies in Ontario and they are funded according to the same funding model as provincial child welfare agencies in Ontario. There are also six pre-mandated FNCFS Agencies who do not have a full protection mandate and are in the process of developing their capacity to become fully-mandated FNCFS Agencies. There are also approximately 25 First Nations reserves that receive prevention services via service contract.

[223] The *1965 Agreement* has never undergone a formal review by AANDC. The sections of the agreement dealing with child and family services have not been updated since 1981, and the Schedules to the agreement have not been updated since 1998. This is significant given in 1984 Ontario implemented the *Child and Family Services Act*, which incorporated elements from other pieces of legislation (for example, youth justice and mental health) to address the child and family services needs of Ontarians. At that time, the Government of Canada took the position that AANDC did not have the mandate or resources to start funding justice and health programs, as those types of programs would fall under a different department (see testimony of P. Digby, *Transcript* Vol. 59 at p. 69).

[224] In 2000, the *NPR* recommended a tripartite review be done of the *1965 Agreement* (see at pp. 18 and 121). The *2008 Report of the Auditor General of Canada* also noted that there are provisions in the *1965 Agreement* to keep it up-to-date and that they could

be used to ensure both the *1965 Agreement* and the services that the federal government pays for are current.

[225] The fact that the *1965 Agreement* has not been kept up-to-date with Ontario's *Child and Families Services Act* was highlighted by Mr. Digby in a 2007 discussion paper (see Annex, ex. 23 [*1965 Agreement Overview*]). The Panel finds the *1965 Agreement Overview* document to be relevant and reliable, especially given Mr. Digby's involvement in its authorship. According to the *1965 Agreement Overview* discussion paper, at page 4, issues raised by various stakeholders with regard to the *1965 Agreement* and its implementation include:

> Concern that the agreement is bilateral, not tripartite, since First Nations were not asked to be signatories in 1965. While clause 2.2 of the 1965 Agreement indicates that bands are to signify concurrence to the extension of provincial welfare programs, this does not reflect the type of intergovernmental relationship sought by many First Nations.
>
> […]
>
> First Nations and the provincial government have, from time to time, expressed interest in INAC cost-sharing additional provincial social service programs to be extended on reserve. INAC has generally not had the resources to 'open up' new areas for cost-sharing. […] There has been no update to the agreement schedule with regard to cost-sharing child welfare. As several programs within the provincial Child and Family Services Act (CFSA) fall outside of INAC's mandate, the department is not in a position to 'open up' discussion on cost-sharing the full CFSA.

[226] In 2011, the Commission to Promote Sustainable Child Welfare (the CPSCW) prepared a discussion paper regarding Aboriginal child welfare in Ontario (see Annex, ex. 24 [*CPSCW Discussion Paper*]). The CPSCW was created by the Minister of Children and Youth Services in Ontario to develop and implement solutions to ensure the sustainability of child welfare. It reports to the Minister thereon. In light of this public mandate, the Panel finds the discussion paper relevant and reliable to the issue of the provision of child and family services to First Nations on reserve in Ontario.

[227] The *CPSCW Discussion Paper*, at page 4, begins by noting the impact of history on many Aboriginal communities:

> The combination of colonization, residential schools, the Sixties Scoop, and other factors have undermined Aboriginal cultures, eroded parenting capacity, and challenged economic self-sufficiency. Many Aboriginal people live in communities that experience high levels of poverty, alcohol and substance abuse, suicides, incarceration rates, unemployment rates, and other social problems. Aboriginal children are disproportionately represented in the child welfare system and in the youth justice system. Suicide rates for Aboriginal children and youth surpass those of non-Aboriginals by approximately five times. Aboriginal youth are 9 times more likely to be pregnant before age 18, far less likely to complete high school, far more likely to live in poverty, and far more likely to suffer from emotional disorders and addictions.

[228] Despite these specific risk factors for Aboriginal peoples, the *CPSCW Discussion Paper* notes that many provincial child welfare agencies give little attention to the requirements for providing services to Aboriginal children set out in Ontario's *Child and Families Services Act* (see at p. 26). Specifically, the discussion paper points to sections 213 and 213.1 of the *Child and Families Services Act* whereby a society or agency that provides services with respect to First Nations children must regularly consult with the child's band or community, usually through a Band Representative, about the provision of the services, including the apprehension of children and the placement of children in care; the provision of family support services; and, the preparation of plans for the care of children.

[229] According to the *CPSCW Discussion Paper*, Band Representatives can be crucial and tend to fulfill the following functions: serving as the main liaison between a Band and Children's Aid Societies [CASs]; providing cultural training and advice to CASs; monitoring Temporary Care Agreements and Voluntary Service Agreements with CASs; securing access to legal resources; attending and participating in court proceedings; ensuring that the cultural needs of a child are being addressed by the CAS; and, participating in the development of a child's plan of care (see at p. 26).

[230] The *CPSCW Discussion Paper* indicates that, in the past, First Nations were funded on a claims basis by the federal government to hire a Band Representative. However, since 2003, that funding was discontinued. Therefore, some First Nations divert

resources from prevention services to cover the cost of a Band Representative, while others simply do not have one (see *CPSCW Discussion Paper* at p. 26).

[231] Providing child welfare services in remote and isolated Northern Ontario communities was also identified by the *CPSCW Discussion Paper* as a challenge for CASs. Those challenges include the added time and expense to travel to the communities they serve, where some communities do not have year round road access and where flying-in can be the only option for accessing a community. In fact, one agency was required to make up to 80 flights in a day.

[232] Another challenge for remote and isolated communities is recruiting and retaining staff, especially qualified staff from the community. The legacy of the Sixties Scoop and the association of CASs with the removal of children from the community have caused some First Nations community members to resent or resist CAS workers and can create a hostile working environment.

[233] Other challenges for remote and isolated communities are a lack of suitable housing, which makes it difficult to hire staff from outside the community and to find suitable foster homes; limited access to court; and, the lack of other health and social programs, which impacts the performance and quality of child and family services (see *CPSCW Discussion Paper* at pp. 28-29). On this last point, the *CPSCW Discussion Paper* emphasizes that "[p]romoting positive outcomes for children, families and communities, requires a full range of services related to the health, social, and economic conditions of the community: child welfare services alone are not nearly enough" (at p. 29).

[234] The *CPSCW Discussion Paper* also notes that there are many distinct differences between designated Aboriginal and non-Aboriginal CASs: they serve significantly larger and less inhabited geographic areas with lower child and youth populations, they have significantly larger case volumes per thousand, they serve more of their children and youth in care versus in their own homes, and they have smaller total expenditures, but significantly higher expenditures per capita and higher expenditures per case (see *CPSCW Discussion Paper* at p. 29).

[235] Finally, in discussing the federal-provincial dynamics of providing child and family services on reserve, the *CPSCW Discussion Paper* comments that instead of working collaboratively towards providing effective service delivery to Aboriginal peoples, the federal government has devolved some of its responsibilities for Aboriginal peoples to the provincial governments, which contributes to some confusion over ultimate jurisdiction (see *CPSCW Discussion Paper* at pp. 34-35).

[236] On this last point, in 2007 the Ontario Ministry of Children and Youth Services wrote to AANDC expressing their concern over AANDC's decision to no longer provide funding for Band Representatives: "with the withdrawal of federal funding, many First Nations do not have the financial resources required to participate in planning for Indian and native children involved with a children's aid society or to take part in child protection legal proceedings" (Annex, ex. 25 at p. 2).

[237] In 2011, the Ontario Ministry of Children and Youth Services again wrote to AANDC on the issue of funding for Band Representatives:

> The paramount purpose of the CFSA is to "promote the best interests, protection and well-being of children." The band representative function supports not only the purpose of the Act but also the other important purposes and provisions to which the Act pertains. A lack of sufficient capacity within First Nation communities limits their ability to respond effectively and in accordance with legislated times frames for action. The withdrawal of [INAC's] funding for band representation functions has eroded First Nations' ability to participate as intended in the CFSA.
>
> (Annex, ex. 26 at p. 2)

[238] Despite the discordance between Ontario's *Child and Families Services Act* and AANDC's policy to no longer fund Band Representatives, Minister Duncan indicated that "it falls within the responsibilities of First Nation governments to determine their level of engagement in child welfare matters" and "we do not foresee the Government of Canada providing funding support in this area" (Annex, ex. 27 at p.1).

[239] Ambiguity surrounding jurisdiction for the provision of mental health services to First Nations youth has also been a cause for concern. When the Anishinaabe Abinoojii Family Services agency sought a mandate to provide children's mental health services, an

AANDC employee prepared a document to provide information to the Regional Director General and Assistant Regional Directors General on the issue (see Annex, ex. 28 [*Abinoojii Mental Health Services Mandate*]). The Executive Director for Anishinaabe Abinoojii Family Services, Ms. Stevens, testified as to the content of the document (see *Transcript* Vol. 25 at pp. 174-178).

[240] According to the *Abinoojii Mental Health Services Mandate* document, there are waiting lists for First Nations children served by the Abinoojii Family Services agency who require mental health services. The document adds that while there is some cooperation between mental health service organizations and the Abinoojii agency to manage these waiting lists, there is also a need for more resources and culturally appropriate assessment tools and counsellors. The Ministry of Children and Youth Services has a Mental Health Policy for Children and Youth and has some resources for mental health counselling, but the needs outstrip the funding (see *Abinoojii Mental Health Services Mandate* at pp. 1-2).

[241] In considering the request, the *Abinoojii Mental Health Services Mandate* document states that AANDC does not have a mandate for mental health services and that these expenditures are not eligible under the *1965 Agreement*. Rather, Health Canada has the federal mandate on mental health and provides funding through a number of programs. However, those programs focus more on prevention and mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counselling (see *Abinoojii Mental Health Services Mandate* at p. 2).

[242] In a roundtable meeting between Abinoojii Family Services agency, AANDC, Health Canada and the Ministry of Children and Youth Services for Ontario, Health Canada recognized a need to look at the whole system as services/programs tend to work in silos and raised the possibility of re-prioritizing resources or seeking additional funding. AANDC indicated that the province is the lead on child welfare and Health Canada is the lead on health issues at the federal level, but that it supports the work on examining existing programs, outlining gaps and working together to ensure First Nations receive services that are comparable and culturally appropriate (see *Abinoojii Mental Health Services Mandate* at p. 2).

[243] In 2012, the Ontario Association of Children's Aid Societies (the OACAS) produced a report regarding trends in child welfare in Ontario, including in Aboriginal communities (see Annex, ex. 29 [*Child Welfare Report*]). The OACAS is an advocacy group representing the interests of 45 CASs member organizations. Governed by a voluntary board of directors, OACAS consults with and advises the provincial government on issues of legislation, regulation, policy, standards and review mechanisms. It promotes and is dedicated to achieving the best outcomes for children and families (see *Child Welfare Report* at p. 2). Given the OACAS's mandate and focus, the Panel finds its report relevant and reliable.

[244] According to the *Child Welfare Report*, the current funding model does not reflect the needs of Aboriginal communities and agencies for several reasons including: insufficient resources for services, where they tend to be crisis driven; shortage of funding for administrative requirements; lack of funding to establish infrastructure necessary to deliver statutory child protection services, while operating within the extraordinary infrastructure deficits of many of the communities they serve; and, insufficient funds to retain qualified staff to deliver culturally appropriate services (at p. 7). Among other things, at page 7 of the *Child Welfare Report*, the OACAS asked the Ontario government to:

> Establish an Aboriginal child welfare funding model and adequate funding to support culturally appropriate programs that encompass the unique experiences of diverse Aboriginal populations – on-reserve, off-reserve, remote, rural, and urban. Invest in capacity building to enable the proper recruitment, training and retention of child welfare professionals in emerging Aboriginal Children's Aid Societies.

[245] In terms of infrastructure and capacity building, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 (see testimony of P. Digby, *Transcript* Vol. 59 at p. 93). Ms. Stevens explained the impact of this on her organization: many high-risk children are sent outside the community to receive services because there is no treatment centre in the community. Abinoojii Family Services spends approximately 2 to 3 million a year sending children outside their community. According to Ms. Stevens, there are not enough resources to build a treatment centre or develop

programs to assist these high-risk children because those funds are expended on meeting the current needs of those children (see *Transcript* Vol. 25 at p. 32).

[246] Again, the above evidence on the *1965 Agreement* identifies shortcomings in AANDC's approach to the provision of child and family services on First Nations reserves in Ontario. In the provision of child and family services, the Panel finds the situation in Ontario falls short of the objective of the *1965 Agreement*"…to make available to the Indians in the Province the full range of provincial welfare programs".

d. Other provincial/territorial agreements

[247] As mentioned above, two other provinces have agreements with AANDC for the provision of child and family services on reserve: Alberta and British Columbia. While in the Yukon, the *Yukon Funding Agreement* applies.

[248] As mentioned above, the *Yukon Funding Agreement* applies to all First Nations children and families ordinarily resident in the Territory. Schedule "DIAND-3" of the *Yukon Funding Agreement* provides for the application of Directive 20-1 to the funding of child and family services to those First Nations children and families.

[249] In Alberta and British Columbia, AANDC reimburses the provinces for the delivery of child and family services to certain First Nations communities on reserve where there are no FNCFS Agencies. In Alberta, six First Nations communities are served by the *Alberta Reform Agreement* for child and family services. In British Columbia, seventy-two First Nation communities receive services under the *BC Service Agreement*.

[250] Pursuant to the *Alberta Reform Agreement*, AANDC reimburses Alberta for the costs of providing various social services, including child welfare services, to certain First Nations reserves in the province. For those child welfare services, funding is provided at the beginning of the fiscal year based on a funding formula using year-end costs of the preceding fiscal year. Adjustments are made based on actual expenditures during the fiscal year (see *Alberta Reform Agreement* at Schedule A, s. 1).

[251] In British Columbia, the *BC MOU* was in place from 1996 to 2012. Under the *BC MOU*, AANDC reimbursed the province for eligible maintenance expenses based on a per diem formula which accounted for the province's administration, supervision and maintenance costs (see *BC MOU* at s. 5.0; and Appendix B and D). The per diem rates could be adjusted annually and the province could receive an adjustment to the previous year's per diem rates based on actual expenditures (see *BC MOU* at Appendix C). Those adjustments included rate increases based on inflation and increased emphasis on prevention services. For the fiscal year 2006/2007, the recalculation of per diem rates resulted in an invoice to AANDC for over $5 million dollars (see Annex, ex. 30).

[252] In 2012, the *BC MOU* was replaced by the *BC Service Agreement*. The *BC Service Agreement* now provides for reimbursement of maintenance expenses based on actual expenditures. It also provides funding to the province for operations expenses based on a costing model agreed to between the province and AANDC (see *BC Service Agreement* at s. 7; and Appendix A). For fiscal year 2012-2013, operations funding amounted to $15 million.

[253] The *Alberta Reform Agreement,* the *BC MOU* and the *BC Service Agreement* provide reimbursement for actual eligible operating and administrative expenditures, including retroactive adjustments for inflation and increases for changes in programming. This is quite different from FNCFS Agencies in those provinces, including under the EPFA in Alberta, where there is no such adjustments for those types of increases in costs (see testimony of C. Schimanke, *Transcript* Vol. 62 at pp. 53-54). As expressed in the *2008 Report of the Auditor General of Canada* at page 19, these adjustments and reimbursements for actuals are linked directly to provincial child welfare legislation:

> 4.49 INAC funds some provinces for delivering child welfare services directly where First Nations do not. INAC has agreements with three of the five provinces we covered on how they will be funded to provide child welfare services on reserves. We found that in these provinces, INAC reimburses all or an agreed-on share of their operating and administrative costs of delivering child welfare services directly to First Nations and of the costs of children placed in care. […]

> 4.50 INAC funding to cover the costs of operating and administering First Nations agencies is established through a formula. Although the program requires First Nations agencies to meet applicable provincial legislation, we found that INAC's funding formula is not linked to this requirement. The main element of the formula is the number of children aged from 0 to 18 who are ordinarily resident on the reserve or reserves being served by a First Nations agency. […]

[254] The Panel will return to this comparison in the section that follows.

iii. AANDC's position on the evidence

[255] AANDC argues the evidence above is not sufficient to establish adverse treatment in the provision of funding for First Nations child and family services, including that there is a lack of specific examples to support the allegation of a denial of such services. In sum, it claims the reports and evidence regarding the FNCFS Program above should be given little weight, that the choices of FNCFS Agencies in administering their budgets should be considered in evaluating any adverse impacts, along with any additional funding they receive beyond Directive 20-1 or the EPFA, that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*, and, even if it were, such comparative evidence is lacking in this case. Each argument is addressed below.

a. The relevance and reliability of the studies on the FNCFS Program

[256] AANDC views the various studies of the FNCFS Program outlined above as having little weight. It questions the comprehensiveness of the studies, noting the experience of a few agencies does not establish differential treatment.

[257] The Panel finds the *NPR* and Wen:De reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of

these reports prior to this Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program.

[258] In its October 2006 *Fact Sheet* (see Annex, ex. 10), AANDC acknowledged the impacts and findings of the Wen:De reports, along with the *NPR*, and committed to refocusing the FNCFS Program to improve outcomes for First Nations children and families on reserve:

> Currently, Program funding is largely based on protection services, which encourage Agencies to remove First Nation children from their parental homes, rather than providing prevention services, which could allow children to remain safely in their homes.
>
> - Program expenditures were $417 million in 2005-2006 and are expected to grow to $540 million by 2010-11 if the program continues to operate under the protection-based model.
>
> - From 1996-97 to 2004-05, the number of First Nation children in care increased by 64.34%.
>
> - Approximately 5.8% of First Nation children living on reserve are in care out of their parental homes.
>
> **Current Issues:** First Nation children are disproportionately represented in the child welfare system. Placement rates on reserve reflect a lack of available prevention services to mitigate family crisis.
>
> […]
>
> **Changes in the landscape:** Provinces and territories have introduced new policy approaches to child welfare and a broader continuum of services and programs that First Nations Child and Family Services must deliver to retain their provincial mandates as service providers. However, the current federal funding approach to child and family services has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians. A fundamental change in the funding approach of First Nations Child and Family Services Agencies to child welfare is required in order to reverse the growth rate of children coming into care, and in order for the agencies to meet their mandated responsibilities.

> **The Future:** A Joint National Policy Review on First Nations Child and Family Services, completed in 2000, recommended that the federal government increase prevention services for children at risk-services that must be provided before considering the removal of the child and placement in out of home care-and that it provide adequate funding for this purpose.
>
> - Indian and Northern Affairs Canada funded research undertaken by the First Nations Child and Family Caring Society of Canada in 2004 and 2005. The reports: *WEN: DE: We are coming to the light of day*, and *WEN: DE: The journey continues*, included recommendations for investments and policy adjustments required to address the shortcomings of the current system. This research will form the basis of Indian and Northern Affairs Canada's request for investments and policy renewal.
>
> […]
>
> - The Government of Canada is committed to working with First Nations, provincial/territorial, and federal partners and agencies to implement a modernized vision of the First Nations Child and Family Services Program, a program that strives for safe and strong children and youth supported by healthy parents.
>
> - The strategy is to refocus the program from a protection-based approach towards a preventive-based model, promote a variety of care options to provide children and youth with safe, nurturing and permanent homes, and build on partnerships and implement practical solutions to improve child interventions services.

[259] Ms. Murphy and Ms. D'Amico also testified about AANDC's reliance on the *NPR* and Wen:De reports in implementing the EPFA (see *Transcript* Vol. 53 at pp. 46-47; and, Vol. 54 at pp. 50-51).

[260] Internal AANDC documents presented at the hearing also support the department's adherence to the findings in the *NPR* and Wen:De reports. AANDC submits the Panel should rely on the testimony of its witnesses rather than what is found in internal documents, given that many of the authors did not testify before the Tribunal in order to provide context and the documents may merely reflect the opinion of employees at a specific time. Therefore, AANDC submits that the Tribunal should assess the weight of documents contextually, with reference to oral evidence regarding their proper

interpretation, and considering the scope of the author's authority to prepare the document in question.

[261] The Panel has considered these arguments in weighing the evidence and finds the documents relied upon below to be straightforward and clear. Many of these documents are presentations prepared for, or delivered to, high level AANDC officials. The Panel finds these presentations highly relevant and reliable given they are the means by which information on the FNCFS Program is provided to AANDC management, including Deputy or Assistant Deputy Ministers, in order to inform policy decisions or future requests to Cabinet (see *Transcript* Vol. 54 at pp. 159, 166; and, Vol. 55 at p. 199). Furthermore, the other AANDC documents referred to below corroborate the information found in those presentations.

[262] A 2005 presentation to the 'Policy Committee' refers to the *NPR* by stating: "[a] 2000 review of FNCFS found that Indian Affairs was funding [FNCFS Agencies] 22% less, on average, than their provincial counterparts" (see Annex, ex. 31 at p. 2 [*Policy Committee presentation*]). The *Policy Committee presentation*, at page 3, goes on to state that, despite maintenance expenditures increasing by 7% to 10% annually, the Department only receives a 2% annual adjustment to the departmental budget. According to the *Policy Committee presentation* at page 3, "[a]dditional investments are now required for further stabilization for basic supports with respect to Enhanced Organizational Support, and Maintenance Volume Growth."

[263] The 2005 *Policy Committee presentation* also indicates FNCFS Agencies are threatening to withdraw from service delivery because they cannot deliver provincially mandated services within their current budgets. The presentation continues by stating that provincial governments have written to the Minister of AANDC indicating their concern that the department is not providing sufficient funding to permit FNCFS Agencies to meet provincial statutory obligations. As a result, the *Policy Committee presentation* warns that provinces may refuse to renew the mandates of FNCFS Agencies or give mandates to new agencies (see at p. 4).

[264] In line with the *NPR* and Wen:De reports, the *Policy Committee presentation* states: "In addition to enhanced basic supports for First Nation Child and Family Services, fundamental change in the approach to child welfare is required in order to reverse the growth rate of children coming into care" (at p. 5). In this regard, the presentation proposes transformative measures be put in place to allow investment in prevention services according to provincial legislation and standards (see at p. 6). This "[e]nables the availability of a full spectrum of culturally-appropriate programs and services that would eventually reduce the over representation of First Nations children in the child welfare system" (*Policy Committee presentation* at p. 6). It also "…addresses immediate critical funding pressures and would stabilize the child welfare situation on reserve" (*Policy Committee* presentation at p. 6). Finally, according to the *Policy Committee* presentation, "[i]ncreasing the budget for basic services would enable [FNCFS Agencies] to retain and train staff and meet the increased costs of maintaining operations (e.g. cost of living adjustment, legal fees, insurance, remoteness)" (at p. 6).

[265] Similarly, in another document entitled "First Nations Child and Family Services (FNCFS) Q's and A's", it states:

> Circumstances are dire. Inadequate resources may force individual agencies to close down if their mandates are withdrawn, or not extended by the provinces. This would result in provinces taking over responsibility for child welfare, likely at a higher cost to Indian and Norther Affairs Canada.
>
> […]
>
> Over the past decade the trend in child welfare has been towards prevention or least disruptive measures. INAC recognizes that the current funding formula is not flexible enough to follow this trend and needs to be revised. […]INAC received authority in 2004-2005 to implement a Flexible Funding Option for Maintenance resources. This will permit some agencies to reprofile Maintenance resources to allow for greater flexibility in how these funds are utilized by placing greater emphasis on prevention services.
>
> Incremental Operations funding will assist agencies to a very limited extent in providing additional prevention services. Additional Operations resources will assist agencies in coping with funding pressures resulting from increased legal fees, insurance costs and other operational expenses that have not been adjusted for since Program Review was implemented in 1994-1995.

(Annex, ex. 32 at pp. 1-2, 5)

[266] Similarly, the *2005 National Program Manual*, at page 14, section 2.2.3, outlines some of the cost pressures experienced by FNCFS Agencies in terms of their operational funding:

> Although the authorities are clear on what to be included in the operations formula, First Nations have expressed a concern that because the formula was developed in the late 1980's, legislation, standards and practices have changed significantly. Although the following items are included in the Operations, First Nations have stated that Recipients are under increasing pressures due to changes over time with respect to:
>
> - *Information Technology*: In the late 1980's, use of computers was limited. Today, however, they are vital to operating social programs and services.
> - *Prevention (Least disruptive measures)*: Recent trends in provincial and territorial legislation have placed a greater emphasis on prevention. Although prevention resources were included in the current formula, the level of funding may not provide enough resources to meet current needs.
> - *Liability Insurance*: As with prevention, the Operations formula includes funding for insurance. However, since September 11, 2001 (9/11) insurance costs have increased dramatically.
> - *Legal Costs*: Although legal costs are included in the Operations formula, they have become a larger issue than planned for when the formula was developed. A higher incidence of contested cases plus changes in provincial practice requiring cases to be presented by legal representatives rather than social workers has resulted in higher costs. Further, litigation on behalf of injured children can be very expensive, even when adequate liability insurance is carried.
>
> It is anticipated that the review of the Operational formula will address these issues. <u>At the present time, however, the current authorities must be applied</u>.
>
> (<u>Emphasis added</u>)

[267] In another document dealing with AANDC's expenditures on Social Development Programs on reserves it states that, despite the federal government acting as a province in the provision of social development programs on reserve, federal policy for social programs has not kept pace with provincial proactive measures and thus perpetuates the

cycle of dependency (see Annex, ex. 33 at pp. 1-2 [*Explanations on Expenditures of Social Development Programs* document]). The document describes AANDC's social programs as "…limited in scope and not designed to be as effective as they need to be to create positive social change or meet basic needs in some circumstances" (*Explanations on Expenditures of Social Development Programs* document at p. 2). It goes on to say that if its current social programs were administered by the provinces this would result in a significant increase in costs for AANDC. The document provides the example of the Kasohkowew Child Wellness Society in Alberta, where it would cost an additional $2.2 million beyond what AANDC currently funds if social services on that reserve reverted back to the province of Alberta (see *Explanations on Expenditures of Social Development Programs* document at p. 2).

[268] Correspondingly, a 2006 presentation regarding AANDC social programs on reserves, including the FNCFS Program, describes those programs as being remedial in focus, not always meeting provincial/territorial rates and standards, and not well-integrated across jurisdictions (see Annex, ex. 34 at p. 5 [*Social Programs presentation*]). With specific regard to the FNCFS Program, the presentation states that "efforts have been concentrated on child protection and removal of the child from the parental home with the result that the children in care rate continues to increase" (see *Social Programs presentation* at p. 5).

[269] In general, the *Social Programs presentation* states that "[m]any First Nation and Inuit children and families are not receiving services reasonably comparable to those provided to other Canadians" (at p. 3). Relatedly, the presentation notes that "[p]rovinces/territories have been critical of [AANDC] funding levels as they do not enable First Nation service providers to meet the standards stipulated in provincial/territorial legislation" (*Social Programs presentation* at p. 6). According to the presentation, the delivery of social programs on reserves is hampered by the absence of legislation, inadequate funding and a division of responsibilities between federal departments which impedes comprehensive program responses (see *Social Programs presentation* at p. 3).

[270] In another presentation, AANDC describes Directive 20-1 as "broken":

> The current system is BROKEN, i.e. piecemeal and fragmented
>
> The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality
>
> […]
>
> The current program focus is on protection (taking children into care) rather than prevention (supporting the family)
>
> […]
>
> Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand
>
> INAC CFS has been unable to keep up with the provincial changes
>
> Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced
>
> (Annex, ex. 35 at pp. 2-3 [*Putting Children and Families First in Alberta presentation*])

[271] The *Putting Children and Families First in Alberta presentation* touts prevention as the ideal option to address these problems at page 4:

> Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve
>
> Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health

[272] Finally, the *Putting Children and Families First in Alberta presentation* states at page 5:

> The facts are clear:
>
> - *Wen:De* Report - Early intervention/prevention is KEY
>
> […]

- First Nation agencies have been lobbying Canada since 1998 to change the system

[273] AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [*2007 Evaluation of the FNCFS Program*]). The findings and recommendations of the *2007 Evaluation of the FNCFS Program* reflect those of the *NPR* and Wen:De reports. Of note, at page ii, the *2007 Evaluation of the FNCFS Program* makes the following findings:

> Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.
>
> The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed.

[274] In response to these findings, the *2007 Evaluation of the FNCFS Program* made six recommendations at page iii, including that AANDC:

> 1. clarify the department's hierarchy of policy objectives for the First Nations Child and Family Services Program, placing the well-being and safety of children at the top;
>
> 2. correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions;

[275] The *2007 Evaluation of the FNCFS Program* goes on to state that the first step in improving the FNCFS Program is to change Directive 20-1 by providing FNCFS Agencies with a new funding stream that ensures adequate support for prevention work (see at p. 35). In discussing the costs and benefits of increasing the FNCFS Program's focus on prevention, the cost estimates provided in *Wen:De Report Three* are outlined, including the $22.9 million for new management information systems, capital costs (buildings,

vehicles and office equipment), and insurance premiums; and, the $86.4 million for annual funding needs for such things as an inflation adjustment to restore funding to 1995 levels, adjusting the funding formula for small and remote agencies, and increasing the operations base amount from $143,000 to $308,751 (see *2007 Evaluation of the FNCFS Program* at pp. 35-36).

[276] In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children.

[277] Similarly, at the hearing, Ms. Murphy described the EPFA as follows:

> MS MacPHEE: Okay. And I think you touched on this earlier, but I wanted to get you to elaborate a little bit more. Could you tell us a little bit how, more specifically maybe, the new Enhanced Prevention Focused Approach was developed? You know, what was the impetus for developing this new approach?
>
> MS MURPHY: We weren't getting good outcomes. MS MURPHY: We were having challenges with First Nations, we were having challenges with the number of children in care, and we wanted to reduce that number and we wanted to have kids be safe and we wanted to avoid having kids having to come into care. I mean, the challenge for first Nations communities -- and I'm sure this has already been outlined here by others, is that, especially for small, remote communities, when child needs to be taken into care, sometimes there's not community-based options, so the child may not stay in that community. And taking a child away from their family and from their community has impacts for sure. So we wanted to find community-based solutions so kids could stay in their communities, be close to – and hopefully have the families be able to be reunited. So we wanted to do that early intervention work which would actually avoid having to have the children actually being removed from their parental home and perhaps being located outside at a distance from their community.
>
> (*Transcript* Vol. 54 at pp.49-50)

[278] However, as the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada,* and the *2012 Report of the Standing Committee on Public Accounts* pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA.

[279] AANDC argues the *2008 Report of the Auditor General of Canada,* and the *2011 Status Report of the Auditor General of Canada*, should also be given minimal weight since the authors of the reports were not called to substantiate the documents or provide the context of statements or opinions contained therein. Additionally, AANDC argues these reports are not probative of the facts in issue.

[280] The Panel rejects AANDC's arguments concerning the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*. The Auditor General of Canada did not testify before the Tribunal as she or he is not a compellable witness (see section 18.1 of the *Auditor General Act*). Nevertheless, the Panel is satisfied the *2008 Report of the Auditor General of Canada* and *2011 Status Report of the Auditor General of Canada* are highly reliable, relevant, and clear. They are written to report findings in a comprehensive manner so as to allow Parliament and all Canadians to understand its recommendations. As stated at section 7(2) of the *Auditor General Act*, reports of the Auditor General of Canada are filed annually with the House of Commons in order to "…call attention to anything that he considers to be of significance and of a nature that should be brought to the attention of the House of Commons…".

[281] Given that the Auditor General is an independent public office in Canada, serving the interests of all Canadians, it would be unreasonable to expect the Panel give little or no weight to the report and findings in the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada*, especially given the fact that many findings in the reports are specific to the FNCFS Program. In addition, as was outlined above, AANDC publicly accepted the recommendations emanating from the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor*

General of Canada, reinforcing the reports' relevance and reliability in this matter. The Panel accepts the findings of the *2008 Report of the Auditor General of Canada* and the *2011 Status Report of the Auditor General of Canada.*

[282] Similarly, the Panel finds the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts* to be highly relevant and reliable in this case. In addition to the fact that the reports relate directly of the FNCFS Program, they are also authored by elected officials performing public duties for the benefit of all Canadians. High ranking officials from AANDC were able to testify before the Committee and, in doing so, acknowledged the findings in those reports. Again, the Panel accepts the findings of the *2009 Report of the Standing Committee on Public Accounts* and the *2012 Report of the Standing Committee on Public Accounts*.

[283] The statements of the Deputy Minister and Assistant Deputy Minister before the Standing Committee on Public Accounts also indicate that they viewed the EPFA as the solution to address the flaws in Directive 20-1. Again, internal AANDC documents support the findings in the *2008 Report of the Auditor General of Canada*, the *2009 Report of the Standing Committee on Public Accounts*, the *2011 Status Report of the Auditor General of Canada* and the *2012 Report of the Standing Committee on Public* Accounts, regarding the need to transition those jurisdictions still under Directive 20-1 to the EPFA, while also acknowledging the need to improve the EPFA.

[284] In 2010, AANDC's Evaluation, Performance Measurement and Review Branch did its own evaluation of the implementation of the EPFA in Alberta (see Annex, ex. 37 [*AANDC Evaluation of the Implementation of the EPFA in Alberta*]). The evaluation found that the design of the EPFA was a move in the right direction with potential for positive outcomes. However, it identified some challenges with the EPFA model, including: timing, provincial requirements, human resources shortages, salaries, support from government/agency management, community linkages, training and geographical isolation. All these were considered by FNFCS Agencies to be essential to the successful implementation of the approach. An additional challenge identified is ensuring that reliable data is collected to allow for accurate performance measurement and some comparability

of prevention services (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. vi, 11,16-17, 21-24).

[285] Moreover, the evaluation noted that, as the EPFA is based on an annual allocation for most aspects and some pieces being determined by a formula, "there is not the flexibility to respond quickly to changes in provincial policy or other external drivers…" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27). According to the evaluation, this lack of flexibility "…is common to INAC programs that adhere to provincial legislation and […] [is] an in-built risk to the program" (*AANDC Evaluation of the Implementation of the EPFA in Alberta* at p. 27).

[286] Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at pp. 16-18, 21-24).

[287] The evaluation recommended revisiting the EPFA funding model within the next year to learn from the past two years of implementation and to incorporate additional resources to address some of the issues faced by rural and remote communities. As part of this review, it recommended AANDC also determine if the calculations that are based on assumed population of children in care are relevant in achieving desired outcomes (see *AANDC Evaluation of the Implementation of the EPFA in Alberta* at p.i).

[288] In 2012, the Evaluation, Performance Measurement and Review Branch of AANDC also did its own evaluation of the implementation of the EPFA in Saskatchewan and Nova Scotia (see Annex, ex. 38 [*AANDC Evaluation of the Implementation of the EPFA in*

Saskatchewan and Nova Scotia]; see also, Annex, ex. 39). Again, the findings are in line with those of the other reports on the FNCFS Program.

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

[290] One of the main challenges identified in the implementation of the EPFA in Saskatchewan and Nova Scotia was unrealistic expectations, largely by community leadership, of what agencies are able to achieve with the funding they receive. According to the evaluation, community leadership occasionally expect agencies to cover costs that are social in nature but that do not fall under the agency's eligible expenditures. That is, the conditions which contribute most to a child's risk are conditions that the child welfare system itself does not have the mandate or capacity to directly address, including economic development, health programing, education and cultural integrity (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35, 49, 51). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* states, at page 49: "AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs".

[291] Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* at pp. 35-36).

[292] In an August 2012 presentation, entitled “First Nations Child and Family Services Program (FNCFS) The Way Forward”, Ms. Odette Johnson, Director of the Children and Family Services Directorate of AANDC outlined to Françoise Ducros, Assistant Deputy Minister, ESDPPS, the need to reassess the EPFA (see Annex, ex. 40 [the *Way Forward presentation*]). The purpose of the presentation was “[t]o provide options and seek approval for next steps in the reform of the FNCFS Program” (*Way Forward presentation* at p. 2). It identifies the drivers behind this reform as: the provincial/territorial shift to prevention, the high numbers/costs of First Nation children in care, AANDC internal audits and evaluations of the FNCFS (along with those of the Auditor General), the reports of Parliamentary Committees, the human rights complaint, and child advocate reports and other research (see the *Way Forward presentation* at p. 5).

[293] According to the *Way Forward presentation*, “[a]udits and evaluations of between 2008 and 2012 demonstrate a need for the EPFA, but also a need to annually review the EPFA formula as constant provincial changes make it difficult to stay current and enable Agencies to provide a full range of child welfare services” (at p. 9). Furthermore, “[p]rovinces have been shifting their caseloads towards greater emphasis on intake and

investigation which may not have been part of original EPFA discussions and are now creating pressures on Agencies" (see the *Way Forward presentation* at p. 9).

[294] At page 13, the *Way Forward presentation* provides a comparative table of "where we are" and "where we need to go":

Where we are		**Where we need to go**
Taking children into care and some work with families in the home	→	Taking children in care for critical cases but more with the families in the home.
Fund agencies and provinces for basic protection services and some prevention with families in the home.	→	Either fund full range of services provided by provinces (differs among jurisdictions) OR transfer child welfare on reserve to the Provincial/Territorial governments.
Initial investments in EPFA in 6 jurisdictions but not necessarily addressing all aspects of child welfare.	→	EPFA in all jurisdictions **fully costed at $108.13M**, supporting all aspects of child welfare including intake, early intervention and allowing for developmental phase.
Developing some capacity for prevention in communities.	→	All communities have capacity in prevention.

[295] The presentation proposes three options to address these issues: (1) implement EPFA in the remaining jurisdictions; (2) expand the EPFA with increased investments to address cost drivers, including implementing the model in the remaining jurisdiction; and, (3) transfer the program to the provinces/territories.

[296] Under option 1, the costs of transferring the remaining jurisdictions to EPFA are estimated at: $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador. (see *Way Forward presentation* at p. 15). There is also an additional $4 million listed for "Maintenance" which Ms. Murphy explained as an infusion of additional funds to avoid having to re-allocate money from elsewhere in AANDC to cover additional costs that go beyond the standard funding formula (see *Transcript* Vol. 54 at pp. 167-168). Furthermore, an additional $2 million is estimated for "Strength and Accountability" to allow AANDC to better administer the FNCFS Program internally (see testimony of S. Murphy, *Transcript* Vol. 54 at pp. 168).

[297] The presentation lists as a "PRO" for this option the recognition that the FNCFS Program cannot address all root causes of the over-representation of children in care.

Under “CONS” it states the “5-year EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies” (*Way Forward presentation* at p. 15). According to Ms. Murphy, who stated she had signed off on the presentation, the major cost drivers are increases in the rates for maintaining children in care, growth in the number of children that come into care and salary increases (see *Transcript* Vol. 54 at pp. 158-159, 179 and 181). She elaborated on the “CON” for option 1 as follows:

> So with this option we were talking about maintenance, but we weren't necessarily dealing with all of the cost drivers that we were observing.
>
> So, as an example, we know that the cost of foster care is going up and so, Agencies are trying to pay those bills and we hadn't properly calculated that in our model.
>
> This option wasn't trying to re-stabilize the existing EPFA jurisdictions for the cost changes that had happened since we introduced the funding models, it was really about the five. So it was sort of the minimum option at the time.
>
> (*Transcript* Vol. 54 at p. 169)

[298] For option 2, the implementation of the expanded EPFA in the remaining jurisdictions is estimated at $65.03 million, while topping-up the existing EPFA jurisdictions is estimated at $43.10 million, for a total of $108.13 million. In addition to these amounts, the presentation indicates that a 3% escalator will be required every year. The “PROS” of this option are that it ensures agencies are able to meet changing provincial standards and salary rates while maintaining a high level of prevention programming; and, that funding remains reasonably comparable with provinces and territories. Under “CONS”, the presentation states: “Option 2 is more costly than Status Quo EPFA implementation” (*Way Forward presentation* at p. 16). During testimony, Ms. Murphy was asked whether the “PROS” of this option suggest that AANDC is not able to provide a reasonably comparable level of services under the FNCFS Program. Ms. Murphy responded:

> It has always been our intention to provide reasonably comparable services.

> We were noticing trends in increasing kids in care and we were having stresses in our budget to be able to maintain those levels and, of course, the Department's doing re-allocations, but we weren't – we noticed changes for sure and we needed to keep up with those changes and we weren't necessarily being successful in all cases of being able to do that.
>
> (*Transcript* Vol. 54 at pp. 163-164)

[299] Finally, the third option of transferring child welfare on reserve to the provinces/territory does not have an estimated cost, but the presentation indicates there is "[p]otential for dramatic increases in costs" (*Way Forward presentation* at p. 17). As Ms. Murphy put it:

> it's certainly expected that if you were to ask someone else to start to take on the delivery of a program, they're going to have their administrative cost structure, they're going to potentially look for funds to offset the cost of them assuming that role.
>
> […]
>
> It doesn't mean that it would. We didn't -- necessarily hadn't costed any of that, but we wanted to at least highlight that there might be a potential for an increase in costs because we might have to absorb, for instance, increased administrative costs that weren't necessarily there right now in the way that we're funding individual Agencies.
>
> And other costs, we don't know. They may want to negotiate other things as part and parcel of taking on that responsibility and we wouldn't wait until you got to negotiation to find out what that was.
>
> (*Transcript* Vol. 54 at pp. 166-167).

[300] The "PROS" of option 3 include: comparability issue would be resolved and better oversight/compliance of child and family services on reserve. Along with the potential for a dramatic increase in costs, the presentation also includes as "CONS" for this option that support for all First Nations is uncertain, and that it involves complimentary programs, therefore, it is a big task to implement and involves cost implications beyond AANDC (*Way Forward presentation* at p. 17).

[301] Following on the *Way Forward presentation*, in two similar presentations in October and November 2012, Ms. Murphy expanded on the options for reforming the FNCFS

Program (see testimony of S. Murphy, *Transcript* Vol. 55 at p. 199). In these presentations Ms. Murphy proposed that AANDC complete the reform of the FNCFS Program to EPFA in the remaining jurisdictions (estimated at $139.7 million over 5 years and $36.6 million ongoing); stabilize pressures in existing EPFA jurisdictions (estimated at 164.1 million over 5 years); add a 3% escalator per year for all jurisdictions to ensure provincial/territorial comparability (estimated at $105.5 million over 5 years and $23.9 million ongoing); and seek additional resources for increased program management and strengthened accountability (estimated at $11.2 million over 5 years and $2.3 million ongoing) (see Annex, ex. 41 at p. 2 [the *Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation*]; and, Annex, ex. 42 at pp. 2, 5 [the *Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation*]).

[302] The need for this increased funding is explained as:

> Maintenance rate increases for children in care have far exceeded the two percent AANDC receives annually. As a result, the Department must reallocate funds from other program areas to cover the deficit.
>
> AANDC must pay the costs to support children in care and these costs are still rising dramatically. As maintenance rates are essentially dictated by provinces, AANDC has no choice but to support the costs of children in care based on these rates.
>
> In addition, no program escalator was approved for any funding model used by the FNCFS Program to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve.
>
> […]
>
> Currently, AANDC has very limited human resources dedicated to the FNCFS Program.
>
> No funding for strengthened accountability for results was provided when EPFA was approved in 2007.
>
> AANDC's activities have increased dramatically with the implementation of EPFA in the 6 jurisdictions.
>
> AANDC is currently limited in how effectively it can manage and monitor the program while developing tripartite partnerships to fully implement EPFA.

> (*Renewal of the First Nations Child and Family Services Program (October 31, 2012) presentation* at pp. 5-6)

[303] In Ms. Murphy's view, while positive outcomes from the EPFA have been identified, "the program is losing ground due to increasing provincial costs" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 3). Furthermore, she views her proposal as addressing "…rising maintenance costs in all jurisdictions", it "allows the program to accommodate provincial rate changes thereby maintaining comparability", and "will allow agencies to devote appropriate resources to prevention, which will lead to a decrease in long term care placements in the medium to longer term" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 6). The impacts of no new investments in the FNCFS Program would, according to Ms. Murphy, "…not advance improved outcomes for First Nations children and their families" and "[t]he Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support" (*Renewal of the First Nations Child and Family Services Program (November 2, 2012) presentation* at p. 8). At the hearing, Ms. Murphy was asked to expand on this last point:

> MEMBER BELANGER: "The Government of Canada will not be able to sustain reasonable provincial comparability for child welfare support." What are we comparing here?
>
> MS MURPHY: I think what we were saying there was that we were starting to have issues in terms of being able to match salaries and the costs of keeping children in care, those other elements that I have laid out, and that so we may have trouble paying those bills.
>
> We are paying those bills now, but if you keep going, at some point you hit the wall and you don't have the ability to continue to reallocate, you put at risk that policy concept of comparability.
>
> (*Transcript* Vol. 55 at p. 216)

[304] For reasons that were not elaborated upon at the hearing, the above options and recommendations were not implemented in AANDC's 2013 or 2014 budgets (see *Transcript* Vol. 55 at pp. 206-208, 221; see also *Transcript* Vol. 61 at pp. 159-162).

[305] Overall, on the issue of the relevance and reliability of the reports on the FNCFS Program, the Panel finds that from the years 2000 to 2012 many reliable sources have identified the adverse effects of the funding formulas and structure of the FNCFS Program. AANDC was involved in the *NPR* and Wen:De reports, and acknowledged and accepted the findings and recommendations in the Auditor General and Standing Committee on Public Account's reports, including developing an action plan to address those recommendations. As the internal evaluations and other relevant and reliable AANDC documents demonstrate, those studies and reports became the basis for reforming Directive 20-1 into the EPFA and, subsequently, recommendations to reform the EPFA. It is only now, in the context of this Complaint, that AANDC raises concerns about the reliability and weight of the various reports on the FNCFS Program outlined above. Moreover, the internal documents discussed above support those reports and are AANDC's own evaluations, recommendations and presentations prepared by its high ranking employees. For these reasons, the Panel does not accept AANDC's argument that the reports on the FNCFS Program have little or no weight and accepts the findings in those reports, along with the corroborating information in documents relied on above.

b. The choices of FNCFS Agencies and additional funding provided

[306] AANDC argues the difference between the level of services and programs offered on and off reserve may have little to do with funding and more to do with the choices made by FNCFS Agencies about the type of services and programs they want to provide and other administrative issues affecting the overall budget. For example, some agencies decide to allocate funds to the salaries of their board members when the budget should be spent on front line services. Also, AANDC points out that some agencies are successful with their budget, including some agencies who have posted surpluses. AANDC submits it also provides additional funding or reallocates funds where FNCFS Agencies require further funding. Therefore, if there are gaps in funding, AANDC contends it has bridged those gaps through additional funds.

[307] As outlined above, Directive 20-1 and the EPFA have certain assumptions built into their funding formulas. In general, that the child population they serve is 1000 children

aged 0-18, that 6% of the total on reserve child population is in care, and that 20% of families are in need of services. Ms. D'Amico explained the use of assumptions as providing stability for FNCFS Agencies. That is, even if less than 6% of its children are in care and 20% of its families are in need of services, it would not reduce the agency's budget. That may indeed be a beneficial situation for agencies where these assumptions accurately reflect their clientele and may even result in the agency receiving a surplus of funding. However, on this last point, the Panel notes *Wen:De Report Two* stated: "Not surprisingly, it was only BC agencies that advised that they had surpluses and, in almost all cases, the surplus came from the maintenance per diem arrangement" (at p. 213). More fundamentally though, where the assumptions do not accurately reflect the clientele of an FNCFS Agency - where the percentage of children in care and families in need of services is higher than 6% and 20% respectively - the funding formula is bound to provide inadequate funding.

[308] In 2006, 18 FNCFS Agencies had over 10% of their children in care out of the parental home (see *Social Programs presentation* at p. 13). In the same year, there were 257 First Nations communities on reserves with no access to child care and many more communities did not have enough resources to support 20% of children from birth to six years of age (see *Social Programs presentation* at p. 14).

[309] For Alberta, Ms. Schimanke indicated that most FNCFS Agencies have around 6% of children in care, but there are some that have anywhere from 11 to 14% (see *Transcript* Vol. 61 at pp. 113-115). Also, as stated above in the *2008 Report of the Auditor General of Canada*, in the five provinces covered by the report, the percentage of children in care ranged from 0 to 28%.

[310] In Manitoba, Ms. Elsie Flette, Chief Executive Office of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), described the effects of the assumptions on FNCFS Agencies:

> If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by AANDC as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in

> care that you have to spend that money on and, so, you have some flexibility for how else to use that money.
>
> But if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the Southern Authority I believe right now four Agencies that exceed those assumptions. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.
>
> When we look at the families and prevention services, I believe there's about five Agencies that exceed that 20 percent. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on- Reserve are getting service.
>
> They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go – they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.
>
> […]
>
> So, it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if you have higher than seven percent you have unfunded workload.
>
> (*Transcript* Vol. 20 at pp. 104-105, 118)

[311] While additional funds have been provided or reallocated to cover maintenance expenditures and/or some *ad hoc* exceptional circumstances, FNCFS Agencies are expected to cover their operations and prevention costs within their fixed budgets, including using those funds to cover any deficits in maintenance expenditures. Those budgets are based on the formulas that, again, do not account for the actual needs of the FNCFS Agencies. They are also static formulas. That is, as the years go by, the formulas become more and more disconnected from the actual needs of FNCFS Agencies and the children and families they serve. Specifically, the formulas do not apply an escalator for regular increases in costs, including for salaries, where the bulk of funding is spent. While Directive 20-1 calls for a cost of living increase of 2% every year, that increase has not

been applied since 1995-1996. Similarly, once EPFA is implemented in a jurisdiction, aside from adjustments for population size, yearly increases in costs are not accounted for in the funding formula. In Alberta for example, as indicated above, funding under EPFA is provided based on provincial rates from 2006. According to an AANDC official, it is up to FNCFS Agencies to work with the budgets they have:

> MR. POULIN: So for an Agency that is over 6 percent, where you need more protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services.
>
> MS SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.
>
> MR. POULIN: That means paying -- you know, that means in effect paying your workers less than what the province does.
>
> MS SCHIMANKE: It could be, yes. That could be one example of things, yes.
>
> MR. POULIN: It could be having less workers and therefore having a higher case ratio than your workers -- than the province does.
>
> MS SCHIMANKE: It could be, yes.
>
> I do have to show, though, that there are Agencies who are above the 6 percent who still show surpluses, so I don't know what they are doing differently. It could be their salaries have been adjusted very low; we don't know what they are doing to make that happen. It may be they're short-staffed and they are just not -- and the staff are carrying higher caseloads, yeah. So there are various examples of what different Agencies are doing, yes.
>
> (*Transcript* Vol. 62 at pp. 51-52)

[312] These last statements highlight the dichotomy between the objective of the FNCFS Program and its actual implementation through Directive 20-1 and the EPFA. While the program is premised upon provincial comparability, the funding mechanisms do not allow many FNCFS Agencies, particularly those agencies that do not match AANDC's

assumptions about children in care and families in need, to keep up with provincial standards and changes thereto.

[313] As noted by the reports on the FNCFS Program, given that funding under Directive 20-1 and the EPFA is largely based on population levels, small and remote agencies are also disproportionately affected by AANDC's funding formulas. In British Columbia for example, small agencies are the norm, not the exception, including many that serve rural and isolated communities. Their challenges include added costs for travel, accessing the communities they serve and getting and retaining staff (see testimony of W. McArthur, *Transcript* Vol. 63 at p. 87).

[314] Given these agencies are funded pursuant to Directive 20-1, most do not have the flexibility or resources necessary to provide prevention services, even with additional funds. In these rural and isolated communities, it is also difficult for First Nations people to access services which are available off reserve, including: mental health services; services to strengthen families; and services for family preservation and reunification (see Annex, ex. 43; see also testimony of W. McArthur, *Transcript* Vol. 63 at p. 87 and Vol. 64 at pp. 6, 167). Despite moving FNCFS Agencies in British Columbia to funding based on actuals in 2011, with the intent to transition them to the EPFA shortly thereafter to address some of these concerns; and, despite the repeated requests of FNFCS Agencies and the province of British Columbia, that transition had yet to occur at the time of the hearing and no announcement was made for EPFA in the 2013-2014 budgets (see testimony of W. McArthur, *Transcript* Vol. 63 at pp. 96-97, 156, 172-173).

[315] The effects of the population thresholds in Directive 20-1, along with the other assumptions built into Directive 20-1 and the EPFA, indicate that a "one-size fits all" approach does not work for child and family services on reserve. The overwhelming evidence in this case suggests that because AANDC does not fund FNCFS Agencies based on need but, rather, based on assumptions of need and population levels, that funding is inadequate to provide essential child and family services to many First Nations. Moreover, the internal AANDC documents outlined above, namely the *Way Forward presentation* and the *Renewal of the First Nations Child and Family Services Program presentation*, indicate that, despite any additional funds provided or reallocated to FNCFS

Agencies, there is still quite a significant difference in funding levels to bring the FNCFS Program into comparability with the provinces. This point is addressed in more detail in the following section.

c. Comparator evidence

[316] AANDC contends that comparison is an essential part of the analysis under human rights legislation. It submits that no evidence was advanced by the Complainants regarding how the provincial or territorial funding models work or what their respective child welfare budgets are as compared to the federal government. In this regard, AANDC argues that the Tribunal should draw a negative inference from the fact that the Complainants did not call provincial and territorial witnesses to testify.

[317] According to AANDC, the Complainants' case lacks substantive evidence about the level of provincial funding compared to federal funding, including addressing the nature and extent of any research thereon. Moreover, no provincial or territorial witnesses were called to support the allegation that there is a difference in child welfare funding or service levels on or off reserve. Given that comparison between federal and provincial funding was at the heart of their case, AANDC submits the Complainants had to demonstrate how much funding is provided by the federal government and each provincial/territorial government for child welfare services. Only if the amount of funding for both was reliably established, could the Tribunal determine if there is a difference and whether that difference amounts to adverse differentiation or a denial of services. According to AANDC, perceived differences in services on and off reserve are not sufficient to substantiate the Complainants' claims.

[318] In any event, AANDC argues that comparing the federal and provincial/territorial funding systems is not a valid comparison under the *CHRA*.

[319] AANDC's argument regarding the need for comparative evidence, and that comparing the federal and provincial/territorial funding systems is not valid under the *CHRA*, has already been rejected by the Federal Court, the Federal Court of Appeal and this Tribunal. In setting aside the Tribunal's decision on AANDC's jurisdictional motion

(2011 CHRT 4), which advanced this same argument, the Federal Court in *Caring Society FC* found at paragraph 251:

> the Tribunal erred in concluding that the ordinary meaning of the term "differentiate adversely" in subsection 5(b) requires a comparator group in every case in order to establish discrimination in the provision of services. This conclusion is unreasonable as it flies in the face of the scheme and purpose of the Act, and leads to patently absurd results that could not have been intended by Parliament.

[320] The Federal Court explained some of the patently absurd results of requiring a comparator group in every case:

> [256] On the Tribunal's analysis, the employer who consciously decides to pay his or her only employee less because she is a woman, or black, or Muslim, would not have committed a discriminatory practice within the meaning of subsection 7(b) of the Act because there is no other employee to whom the disadvantaged employee could be compared.
>
> [257] Similarly, the shopkeeper who forces his or her employee to work in the back of the shop after discovering that the employee is gay would not have committed a discriminatory practice if no one else was employed in the store.
>
> […]
>
> [259] In the examples cited above, individuals are clearly being treated in an adverse differential manner in their employment because of their membership in a protected group. However, according to the Tribunal's interpretation, no recourse would be available to these individuals under the Act. Such an interpretation does not accord with the purpose of the legislation and is unreasonable.
>
> (*Caring Society FC* at paras. 256-257, 259)

[321] After examining the role of comparator groups in a discrimination analysis and the Supreme Court's decision in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (*Withler*), the Federal Court made the following statements with regard to the use of comparator groups in analyzing alleged discrimination against Aboriginal peoples:

> [332] Aboriginal people occupy a unique position within Canada's constitutional and legal structure.

> […]
>
> [337] By interpreting subsection 5(b) of the *Canadian Human Rights Act* so as to require a mirror comparator group in every case in order to establish adverse differential treatment in the provision of services, the Tribunal's decision means that, unlike other Canadians, First Nations people will be limited in their ability to seek the protection of the Act if they believe that they have been discriminated against in the provision of a government service on the basis of their race or national or ethnic origin. This is not a reasonable outcome.
>
> […]
>
> [340] I also agree with the applicants that an interpretation of subsection 5(b) that accepts the *sui generis* status of First Nations, and recognizes that different approaches to assessing claims of discrimination may be necessary depending on the social context of the claim, is one that is consistent with and promotes Charter values.
>
> (*Caring Society FC* at paras. 332, 337, 340)

[322] On appeal, the Federal Court of Appeal accepted the Federal Court's reasoning regarding the use of comparator groups in a discrimination analysis. In fact, it noted that cases postdating the Federal Court's decision confirmed the reduced role of comparator groups in the analysis:

> In *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court reiterated that the existence of a comparator group does not determine or define the presence of discrimination, but rather, at best, is just useful evidence. It added that insistence on a mirror comparator group would return us to formalism, rather than substantive equality, and "risks perpetuating the very disadvantage and exclusion from mainstream society the [*Human Rights*] *Code* is intended to remedy" (at paragraphs 30-31). The focus of the inquiry is not on comparator groups but "whether there is discrimination, period" (at paragraph 60).
>
> In *Quebec (Attorney General) v. A.*, 2013 SCC 5 at paragraph 346 (*per* Abella J. for the majority), the Supreme Court has reaffirmed that "a mirror comparator group analysis may fail to capture substantive equality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply": *Withler*, supra at paragraph 60. The Supreme Court went so far as to cast doubt on the authority of *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, an earlier case in which an unduly influential or determinative

> role was given to the existence of a comparator group – similar to what the Tribunal did here.
>
> (*Caring Society FCA* at para. 18)

[323] The Panel agrees with the Federal Court and Federal Court of Appeal's reasoning on the role of comparator groups in a discrimination analysis. AANDC's argument regarding the need for comparative evidence in this case is inconsistent with the *Caring Society FC* and *Caring Society FCA* decisions. Furthermore, there is no authority for its proposition that interjurisdictional comparisons are not valid under the *CHRA*.

[324] While the Supreme Court has previously stated that equality is a comparative concept, it has also recognized that "…every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality" (*Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at p. 164 [*Andrews*]). With regard to this last statement, the Supreme Court in *Withler*, at paragraph 2, stated that equality is about substance, not formalism:

> In our view, the central issue in this and others. 15(1) cases is whether the impugned law violates the animating norm of s. 15(1), substantive equality: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. To determine whether the law violates this norm, the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong. The central s. 15(1) concern is substantive, not formal, equality. A formal equality analysis based on mirror comparator groups can be detrimental to the analysis. Care must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group. At the end of the day there is only one question: Does the challenged law violate the norm of substantive equality in s. 15(1) of the *Charter*?

[325] As noted by the Federal Court of Appeal in *Caring Society FCA*, the decisions in *Moore* and *Quebec (Attorney General) v. A.*, 2013 SCC 5 (*A*), echo the approach to comparator groups enunciated in *Withler*. That is, while the use of comparative evidence may be useful in analyzing a claim of discrimination, it is not determinative of the issue. In fact, as the Supreme Court noted in *Withler*, at paragraph 59: "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in

light of their distinct needs and circumstances, no one is like them for the purposes of comparison".

[326] Rather, the full context of the case and all relevant evidence, including any comparative evidence, must be considered (see *Withler* at para. 2). As the Federal Court of Appeal noted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paragraph 27 (*Morris*), the legal definition of a *prima facie* case does not require a complainant to adduce any particular type of evidence to prove the existence of a discriminatory practice under the *CHRA*. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove a discriminatory practice. The Federal Court of Appeal in *Morris*, at paragraph 28, concluded that:

> A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms.

[327] In this vein, the Panel notes the present Complaint was brought under both subsections 5(a) and (b) of the *CHRA*. The interpretation of the wording of subsection 5(b), "to differentiate adversely", has largely been the basis for arguing the need for comparative evidence. That is, "to differentiate" is to treat someone differently in comparison to others. Aside from the French version of subsection 5(b) not having the same comparative connotation, as it simply uses the term "défavoriser", subsection 5(a) also does not use wording implying a comparison. It speaks only of being denied a good or a service. As the Federal Court noted in *Caring Society FC*, requiring comparator evidence under 5(b), but not under 5(a), would create an internal incoherence between the subsections by establishing different legal and evidentiary requirements in order to establish discrimination under each provision (see *Caring Society FC* at paras. 276-279).

[328] Similarly, AANDC's argument that there can be no cross-jurisdictional comparisons or comparisons between different service providers is not supported by anything found in the *CHRA* or in the jurisprudence regarding comparator evidence outlined in the preceding paragraphs. In fact, section 50(3)(c) of the *CHRA* allows the Panel to receive and accept

any evidence and information that is sees fit, as long as it is not privileged information [s. 50(4)] or the testimony of a conciliator appointed to settle the complaint [s. 50(5)]. Furthermore, reasonable comparability with provincial/territorial standards is part of AANDC's own objective in implementing the FNCFS Program and negotiating the other provincial/territorial agreements. While AANDC argues "reasonable comparability" is an administrative term and not a legal term requiring mirror services are provided on and off reserve, that argument has no bearing on the Complainants' ability to bring evidence related thereto. AANDC undertook to ensure First Nations on reserve receive reasonably comparable child and family services to those provided off reserve in similar circumstances. It is unreasonable and unfounded to argue the Complainants should not be able to bring evidence related thereto.

[329] While there is no obligation to bring forward comparative evidence to substantiate a discrimination complaint, there was some comparative evidence brought forward in this case demonstrating a difference between child and family services funding and service levels provided on and off reserve. First, the FNCFS Agencies still under Directive 20-1 receive less funding than those who have transitioned to the EPFA. As indicated in the *2011 Status Report of the Auditor General of Canada*, funding for operations and prevention services increased between 50 and 100% in each of the provinces that transitioned to EPFA (see at p. 25, s. 4.54). Furthermore, as indicated above, AANDC has estimated the difference in annual funding to transfer the remaining jurisdictions to the EPFA as $21 million for British Columbia; $2 million for the Yukon; $5 million for Ontario; $2 million for New Brunswick; and, $2 million for Newfoundland and Labrador (see *Way Forward presentation* at p. 15). As Ms. D'Amico stated at the hearing:

> MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the shortcomings in the funding formulas], there isn't comparability yet; this is something you are trying to attain?
>
> MS. D'AMICO: In six jurisdictions, I can tell you that there is comparability. In the other jurisdictions, because we haven't moved to EPFA, the amounts that they are receiving are more than 20-1, but I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the

> remaining jurisdictions and they would receive more under EPFA based on all of those ratios.
>
> (*Transcript* Vol. 51 at pp. 179-180)

[330] Second, AANDC has identified that increases in funding are even necessary in EPFA jurisdictions to ensure reasonable comparability with the provinces. Again, in the *Way Forward presentation*, it states the "EPFA funding envelope may not be addressing provincial cost drivers or funding pressures related to the operational efficiencies of Agencies" (at p. 15). To address this, the presentation presents the option of adjusting the EPFA costing model with increased investments to address cost drivers: "EPFA Plus". To implement this increased investment in the jurisdictions that do not function under the EPFA, the *Way Forward presentation* estimates the cost to be $65.03 million. To top-up the existing EPFA jurisdictions, EPFA Plus is estimated to cost $43.10 million. According to the *Way Forward presentation*, EPFA Plus "[e]nsures funding remains reasonably comparable with provinces and territories…" (at p. 16). While AANDC witnesses testified that the amounts in the *Way Forward presentation* are rough estimates that err on the size of magnitude, the Panel still finds they are indicative of the type of investments required to provide more meaningful services to First Nations children and families on reserve and in the Yukon.

[331] Moreover, these amounts are similar to those recommended in *Wen:De Report Three* (see at p. 33). *Wen:De Report Three* also cautioned against implementing its recommendations in a piece meal fashion as doing so would undermine the overall efficacy of its proposed changes (see at p. 15). However, by not addressing all the shortcomings of Directive 20-1 in implementing the EPFA, the overall efficacy of the EPFA model is now undermined as indicated in the *Way Forward presentation*.

[332] A third comparison also arises from the *Way Forward presentation*. To resolve comparability, the presentation recommends AANDC transfer child welfare services on reserve to the provinces/territory. It recognizes that the provinces and territories have expertise in child welfare and that there would be better oversight and compliance of child and family services on reserve if they are given the full range of responsibilities, including the responsibility for funding. However, the presentation notes that this option has the

“[p]otential for dramatic increases in costs” for AANDC (*Way Forward presentation* at p. 17).

[333] In this same vein, another useful comparison in this case is the difference between the delivery of child and family services through the FNCFS Program against the delivery of those services through the *Alberta Reform Agreement*, *BC MOU* and *BC Service Agreement*. AANDC argues these agreements are not evidence of how the province funds the off reserve population or evidence that AANDC underfunds FNCFS Agencies. However, these arguments do not address the fact that FNCFS Agencies are funded in a different manner than the reimbursements provided by AANDC to the provinces. The funding provided to Alberta and British Columbia under these agreements is not based on population levels or assumptions about children in care and families in need. Rather, those provinces are reimbursed for the actual costs or an agreed upon share of the costs for providing child and family services. They receive adjustments for inflation and increases in the costs of services, whereas FNCFS Agencies do not. Most importantly, because of the payment of actuals and adjustments thereof annually, there is a more direct connection between the child and family services standards of those provinces and the delivery of those services to the First Nation communities they serve.

[334] By comparison, neither Directive 20-1 nor the EPFA provide adjustments for the cost of living or for changes in provincial legislation and standards. Both types of adjustments were identified by *Wen:De Report Two* as major flaws in Directives 20-1 and, despite these findings, the EPFA model incorporated these same flaws. As *Wen:De Report Two* specified, not adjusting funding for increases in the cost of living leads to both under-funding of services and to distortion in the services funded (see at p. 45). Furthermore, by not providing adjustments for changing provincial legislation and standards, the FNCFS Program still contains no mechanism to ensure child and family services provided on reserve are reasonably comparable to those provided to children in similar circumstances off reserve (see *Wen:De Report Two* at p. 50).

[335] AANDC's argument about the Complainants' lack of comparative evidence also ignores the fact that the *NPR*, Wen:De reports, Auditor General and Standing Committee reports have all identified a need for AANDC to do this analysis and recommended they do so. Moreover, in response to the Auditor General and Standing Committee reports recommending AANDC perform a comparative analysis of child welfare services provided on and off reserve, AANDC indicated that it has not done so because of inherent difficulties in doing so. Despite said difficulties, "reasonable comparability" remains AANDC's standard for the FNCFS Program.

[336] The difficulties in performing this comparative analysis were also identified in a document entitled *Comparability of Provincial and INAC Social Programs Funding*, authored by AANDC employees and to be included in a Ministerial Briefing Binder (see Annex, ex. 44). The document explains that for a number of reasons, such as differences in the way social programs are delivered in the provinces in terms of types of services, the number of services and the allocation of funding, it is difficult to arrive at conclusive and comparable numbers (see *Comparability of Provincial and INAC Social Programs Funding* at p. 1). In addition, provincial data may not be directly comparable as it could include costs such as overhead or program costs not funded through the FNCFS Program (see *Comparability of Provincial and INAC Social Programs Funding* at p. 4). Where total expenditures per child in care are compared, there is some indication that AANDC funds child and family services at higher levels compared to some provinces. However, the *Comparability of Provincial and INAC Social Programs Funding* document, at page 4, notes that funding levels do not relate to the real needs of children and their families:

> this analysis is not able to recognize that disadvantaged groups may have higher levels of need for services (due to poverty, poor housing conditions, high levels of substance abuse, and exposure to family violence) or that the services or placement options they require may be at a substantially higher cost for services.

[337] Ms. D'Amico also testified about the difficulty in comparing services provided by FNCFS Agencies to those provided by the provinces:

> MS CHAN: […] Can you tell, or is there a way for the Program to know if they are comparable in terms of the services that are being provided on-Reserve?
>
> MS D'AMICO: I don't believe that we can.
>
> […]
>
> Because we are talking about different types of communities, different types of systems and different types of services that are being administered by different service delivery agents. So what I mean by this is, one First Nation community off-Reserve who looks exactly the same as an off-Reserve community isn't actually going to get the same services as that other community, they are going to get culturally specific services that that Agency deems appropriate for the children and families that they are serving.
>
> (*Transcript* Vol. 51 at p. 183)

[338] Because of these difficulties, Ms. D'Amico indicated that AANDC's funding is not premised on comparability of service levels between on and off reserve child and family services, but simply on maintaining comparable funding levels with the province:

> MS D'AMICO: Because in the case of EPFA we have -- we are currently funding at the same salaries and staffing ratios as the province, and that is the only comparable variables that we could find. So it has nothing to do with the service delivery, it has to do with the funding, and that -- and so we have found comparable variables that the province how the province funds is how we fund.
>
> (*Transcript* Vol. 51 at p. 103)

[339] However, as indicated above, even salaries are fixed when the EPFA is implemented and in Alberta, for example, they are still using 2006 salary rates in 2014. Furthermore, as indicated in the *Comparability of Provincial and INAC Social Programs Funding* document, an approach to comparability based on funding and not service levels does not recognize the higher levels of need for services for First Nations or that the services or placement options they require may be at a substantially higher cost.

[340] This last point allows the Panel to make an effective comparison between the child and family services offered on and off reserve based on the principle of the best interest of the child.

iv. Best interest of the child and Jordan's Principle

[341] There is a focus on service levels and the needs of children and families off reserve, namely an emphasis on least disruptive/intrusive measures. On the other hand, under the federal FNCFS Program, there is a focus on funding levels and the application of funding formulas, where funds for prevention/least disruptive measures are fixed and funds to bring a child into care are covered at cost.

[342] Provincial child welfare legislation and standards focus on prevention and least disruptive measures (see for example Ontario's *Child and Family Services Act* at s. 1; Alberta's *Child, Youth and Family Enhancement Act* at s. 2; *The Child and Family Services Act* in Manitoba at Declaration of Principles and s. 2; *The Child and Family Services Act* in Saskatchewan at ss. 3-5; Nova Scotia's *Children and Family Services Act* at Preamble and ss. 2, 13, 20; British Columbia's *Child, Family and Community Service Act* at ss.2-4, 30; and, Quebec's *Loi sur la Protection de la Jeunesse* at ss. 1-4). These statutes recognize that removing a child from his or her family, home or community should only be done when all other least disruptive measures have been exhausted and there is no other alternative.

[343] This focus on least disruptive measures recognizes the significant effect of separating a family. The Supreme Court, in *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48 at paragraph 78, outlined the effects of bringing a child into care:

> The most disruptive form of intervention is a court order giving the agency temporary or permanent guardianship of a child. Particularly in the case of a permanent order, this may sever legal ties between parent and child forever. To make such an order, a court must find that the child is in need of protection within the meaning of the applicable statute. In addition, the court must find that the "best interests of the child" dictate a temporary or permanent transfer of guardianship. As Lamer C.J. observed in *G. (J.)*,

> *supra*, at para. 76: "**Few state actions can have a more profound effect on the lives of both parent and child**."
>
> (**Emphasis added**)

[344] As indicated above, the provinces' legislation and standards dictate that all alternatives measures should be explored before bringing a child into care, which is consistent with sound social work practice as described earlier. However, by covering maintenance expenses at cost and providing insufficient fixed budgets for prevention, AANDC's funding formulas provide an incentive to remove children from their homes as a first resort rather than as a last resort. For some FNCFS Agencies, especially those under Directive 20-1, their level of funding makes it difficult if not impossible to provide prevention and least disruptive measures. Even under the EPFA, where separate funding is provided for prevention, the formula does not provide adjustments for increasing costs over time for such things as salaries, benefits, capital expenditures, cost of living, and travel. This makes it difficult for FNCFS Agencies to attract and retain staff and, generally, to keep up with provincial requirements. Where the assumptions built into the applicable funding formulas in terms of children in care, families in need and population levels are not reflective of the actual needs of the First Nation community, there is even less of a possibility for FNCFS Agencies to keep pace with provincial operational requirements that may include, along with the items just mentioned, costs for legal or band representation, insurance premiums, and changes to provincial/territorial service standards.

[345] AANDC officials working in the FNCFS Program have indicated that they are not experts in the field of child welfare and, instead, rely on provincial legislation and standards to dictate the level of funding that should be provided on reserves. Yet, they apply a formula to fund FNCFS Agencies that does not take into account the standards for least disruptive measures set by provincial legislation. Tellingly, in funding child and family services, the provinces do not apply a funding formula:

> MS CHAN: In terms of funding, have you seen provincial funding formulas to calculate child welfare payment that is made by the province?
>
> MS D'AMICO: Not to date.

> MS CHAN: What difficulties does this cause for the Program, if any, in determining how you are going to fund?
>
> MS D'AMICO: So this has been our primary challenge, to try and figure out how to fund equitably or comparably because we have consistently asked the province, give us a funding formula for an Agency or for a regional office in your jurisdiction and show us what that is and we will see if we can replicate it, then we would be assured that, you know, infamous provincial comparability.
>
> […]
>
> The provinces don't have that, they have a chart of accounts, they fund based on a variety of different things. You know, an example would be British Columbia, they have five different regional offices; those five different regional offices have different salary grids, they have different operational budgets that are not based on any particular formula.
>
> So it has been incredibly challenging to find those comparable pieces so that we can ensure comparability. It has just been -- it's literally apples and oranges.
>
> So, like I said, it's those variables […] that we have been able to find with the province to be able to inject in our formula so that at least we could have, first of all, a consistent formula across the country, but one that is tailored to every single jurisdiction based on provincial comparability, provincial variables.
>
> So it's not absolute in terms of service. If a service is provided in one community, it's not necessarily being provided in another community even off-Reserve. It's very difficult and the services vary, there is so many different things that child protection and other community partners provide in the vast spectrum of the social safety net.
>
> (*Transcript* Vol. 51 at pp. 184-186)

[346] A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Lawv. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As explained by Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators.
>
> (Bala, Nicholas, "The Best Interests of the Child in the Post-Modernist Era: A Central but Illusive and Limited Concept", in *Special Lectures of the Law Society of Upper Canada 2000: Family Law* (Toronto: LSUC, 1999) at p. 3.1)

[347] With regard to the FNCFS Program, there is discordance between on one hand, its objectives of providing culturally relevant child and family services on reserve, that are reasonably comparable to those provided off reserve, and that are in accordance with the best interest of the child and keeping families together; and, on the other hand, the actual application of the program through Directive 20-1 and the EPFA. Again, while maintenance expenditures are covered at cost, prevention and least disruptive measures funding is provided on a fixed cost basis and without consideration of the specific needs of communities or the individual families and children residing therein.

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

[349] The adverse impacts outlined throughout the preceding pages are a result of AANDC's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program and *1965 Agreement*. Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner.

[350] In this regard, and in addressing the difference between the allocation of funding by AANDC for First Nations child and family services and that of the provinces, another important consideration brought forward by the Complainants and in the evidence is the application of Jordan's Principle.

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

[352] Jordan's Principle is in recognition of Jordan River Anderson, a child who was born to a family of the Norway House Cree Nation in 1999. Jordan had a serious medical condition, and because of a lack of services on reserve, Jordan's family surrendered him to provincial care in order to get the medical treatment he needed. After spending the first two years of his life in a hospital, he could have gone into care at a specialized foster home close to his medical facilities in Winnipeg. However, for the next two years, AANDC, Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs and Jordan remained in hospital. They were still arguing when Jordan passed away, at the age of five, having spent his entire life in hospital.

[353] On October 31, 2007, Ms. Jean Crowder, the Member of Parliament for Nanaimo-Cowichan, brought forward motion 296 in the House of Commons:

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

The motion was unanimously passed on December 12, 2007 (see Annex, ex. 45).

[354] In response, AANDC and Health Canada entered into the *Memorandum of Understanding on the Federal Response to Jordan's Principle* (see Annex, ex. 46 [*2009 MOU on Jordan's Principle*]; see also testimony of C. Baggley, *Transcript* Vol. 57 at pp. 9-

13, 23, 40-41, 84-85). In the *2009 MOU on Jordan's Principle*, signed by an Assistant Deputy Minister for each department, both AANDC and Health Canada acknowledge that they have a role to play in Jordan's Principle and a shared responsibility in working together to develop and implement a federal response (see at p. 1). The purpose of the memorandum is to act as a guide for the two departments in addressing/resolving funding disputes as they arise between the federal and provincial governments, as well as between the two departments, "…ensuring that services to children identified in a Jordan's Principle case are not interrupted as a result of disputes" (*2009 MOU on Jordan's Principle* at p. 1).

[355] The memorandum also serves as a guide for AANDC and Health Canada to collaborate on the federal implementation of Jordan's Principle. In this regard, the memorandum indicates that Health Canada's role in responding to Jordan's Principle is by virtue of the range of health-related services it provides to First Nations people, including: nursing services; home and community care; community programs; and, medically necessary non-insured health benefits. AANDC's role in responding to Jordan's Principle is by virtue of the range of social programs it provides to First Nations people, including: special education; assisted living; income assistance; and, the FNCFS Program (see *2009 MOU on Jordan's Principle* at pp. 1-2).

[356] Once a possible Jordan's Principle case is identified, the *2009 MOU on Jordan's Principle* provides for a review of existing federal authorities and program policies to determine whether the expenditures are eligible under an existing program and can be paid through existing departmental funds. If the dispute over funding arises between the federal and provincial governments, Health Canada and AANDC are to work together to engage and collaborate with the province and First Nations representatives to resolve the dispute through a case management approach. To ensure there is no disruption/delay in service, Health Canada was allocated $11 million to fund goods/services while the dispute is being resolved (see *2009 MOU on Jordan's Principle* at p. 2). The funds were provided annually, in $3 million increments, from 2009 to 2012. The funds were never accessed and have since been discontinued (see testimony of C. Baggley, *Transcript* Vol. 57 at pp. 123-125).

[357] According to the *2009 MOU on Jordan's Principle*, a governance structure has been developed to support communication and information-sharing between the two departments on matters related to Jordan's Principle. This governance structure includes "…supporting the resolution of departmental disputes where HC and AANDC are uncertain or do not agree on which department/jurisdiction is responsible for funding the goods/services based on their respective mandates, policies and authorities" (*2009 MOU on Jordan's Principle* at p. 2). The governance structure was also established to ensure that funding disputes are addressed and coordinated in a timely manner: timing to address case needs and make decisions being "…crucial to ensuring that funding disputes do not disrupt services provided to a child (*2009 MOU on Jordan's Principle* at p. 3).

[358] Health Canada and AANDC renewed their *Memorandum of Understanding on the Federal Response to Jordan's Principle* in January 2013 (see Annex, ex. 47 [*2013 MOU on Jordan's Principle*]). Again, signed by an Assistant Deputy Minister from each department, the *2013 MOU on Jordan's Principle* acknowledges that Health Canada and AANDC "…have a role to play in supporting improved integration and linkages between federal and provincial health and social services" (*2013 MOU on Jordan's Principle* at p. 1). The *2013 MOU on Jordan's Principle* now provides that during the resolution of a Jordan's Principle case, the federal department within whose mandate the implicated programs or service falls will seek Assistant Deputy Minister approval to fund on an interim basis to ensure continuity of service.

[359] Ms. Corinne Baggley, Senior Policy Manager for the Children and Family Directorate of the Social Policy and Programs branch of AANDC indicated that the federal response to Jordan's Principle is focused on cases involving a jurisdictional dispute between a provincial government and the federal government and on children with multiple disabilities requiring services from multiple service providers. Furthermore, the service in question must be a service that would be available to a child residing off reserve in the same location (see *Transcript* Vol. 57 at pp. 9-13; see also Annex, ex. 48). While she estimated that approximately half of the cases tracked under the Jordan's Principle initiative involved disputes between federal departments, she indicated that the policy was built specifically around Jordan's case (see *Transcript* Vol. 58 pp. 24-25, 40-41).

[360] The Complainants claim AANDC and Health Canada's formulation of Jordan's Principle has narrowly restricted the principle. Whereas the motion was framed broadly in terms of services needed by children, AANDC and Health Canada's formulation applies only to inter-governmental disputes and to children with multiple disabilities.

[361] On the other hand, AANDC is of the view that Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program. Therefore, it is beyond the scope of this Complaint. AANDC also argues that the FNCFS Program does not aim to address all social needs on reserve as there are a number of other social programs that meet those needs and are available to First Nations on reserve. Moreover, the FNCFS Program authorities do not allow them to pay for an expense that would normally be reimbursed by another program (i.e. the stacking provisions in the *2012 National Social Programs Manual* at p. 10, section 11.0). In any event, AANDC argues there is no evidence to suggest that its approach to Jordan's Principle results in adverse impacts.

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

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 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.
>
> (Emphasis added)

[363] *Wen:De Report Two* indicated that 36% of jurisdictional disputes are between federal government departments, 27% between provincial departments and only 14% were between federal and provincial governments (see at p. 38). Some of these disputes took up to 200 hours of staff time to sort out: "[t]he human resource costs related to

resolving jurisdictional disputes make them an extraordinary cost for agencies which is not covered in the formula" (*Wen:De Report Two* at p. 26).

[364] Jordan's Principle also relates to the lack of coordination of social and health services on reserve. That is, like Jordan, due to a lack of social and health services on reserve, children are placed in care in order for them to access the services they need. As noted in the *2008 Report of the Auditor General of Canada*, at pages 12 and 17:

> 4.20 Child welfare may be complicated by social problems or health issues. We found that First Nations agencies cannot always rely on other social and health services to help keep a family together or provide the necessary services. Access to such services differs not only on and off reserves but among First Nations as well. INAC has not determined what other social and health services are available on reserves to support child welfare services. On-reserve child welfare services cannot be comparable if they have to deal with problems that, off reserves, would be addressed by other social and health services.
>
> […]
>
> 4.40 First Nations children with a high degree of medical need are in an ambiguous situation. Some children placed into care may not need protection but may need extensive medical services that are not available on reserves. By placing these children in care outside of their First Nations communities, they can have access to the medical services they need. INAC is working with Health Canada to collect more information about the extent of such cases and their costs.

[365] The *2008 Report of the Auditor General of Canada*, at page 16, also found that coordination amongst AANDC programs, and between AANDC and Health Canada programs, is poor:

> 4.38 As the protection and well-being of First Nations children may require support from other programs, we expected that INAC would facilitate coordination between the [FNCFS] Program and other relevant INAC programs, and facilitate access to other federal programs as appropriate.
>
> 4.39 We found fundamental differences between the views of INAC and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care. According to INAC, the services available to these children before they are placed in care should continue to be available. According to Health Canada, however, an on-

> reserve child in care should have access to all programs and services available to any child in care in a province, and INAC should take full financial responsibility for these costs in accordance with federal policy. INAC says it does not have the authority to fund services that are covered by Health Canada. These differences in views can have an impact on the availability, timing, and level of services to First Nations children. For example, it took nine months for a First Nations agency to receive confirmation that an $11,000 piece of equipment for a child in care would be paid for by INAC.
>
> (Emphasis added)

[366] For example, a four-year-old First Nations child suffered cardiac arrest and an anoxic brain injury during a routine dental examination. She became totally dependent for all activities of daily living. Before being discharged from hospital, she required significant medical equipment, including a specialized stroller, bed and mattress, a portable lift and a ceiling track system. A request was made to Health Canada's Non-Insured Health Benefits Program requesting approval for the medical equipment. However, the equipment was not eligible under the program and required approval as a special exemption.

[367] An intake form disclosed during the hearing and prepared by provincial authorities in Manitoba, but which accords with AANDC's records of the incident, documents how the case proceeded thereafter (*see* Annex, ex. 49 [*Intake Form*]; see also Annex, ex. 50; and, testimony of C. Baggley, *Transcript* Vol. 58 at pp. 58-60). Initial contact was made with AANDC on November 29, 2012. A conference call was held on December 4, 2012, where Health Canada accepted to pay for the portable lift, but would "absolutely not" pay for the specialized bed and mattress. On December 19, 2012, the child was discharged from hospital. Over a month later, the specialized bed and mattress were provided, but only as a result of an anonymous donation. In the concluding remarks of the *Intake Form*, where it asks "[p]lease provide details on the barriers experienced to access the required services" it states at page 8:

> Health Canada does not have the authority to fund hospital or specialized beds and mattresses. NIHB said "absolutely not".
>
> AANDC ineligible through In Home Care (only provide for non medical supports) and family not in receipt of Income Assistance Program to access special needs funding.

> Southern Regional Health Authority (provincial) was approached but indicated they are unable to fund the hospital bed.
>
> Sandy Bay First Nation does not have the funding or has limited funding and is unable to purchase bed.
>
> Jurisdictions lacking funding authority to cover certain items which result in gaps and disparities.

[368] The lack of integration between federal government programs on reserve, in more areas than only with children with multiple disabilities, is highlighted in an AANDC document entitled *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region* (see Annex, ex. 51 [*Gaps in Service Delivery to First Nation Children and Families in BC Region*]). As indicated in the accompanying email message attaching the document, under the subject line "Jordan's Principle: Parallel work with HC", the document represents the views of AANDC's British Columbia regional office, including its Director of Intergovernmental Affairs, and is informed by other experienced officials within the regional office.

[369] The *Gaps in Service Delivery to First Nation Children and Families in BC Region* document indicates at page 1:

> The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve. The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program.

[370] The document goes on to identify gaps based on the first-hand experience of AANDC officials and FNCFS Agencies. For example, once a child is in care, the FNCFS Program cannot recover costs for Non-Insured Health Benefits from Health Canada. In that situation, Health Canada deems that there is another source of coverage (the FNCFS Program); however, AANDC does not have authority to pay for medical-related expenditures. Generally, there is confusion in how to access non-insured health benefits (i.e. where to get the forms; where to send the forms and who to call for questions given

the official website does not give contact information) (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 1-2).

[371] Dental services are also identified as an area of contention for FNCFS Agencies and First Nations individuals. Even in emergency situations, basic dental care is denied by the Non-Insured Health Benefits program if pre-approval is not obtained. If pressed, Health Canada advises clients to appeal the decision which can create additional delays. When a child in care is involved however, the FNCFS Agency has no choice but to pay for the work (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at p. 2).

[372] Another medical related expenditure identified as a concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3).

[373] In some cases, the FNCFS Program is paying for eligible Non-Insured Health Benefits expenditures even though they are not eligible expenses under the FNCFS Program (see *Gaps in Service Delivery to First Nation Children and Families in BC Region* at pp. 2-3). This is problematic considering AANDC has to reallocate funds from some of its other programs - which address underlying risk factors for First Nations children - in order to pay for maintenance costs. Again, as the *2008 Report of the Auditor General of Canada* pointed out at page 25:

> 4.72 Because the program's expenditures are growing faster than the Department's overall budget, INAC has had to reallocate funding from other programs. In a 2006 study, the Department acknowledged that over the past decade, budget reallocations—from programs such as community infrastructure and housing to other programs such as child welfare—have

> meant that spending on housing has not kept pace with growth in population and community infrastructure has deteriorated at a faster rate.
>
> 4.73 In our view, the budgeting approach INAC currently uses for this type of program is not sustainable. Program budgeting needs to meet government policy and allow all parties to fulfill their obligations under the program and provincial legislation, while minimizing the impact on other important departmental programs. The Department has taken steps in Alberta to deal with these issues and is committed to doing the same in other provinces by 2012.

[374] As mentioned above, AANDC's own evaluations of the FNCFS Program have also identified this issue. The *2007 Evaluation of the FNCFS Program* identified the FNCFS Program as one of five AANDC programs that have the potential to improve the well-being of children, families and communities. The other four are the Family Violence Prevention Program, the Assisted Living Program, the National Child Benefit Reinvestment Program and the Income Assistance Program. According to the evaluation, "[i]t is possible that, with better coordination, these programs could be used more strategically to support families and help them address the issues most often associated with child maltreatment" (*2007 Evaluation of the FNCFS Program* at p. 38). In addition, the evaluation identifies other federal programs for First Nations who live on reserve offered by Human Resources and Social Development Canada, Justice Canada and Public Safety and Emergency Preparedness Canada, along with Health Canada, that also directly contribute to healthy families and communities (see *2007 Evaluation of the FNCFS Program* at pp. 39-45). On this basis, the *2007 Evaluation of the FNCFS Program*, at pages 47-48, proposes three approaches to FNCFS Program improvement:

> **Approach A**: Resolve weaknesses in the current FNCFS funding formula, Program Directive 20-1, because in its current form, it discourages agencies from a differential response approach and encourages out-of-home child placements.
>
> **Approach B**: Besides resolving weaknesses in Program Directive 20-1, encourage First Nations communities to develop comprehensive community plans for involving other INAC social programs in child maltreatment prevention. The five INAC programs (the FNCFS Program, the Assisted Living Program, the National Child Benefit Reinvestment Program, the Family Violence Prevention Program, and the Income Assistance Program) all target the same First Nations communities, and they all have a role to

> play in improving outcomes for children and families, so their efforts should be coordinated and a performance indicator for all of them under INAC's new performance framework for social programs should be the rate of child maltreatment in on-reserve First Nation communities.
>
> **Approach C**: In addition to approaches A and B, improve coordination of INAC social programs with those of other federal departments that are directed to First Nations on reserve, for example health and early childhood development programs. With greater coordination and a stronger focus on the needs of individual communities, these programs could make a greater contribution to child maltreatment prevention, and could be part of a broader healthy community initiative.

[375] Similarly, the 2010 *AANDC Evaluation of the Implementation of the EPFA in Alberta* found several jurisdictional issues as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In 2012, the *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* found that "[t]here is a need to better coordinate federal programming that affects children and parents requiring child and family services" (at p. 49). The *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia*, at page 49, goes on to state:

> It is clear that the FNCFS Program does not and cannot work in isolation from other programming. Too many factors affect the overall need for child and family services programming, and it would be unrealistic to assume that agencies can fully deliver services related to all of them. AANDC could improve its efficiency by having a better understanding of other AANDC or federal programming that affect children and parents requiring child and family services and facilitating the coordination of these programs. Economic development, health promotion, education and cultural integrity are key areas where an integration of programming and services has been noted as potentially addressing community well-being in a way that is both effective and necessary for positive long-term outcomes, and ultimately a sustained reduction in the number of children coming into care.

[376] Jordan's Principle was also considered by the Federal Court in *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342. The Pictou Landing Band Council (the PLBC) applied for judicial review of an AANDC decision not to reimburse them for in-home health care to one of its members. The PLBC indicated that Jordan's Principle was at issue. However, after case conferencing with the provincial government

and officials from the PLBC, AANDC and Health Canada determined there was no jurisdictional dispute in the matter as both levels of government agreed that the funding requested was above what would be provided to a child living off reserve.

[377] The Federal Court found AANDC's interpretation of Jordan's Principle to be narrow and the finding that it was not engaged to be unreasonable:

> [96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.
>
> [97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the [*Social Assistance Act*] and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[378] In determining that AANDC and Health Canada did not properly assess the PLBC request for funding to meet its member's needs, the Federal Court concluded that:

> [111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The [*Social Assistance Act*] and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.
>
> […]
>
> [116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and costs that meet the needs of the on reserve First Nation child.

[379] Jordan's Principle is designed to address issues of jurisdiction which can result in delay, disruption and/or denial of a good or service for First Nations children on reserve. The 2009 and 2013 Memorandums of Understanding have delays inherently built into them by including a review of policy and programs, case conferencing and approvals from the Assistant Deputy Minister, before interim funding is even provided. It should be noted that the case conferencing approach was what was used in Jordan's case, sadly, without success (see testimony of Dr. Cindy Blackstock, *Transcript* Vol. 48 at p. 104).

[380] It also unclear why AANDC`s position focuses mainly on inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers. The evidence above indicates that a large number of jurisdictional disputes occur between federal departments, such as AANDC, Health Canada and others. Tellingly, the $11 million Health Canada fund to address Jordan's Principle cases was never accessed. According to Ms. Baggley, the reasons for this were that the cases coming forward did not meet the criteria for the application of Jordan's Principle; or, were resolved before having to access the fund (see *Transcript* Vol. 57 at pp. 123-125).

[381] In the Panel's view, it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families. Such an approach defeats the purpose of Jordan's Principle and results in service gaps, delays and denials for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need.

[382] More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made.

v. Summary of findings

[383] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements intend to provide funding to ensure the safety and well-being of First Nations children on reserve by supporting culturally appropriate child and family services that are meant to be in accordance with provincial/territorial legislation and standards and be provided in a reasonably comparable manner to those provided off-reserve in similar circumstances. However, the evidence above indicates that AANDC is far from meeting these intended goals and, in fact, that First Nations are adversely impacted and, in some cases, denied adequate child welfare services by the application of the FNCFS Program and other funding methods.

[384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS

Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC

maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[390] Notwithstanding budget surpluses for some agencies, additional funding or reallocations from other programs, the evidence still indicates funding is insufficient. The Panel finds AANDC's argument suggesting otherwise is unreasonable given the preponderance of evidence outlined above. In addition, the reallocation of funds from other AANDC programs, such as housing and infrastructure, to meet the maintenance costs of the FNCFS Program has been described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve. Again, recommendations by the Auditor General and Standing Committee on Public Accounts on this point have largely gone unanswered by AANDC.

[391] Furthermore, in areas where the FNCFS Program is complemented by other federal programs aimed at addressing the needs of children and families on reserve, there is also a lack of coordination between the different programs. The evidence indicates that federal government departments often work in silos. This practice results in service gaps,

delays or denials and, overall, adverse impacts on First Nations children and families on reserves. Jordan's Principle was meant to address this issue; however, its narrow interpretation by AANDC and Health Canada ignores a large number of disputes that can arise and need to be addressed under this Principle.

[392] While seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. For instance, given the agreement has not been updated for quite some time, it does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act*. The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof. Tellingly, AANDC's position is that it is not required to cost-share services that are not included in the *1965 Agreement*.

[393] Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon, including a denial of adequate child and family services, by the application of AANDC's FNCFS Program, funding formulas and other related provincial/territorial agreements. These findings are consistent with those of the *NPR,* Wen:De reports, Auditor General of Canada reports and Standing Committee on Public Accounts reports. Again, the Panel accepts the findings in those

reports and has relied on them to make its own findings. Those findings are also corroborated by the other testimonial and documentary evidence outlined above, including the internal documents emanating from AANDC.

[394] As will be seen in the next section, the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.

C. Race and/or national or ethnic origin is a factor in the adverse impacts or denials

[395] As mentioned above, there is no dispute in this case that First Nations possess the characteristics of race and/or national or ethnic origin. Discrimination claims regarding Aboriginal peoples have been founded on both grounds (see for example *The Queen v. Drybones*, [1970] SCR 282; *Bear v. Canada (Attorney General)*, 2003 FCA 40; *Bignell-Malcolm v. Ebb and Flow Indian Band*, 2008 CHRT 3; and *Commission des droits de la personne et des droits de la jeunesse c. Blais*, 2007 QCTDP 11).

[396] The provision of child and family services under the FNCFS Program and the other provincial agreements are specifically aimed at First Nations living on reserve. Under the *Yukon Agreement*, the services are aimed at all First Nations living in the territory. That is, the determination of the public to which the services are offered is based uniquely on the race and/or ethnic origin of the service recipients. Pursuant to the application of the FNCFS Program, corresponding funding formulas and the other provincial/territorial agreements, First Nations people living on reserve and in the Yukon are *prima facie* adversely differentiated and/or denied services because of their race and/or national or ethnic origin in the provision of child and family services.

[397] AANDC argues there is no evidence that any changes to the FNCFS Program and corresponding funding formulas or the other related provincial/territorial agreements would lead to better outcomes for First Nations children and families. Therefore, it argues the Complainants have failed to establish a *prima facie* case of discrimination. In any event,

the question of whether federal funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under section 5 of the *CHRA*.

[398] The *prima facie* discrimination analysis is not concerned with proposed outcomes. It is concerned with adverse impacts and whether a prohibited ground is a factor in any adverse impacts. Proposed outcomes only come into play if the complaint is substantiated and an order from the Tribunal is required to rectify the discrimination under section 53(2) of the *CHRA*. The Panel also disagrees that the question of whether funding is sufficient to meet a perceived need is beyond the scope of an investigation into discrimination under the *CHRA*. That question and evidence related thereto informs the ultimate determination to be made in this case: whether First Nations children and families residing on-reserve have an opportunity equal with other individuals in accessing child and family services. That is, it addresses the issue of substantive equality.

i. Substantive equality

[399] The purpose of the *CHRA* is to give effect to the principle of equality. That "all individuals should have **an opportunity equal with other individuals** to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2, **emphasis added**). The equality jurisprudence under section 15 of the *Charter* informs the content of the *CHRA*'s equality statement (see *Caring Society FCA* at para. 19). In this regard, the Supreme Court has consistently held that equality is not necessarily about treating everyone the same. As mentioned above, "identical treatment may frequently produce serious inequality" (*Andrews* at p. 164).

[400] As articulated in *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 69, "[i]t is easy to say that everyone who is just like "us" is entitled to equality […] it is more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy". In other words, true equality and the accommodation of differences, what is termed 'substantive equality', will frequently require the making of distinctions (see *Andrews* at pp. 168-169). That is, in some cases "discrimination can accrue from a failure

to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public" (see *Eldridge* at para. 78).

[401] In *Eldridge*, the issue was whether the failure to provide sign language interpreters for hearing impaired persons as part of a publicly funded scheme for the provision of medical care was in violation of section 15 of the *Charter*. The Supreme Court held that discrimination stemmed from the actions of subordinate authorities, such as hospitals, who acted as agents of the government in providing the medical services set out in legislation. However, the Legislature, in defining its objective as guaranteeing access to a range of medical services, could not evade its obligations under section 15 of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective. The medical care system applied equally to the entire population of the province, but the lack of interpreters prevented hearing impaired persons from benefitting from the system to the same extent as hearing persons. The legislation was discriminatory because it had the effect of denying someone the equal protection or benefit of the law.

[402] In determining whether there has been discrimination in a substantive sense, the analysis must also be undertaken in a purposive manner "…taking into account the full social, political and legal context of the claim" (see *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 30). For Aboriginal peoples in Canada, this context includes a legacy of stereotyping and prejudice through colonialism, displacement and residential schools (see *R. v. Turpin*, [1989] 1 SCR 1296 at p. 1332; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para. 66; *Lovelace v. Ontario*, [2000] 1 SCR 950 at para. 69; *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59; and, *R. v. Ipeelee*, [2012] 1 S.C.R. 433 at para. 60).

[403] In providing the benefit of the FNCFS Program and the other related provincial/territorial agreements, AANDC is obliged to ensure that its involvement in the provision of child and family services does not perpetuate the historical disadvantages endured by Aboriginal peoples. If AANDC's conduct widens the gap between First Nations and the rest of Canadian society rather than narrowing it, then it is discriminatory (see *A* at para. 332; and, *Eldridge* at para. 73).

[404] The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.

ii. Impact of the Residential Schools system

[405] **Please note** that the information below contains graphic facts about Residential Schools. If this information causes distress, especially for survivors and their families, a 24-hour Indian Residential Schools Crisis Line has been set up to provide support, including emotional and crisis referral services:

1-866-925-4419

a. History of Residential Schools

[406] Dr. John Milloy, a historian and author of *A National Crime, The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: University of Manitoba Press, 2006) [*A National Crime*]), was qualified as an expert on the history of Residential Schools before the Tribunal. His evidence was uncontroverted and supported by official archives and other documents referenced in his book. As such, the Panel accepts Dr. Milloy's evidence as fact.

[407] During the Residential Schools era, Aboriginal children were removed from their homes, often forcibly, and brought to residential schools to be "civilized". Living conditions in many cases were appalling, giving place to disease, hunger, stress, and despair. Children were often cold, overworked, shamed and could not speak their native language for fear of severe punishment, including some students who had needles inserted into their tongues. Many children were verbally, sexually and/or physically abused. There were instances where students were forced to eat their own vomit. Some children were locked in closets, cages, and basements. Others managed to run away, but some of those who

did so during the winter months died in the cold weather. Many children committed suicide as a result of attending a Residential School.

[408] Overall, a large number of Aboriginal children under the supervision of the Residential Schools system died while “in-care” (see *A National Crime* at p. 51). Many of those who managed to survive the ordeal are psychologically scarred as a result. In addition to the impacts on individuals, Dr. Milloy also explained how the Residential Schools affected First Nations communities as a whole. In losing future generations to the Residential Schools, the culture, language and the very survival of many First Nations communities was put in jeopardy.

[409] Elder Robert Joseph, from the Kwakwaka’wakw community, gave a very moving and detailed account of his personal experience in the Residential Schools system. According to Elder Joseph, abuse, strip searches, withholding gifts and visits from family members, and public shaming were very commonplace. In his view, some of the strip searches were actually veiled instances of sexual assault. In one instance, as a form of punishment, he recounted being stripped naked in front of the boys’ division of the school and told to bend over. He also spoke of children being locked in closets and cages and the prevalence of racist remarks.

[410] Elder Joseph’s experience gave him a deep sense of loneliness and he turned to alcohol to cope with the despair. He has since turned his life around and is now an advocate for reconciliation and healing for Aboriginal people.

[411] The Government of Canada has recognized the impacts and consequences of the Residential Schools system. In a 2008 Statement of Apology to former students of Residential Schools (see Annex, ex. 52), former Prime Minister Stephen Harper stated:

> The treatment of children in Indian Residential Schools is a sad chapter in our history.
>
> For more than a century, Indian Residential Schools separated over 150,000 Aboriginal children from their families and communities. In the 1870's, the federal government, partly in order to meet its obligation to educate Aboriginal children, began to play a role in the development and administration of these schools. Two primary objectives of the Residential

Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

[…]

The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities.

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today.

[…]

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

The burden of this experience has been on your shoulders for far too long. The burden is properly ours as a Government, and as a country. There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again. You have been working on recovering from this experience for a long time and in a very real sense, we are now joining you on this journey. The Government of Canada sincerely apologizes and asks

> the forgiveness of the Aboriginal peoples of this country for failing them so profoundly.

[412] In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day.

b. Transformation of Residential Schools into an aspect of the child welfare system

[413] Residential Schools operated as a "school system" from the 1880's until the 1960's, when it became a marked component of the child welfare system. In about 1969, the Church's involvement in the Residential Schools system ceased, and the federal government took over sole management of the institutions. At around the same time, new regulations came into effect outlining who could attend Residential Schools, placing an emphasis on orphans and "neglected" children. The primary role of many Residential Schools changed from a focus on "education" to a focus on "child welfare". Despite this, many children were not sent home, because their parents were assessed as not being able to assume the responsibility for the care of their children (see *A National Crime* at pp. 211-212; and, testimony of Dr. Milloy, *Transcript* Vol. 34 at pp. 19-20).

[414] Over a 50-year period, between the 1930's to the 1980's, the number of schools declined steadily from 78 schools in 1930 down to 12 schools in 1980. The last school closed in 1986. The FNCFS Program is then implemented in 1990.

c. Intergenerational trauma of Residential Schools

[415] Dr. Amy Bombay, Ph.D. in neuroscience and M.Sc. in psychology, was qualified as an expert on the psychological effects and transmission of stress and trauma on wellbeing. She spoke about the intergenerational transmission of trauma among the offspring of Residential School survivors. The Panel finds Dr. Bombay's evidence reliable and helpful

in understanding the impacts of the individual and collective trauma experienced by Aboriginal peoples and finds her evidence highly relevant to the case at hand.

[416] Dr. Bombay explained how Residential Schools fits into the larger traumatic history that Aboriginal peoples have been exposed to:

> …for indigenous groups in Canada and worldwide, colonialism has comprised multiple collective traumas […] these include things like military conquest, epidemic diseases and forced relocation.
>
> So Indian residential schools is really just one example of one collective trauma which is part of a larger traumatic history that aboriginal peoples have already been exposed to.
>
> (*Transcript* Vol. 40 at p. 94)

[417] According to Dr. Bombay, these collective traumas have had a cumulative effect over time, namely on individual and community health (see *Transcript* Vol. 40 at p. 83). In her words: "these collective effects are greater than the sum of the individual effects" (*Transcript* Vol. 40 at p. 82). Similar effects have been shown in other populations and in other groups who have undergone similar collective traumas, such as Holocaust survivors, Japanese Americans subjected to internment during World War II, and survivors of the Turkish genocide of Armenians (see *Transcript* Vol. 40 at pp. 111-112). To measure and describe the fact that some groups have undergone this chronic exposure to collective traumas, Dr. Maria Yellow Horse Brave Heart of the University of New Mexico coined the term "historical trauma", which is defined as "…the cumulative emotional and psychological wounding over the lifespan across generations emanating from massive group trauma" (see testimony of Dr. Bombay, *Transcript* Vol. 40 at pp. 94-95).

[418] For Residential School survivors, Dr. Bombay indicated that they are more likely to suffer from various physical and mental health problems compared to Aboriginal adults who did not attend. For example, Residential School survivors report higher levels of psychological distress compared to those who did not attend, and they are also more likely to be diagnosed with a chronic physical health condition (see *Transcript* Vol. 40 at pp. 109-110).

[419] With respect to social outcomes, Dr. Bombay explained some of the intergenerational impacts of Residential Schools as follows:

> …numerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing -- being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools -- how they treated the children, actually instilled negative -- a lot of negative parenting practices, as this was the only models of parenting that they were exposed to.
>
> (*Transcript* Vol. 40 at p. 110)

[420] Generationally, the above noted impacts could descend from the Residential School survivor, to their children and then to their grandchildren. In this regard, Dr. Bombay indicated, relying on the 2002-2003 Regional Health Survey, that 43% of First Nations adults on-reserve perceived that their parents' attendance at Residential School negatively affected the parenting that they received while growing up; 73.4% believed that their grandparents' attendance at Residential School negatively affected the parenting that their parents received; 37.2% of First Nations adults whose parents attended Residential School had contemplated suicide in their life versus 25.7% whose parents did not; and, the grandchildren of survivors were also at an increased risk for suicide as 28.4% had attempted suicide versus only 13.1% of those whose grandparents did not attend Residential School (see *Transcript* at Vol. 40 pp. 110-11, 114-115).

[421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).

[422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding

funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[423] AANDC submits that in determining what services to provide and how to deliver them, the FNCFS Agencies decide what is "culturally appropriate" for their community. The definition of what is culturally appropriate depends on the specific culture of each First Nation community. According to AANDC, this is best left to the discretion of the FNCFS Agencies or First Nations leadership.

[424] However, in the *2008 Report of the Auditor General of Canada*, the Auditor General indicated that "[t]o deliver this program as the policy requires, we expected that the Department would, at a minimum know what "culturally appropriate services" means" (at s. 4.18, p. 12). That is, AANDC had no assurances that the FNCFS Program funds child welfare services that are culturally appropriate. In response, AANDC developed a guiding principle for what it understands culturally appropriate services to be:

> the Government of Canada provides funding, as a matter of social policy, to **support the delivery of culturally appropriate services** among First Nation communities that **acknowledge and respect values, beliefs and unique circumstances** being served. As such, culturally appropriate services encourage activities such as kinship care options where a child is placed with an extended family member so that cultural identity and traditions may be maintained.
>
> (see *AANDC's Response to the 2009 Report of the Standing Committee on Public Accounts*, **emphasis added**)

[425] Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless. A glaring example of this is the denial of funding for Band Representatives under the *1965 Agreement* in Ontario. Another is the assumptions built into Directive 20-1 and the EPFA. If funding does not correspond to the

actual child welfare needs of a specific First Nation community, then how is it expected to provide services that are culturally appropriate? With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity.

[426] Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma.

[427] In this regard, it should be noted again that the federal government is in a fiduciary relationship with Aboriginal peoples and has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, more has to be done to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children. This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples.

iii. Canada's international commitments to children and Indigenous peoples

[428] As stated earlier, Amnesty International was granted "Interested Party" status to assist the Tribunal in understanding the relevance of Canada's international human rights obligations to the Complaint. Amnesty International argues that the interpretation and application of the *CHRA*, and in particular of section 5, must respect Canada's

international obligations as enunciated in various international United Nations instruments, such as the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on Elimination of all Forms of Discrimination*, the *Universal Declaration on Human Rights* and the *Declaration on the Rights of Indigenous Peoples*.

[429] Amnesty International also refers to the views of treaty bodies, such as the United Nations Human Rights Committee (UNHRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Committee on the Rights of the Child (CRC) in support of its argument that when a treatment discriminates both on the basis of First Nations identity and because of residency, it constitutes multiple violations of the prohibition of discrimination, which is a peremptory norm of international law. Specifically, Amnesty International points to these bodies' recommendations that special attention must be given to the prohibition of discrimination against children.

[430] In AANDC's view, the international law concepts and arguments advanced by Amnesty International do not assist the Tribunal in interpreting and applying the *CHRA* to the facts of this Complaint. Rather, they see Amnesty International's arguments as a claim that the Government of Canada is in violation of its international obligations, which is beyond the purview of the Complaint.

[431] In order to form part of Canadian law, international treaties need national legislative implementation, unless they codify norms of customary international law that are already found in Canadian domestic law. However, when a country becomes party to a treaty or a covenant, it clearly indicates its adherence to the contents of such a treaty or covenant and therefore makes a commitment to implement its principles in its national legislation. This public engagement is solemn and binding in international law. It is a declaration from the country that its national legislation will reflect its international commitments. Therefore, international law remains relevant in interpreting the scope and content of human rights in Canadian law, as was underlined by the Supreme Court on numerous occasions since Chief Justice Dickson's dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313.

[432] The basic principle, which is not limited to *Charter* interpretation, is that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038 at p. 1056). That is so because Parliament and the provincial legislatures are presumed to respect the principles of international law (see *Baker* at para. 81).

[433] This approach often leads the Supreme Court to look at decisions and recommendations of human right bodies to interpret the scope and content of domestic law provisions in the light of international law (see for example *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892 at p. 920; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at pp. 149-150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 26-27; and, *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras 154-160).

[434] In recent years, the Supreme Court has been willing to expand the relevance of international law and to give effect to Canada's role and actions in the development of norms of international law, particularly in the area of human rights (see *United States v. Burns*, 2001 SCC 7 at para. 81 [*Burns*]; and, *Canada (Justice) v. Khadr*, 2008 SCC 28 at paras. 2-3). In *Burns*, the Supreme Court found that Canada's advocacy for the abolition of the death penalty, and efforts to bring about change in extradition arrangements when a fugitive faces the death penalty, prevented it from extraditing someone to the United States facing the same sentence without obtaining assurance that it would not be carried out. The same reasoning applies to the case at hand as Canada has expressed its views internationally on the importance of human rights on numerous occasions.

[435] Indeed, since the foundation of the United Nations (the UN), Canada has been actively involved in the promotion of human rights on the international scene. This began with the participation of the Canadian Director of the UN Secretariat's Division for Human Rights, Mr. John Humphrey, in writing the preliminary draft of the *Universal Declaration of Human Rights* (the *Universal Declaration*), in 1947. Today, Canada still voices itself as a strong supporter of human rights at the international level.

[436] Canada's international human rights obligations with respect to equality and non-discrimination stem from various legal instruments. Similarities can be seen in the wording of both domestic and international human rights instruments and in the scope and content of their provisions. The close relationship between Canadian and international human rights law can also be seen both in the periodic reports submitted by Canada to various international treaty monitoring bodies on the steps taken domestically to give effect to the obligations flowing from the treaties and in the monitoring bodies' recommendations to Canada.

[437] Developments in human rights at the national level followed the *Universal Declaration* at the international level. Adopted by the United Nations General Assembly by resolution 217A at its 3rd session in Paris on 10 December 1948, article 2 of the *Universal Declaration* sets out the principle of equality and non-discrimination in the enjoyment of human rights. Article 7 proclaims equality before the law and equal protection of the law. As indicated above, these equality principles are now ingrained in section 15 of the *Charter* and in the purpose of the *CHRA*.

[438] Initially, the *Universal Declaration* was intended as a guide for governments in their efforts to guarantee human rights domestically. It was also meant to enunciate human rights principles that would be further developed into a legally binding convention. This eventually led to the adoption of two covenants and two optional protocols that, along with the *Universal Declaration*, are considered to form the International Bill of Rights.

[439] The first of those two covenants was the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (the *ICCPR*), entered into force by Canada on August 19, 1976. At the same time, Canada recognized the jurisdiction of the UNHRC to hear individual complaints by ratifying the *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 U.N.T.S. 302. Articles 2 and 26 of the *ICCPR* guarantee equality and prohibit discrimination in terms that are similar to those of the *Universal Declaration*.

[440] In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the *ICCPR* should be understood to imply:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The UNHRC went on to state that the aim of the protection is substantive equality, and to achieve this aim States may be required to take specific measures (see at paras. 5, 8, and 12-13).

[441] The second of the two covenants that stem directly from the *Universal Declaration* is the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 (the *ICESCR*), which Canada entered into force on August 19, 1976. Article 2(2) guarantees the exercise of the rights protected without discrimination. Article 10 provides that special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions.

[442] The *ICESCR* is considered to be of progressive application. However, in General Comment No. 20, 2 July 2009 (E/C.12/GC/20), the CESCR stated that, given their importance, the principles of equality and non-discrimination are of immediate application, notwithstanding the provisions of article 2 of the ICESR (see paras. 5 and 7). The CESCR also affirmed that the aim of the *ICESCR* is to achieve substantive equality by "…paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations" (at paras. 8; see also paras. 9 and 10). It added that the exercise of covenant rights should not be conditional on a person's place of residence (see at para. 34).

[443] In a report to the CESCR outlining key measures it adopted for the period of January 2005 to December 2009 to enhance its implementation of the *ICESCR*, Canada reported on the FNCFS Program and declared that "[t]he anticipated result is a more secure and stable family environment and improved outcomes for Indian children ordinarily

resident on reserve" (see *Canada's Sixth Report on the United Nations' International Covenant on Economic, Social and Cultural Rights* (Minister of Public Works and Government Services, 2013) at para. 103). Canada also reported that it had begun transitioning the FNCFS Program to a more prevention based model, the EPFA, "…on a jurisdiction-by-jurisdiction basis with ready and willing First Nations and provincial/territorial partners […] with the goal to have all jurisdictions on board by 2013" (at paras. 105-106). While the Government of Canada made this undertaking, the evidence is clear that this goal was not met.

[444] In addition to the covenants that protect human rights in general, Canada is a party to legal instruments that focus on specific issues or aim to protect specific groups of persons. Canada is a party to the *International Convention for the Elimination of all Forms of Racial Discrimination*, 660 U.N.T.S. 195 (the *ICERD*), ratified in 1970. The *ICERD* clarifies the prohibition of discrimination found in the *Universal Declaration*, to which it refers to in its preamble. Articles 1 and 2 define racial discrimination and direct States to take all necessary measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The purpose is to guarantee them the full and equal enjoyment of human rights and fundamental freedoms, including special measures whenever warranted. Article 5 further highlights rights whose enjoyment must be free of discrimination, including the right to social services, which includes public health, medical care and social security.

[445] The monitoring body of the *ICERD*, the CERD, has discussed the meaning and scope of special measures in the *ICERD*. It has expressed a similar understanding of substantive equality as Canadian courts (see CERD, General Recommendation No. 32, September 24, 2009 (CERD/C/GC/32) at para. 8). In addition, it recognized that "special measures" that may be called for in order to achieve effective equality "…include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus…" (at para. 13).

[446] In 2011, Canada reported to the CERD on the measures taken domestically to implement the *ICERD*. The CERD made several recommendations, including: "[d]iscontinuing the removal of Aboriginal children from their families and providing family

and child care services on reserves with sufficient funding" [see *Consideration of reports submitted by States parties under article 9 of the convention, Concluding observations of the CERD*, 9 March 2012 (CERD/C/CAN/CO/19-20) at para. 19(f)].

[447] Although AANDC argues that the federal government is merely funding child welfare services on-reserve as a matter of social policy, budgetary measures in and of themselves are an important component of the steps to be taken in order to achieve substantive equality for First Nations children. The recommendation of the CERD, read with the views it expressed in General Recommendation No. 32, indicate that the CERD sees insufficient funding of child care services on reserve as inhibiting substantive equality for First Nations in the provision of child and family services.

[448] Another important international instrument aiming at the protection of a specific group of persons that is relevant to the present case is the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the *CRC*), entered into force by Canada on January 12, 1992. Children have the same human rights as adults. However, they are more vulnerable and in need of protection that addresses their special needs. Consequently, the *CRC* focuses on giving them the special care, assistance and legal protection that they need (see in particular articles 2, 3, 5, 7.1, 8.1, 9, 9.1, 18.1, 20, 25 and 30). Furthermore, when it ratified the *CRC*, Canada made a Statement of Understanding expressing its view that, in assessing what measures are appropriate to implementing the rights recognized in the *CRC*, the rights of Aboriginal children to enjoy their own culture, to profess and practice their own religion and to use their own language must not be denied (Convention on the Rights of the Child, Declarations and Reservations, Canada, online: United Nations <http://www.treaties.un.org>).

[449] The *CRC*'s monitoring body, the CRC Committee, stressed the importance of culturally appropriate social services for indigenous children (see General Comment No. 11, February 12, 2009 (CRC/C/GC/11) at para. 25). With respect to childcare and support services, Canada reported that "[t]he Government of Canada plays a supporting role by providing a range of child and family benefits and transferring funds to other governments in Canada based on shared goals and objectives" (*Canada's Third and Fourth Reports on the Convention on the Rights of the Child*, 20 November 2009 at para. 49). Canada also

reported, as it did to the CESCR, that it is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach and that it expected that all agencies would be using the prevention-focused approach by 2013 (see at para. 98).

[450] In response to Canada, the CRC Committee expressed deep concern "…at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability" (*Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session (17 September – 5 October 2012)*, 6 December 2012 (CRC/C/CAN/CO/3-4) at para. 55). Among other things, the CRC Committee recommended that Canada intensify cooperation with communities and community leaders to find suitable alternative care solutions for children in these communities [see at para. 56(f)]. It further recommended that Canada "[e]nsure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs" [see at para. 68(c)].

[451] Again, the recommendations of the CRC Committee reinforce the need for adequate funding, linked to the needs of First Nations children and families, in order to achieve substantive equality in the provision of child and family services on-reserve.

[452] Finally, the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., Supp. No 49 Vol III, UN Doc A/61/49 (2007) (the *UNDRIP*), which was adopted by the United Nations General Assembly on September 13, 2007, was endorsed by Canada on November 12, 2010. Article 2 provides that Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular rights based on their indigenous origin or identity. Although this international instrument is, at the time being, a declaration and not a treaty or a covenant, and is not legally binding except to the extent that some of its provisions reflect customary international law, when Canada endorsed it, it reaffirmed its commitment to "…improve the well-being of Aboriginal Canadians"(*Canada's Statement of Support on the United Nations*

Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca>).

[453] The international instruments and treaty monitoring bodies referred to above view equality to be substantive and not merely formal. Consequently, they consider that specific measures, including of a budgetary nature, are often required in order to achieve substantive equality. These international legal instruments also reinforce the need for due attention to be paid to the unique situation and needs of children and First Nations people, especially the combination of those two vulnerable groups: First Nations children.

[454] The concerns expressed by international monitoring bodies mirror many of the issues raised in this Complaint. The declarations made by Canada in its periodic reports to the various monitoring bodies clearly show that the federal government is aware of the steps to be taken domestically to address these issues. Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric.

[455] Substantive equality and Canada's international obligations require that First Nations children on-reserve be provided child and family services of comparable quality and accessibility as those provided to all Canadians off-reserve, including that they be sufficiently funded to meet the real needs of First Nations children and families and do not perpetuate historical disadvantage.

VI. Complaint substantiated

[456] In light of the above, the Panel finds the Complainants have presented sufficient evidence to establish a *prima facie* case of discrimination under section 5 of the *CHRA*. Specifically, they *prima facie* established that First Nations children and families living on reserve and in the Yukon are denied [s. 5(a)] equal child and family services and/or differentiated adversely [s. 5(b)] in the provision of child and family services.

[457] Through the FNCFS Program and other related provincial/territorial agreements, AANDC provides a service intended to "ensure", "arrange", "support" and/or "make available" child and family services to First Nations on reserve. With specific regard to the

FNCFS Program, the objective is to ensure culturally appropriate child and family services to First Nations children and families on reserve and in the Yukon that are intended to be in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances. However, the evidence in this case demonstrates that AANDC does more than just ensure the provision of child and family services to First Nations, it controls the provision of those services through its funding mechanisms to the point where it negatively impacts children and families on reserve.

[458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.
- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.
- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;
- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families.
- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

[459] The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts perpetuate the historical disadvantage and trauma suffered by Aboriginal people, in particular as a result of the Residential Schools system.

[460] AANDC's evidence and arguments challenging the Complainants' allegations of discrimination have been addressed throughout this decision. Overall, the Panel finds AANDC's position unreasonable, unconvincing and not supported by the preponderance of evidence in this case. Otherwise, as mentioned earlier, AANDC did not raise a statutory exception under sections 15 or 16 of the *CHRA*.

[461] Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the *1965 Agreement* in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve.

[462] This concept of reasonable comparability is one of the issues at the heart of the problem. AANDC has difficulty defining what it means and putting it into practice, mainly because its funding authorities and interpretation thereof are not in line with

provincial/territorial legislation and standards. Despite not being experts in the area of child welfare and knowing that funding according to its authorities is often insufficient to meet provincial/territorial legislation and standards, AANDC insists that FNCFS Agencies somehow abide by those standards and provide reasonably comparable child and family services. Instead of assessing the needs of First Nations children and families and using provincial legislation and standards as a reference to design an adequate program to address those needs, AANDC adopts an *ad hoc* approach to addressing needed changes to its program.

[463] This is exemplified by the implementation of the EPFA. AANDC makes improvements to its program and funding methodology, however, in doing so, also incorporates a cost-model it knows is flawed. AANDC tries to obtain comparable variables from the provinces to fit them into this cost-model, however, they are unable to obtain all the relevant variables given the provinces often do not calculate things in the same fashion or use a funding formula. By analogy, it is like adding support pillars to a house that has a weak foundation in an attempt to straighten and support the house. At some point, the foundation needs to be fixed or, ultimately, the house will fall down. Similarly, a REFORM of the FNCFS Program is needed in order to build a solid foundation for the program to address the real needs of First Nations children and families living on reserve.

[464] Not being experts in child welfare, AANDC's authorities are concerned with comparable funding levels; whereas provincial/territorial child and family services legislation and standards are concerned with ensuring service levels that are in line with sound social work practice and that meet the best interest of children. It is difficult, if not impossible, to ensure reasonably comparable child and family services where there is this dichotomy between comparable funding and comparable services. Namely, this methodology does not account for the higher service needs of many First Nations children and families living on reserve, along with the higher costs to deliver those services in many situations, and it highlights the inherent problem with the assumptions and population levels built into the FNCFS Program.

[465] AANDC's reasonable comparability standard does not ensure substantive equality in the provision of child and family services for First Nations people living on reserve. In

this regard, it is worth repeating the Supreme Court's statement in *Withler*, at paragraph 59, that "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison". This statement fits the context of this complaint quite appropriately. That is, human rights principles, both domestically and internationally, require AANDC to consider the distinct needs and circumstances of First Nations children and families living on-reserve - including their cultural, historical and geographical needs and circumstances – in order to ensure equality in the provision of child and family services to them. A strategy premised on comparable funding levels, based on the application of standard funding formulas, is not sufficient to ensure substantive equality in the provision of child and family services to First Nations children and families living on-reserve.

[466] As a result, and having weighed all the evidence and argument in this case on a balance of probabilities, the Panel finds the Complaint substantiated.

[467] The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves.

VII. Order

[468] As the Complaint has been substantiated, the Panel may make an order against AANDC pursuant to section 53(2) of the *CHRA*. The aim in making an order under section 53(2) is not to punish AANDC, but to eliminate discrimination (see *Robichaud* at para. 13). To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 37). In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the

particular circumstances of the case and the evidence presented (*Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).

[469] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the Act. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the Act are obtained. Applying a purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134; and, *Doucet-Boudreau* at paras. 25 and 55).

[470] The Complainants, Commission and Interested Parties request a variety of remedies to address the findings in this Complaint, including declaratory orders; orders to cease the discriminatory practice and take measures to redress or prevent it from reoccurring; and, compensation under sections 53(2)(e) and 53(3) of the *CHRA*.

[471] Furthermore, unrelated to the remedies requested under section 53(2), the Panel is also seized of a previous motion from the Complainants for costs related to the allegation that AANDC abused the Tribunal's process through its late disclosure of documents.

A. Findings of discrimination

[472] The Caring Society requests several declarations be made by the Tribunal in order to clarify which aspects of the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements are discriminatory. According to the Caring Society, this Tribunal routinely provides declaratory relief in the form of findings of discrimination.

[473] Indeed, throughout this decision, and generally at paragraph 458 above, the Panel has outlined the main adverse impacts it has found in relation to the FNCFS Program and other related provincial/territorial agreements. As race and/or national or ethnic origin is a factor in those adverse impacts, the Panel concluded First Nations children and families living on reserve and in the Yukon are discriminated against in the provision of child and

family services by AANDC. The Panel believes these findings address the Caring Society's request for declaratory relief.

B. Cease the discriminatory practice and take measures to redress and prevent it

[474] Section 53(2)(a) of the *CHRA* allows the Tribunal to order that the person found to be engaging in the discriminatory practice "cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future". Furthermore, section 53(2)(b) allows the Tribunal to order that the person "…make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice".

[475] Pursuant to these sections of the *CHRA*, the Complainants and Commission request immediate relief for First Nations children. In their view, this can be accomplished by ordering AANDC to remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program and child and family services in Ontario under the *1965 Agreement*; and, requiring AANDC to properly implement Jordan's Principle. Moving forward in the long term, the Complainants and Commission request other orders that AANDC reform the FNCFS Program and the *1965 Agreement* to ensure equitable levels of service, including funding thereof, for First Nations child and family services on-reserve.

[476] The Caring Society has provided a detailed methodology of how this reform can be achieved. It proposes a three-step process to redesign the FNCFS Program: (1) reconvene the National Advisory Committee to identify discriminatory elements in the provision of funding to FNCFS Agencies and make recommendations thereon; (2) fund tri-partite regional tables to negotiate the implementation of equitable and culturally based funding mechanisms and policies for each region; and, (3) develop an independent expert structure with the authority and mandate to ensure AANDC maintains non-discriminatory and culturally appropriate First Nations child and family services.

[477] Relatedly, the Caring Society also requests the public posting of information regarding the FNCFS Program, Jordan's Principle and children in care to educate FNCFS Agencies and the public about AANDC's child welfare policies, practices and directives and to help prevent future discrimination. Furthermore, it asks that AANDC staff be trained on First Nations culture, historic disadvantage, human rights and social work.

[478] The AFN requests similar reform, including commissioning a study to determine the most effective means of providing care for First Nations children and families and greater performance measurements and evaluations of AANDC employees related to the provision of First Nations child and family services. Similarly, in Ontario, the COO requests that an independent study of funding and service levels for First Nations child welfare in Ontario based on the *1965 Agreement* be conducted.

[479] Consistent with Canada's international obligations, Amnesty International stresses the need for a timely and effective remedy to achieve substantive equality for First Nations children and families on reserve, including increased funding, systemic structural changes to the way AANDC provides funding and a comprehensive and systematic monitoring mechanism for assuring non-repetition of breaches of the rights of First Nations children.

[480] AANDC submits that, while the Tribunal may order amendments to policy and provide guidance on the shape of amendments, it cannot prescribe the specific policy that must be adopted. According to AANDC, this is particularly appropriate in this case where the policy at issue is a complex scheme that takes into account competing priorities and must fit within broader governmental policy approaches. Such decisions are entitled to some considerable degree of deference and margin of reasonableness. Furthermore, AANDC argues the proposed remedy would intrude into the executive branch of government's role to establish public policy and direct the spending of public funds in accordance with fiscal priorities. AANDC is also concerned that some of the proposed reform measures are over-broad and beyond the scope of the Complaint. As such, it views aspects of the methodology proposed by the Complainants to be beyond the power of the Tribunal or any other court to order.

[481] The Panel is generally supportive of the requests for immediate relief and the methodologies for reforming the provision of child and family services to First Nations living on reserve, but also recognizes the need for balance espoused by AANDC. AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.

[482] More than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interest of the child, all First Nations children and families living on-reserve should have an opportunity "…equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society" (*CHRA* at s. 2).

[483] That said, given the complexity and far-reaching effects of the relief sought, the Panel wants to ensure that any additional orders it makes are appropriate and fair, both in the short and long-term. Throughout these proceedings, the Panel reserved the right to ask clarification questions of the parties while it reviewed the evidence. While a discriminatory practice has occurred and is ongoing, the Panel is left with outstanding questions about how best to remedy that discrimination. The Panel requires further clarification from the parties on the actual relief sought, including how the requested immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis.

[484] Within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis.

C. Compensation

[485] Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the

discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in wilfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000.

[486] The Caring Society asks the Panel to award compensation under section 53(3) for AANDC's wilful and reckless discriminatory conduct with respect to each First Nations child taken into care since February 2006 to the date of the award. In the Caring Society's view, as early as the 2000 findings of the *NPR*, AANDC voluntarily and egregiously omitted to rectify discrimination against First Nations children. It also notes that the federal government benefited for many years from the money it failed to devote to the provision of equal child and family services for First Nations children. As a result, it believes the maximum amount of $20,000 should be awarded per child. The Caring Society requests the compensation be placed in an independent trust to fund healing activities for the benefit of First Nations children who have suffered discrimination in the provision of child and family services.

[487] The AFN also requests compensation. It asks for an order that it, AANDC, the Caring Society and the Commission form an expert panel to establish appropriate individual compensation for children, parents and siblings impacted by the child welfare practices on reserve between 2006 and the date of the Tribunal's order.

[488] Amnesty International submits any compensation should address both physical and psychological damages, including the emotional harm and inherent indignity suffered as a result of the breach.

[489] AANDC submits there is insufficient evidence before the Tribunal to award the requested compensation. It argues the Caring Society's request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of AANDC's funding practices. According to AANDC, the Caring Society's assertions overlook the complex nature of factors that lead to a child being removed from his or her home and, given the absence of individual evidence thereon, it is impossible for the Tribunal to assess compensation on an individual basis. Furthermore, AANDC submits

the Complainants' authority to receive and distribute funds on behalf of "victims" has not been established.

[490] Similar to its comments above, the Panel has outstanding questions regarding the Complainants' request for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Again, within three weeks of the date of this decision, the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered.

D. Costs for obstruction of process

[491] As part of a motion for disclosure decided in ruling 2013 CHRT 16, the Complainants requested costs from AANDC with respect to its alleged obstruction of the Tribunal's process. At that time, the Panel took the costs request under reserve and indicated the issue would be the subject of a subsequent ruling. The Complainants have reiterated their request for costs as part of their closing submissions on this Complaint. In response, AANDC reaffirmed its assertion that the Tribunal does not have the authority to award such costs.

[492] The Panel continues to reserve its ruling on the Complainants' request for costs in relation to the motion for disclosure decided in ruling 2013 CHRT 16. A ruling on the issue will be provided in due course.

E. Retention of jurisdiction

[493] The Complainants, Commission and Interested Parties request the Panel retain jurisdiction over this matter until any orders are fully implemented.

[494] As indicated above, the Panel has outstanding questions on the remedies being sought by the Complainants and Commission. A determination on those remedies is still to be made. As such, the Panel will maintain jurisdiction over this matter pending the determination of those outstanding remedies. Any further retention of jurisdiction will be re-evaluated when those determinations are made.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 26, 2016

VIII. Annex: exhibit references

1. **Exhibit HR-6, Tab 74**: *Glossary of Social Work Terms*, prepared for the Canadian Human Rights Commission by Michelle Sturtridge (February 2013)
2. **Exhibit HR-1, Tab 3**: Dr. Rose-Alma J. MacDonald & Dr. Peter Ladd et al., *First Nations Child and Family Services Joint National Policy ReviewFinal Report* (Ottawa: Assembly of First Nations and Department of Indian Affairs and Northern Development, 2000)
3. **Exhibit HR-3, Tab 29**: Department of Indian and Northern Affairs Canada, *First Nations Child and Family Services National Program Manual* (Ottawa: Social Policy and Programs Branch, 2004)
4. **Exhibit HR-13, Tab 272**: Indian and Northern Affairs Canada, *National Social Programs Manual* (January 31, 2012)
5. **Exhibit HR-11, Tab 214**: *Memorandum of Agreement Respecting Welfare Programs for Indians*, between the Government of Canada and the Government of the Province of Ontario (19 May, 1966)
6. **Exhibit HR-13, Tab 270**: *Arrangement for the Funding and Administration of Social Services*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of Alberta (23 January, 1992)
7. **Exhibit HR-13, Tab 275**: *Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve*, between the Province of British Columbia and Her Majesty the Queen in right of Canada (March 30, 2012)
8. **Exhibit HR-13, Tab 274**: *Memorandum of Understanding for the Funding of Child Protection Services for Indian Children*, between Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the province of British Columbia (28 March, 1996)
9. **Exhibit HR-13, Tab 305**: *Funding Agreement*, between Her Majesty the Queen in Right of Canada and the Government of Yukon (March 23, 2012)
10. **Exhibit HR-4, Tab 38**: *Fact Sheet – First Nations Child and Family Services* (October 2006), previously online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/info/fnsocec/fncfs_e.html>
11. **Exhibit HR-13, Tab 285**: Indian and Northern Affairs Canada, *First Nations Child and Family Services British Columbia Transition Plan (Decision by Assistant Deputy Minister – ESDPP)* by Megan Reiter, Barbara D'Amico & Steven Singer (March 16, 2011)

12. **Exhibit HR-15, Tab 404**: Indian and Northern Affairs Canada, *Reform of the FNCFS Program in Quebec (Information for the Deputy Minister)* by Rosalee LaPlante & Catherine Hudon (July 7, 2008)

13. **Exhibit HR-1, Tab 4**: John Loxley, Fred Wien and Cindy Blackstock, *Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report, a summary of research needed to explore three funding models for First Nations child welfare agencies* (Vancouver: First Nations Child and Family Caring Society of Canada, 2004)

14. **Exhibit HR-4, Tab 32**: Indian and Northern Affairs Canada, *Evaluation of the First Nations Child and Family Services Program* (Departmental Audit and Evaluation Branch, March 2007)

15. **Exhibit HR-1, Tab 5**: Dr. Cindy Blackstock et al., *Wen:De We Are Coming to the Light of Day* (Ottawa: First Nations Child and Family Caring Society, 2005)

16. **Exhibit HR-1, Tab 6**: John Loxley et al., *Wen:De The Journey Continues* (Ottawa: First Nations Child and Family Caring Society, 2005)

17. **Exhibit HR-3, Tab 11**: Auditor General of Canada, *May 2008 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* (Ottawa: Minister of Public Works and Government Services Canada, 2008)

18. **Exhibit HR-3, Tab 15**: House of Commons 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* (Ottawa: Communication Canada-Publishing, March 2009, 40th Parliament, 2nd session)

19. **Exhibit HR-3, Tab 16**: *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* (Presented to the House of Commons on August 19, 2009) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

20. **Exhibit HR-5, Tab 53**: Auditor General of Canada, *2011 Status Report of the Auditor General of Canada to the House of Commons, Chapter 4, Programs for First Nations on Reserves* (Ottawa: Minister of Public Works and Government Services Canada, 2011)

21. **Exhibit HR-4, Tab 45**: House of Commons 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* (Ottawa: Public Works and Government Services Canada, February 2012, 41st Parliament, 1st session)

22. **Exhibit HR-5, Tab 54**: *Government Response to the Report of the Standing Committee on Public Accounts on Chapter 4, Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada* (Presented to the House of Commons on June 5, 2012) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

23. **Exhibit HR-11, Tab 239**: Indian and Northern Affairs Canada, Strategic Direction and Policy Directorate, Ontario Region, Discussion Paper: *1965 Agreement Overview* (November 2007)

24. **Exhibit HR-11, Tab 21**: Commission to Promote Sustainable Child Welfare, Discussion Paper: *Aboriginal Child Welfare in Ontario* (July 2011)

25. **Exhibit HR-14, Tab 362**: Letter from Mary Anne Chambers, Minster of Children and Youth Services, to John Duncan, Minister of Indian and Norther Affairs Canada (February 23, 2007)

26. **Exhibit HR-11, Tab 222**: Letter from Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario, to John Duncan, Minister of Indian and Norther Affairs Canada (March 25, 2011)

27. **Exhibit HR-11, Tab 223**: Letter from John Duncan, Minister of Indian and Norther Affairs Canada, to Laurel Broten, Minster of Children and Youth, and Grand Chief Phillips, Chiefs of Ontario (n.d. July 7, 2011?)

28. **Exhibit HR-11, Tab 224**: Department of Indian Affairs and Northern Development Canada, *Abinoojii Mental Health Services Mandate*, Information for Regional Director General and Assistant Reginal Directors General prepared by Nicole Anthony (April 1, 2011)

29. **Exhibit HR-11, Tab 209**: Ontario Association of Children's Aid Societies, *Child Welfare Report* (2012)

30. **Exhibit HR-13, Tab 281**: Letter from Glen Foulger, Revenue Manager, and Robert Parenteau, Director of Operations for Aboriginal Regional Support Services, Ministry of Children and Family Development, British Columbia, to Linda Stiller, Manager of Inter-Governmental Affairs, Indian and Northern Affairs Canada (June 22, 2007)

31. **Exhibit HR-14, Tab 353**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS)*, presentation to Policy Committee (April 12, 2005)

32. **Exhibit HR-6, Tab 64**: Indian and Northern Affairs Canada, *First Nations Child and Family Services (FNCFS) Q's and A's* (n.d.)

33. **Exhibit HR-13, Tab 330**: Indian and Northern Affairs Canada, *Explanations on Expenditures of Social Development Programs* (n.d.)

34. **Exhibit HR-14, Tab 354**: Indian and Northern Affairs Canada, *Social Programs*, presentation (February 7, 2006)

35. **Exhibit HR-6, Tab 81**: Indian and Northern Affairs Canada, *First Nation Child and Family Services: Putting Children and Families First in Alberta*, presentation [n.d.]

36. **Exhibit HR-3, Tab 17**: Letter from Micheal Wernick, Deputy Minister, Indian and Northern Affairs Canada, to Bruce Stanton, Chair of the Standing Committee on Aboriginal Affairs and Northern Development (11 September 2009)

37. **Exhibit HR-5, Tab 48**: Indian and Northern Affairs Canada, *Final Report: Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, September 2010)

38. **Exhibit HR-12, Tab 247**: Aboriginal Affairs and Northern Development Canada, *Final Report: Implementation Evaluation of the Enhanced Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program* (Evaluation, Performance Measurement and Review Branch, November 23, 2012)

39. **Exhibit HR-9, Tab 146**: Aboriginal Affairs and Northern Development Canada, *Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia*, presentation (April 27, 2012)

40. **Exhibit HR-12, Tab 248**: Aboriginal Affairs and Northern Development Canada, *First Nations Child and Family Services Program (FNCFS) The Way Forward*, presentation by Odette Johnson, Director of the Children and Family Services Directorate of AANDC to Françoise Ducros, Assistant Deputy Minister, ESDPPS (August 29, 2012)

41. **Exhibit HR-13, Tab 288**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (October 31, 2012)

42. **Exhibit HR-13, Tab 289**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (November 2, 2012)

43. **Exhibit R-14, Tab 85**: Aboriginal Affairs and Northern Development Canada, *British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework*, working draft (December 19, 2013)

44. **Exhibit HR-14, Tab 351**: Indian and Northern Affairs Canada, *Comparability of Provincial and INAC Social Programs Funding*, attachment to an email sent by Serge Menard, Policy Analyst, Social Policy and Programs Branch (October 16, 2008)

45. **Exhibit HR-3, Tab 20**: *Private Members' Business*, 39th Parliament, 2nd Session, *Hansard*, 012 (October 31, 2007); and, *Vote No. 27*, 39th Parliament, 2nd Session, Sitting No. 36 (December 12, 2007)

46. **Exhibit R-14, Tab 41**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Indian and Northern Affairs Canada and Health Canada (June 24, 2009)

47. **Exhibit HR-11, Tab 235**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Aboriginal Affairs and Northern Development Canada and Health Canada (January 2013)

48. **Exhibit R-14, Tab 39**: Health Canada, *Update on Jordan's Principle: The Federal Government Response*, presentation (June 2011)

49. **Exhibit HR-15, Tab 420**: *Jordan's Principle Case Conferencing to Case Resolution Federal/Provincial Intake Form* (November 21, 2012)

50. **Exhibit R-14, Tab 54**: *Federal Focal Points Tracking Tool Reference Chart – Manitoba Region* (January 2013)

51. **Exhibit HR-6, Tab 78**: Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009)

52. **Exhibit HR-3, Tab 10**: Government of Canada, *Statement of Apology - to former students of Indian Residential Schools* (June 11, 2008)

53. **Exhibit HR-14, Tab 340**: Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), 48(4) Transcultural Psychiatry 367

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

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

Decision of the Tribunal Dated: January 26, 2016

Dates and Place of Hearing: February 25, 26, 27 and 28, 2013;
March 1, 2013;
April 2, 3, 4, 8 and 9, 2013;
May 13, 14, 21 and 22, 2013;
July 15, 16, 17, 19, 22 and 24, 2013;
August 7, 12, 28, 29 and 30, 2013;
September 3, 4, 5, 6, 11, 12, 23, 24, 25 and 26, 2013;
October 28, 29 and 30, 2013;
November 6, 2013;
December 5, 9 and 10, 2013;
January 9, 10, 13, 14 and 15, 2014;
February 10, 11, 12 and 13, 2014;
March 17, 18, 19 and 20, 2014;
April 2, 3, 4 and 30, 2014;
May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;
October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

Appearances:

Sébastien Grammond, Robert Grant, David Taylor, Anne Levesque, Sarah Clarke, Michael Sabet, Paul Champ and Yavar Hameed, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

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

Daniel Poulin, Philippe Dufresne, Sarah Pentney and Samar Musallam, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

Schedule A, Tab 2

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 10
Date: April 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indian Affairs and Northern Development Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Table of Contents

I. Continuation of remedial order

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*).

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[3] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

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

II. Progress to date

[6] INAC accepts the *Decision* and has not sought judicial review of its findings or general orders. It is committed to working with child and family services agencies; front-line service providers; First Nations organizations, leadership, and communities; the Complainants; and the provinces and territories, on steps towards program reform and meaningful change for children and families. It has also specifically committed to the following:

- A full-scale reform of its child welfare program.
- Review of the *1965 Agreement*.
- Not to reduce or restrict funding to the FNCFS Program
- To immediately re-establish the National Advisory Committee.
- And, it supports the new iteration of the Canadian Incidence Study.

[7] INAC's submissions also indicated that immediate relief in response to the *Decision* would include increased funding for the FNCFS Program. The 2016 federal budget allocated $634.8 million over five years for the FNCFS Program. According to INAC, $71.1 million is to be provided in 2016-2017 for the following:

- $54.2 million for:
    - immediate adjustments to Operations and Prevention through additional investments to update existing funding agreements;
    - increases to the per child service purchase amounts (including for prevention services);
    - funding for intake and investigation services;
    - upward adjustments for agencies with more than 6% of children in care; and,

- investments for providing federal support to expand provincial case management systems on reserve.

- $16.2 million for prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon at nationally-consistent levels across all jurisdictions.

- $700,000 to INAC resources for outreach, engagement and effective allocation of funding to service providers.

[8] In addition to the funding identified in the 2016 budget, INAC also commits to provide additional funding for:

- maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements, as they arise; and

- support for an engagement process going forward in conjunction with the National Advisory Committee and Regional Tables to work on medium and long-term reform.

[9] The Panel acknowledges the commitments made by the Federal government so far and is encouraged by its efforts to implement the Tribunal's orders.

III. Updated order

[10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.

[11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). In line with this special status, the

CHRA must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).

[12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect to the principle that:

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of

the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 11 CHRR D/194 (CHRT) at paras. 15 and 21).

[18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).

[19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.

A. The FNCFS Program

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.
>
> [385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.
>
> [386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations

in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure

> reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief.

[22] Again, while it appreciates the Federal government's commitments and efforts to date, the Panel requires more clarity from INAC moving forward to ensure its orders are effectively and meaningfully implemented. As the Assembly of First Nations stated in its submissions; "[a]n order for immediate relief to the FNCFS Program should be meaningful but temporary until such time that the FNCFS Program can be completely overhauled." The Panel agrees with this statement. To address this, the Panel believes the best course of action is for INAC to provide ongoing reporting to the Tribunal. That is, the Panel will supervise the implementation of its orders by way of regular detailed reports created by INAC, to which the parties will have an opportunity to provide submissions.

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on

budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

[24] INAC is directed to provide this report within four weeks of this ruling. Following reception of the report, and given the length of time that has elapsed since the *Decision*, an in-person case management meeting will then occur to provide an opportunity for the parties and Panel to discuss the report, ask questions, and make submissions, if any. Thereafter, the Panel will issue a further ruling if necessary. The Tribunal will canvass the parties for dates for this case management meeting in the days following the release of this ruling.

[25] The Panel recognizes that INAC provided additional information regarding its 2016 budget allocation for the FNCFS Program following the close of submissions for this ruling and invited the parties to meet to discuss the issue. The Complainants raised concerns with the timing and manner in which this information was sent to the Tribunal. Neither is interested in another round of submissions on the issue at this time. The Panel did not consider INAC's additional information regarding the 2016 budget as part of this ruling. However, in a much more detailed fashion, this information will presumably form part of the material to be included in the report to follow and the other parties will have an opportunity to provide submissions thereon.

B. The *1965 Agreement*

[26] The Panel's main finding with regard to the *1965 Agreement* was that it had not been updated to ensure on-reserve communities in Ontario could fully comply with the *Child and Family Services Act*, including the provision of Band Representatives and mental health services (see the *Decision* at paras. 217-246 and 458).

[27] The Federal government has indicated that it has met with the Government of Ontario and expressed a need to review the *1965 Agreement*. It submits these preliminary

meetings have set the stage for more substantive discussions that will take place with First Nations.

[28] Furthermore, following the *Decision* and while submissions were being filed in advance of this ruling, the Nishnawbe Aski Nation (NAN) filed a motion seeking interested party status. NAN seeks to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario.

[29] Notwithstanding NAN's motion, the Panel made a commitment to the parties to rule upon immediate relief items expeditiously and wanted to rule upon as many of those items as possible in this ruling. However, given the Panel will rule upon NAN's motion shortly following the release of this ruling and that there may be further submissions to consider on the *1965 Agreement*, the Panel believes it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* after receiving those further submissions from the parties.

C. Jordan's Principle

[30] In the *Decision*, the Panel found the Federal government's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, that delays were inherently build into the Federal government's process for dealing with potential Jordan's Principle cases and that it was unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children and not just those with multiple disabilities (see the *Decision* at paras. 379-382 and 458).

[31] According to the Federal government, INAC and Health Canada have begun discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. Over the next two to three months, it will begin engaging First Nations and the provinces and

territories in these discussions. It anticipates options for changes to Jordan's Principle could be developed within twelve months.

[32] However, the Panel's order specifically indicated that INAC was to "…immediately implement the full meaning and scope of Jordan's principle" (the *Decision* at para. 481). While it understands a period of time may have been needed to meet with partners and stakeholders and put a framework in place, the Panel did not foresee this order would take more than three months to implement. The order is to "immediately implement", not immediately start discussions to review the definition in the long-term. There is already a workable definition of Jordan's Principle that has been adopted by the House of Commons. While review of this definition and the Federal government's framework for implementing it may benefit from further long-term review, the Panel sees no reason why the current definition cannot be implemented now.

[33] Therefore, the Panel orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[34] INAC will report to the Panel within two weeks of this ruling to confirm this order has been implemented.

D. Other issues

[35] The Complainants made various other submissions with respect to implementing the Panel's orders in the short term. While some were addressed by INAC, others were not (see for example para. 16 of the First Nations Child and Family Caring Society's submissions dated March 31, 2016; and paras. 12-15 of the Assembly of First Nations' submissions dated March 3, 2016). It would be helpful to the Panel and the parties if INAC could respond to those additional immediate relief items as part of its report on the FNCFS Program ordered above. Therefore, in its FNCFS Program report, the Panel directs INAC

to address the immediate relief items sought by the Complainants that have not been addressed in INAC's submissions to date.

E. Retention of jurisdiction

[36] Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33).

[37] Given the ongoing nature of the orders above, and given the Panel still needs to rule upon other outstanding remedial requests, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following the further reporting by INAC and the Panel's ruling on the other outstanding remedies.

IV. Concluding remarks by Panel Chairperson

[38] I wish to share some concluding remarks with the parties. Member Lustig has read and supports these remarks.

[39] The hearings in this matter were held in a spirit of reconciliation, with an overarching goal of maintaining an atmosphere of peace and respect. Respect for all involved was paramount and, given the nature of the case, respect for Aboriginal peoples not only participating in the proceedings, but also following the proceedings in person and on the Aboriginal Peoples Television Network. Fostering this atmosphere of peace and respect is of paramount importance considering the Tribunal's key role in determining fundamental human rights and in safeguarding the public's confidence in the administration of justice, especially for Aboriginal peoples.

[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an

opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.

[41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the *Decision* are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change. The time is now.**

[42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 26, 2016

Schedule A, Tab 3

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Ruth Walden et al.

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Treasury Board of Canada and
Human Resources and Skills Development Canada)

Respondents

- and -

Professional Institute of the Public Service of Canada

Interested party

Ruling

Member: Matthew D. Garfield
Date: October 24, 2011
Citation: 2011 CHRT 19

Introduction

[1] On September 30, 2011, I granted the motion of the Professional Institute of the Public Service of Canada ("PIPSC") to become an Interested Party in the instant proceeding, with conditions. It may cross-examine witnesses and make submissions, but may only adduce evidence with leave of the Tribunal. These are my Reasons for making that Ruling.

Main Proceeding

[2] The proceeding involves the finding of a different panel of the Tribunal that:

> …the Complainants [now numbering 417] have established that the Respondents' refusal since March of 1978, to recognize the professional nature of the work performed by the medical adjudicators [almost exclusively female nurses] in a manner proportionate to the professional recognition accorded to the work of the medical advisors [predominantly male doctors], is a discriminatory practice within the meaning of both ss. 7 and 10. The effects of the practice have been to deprive the adjudicators of professional recognition and remuneration commensurate with their qualifications, and to deprive them of payment of their licensing fees, as well as training and career advancement opportunities on the same basis as the advisors.
> [*Walden v. Canada (Social Development)*, 2007 CHRT 56, at para. 143]

The Medical Adjudicators and Medical Advisors adjudicate claims under the Canada Pension Plan Disability Benefits Program.

[3] Both the Tribunal's Liability and Remedy Decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The Remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage (including benefit) loss. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue. The wage loss issue remains outstanding.

Motion for Interested Party Status

[4] PIPSC brought a motion to be added as an Interested Party, with full status: i.e., right to adduce evidence, cross-examine witnesses and make submissions (oral and written). The Armstrong- and Harrison-represented Complainants and the Commission consent to PIPSC being added as an Interested Party. The Self-represented Complainants take no position. The Respondent opposes the motion.

Grounds of the Motion

[5] PIPSC argues that section 50 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*") gives the Tribunal wide discretion in making this determination. It states that interested party status (sometimes referred to as "intervenor" status) has been granted in the past by the Tribunal in situations where:

> (a) the prospective interested party's expertise will be of assistance to the Tribunal;
> (b) its involvement will add to the legal positions of the parties; and
> (c) the proceeding may have an impact on the moving party's interests.

PIPSC submits that meeting any one of these criteria is sufficient to be accorded the status.

[6] The moving party argues that it has met all three criteria or conditions. Regarding the first criterion, PIPSC has a 91-year history as an association, then union, representing federal public servants. Today, it has approximately 57,000 members employed by approximately 27 different employers in seven jurisdictions. Eighteen of the bargaining units with over 40,000 members are in the federal government sphere. These members in the federal public service "are a highly skilled and well-educated workforce, comprised largely of scientists and other professionals." Notably, PIPSC is the bargaining agent for the Medical Adjudicators (nurses) (as of July 20, 2011), the Medical Advisors (doctors), and indeed, all of the sub-groups in the Health

Services Occupational Group (SH). This Group includes other Medical/Disability Adjudicators in the federal public service.

[7] PIPSC submits that its expertise will be of assistance to the Tribunal in determining the quantum of wage loss and the method for arriving at that determination. "As a sophisticated and experienced federal public service bargaining agent, the Institute has professional staff with expertise in the areas of classification, collective agreement bargaining, and federal public service wage rates. This is expertise and knowledge that the complainants do not possess." PIPSC also points out that it has a human rights expertise, and "a proven track record" in advancing human rights claims before this Tribunal and the courts.

[8] The bargaining agent also states that its involvement will add to the legal positions of the parties. It cites a number of examples. PIPSC claims that its participation will not duplicate those of the parties, although it acknowledges that many of the positions of it, the Complainants and the Commission will be similar.

[9] On the third criterion, it claims that that its interests as the bargaining agent and those of its members are clearly engaged in this proceeding. It is the bargaining agent now for the Medical Adjudicators, which includes most of the Complainants (some are retired), and those Medical Adjudicators who are not Complainants in this proceeding, but may be entitled nevertheless to compensation as "victims" pursuant to the *CHRA*.

[10] PIPSC notes that the SH Group collective agreement expired last month. The determination of the Tribunal on the wage loss issue will be relevant to the bargaining of a new agreement, although the two processes are distinct. PIPSC acknowledges that the Tribunal is to determine the appropriate quantum of past wage loss based on the *CHRA*, case law and evidence before it. "Regardless, even a lump sum payment for past wage loss could impact the wage rate provisions in the Medical Adjudicators' next Collective Agreement, and therefore its terms are potentially affected by any Tribunal decision."

[11] PIPSC also submits that the Respondent's position regarding bargaining has been inconsistent and unclear "with respect to the role of collective bargaining and a negotiated wage rate on the Tribunal's determination of wage losses." As a result, it "remains concerned that its interests and that of its members will be affected by any Tribunal order."

[12] The bargaining agent further claims that its interests and those of its members are in play here especially given the fact that the discriminatory practice continues to this day – i.e., the Medical Adjudicators are still being paid at the Program Administrator classification rate. This is notwithstanding the Tribunal having ordered on May 25, 2009 that they be reclassified as a new nursing sub-group (NU-EMU) and that "work on the creation of the new NU subgroup commence within 60 days of the date of this decision": see *Walden v. Canada (Social Development)*, 2009 CHRT 16, at para. 60. This has resulted in "a pyrrhic victory" for the Complainants, according to PIPSC.

Respondent's Position

[13] The Respondent states that, to obtain interested party status, an applicant must meet the following two-prong test:

(a) the applicant must demonstrate that its expertise will be of assistance in determining the issues before the Tribunal; and
(b) the applicant must demonstrate that it will add significantly to the legal position of the parties representing a similar viewpoint.

The Respondent says PIPSC meets neither.

[14] Now that the pain and suffering component appears to be settled (depending on whether all of the Self-represented Complainants have agreed to the settlement), the outstanding issue before the Tribunal is a discrete one: the quantum of wage loss (including benefits). The

Respondent submits that PIPSC's claimed areas of expertise (i.e., in the areas of classification, collective bargaining, federal public service wage rates, and human rights) will not be of assistance to the Tribunal.

[15] Regarding its expertise in classification, the Respondent argues that the Tribunal has already made a determination and ordered the creation of a new nursing sub-group. This aspect of the Order was not judicially reviewed. "In fact, the complainants argued before the Tribunal that the appropriate redress would be to include them in the Nursing Classification [as a new sub-group: NU-EMU]." PIPSC should not be allowed "to launch a collateral attack on the earlier re-classification order…" Thus, its expertise in this area will not be of assistance to the Tribunal.

[16] The Respondent states that PIPSC's expertise in collective bargaining is also of no assistance here. The Tribunal cannot order compensation for any period beyond the date at which the discriminatory practice ceases, according to the *CHRA*. As well, it can only order a lump sum award as a monetary remedy.

[17] Regarding public service wage rates, the Respondent says these are publicly available and on-line. "…PIPSC offers no greater or additional expertise than what is already available publicly and/or through Treasury Board Secretariat."

[18] With respect to human rights expertise, the Respondent argues that the Tribunal itself as well as the Commission has a statutorily recognized expertise in this area.

[19] PIPSC also will not add to the legal position of the parties, according to the Respondent. The bargaining agent's "submissions indicate its position is virtually identical to that of the represented Complainants and the Commission."

[20] The Respondent further submits that the Tribunal's re-determination of past wage loss will not impact on PIPSC's interests. Nothing in this proceeding to date will impact on the

bargaining agent's reputation and indeed, it only recently became the bargaining agent for the Complainants who are CPP Medical Adjudicators. As well, there is no collective agreement at present between Treasury Board and PIPSC covering the Medical Adjudicators. The Medical Adjudicators are still being paid at the PM rates. Furthermore, "collective bargaining is a process separate and apart from the Tribunal's re-determination of past wage loss." As well, the Respondent says that, while PIPSC represents the Medical Advisors and other nursing sub-groups, none of these people are parties to this proceeding. Hence, the Tribunal does not have the jurisdiction to make an order affecting these groups.

[21] By way of conclusion, the Respondent states that the Armstrong-represented Complainants have been well-represented. "Laid bare, PIPSC's interest is in advocating, along with the complainants, for a past wage loss award that is premised on as high an imputed wage rate as possible so that it can use this imputed past rate as leverage in future collective bargaining."

Analysis

Statutory Provisions and the Law

[22] Section 50 of the *CHRA* gives the Tribunal the authority to add interested parties to the proceeding. The section does not provide any conditions for the exercise of this discretionary power. Rule 8 of the Tribunal's *Rules of Procedure* deals with the procedural aspects of such a motion. There has been ample case law at the Tribunal addressing motions for interested party status.

[23] Concisely put, the case law indicates that interested party status has been granted in the past by the Tribunal in situations where:

(a) the prospective interested party's expertise will be of assistance to the Tribunal;

(b) its involvement will add to the legal positions of the parties; and

(c) the proceeding will have an impact on the moving party's interests.

[24] I am granting the motion, with conditions on the basis that I am satisfied that PIPSC has demonstrated that it meets all three criteria. On the issue of expertise being of assistance to the Tribunal, I am satisfied that PIPSC, as demonstrated in the historical narrative referred to above, has expertise in areas not possessed by the Complainants and Commission that will assist the Tribunal in determining the quantum of wage loss and the method for arriving at that determination. The exercise before the Tribunal is not a simple one. PIPSC will be of assistance as an interested party. As well, while PIPSC's positions are for the most part identical or similar to those of the Complainants and the Commission, there are instances where it takes a different approach, some more nuanced than others.

[25] On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding.

[26] It is true that PIPSC did not become the bargaining agent until very recently. However, the discriminatory practice has not ceased; it is ongoing. While the Medical Adjudicator position has been reclassified, the Complainants (and "victims" if so included) are *inter alia* still being paid at the discriminatory PM rates. The Tribunal's Order dated May 25, 2009 has yet to be fully implemented.

[27] I also agree with PIPSC that the Respondent's position vis-à-vis the interplay between this proceeding and collective bargaining has not been consistent. While I acknowledge that the two processes are separate and that the Tribunal has a discrete issue before it (quantum of wage loss/benefits, assuming that pain and suffering has been agreed to by *all* of the Complainants),

there is interplay. The Tribunal's determination of wage loss *may* influence the positions taken by Treasury Board and the bargaining agent in upcoming collective bargaining negotiations. Whether this occurs with regard to the ultimate wage rate negotiated is of course up to the parties to the collective bargaining exercise.

Conclusion

[28] Based on the foregoing, I ordered on September 30, 2011 that PIPSC be granted interested party status, with conditions. I am satisfied that it can make the necessary contribution and represent its members' interests by cross-examining witnesses and making submissions – oral and/or written. If it becomes evident that it also needs to adduce evidence, then PIPSC may seek leave thereof.

[29] PIPSC's granting of interested party status should not be construed as an invitation to re-open matters already determined. For example, on the issue of the NU-EMU sub-group classification, I am reluctant to move in a backward fashion and re-open this issue as PIPSC seems to suggest, even assuming that I have the authority to do so, as this was determined by a previous panel of the Tribunal and was not judicially reviewed by any of the parties. This topic will be addressed at the upcoming Case Management Conference.

Signed by

Matthew D. Garfield
Tribunal Member

Ottawa, Ontario
October 24, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1111/9205, T1112/9305 & T1113/9405

Style of Cause: Ruth Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)

Ruling of the Tribunal Dated: October 24, 2011

Appearances:

Laurence Armstrong, for 382 Complainants

Marlene Harrison, for 9 Complainants

No submissions received, for 26 Self-represented Complainants

Daniel Poulin, for the Canadian Human Rights Commission

Lynn Marchildon, for the Respondent

Peter Engelmann, for the Interested Party

Schedule A, Tab 4

Federal Court  Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[18] 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.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services,
>
> (vi) rehabilitation services;
>
> [Emphasis added]

Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

> …
>
> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

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

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children…

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] 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.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations.* She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, less the time his

family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *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.

[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec,* 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1045-11
STYLE OF CAUSE:	PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	APRIL 4, 2013

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPLICANTS
Jonathan D.N. Tarlton Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Schedule A, Tab 5

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Spookw v. Gitxsan Treaty Society,
2015 BCCA 77

Date: 20150116
Docket: CA041986

Between:

Spookw also known as Geri McDougall on behalf of herself and other Gitxsan Chiefs and members, Baskyalaxha also known as William Blackwater Sr., Suu Dii also known as Yvonne Lattie, Luutkudziiwuus also known as Charlie Wright, Xsimwits Inn also known as Lester Moore, Moolxhan also known as Noola and as Norman Moore, Gitanmaax Indian Band, Glen Vowell Indian Band, Gitwangak Indian Band, Kispiox Indian Band, and Gitksan Local Services Society

Appellants
(Plaintiffs)

And

Gitxsan Treaty Society, Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia dated June 18, 2014 (Spookw v. Gitzsan Treaty Society, 2014 BCSC 1100, Smithers Registry No. 15150)

Oral Reasons for Judgment

Counsel for the Appellants:	M.L. Macaulay and C. Joseph
Counsel for the Respondent, Gitxsan Treaty Society:	A. Schalles
Counsel for the Respondent, Attorney General of British Columbia	K.J. Phillips
Counsel for the Respondent, Attorney General of Canada	N. Wright and A. Singh
Counsel for the Proposed Intervenor, Tsetsaut/Skii km Lax Ha Nation	M.C. Power and D.P. Taylor
Place and Date of Hearing:	Vancouver, British Columbia January 16, 2015
Place and Date of Judgment:	Vancouver, British Columbia January 16, 2015

Summary:

Application for intervenor status by the Tstesaut/Skii km Lax Ha Nation. The underlying appeal concerns the right of the Gitxsan Treaty Society to speak on behalf of Gitxsan houses during consultations and negotiations with the Crown. The TSKLH identified itself as a Gitxsan house in earlier litigation, but now takes the position that it is not a Gitxsan house. The appellant and respondents take the position that the TSKLH is a Gitxsan house. Held: Application dismissed. Because the TSKLH takes the position that it is not a Gitxsan House, and because the validity of that position will not be before the court in the appeal, this appeal will not finally determine rights of the proposed intervenor. It therefore does not have a “direct interest” in the appeal. Further, the proposed intervenor does not a have unique perspective on the issues before the court, and there is no necessity of giving it intervenor status to ensure that all issues are fully canvassed.

[1] GROBERMAN J.A.: This is an application by the Tsetsaut/Skii km Lax Ha Nation (the “TSKLH”) to intervene in the appeal.

[2] The underlying claim in this case concerns the right of the Gitxsan Treaty Society to speak on behalf of Gitxsan houses during consultations and negotiations with the Crown.

[3] The appellant Gitxsan houses say that the Society is wrongly purporting to represent them in discussions with the Crown. In addition to making claims against the Society, they make claims against the Crown, both federal and provincial, asserting that the Crown has breached its obligations to the appellants by conducting consultations and negotiations with the Society.

[4] The issue of who speaks on behalf a First Nation group is one of the most complex and difficult facing First Nations, the Crown, and the courts in respect of Aboriginal law. This case may ultimately be of considerable importance to the development of the law in that area. In the circumstances, it is not surprising that there is considerable interest in the appeal.

[5] The intervention application is not made in a timely manner in accordance with the Rules, but all parties consent to an extension of the time to apply for intervenor status. Such an order, would, I think, have been granted in any event, as there is no prejudice resulting from the delay. Indeed, there is still an issue outstanding in the court below, that being costs. The order in the court below has not yet been entered, so no one is adversely affected by the late application.

[6] I turn then to the question of whether intervenor status should be granted. One of the underlying difficulties in this case is that there is dispute as to the nature of the TSKLH. It appears to have been a plaintiff in the Delgamuukw litigation, apparently as a Gitxsan house. The parties to this litigation, for various reasons (and perhaps with varying degrees of commitment to the proposition), take the position that it is a Gitxsan house. TSKLH, however, denies that it is part of the Gitxsan First Nation, and says that it is an independent entity.

[7] That issue is far too complex be determined on a simple chambers application such as the one today. However, as I will explain, the nature of the group does impinge on the analysis of whether to grant intervenor status. While I will make reference to the issue, therefore, I am not making any

determination with respect to it, and nothing that I say should be taken as indicating that the Court has come to even tentative conclusions as to the relationship, if any, between the Gitxsan and the TLSKH.

[8] It is now well-established in this Court's jurisprudence that there are two separate routes to intervenor status. For convenience, I will refer to my own reasons for judgment in the intervention application in Ahousaht Indian Band and Nation v. Canada (Attorney General), 2012 BCCA 330, upheld on review by this Court at 2012 BCCA 404. There are a number of other cases that stand for the same propositions, and I mention Ahousaht simply because all of the parties have referred to it.

[9] As indicated in para. 2 of the chambers decision in Ahousaht, applicants will be granted leave to intervene in two circumstances. The first is where a decision on an appeal will have a direct impact on the applicant. In such situations, the applicant for intervenor status, while not a party to the appeal, is in a position analogous to that of a party. His, her or its rights will be determined by the appeal.

[10] As I indicated in Ahousaht, concerns of fairness dictate that the Court will generally grant intervenor status in cases where the proposed intervenor's rights will be directly determined in the appeal. Few prospective intervenors can demonstrate a direct interest of that sort in litigation. As this Court has indicated on a number of occasions, merely being affected by the precedential effect of a decision does not constitute a direct interest.

[11] The issue in this case is one of general importance in Aboriginal law and general importance to First Nations collectives in Canada, as well as to the Crown. The case, however, will only directly decide whether the Gitxsan Treaty Society can properly negotiate and consult on behalf of specific Gitxsan houses. If it is not a Gitxsan house, this appeal will only affect the proposed intervenor in an indirect manner, by establishing general legal principles. On the other hand, if it were a Gitxsan house, the applicant might be directly affected by the appeal, because it would be in a position precisely analogous to that of the appellants.

[12] If I were to accept the position taken by everyone but the applicant on this intervention application, then, I would find that the applicant had a direct interest in the litigation, and I would grant intervenor status. The intervenor itself, however, does not accept that it is a Gitxsan house. The position it takes here, and the position that it will be entitled to take in the future, is that the decision in this case will not be conclusive of its own rights. The case will, therefore, not determine the intervenor's rights directly.

[13] In my view, the proposed intervenor's factual characterization of the case is decisive, and the fact that the respondents on this application consider the TSKLH to be a Gitxsan house cannot be determinative. It is the TSKLH that will ultimately be entitled to make representations in an appropriate case as to whether it is or is not a Gitxsan house.

[14] Although Mr. Power made a valiant effort to suggest that this case is one in which his client has a direct interest, I am not satisfied that any decision by this Court will directly decide the capacity of

the Gitxsan Treaty Society to represent the interests of the TSKLH. That issue will have to be determined in separate litigation.

[15] In saying this, I recognize that if the Gitxsan Treaty Society is not in a position to speak on behalf of the appellants, it is probably not in a position to speak on behalf of the TSKLH, either. The converse is not true, however. If the Gitxsan Treaty Society is entitled to speak for the appellants, it may, nonetheless, not have status to speak on behalf of the TSKLH.

[16] Because the TSKLH contends that it is not a Gitxsan house and that the Gitxsan Treaty Society cannot in any sense speak for it, it seems to me that its interests in this case do not differ from the interests of any other First Nation collective in British Columbia or, indeed, in Canada. As an independent First Nation, the intervenor might be affected by the precedential effect of the appeal but it does not come within the “directly affected” branch of the test for intervenor status.

[17] For those reasons I find that the TSKLH has not established that it has a direct interest in this litigation or that its rights will be directly decided in this litigation.

[18] The next question is whether the TSKLH brings a unique perspective to the case such that it should be granted intervenor status to make arguments that ensure that a specific perspective is not ignored and is in front of the court.

[19] The issues upon which TSKLH wishes to make its intervention are the fiduciary obligations of the Crown and the honour of the Crown. It wishes to make arguments on how those obligations impact the Crown’s duty to ensure that it is conducting negotiations and consultations with appropriate First Nations collectives.

[20] With all due respect, I am not convinced that there is any uniqueness in the perspective of the TSKLH with respect to the Crown’s fiduciary obligations and the honour of the Crown. The same arguments that the TSKLH proposes to make can be made by the appellants and, indeed, could be made by any other Aboriginal collective in British Columbia or Canada. While the arguments are in no sense frivolous and will definitely be of interest to the court, there is no necessity of giving intervenor status to the TSKLH in order to ensure that the arguments are made.

[21] For those reasons I am not convinced that intervenor status should be granted to the TSKLH.

[22] On this application the Gitxsan Treaty Society seeks costs from the TSKLH. I am not convinced, given the nature of this application, that costs should be awarded. This was an attempt by the TSKLH to offer its assistance to the Court. While I acknowledge that the Gitxsan Treaty Society has opposed the application and has provided the Court with argument, I am not convinced that it has been put out or inconvenienced by this application in such a way that would justify the granting of costs. Without purporting to provide any guidance for judges in the future as to whether costs are granted on intervenor applications, I am convinced that this application was in the interests of the TSKLH and not contrary to the other parties’ interests. I am also satisfied that it was in the interest of the Court to

consider the application. For that reason I am ordering that each party bear their own costs of this application.

"The Honourable Mr. Justice Groberman"

Schedule C, Tab 1

Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

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

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

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties 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.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

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

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

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

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

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their

own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

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

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

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy

throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute

a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any

amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

Schedule C, Tab 2

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A.

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social

progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing 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,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

---

[2] See resolution 2200 A (XXI), annex.

[3] A/CONF.157/24 (Part I), chap. III.

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

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 or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to

[4] Resolution 217 A (III).

their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

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.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources

equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law

and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.