Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent

- and -

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL CANADA

Interested Parties

# WRITTEN SUBMISSIONS REGARDING IMMEDIATE RELIEF ITEMS, PURSUANT TO THE PANEL'S FEBRUARY 10, 2016 DIRECTIVE


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## I. General Considerations

1. Achieving substantive equality for First Nations children in the context of child welfare services will require, as the Tribunal noted, a full reform of the FNCFS program. At the outset, the Caring Society acknowledges that making adjustments to the existing program will not achieve this goal, nor will its suggested orders for immediate relief.

2. Nevertheless, the Caring Society submits that it is necessary to order the Respondent to take certain immediate actions that will lessen the adverse impact experienced by First Nations children living on-reserve and in the Yukon in the context of child welfare services and Jordan's Principle while medium- to long-term reforms are developed and/or implemented. Long-term and systemic changes must follow in order to redress discrimination for First Nations children living on-reserve and in the Yukon.

3. The immediate relief measures sought by the Caring Society have been crafted with the best interests of children in mind and are not meant to constrain the negotiation and implementation of a reformed FNCFS program, which must address all of the findings of discrimination made by the Tribunal.

4. Moreover, the immediate relief measures sought by the Caring Society should not be interpreted as mandating the perpetuation of certain aspects of the existing program. The immediate relief measures the Caring Society proposes will be superseded by the new FNCFS program when it comes into effect. As such, the Tribunal should not hesitate to provide some short-term relief to lessen the adverse impact experienced by First Nations children in the context of child welfare services and Jordan's Principle while a long-term remedy is being crafted.

5. The list of immediate orders found at pages 206-208 of the Caring Society's closing submissions was drafted without the benefit of the Tribunal's decision on the merits. The Caring Society has redrafted the immediate measures provided in its October 2014 closing submissions in light of the Tribunal's decision. We attach a draft order that could inspire the Tribunal in drafting its immediate relief orders, which is found in Schedule "A". The principles underlying the redrafted order are addressed in response to the Panel's questions below.

6. The immediate relief measures assume that the Respondent will not reduce or further restrict First Nations child and family service program funding unless ordered by the Tribunal or as agreed to between the parties.

## II. Changes to the FNCFS Program

7. Several of the items of immediate relief provided for in the attached draft order are related to addressing *some* of the aspects of the current FNCFS program that the Panel has found to be discriminatory contrary to section 5 of the *Canadian Human Rights Act*, RSC 1985, c H-6 ("*CHRA*"). Many of the items of immediate relief in the attached draft order are based on recommendations made by the Joint National Program Review (2000), the Wen:De reports (2005) and the report of the Auditor General of Canada (2008). Many are also crafted to address the discriminatory aspects of the formula that were helpfully identified by the Canadian Human Rights Commission ("the Commission") in its closing submissions.

8. To assist the Tribunal in linking these various sources of information, we have prepared a table of the relief requested, correlated with the Commission's submissions and the Tribunal's January 26, 2016 decision. This table is appended as Schedule "B".

9. Some of the items identified by the Commission as a source of discrimination are not addressed in the Caring Society's request for immediate relief, and may be addressed in the context of medium- to long-term reforms. At the immediate relief stage, the Caring Society's goal is to identify measures that lend themselves to immediate implementation through an order of the Tribunal under section 53(2)(b) of the *CHRA* in order to provide some immediate relief to First Nations children experiencing discrimination.

*A. Culturally-based child and family service standards, programs, and evaluation mechanisms*

10. In particular, the Caring Society seeks an initial amount to be paid to FNCFS Agencies to support the development of a culturally based vision for safe and healthy children and families and culturally based child and family service standards, programs and evaluation mechanisms (item no. 2 of Schedule "A").

11. Given the Tribunal's finding that the current FNCFS program does not respond to the specific needs of First Nations children living on-reserve and in the Yukon and the lack of funding in the current program for culturally based standards, policies and program development, such an immediate injection of funds to develop or refine culturally-based visions of healthy children and families can guide the development of culturally-based standards and programs. This information will provide a foundation for the reform required to ensure the FNCFS program meets the needs of children and families and inform overall program reform.

*B. Lessening the adverse impacts of the current funding formula*

12. Item 6 of schedule A is intended to lessen the adverse impacts of the current funding formula and is a synthesis of the orders sought by the Caring Society in its closing submissions that were directed to that purpose.

13. In particular, item 6(a) combines items 4, 5 and 6 at page 206 of those submissions, using an inflation rate of 44% for the period 1995-2015, as reported by the Bank of Canada on its website. Item 6(c) reflects item 10 at page 207 of those submissions and seeks to implement the proposal made in *Wen:De – The Journey continues* (CHRC Tab 6) at page 23. The table in the schedule to the proposed order is based on Appendix C to the *Wen:De* report, with the amounts multiplied by a factor of 3.106 (which is $444,601 / $143,158).

*C. Lawyers' fees*

14. With respect to lawyers' fees, an upper limit is reasonable. One readily available manner to address this concern is to require the reimbursement of those fees according to the tariff employed by the federal government for the remuneration of outside counsel, as updated from time to time. A table of the current rates is appended as Schedule "C", for the benefit of the Tribunal.

## III. FNCFS Program Budget Adjustment

15. Paragraph 480 of the Caring Society's closing submissions note the expected cost of immediate relief measures to be at least $108 million per year. The source of that figure is INAC's own calculations, in a document filed during the hearing of the complaint as CHRC Tab 248, regarding the cost of transitioning all provinces to EPFA and somewhat improving the program. The cost of implementing the immediate relief sought by the Caring Society will exceed that figure.

16. The Caring Society does not have the data nor the resources necessary to prepare budgetary estimates of those costs. On the other hand, the Respondent does have the capacity to make such calculations. For example, R-10 is the template for the EPFA formula, and the Respondent's witnesses' evidence was that funding levels were set based on the adjustment of various funding elements. Further, increasing the per-child service purchase amount from $100 to $200 could easily be calculated by the Respondent using available mechanisms. The Respondent could be asked to provide updated funding figures if such information is required by the Tribunal.

17. However, the Tribunal need not include an estimate of the cost of immediate relief measures in an order addressing immediate relief. Any estimate of costs provided by the Tribunal could be inaccurate and risks being interpreted by the Respondent as a cap. Pursuant to any order for immediate relief made by the Tribunal, the Respondent ought to provide the necessary funding to implement the measures in question, all while ensuring that funding is not diverted from other programs serving First Nations communities as per the recommendation of the Auditor General of Canada (2008). It would then be Parliament's responsibility to appropriate the funds required by the Respondent to comply with the Tribunal's orders.

18. Likewise, the negotiation of any medium- or long-term remedies will also require new funding and policy authorities. When the precise parameters of those reforms are agreed to between the parties or ordered by the Tribunal, it is expected that the Respondent will seek the required budgetary appropriations and/or authorities as needs arise.

## IV. Transition from Directive 20-1 to EPFA

19. As the Tribunal knows, EPFA builds upon the same funding formula found in Directive 20-1. All the immediate orders sought by the Caring Society with respect to the funding formula (most particularly item nos. 4, 5, and 6) will apply to provinces covered by EPFA and those still covered by Directive 20-1. This will provide some immediate relief to children and families in all provinces and the Yukon, except Ontario which is treated separately.

20. In line with the overarching goal of advancing medium- to long-term reform of the FNCFS program, the Caring Society no longer seeks an order for immediate relief with respect to the transition from Directive 20-1 to EPFA. The Caring Society submits that issues surrounding the structure of the new FNCFS program that will apply in all provinces and in the Yukon will be better addressed at the stage of the negotiation of medium- and long-term remedies.

21. Nevertheless, First Nations children and families in British Columbia, New Brunswick and Newfoundland and Labrador and the Yukon are currently deprived of prevention services

which are offered to children in provinces covered by EPFA. To lessen the adverse impacts caused by this situation, the Caring Society seeks an order that the Respondent immediately extend similar levels of funding allocated to FNCFS Agencies in EPFA provinces with respect to prevention services to FNCFS Agencies in British Columbia, New Brunswick and Newfoundland and Labrador (in item no. 15 of schedule A).

## V. Jordan's Principle

22. The Caring Society welcomes the Tribunal's order requiring the Respondent 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. At page 208 of its closing submissions, the Caring Society also sought certain immediate orders concerning Jordan's Principle.

23. The Caring Society takes the position that the Respondent must immediately ensure that First Nations children are able to access public services on the same terms as other children ensuring no service denials, delays or disruptions.

24. In light of the Tribunal's general order, the Caring Society has redrafted its request for immediate relief, clarifying the scope of Jordan's Principle and seeking an order that the Respondent cease applying three specific rules that have the effect of discriminating against First Nations children seeking access to services, namely that it applied Jordan's principle only to disputes between two federal government departments, that it only applied Jordan's principle to disputes regarding children with multiple disabilities, and that it required case conferencing as a condition precedent to the receipt of funding by a First Nations child.

## VI. 1965 Agreement

25. Immediate relief with respect to the 1965 Agreement is dealt with at item nos. 7 and 16 of the draft order appended as Schedule "A", which provides for an update to the schedules of the 1965 Agreement in order to provide a measure of immediate relief to First Nations children living on-reserve.

26. With respect to a study of the 1965 Agreement, the Caring Society requested the following at pages 208-209 of its closing submissions:

> Performing, within one year, a special study of the application of FNCFS in Ontario, through a mechanism developed through the agreement of the parties and with accompanying funding that allows for the meaningful participation of First Nations child and family service agencies, First Nations governments, AANDC, and the Province of Ontario to determine the adequacy of the 1965 Agreement in achieving: 1) comparability of services; 2) culturally appropriate services that account for historical disadvantage; and 3) ensuring the best interests of the child are paramount;

27. The Caring Society submits that the results of such a study will inform the negotiation process that will be the subject of the next phase of the remedies process as set forth by the Tribunal. In particular, this study will produce knowledge that will be very useful when negotiating a medium- to long-term reform of the FNCFS program.

28. The Caring Society would also request the Tribunal to direct that any study regarding the FNCFS Program or 1965 Agreement be performed by experts agreed to by the Complainants and the Respondent. The Caring Society has already identified such experts.

29. At this stage, it is difficult to be more precise as to the timing of such a study. Inevitably, the timing of the study will have to be coordinated with the timing of the negotiation process that will be addressed in the next phase of the remedies process. If the Tribunal believes that one year is too long a period for the completion of the study, the Caring Society submits that it could be completed within nine months. Such a delay would ensure that the results of the study are useful for the negotiation of a reform of the FNCFS program.

30. The Caring Society has also requested that the Respondent must, with respect to Ontario, update the schedule of the 1965 Agreement to reflect the current version of the *Child and Family Services Act* (Ontario) and ensure funding for the full range of statutory services including band representatives, children's mental health and prevention services.

31. The Caring Society has also requested that an amount of $5 million, adjusted for compound inflation from 2012 values pursuant to the Consumer Price Index, be immediately allocated for prevention services in Ontario. The Caring Society submits that this amount should be divided among FNCFS agencies in Ontario in proportion to the population of First Nations children residing on-reserve that they serve. This is reflected in item no. 16 of schedule A.

## VII. Other pressing relief

32. The Caring Society also requests, at item no. 8 in Schedule "A", an order that:

> The Respondent must immediately provide $30,000.00 to the Aboriginal Peoples Television Network to transfer the tapes of the Tribunal hearings onto a publicly accessible format and provide sufficient funds to the National Centre for Truth and Reconciliation to store and manage public access to the tapes.

33. Pursuant to item 5(m) of the Guidelines approved by the Tribunal for the filming and broadcasting of the proceedings, APTN must retain recordings for three years. That period will be coming to an end shortly with respect to the earlier parts of the proceedings. Given the legal, social, moral and political importance of this case, the Caring Society invites the Respondent to consent to such an order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 18, 2016

Sébastien Grammond / Anne Levesque
Sarah Clarke / David P. Taylor

**Counsel for the Caring Society**

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 18, 2016

Sébastien Grammond / Anne Levesque
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**Counsel for the Caring Society**

## SCHEDULE "A"

## DRAFT ORDER

1. The Respondent must implement Jordan's Principle in a way that ensures that First Nations children can access public services on the same terms as those provided to the non-indigenous population in the same province or territory, without service denials, delays or disruptions related to jurisdictional or payment disputes and, in particular:

    a. The Respondent must apply Jordan's Principle to address disputes within and among federal government departments and disputes between the federal government and the provinces and territories;

    b. The Respondent must apply Jordan's Principle to all First Nations children and to all public services;

    c. The Respondent must apply Jordan's Principle without requiring that case conferencing be a condition precedent to the receipt of funding by a First Nations child;

    d. The Respondent must, within 10 days of consenting to this order, communicate such reforms in detail and in writing to First Nations, FNCFS agencies, federal employees working in First Nations children's programs including Jordan's Principle focal points and to the public;

2. On April 1, 2016, the Respondent must provide each FNCFS agency with an initial amount of $75,000.00 to develop and/or update a culturally based vision for safe and healthy children and families and to begin to develop and/or update culturally based child and family service standards, programs and evaluation mechanisms;

3. Before August 31, 2016 and in a manner approved by the Canadian Human Rights Commission (hereinafter "the Commission") and the Complainants, the Respondent must ensure that its staff and executive staff receive 15 hours of mandatory training on the Truth and Reconciliation Commission's final report (December, 2015); the FNCFS Program (including formula development, assumptions, and program reviews); the Tribunal decision on the merits, and on the full meaning and scope of Jordan's Principle as set out in the Tribunal's decision on the merits;

4. Beginning immediately and on an ongoing basis, unless supplanted by additional order by the Tribunal and/or by written agreement of the Parties, the Respondent must fully reimburse the following actual costs incurred by FNCFS agencies, without restrictions based on the existing funding formulas:

    a. legal fees related to child welfare investigations (i.e., warrants), children in care and inquiries, according to the tariff employed by the federal government for the remuneration of outside counsel, as updated from time to time;

b. actual costs related to the receipt, assessment and investigation of child protection reports;

c. costs of building repairs where a FNCFS agency has received from a licensed building inspector, structural engineer, fire marshal or equivalent First Nations authority a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations;

5. With respect to Directive 20-1 and the Enhanced Prevention Funding Approach ("EPFA") or any modifications thereof, the Respondent must cease the practice of requiring FNCFS agencies to recover cost overruns related to increases in the number of children in care or the higher needs of children in care from the prevention and operations funding streams;

6. The Respondent must immediately make the following adjustments in the calculation of the operation and prevention budgets of FNCFS agencies, with respect to provinces and territories covered by Directive 20-1 and those covered by EPFA:

   a. Replacing the formula mentioned at paragraph 126 of the Tribunal's decision on the merits with the following formula: "A fixed amount of $444,601 per organization + $15,427.57 per member band + $1,046.75 per child (0-18 years) + $13,298.73 x average remoteness factor + $12,766.90 per member band x average remoteness factor + $106.06 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," and adjusting the base amounts in that formula according to the increase in the consumer price index for fiscal years 2016-17 and forward;

   b. Providing FNCFS agencies with an upward adjustment of their operations and prevention budgets where the percentage of children in care and percentage of families receiving services from such an agency exceed 6% and 20%, respectively, for the population served by the agency concerned, in proportion to the excess of the percentage of children in care over 6% and of the percentage of families receiving services over 20%. No downward adjustments will be applied to FNCFCS agencies with fewer than 6% of children in care and/or serving fewer than 20% of families;

   c. Where a FNCFS agency serves a population of between 251 and 801 Registered Indian children, replacing the amount of $444,601 in the formula by the amounts set out in Schedule "A" to this order, adjusted according to the increase in the consumer price index for fiscal years 2016-17 and forward;

   d. Funding all FNCFS agencies serving fewer than 251 Registered Indian children on reserve at the amount provided to agencies serving at least 251 Registered Indian children on reserve;

   e. Increasing the service purchase amount in Directive 20-1 and EPFA to $200.00 per child from the current value of $100.00 per child, with an adjustment according to the consumer price index for fiscal years 2016-17 and forward;

f. Increasing funding to restore lost purchasing power in other items of the operations and prevention funding streams related to the Respondent's failure to provide a compounded annual inflation adjustment pursuant to the Consumer Price Index and by providing adjustments according to the increase in the consumer price index for fiscal years 2016-17 and forward;

g. Not introducing any funding reductions or restrictions.

7. The Respondent, must, with respect to Ontario, update the schedule of the 1965 agreement to reflect the current version of the *Child and Family Services Act* (Ontario) and ensure funding for the full range of statutory services including band representatives, children's mental health and prevention services;

8. The Respondent must immediately provide $30,000.00 to the Aboriginal Peoples Television Network to transfer the tapes of the Tribunal hearings onto a publicly accessible format and provide sufficient funds to the National Centre for Truth and Reconciliation to store and manage public access to the tapes;

9. In partnership with affected First Nations and Tribal Councils, the Respondent must review decisions to deny funding to support the development and operation of FNCFS agencies particularly with regard to the applications for new agencies by the Okanagan Nation Alliance and Carcross First Nations;

10. The Respondent must fund a new iteration of the Canadian Incidence Study of Reported Child Abuse and Neglect;

11. The Respondent must seek new funding to meet the obligations set out in the Tribunal's decision on the merits, including, but not limited to, the obligations described in this consent order and obligations towards provincial and territorial governments directly serving First Nations children (which are not specified in this consent order), and cease its practice of reallocating funding from other First Nations programs to address shortfalls in First Nations child and family services, education, social assistance and other programs;

12. The Respondent must not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle;

13. The Respondent must cease its practice of reallocating funding from other First Nations programs to address shortfalls in First Nations child and family services, education, social assistance and other programs, or that arise as a result of Jordan's Principle;

14. The Respondent must update its policies, procedures (including FNCFS agency reporting procedures) and contribution agreements to comply with the Tribunal's order and communicate such reforms in detail and in writing to First Nations, FNCFS agencies and the public;

15. The Respondent must fund FNCFS Agencies in British Columbia, New Brunswick and Newfoundland and Labrador for the provision of prevention services on par with the funding received by such agencies in other provinces;

16. The Respondent must pay an amount of $5,000,000.00, adjusted for the compound rate of inflation from 2012 values pursuant to the Consumer Price Index, to be divided among FNCFS agencies in Ontario in proportion to the population of First Nations children residing on reserve that they serve, in order to allow them to provide prevention services;

17. This order will be effective until such time as the parties reach a further agreement or the Tribunal orders otherwise.

SCHEDULE “A”

TABLE OF BASE OPERATIONS AMOUNTS FOR SMALLER AGENCIES

| Number of Children Served Higher Than | Base Amount for Operations Funding |
|---|---|
| 250 | $133 888 |
| 275 | $148 193 |
| 300 | $162 479 |
| 325 | $176 747 |
| 350 | $190 998 |
| 375 | $205 235 |
| 400 | $219 453 |
| 425 | $233 652 |
| 450 | $247 835 |
| 475 | $262 003 |
| 500 | $276 150 |
| 525 | $290 284 |
| 550 | $304 399 |
| 575 | $318 495 |
| 600 | $332 577 |
| 625 | $346 639 |
| 650 | $360 686 |
| 675 | $374 714 |
| 700 | $388 727 |
| 725 | $402 721 |
| 750 | $416 697 |
| 775 | $430 660 |
| 800 | $444 601 |

## SCHEDULE "B"

## COMPARISON OF CHRC SUBMISSIONS AND REMEDIES SOUGHT

| Submissions of the CHRC or the Complainant | Finding of the Tribunal | Remedy Sought |
|---|---|---|
| Disputes between levels of government and also between various government departments —about who should fund services‖ can result in delay, disruption and or denial of a service for a First Nations child on reserve.1019 These issues are dealt with on an *ad hoc* case-by-case basis, and the federal government has not adopted an overarching policy to address these gaps in jurisdiction.[1]<br><br>Whether Jordan's Principle is part of the FNCFS Program or not, it is a policy developed by the Respondent to address issues of jurisdiction which can result in delay, disruption and/or denial of a service for a First Nations child on reserve. To the extent these jurisdictional disputes continue to exist, the Commission submits that they constitute adverse differential treatment of First Nations on reserve contrary to section 5 of the *Canadian Human Rights Act*. Jordan's Principle, as a mechanism designed by the Respondent to resolve these disputes, forms part of the initial complaint of discrimination in this case, and is thus within the purview of the Tribunal's inquiry.[2]<br><br>Given that Canada's implementation of Jordan's Principle is *prima facie* discriminatory, it has the onus of justifying its approach. The only explanation advanced before this | 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.[4]<br><br>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.[5]<br><br>The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations | 1. The Respondent must implement Jordan's Principle in a way that ensures that First Nations children can access public services on the same terms as those provided to the non-indigenous population in the same province or territory without service denials, delays or disruptions related to jurisdictional or payment disputes and, in particular:<br><br>a. The Respondent must apply Jordan's Principle to address disputes within and among federal government departments and FNCFS agencies and disputes between the federal government and the provinces and territories;<br><br>b. The Respondent must apply Jordan's Principle to all First Nations children and to all public services; |

[1] Submissions of the Canadian Human Rights Commission to the Canadian Human Rights Tribunal dated August 24, 2014 (hereinafter ''CHRC submissions'') at para 593.
[2] Reply Submissions of the Canadian Human Rights Commission to the Canadian Human Rights Tribunal dated October 14, 2014 (hereinafter ''CHRC Reply Submissions'') at para 57.
[4] *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)* (hereinafter ''CHRT Decision''), 2016 CHRT 2, para 351.
[5] CHRT Decision, para 458, sub-para 5.

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| Tribunal for the narrowness of the federal definition of Jordan's Principle was given by Corinne Baggley.<br>[T]he policy response that we were mandated to implement was based on Jordan, and my role is to provide that analysis and advice, and we had to start with Jordan's case and look at those particulars and implement, to ensure that if there are other children like Jordan out there that the federal response as our very first step that we could actually address those cases.<br>It has been seven years since Motion No. 296 was unanimously passed in the House of Commons, without the restrictive definition of Jordan's Principle that Canada has adopted. To date, there has been no sign that Canada is contemplating moving past the "very first step" that it decided on. The *CHRA* does not simply require service providers to take procedural "first steps" to ensure non-discrimination. Rather, the right to non-discrimination is a substantive one.[3] | children. [6] | c. The Respondent must, within 10 days of consenting to this order, communicate such reforms in detail and in writing to First Nations, FNCFS agencies, federal employees working in First Nations children's programs including Jordan's Principle focal points and to the public; |
| In addition to funding, AANDC controls le quality and quantity of child and family services available to First Nations children on reserve in other ways. For example, AANDC's decision to stop providing cost of living adjustment in 1999 has had and continues to have considerable impacts on agencies' purchasing power, and thus on the availability and quality of culturally appropriate services on reserve.[7]<br><br>FNCFSA's are in the best position to fulfill this mandate, both because of their understanding of local realities and because they have pre-established relationships with community leaders and with the First Nations children who benefit from child and family services. The development of culturally-appropriate services must therefore include the provision of | 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. [9]<br><br>[I]f 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 | 2. On April 1, 2016, the Respondent must provide each FNCFS agency with an initial amount of $75,000.00 to develop and/or update a culturally based vision for safe and healthy children and families and to begin to develop and/or update culturally based child and family service standards, programs and evaluation mechanisms; |

[3] Submissions of the First Nations Child and Family Caring Society of Canada to the Canadian Human Rights Tribunal dated August 28, 2014 (hereinafter "Caring Society submission") at paras 457-458

[6] CHRT Decision at para 458, sub-para 6.

[7] CHRC Submissions at para 400.

[9] CHRT Decision at para 389 (emphasis added).

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| adequate funding and support for FNCFSA's in any community wishing to participate in the FNCFS Program. Most importantly, childcare practices must be holistic and tailored to reflect traditional values. This can be accomplished by supporting initiatives such as the Touchstones of Hope program to collectively identify visions of safe and healthy children within the distinct cultural and linguistic community to guide the design, operation and evaluation of service delivery. Other means of ensuring the FNCFS Program delivers more culturally-appropriate services include Elder's advisory committees, integrating cultural teachings into the administrative structures, encouraging customary care arrangements, customary adoptions, cultural camps, and family conferencing, as well as the involvement of extended family members in childcare decisions.[8] | 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.[10]<br><br>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.[11] | |

[8] Caring Society Submissions at para 342.
[10] CHRT Decision at para 425.
[11] CHRT Decision at para 458, para sub-para 1 (emphasis added).

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| | 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. [12]<br>[H]uman 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.[13] | |
| [M]ost of AANDC's administration and program staff do not have an educational background or training regarding First Nations peoples or social work. AANDC witnesses testifying for Canada had educational credentials in fields ranging from business administration, to forestry, criminology, and tourism. While these credentials have merit in related professions, they are unrelated to qualifications in social work, econometrics and Aboriginal studies that are directly relevant to the FNCFS Program. Sheilagh Murphy testified that she was not sure if any of her staff had any formal training in social work but recognized it would be good to have staff with social work qualifications.[14] | 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.[15] | 3. Before August 31, 2016 and in a manner approved by the Canadian Human Rights Commission (hereinafter "the Commission") and the Complainants, Respondent must ensure that its staff and executive staff receive 15 hours of mandatory training on the Truth and Reconciliation Commission's final report (December, 2015); the FNCFS Program including formula development, assumptions, and program reviews; the Tribunal decision on the merits; and on the full meaning and scope of Jordan's Principle as set out in the Tribunal's decision on the merits; |
| **Legal Fees**<br>[…] AANDC's funding formulas, including Directive 20-1, EPFA and the 1965 Agreement, do not provide adequate | Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding | 4. Beginning immediately and on an ongoing basis unless supplanted by additional order by the Tribunal and/or by |

[12] CHRT Decision at para 458, sub-para 2 (emphasis added).
[13] CHRT Decision at para 465.
[14] Caring Society Submissions at paras 504-505.
[15] CHRT Decision para 381.

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| funding for a number of key elements necessary for the provision of child welfare services on reserve, including: salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.<br>The lack of funding available for these essential costs is a direct result of the structure and design of AANDC's funding formulas – particularly the operations stream. Consequently, many First Nations child and family service agencies find themselves in deficit and struggle to provide services to the vulnerable First Nations children and families in the communities they serve.[16]<br><br>**Intake and Investigations**<br>Intake and investigation is work that the provinces do off reserve, but AANDC does not provide funding to cover these costs for First Nations child and family service agencies.[17]<br><br>**Capital Infrastructure**<br>Under Directive 20-1 and EPFA, AANDC does not provide funding for capital infrastructure. First Nations child and family service agencies are expected to rent buildings on reserve and pay for those costs out of their fixed operations budgets. This has been identified as a major weakness in Directive 20-1, and continues to be a serious shortcoming in the EPFA funding model. As Dr. Blackstock noted, the lack of funding for capital requirements poses a significant challenge to many First Nations child and family service agencies in light of the well documented housing crisis on reserves across Canada.[18] | 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.[19]<br><br>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, | written agreement of the Parties, the Respondent must fully reimburse the following actual costs incurred by FNCFS agencies, without restrictions based on the existing funding formulas:<br><br>a. legal fees related to child welfare investigations (i.e., warrants), children in care and inquiries, according to the tariffs used by the federal government for the remuneration of outside counsel;<br><br>b. actual costs related to the receipt, assessment and investigation of child protection reports;<br><br>c. costs of building repairs where a FNCFS agency has received from a licensed building inspector, structural engineer, fire marshal or equivalent First Nations authority a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations; |

[16] CHRC Submissions at para 504-505.
[17] CHRC Submissions at para 559.
[18] CHRC Submissions at paras 515-517.
[19] CHRT Decision at para 389.

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| | 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.[20] | |
| Additionally, the reliability of prevention funding is unknown for a First Nations child and family service agency because EPFA funding is set for a five-year term, and AANDC —re-base an agency's maintenance budget each year during that term. That is to say that if there is a decrease in maintenance expenditures in the first year, an agency's maintenance budget will be decreased by that amount moving forward into the second year.<br>Therefore, if as a result of AANDC's re-basing, an agency's maintenance budget has decreased in the second year of EPFA funding, and if they are suddenly faced with an onslaught of child protection cases, they may need to use their operations and/or prevention dollars in order to offset their deficit in maintenance.[21] | 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.[22] | 5. With respect to Directive 20-1 and the Enhanced Prevention Funding Approach (EPFA) or any modifications thereof, the Respondent must cease the practice of requiring FNCFS agencies to recover cost overruns related to increases in the number of children in care or the higher needs of children in care from the prevention and operations funding streams; |
| **<u>Cost of Living Adjustment</u>**<br>In effect, the lack of cost of living adjustment in AANDC's funding formulas compounds the challenges they face to provide comparable levels of service to the province and territories. The cost of living back in 1995 was far less than what it is today, so First Nations child and family service agencies have effectively lost their —purchasing power | 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 | 6. The Respondent must immediately make the following adjustments in the calculation of the operation and prevention budgets of FNCFS agencies, with respect to provinces and territories covered by Directive 20-1 and those covered by EPFA: |

[20] CHRT Decision para 458, sub-para 1.
[21] CHRC Submissions at para 445-446.
[22] CHRT Decision at para 347.

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| because of way AANDC has chosen to apply its funding formulas on reserve.<br>The funding formulas themselves in fact call for a cost of living adjustment – AANDC has decided not to apply it to First Nations on reserve. This has a serious impact on the quantity and quality of services available to First Nations children on reserve, who are undoubtedly among the most vulnerable in the country. As Dr. Loxley testified, AANDC's failure to adjust for inflation means that the —real value of the dollars going to First Nations Agencies [is] actually declining annually quite significantly.[23]<br><br>**Flawed assumption of 6% of children in care**<br>In her 2008 report, the Auditor General concluded that these assumptions lead —to funding inequities […] because, in practice, the percentage of children that [First Nations child and family service agencies] bring into care varies widely. In other words, these assumptions (and therefore funding formulas upon which they are based) do not necessarily reflect the real and greater needs of First Nations communities. While some First Nations child and family service agencies benefit from these assumptions because their percentage of children in care is at or below 6%, others struggle to provide adequate services to First Nations children on reserve because their numbers of children in care exceed the 6% assumption.[24]<br><br>**Flawed assumption of 20% of children needing preventative services**<br>With respect to the assumptions that each First Nation household on reserve has an average of 3 children, and that | perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.[29]<br><br>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.[30]<br><br>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.[31] | a. Replacing the formula mentioned at paragraph 126 of the Tribunal's decision on the merits with the following formula: "A fixed amount of $444,601 per organization + $15,427.57 per member band + $1046.75 per child (0-18 years) + $13.298,73 x average remoteness factor + $12,766.90 per member band x average remoteness factor + $106.06 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," and adjusting the base amounts in that formula according to the increase in the consumer price index for fiscal years 2016-17 and forward;<br><br>b. Providing FNCFS agencies with an upward adjustment of their operations and prevention budget where the percentage of children in care and percentage of families receiving services from such an agency exceed 6% and 20%, respectively, for the population served by the agency concerned, in proportion to the excess of the percentage of children in care over 6% and of the percentage of families receiving services over 20%. No downward adjustments will be applied to FNCFCS agencies with fewer than 6% of children in |

[23] CHRC Submissions at para 562-563.
[24] CHRC Submissions at para 425-426.
[29] CHRT Decision at para 386.
[30] CHRT Decision para 458, sub-para 1.
[31] CHRT Decision, para 458, sub-para 2.

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| 20% of on reserve families require prevention services, the rationale for these assumptions is unknown. Once again, these assumptions, which determine the amount of funding a First Nations child and family service agency receives for prevention services, do not necessarily reflect the real and greater needs of First Nations communities. While some agencies may enjoy a benefit as a result of these assumptions, others struggle to provide adequate prevention services to First Nations children and families because they have more than 20% of families on reserve accessing these services. Yet, neither Directive 20-1 nor EPFA have built-in adjustments to allow funding (and therefore the agencies themselves) to better respond to situations where the number of children and/or families accessing these services is in excess of the assumptions upon which the formulas are based.[25]<br><br>**<u>Small agencies</u>**<br>These funding pressures are felt most especially by small agencies across Canada, whose operations budgets are subject to downward adjustments based on the size of the on reserve First Nations child populations they serve.[26]<br><br>With respect to the issue of small agencies and small communities, the solution ought not to involve "mixing and matching" between communities of comparable size. As Dr. Blackstock noted in her evidence, "it would be very difficult for one community, say the Coast Salish, to deliver culturally relevant services to the community in the interior because they will often speak very different languages, they will have very different social structures."[27]<br><br>**<u>Purchasing Power</u>** | | care and/or serving fewer than 20% of families;<br><br>c. Where a FNCFS agency serves a population of between 251 and 801 Registered Indian children, replacing the amount of $444,601 in the formula by the amounts set out in schedule A to this order, adjusted according to the increase in the consumer price index for fiscal years 2016-17 and forward;<br><br>d. Funding all FNCFS agencies serving fewer than 251 Registered Indian children on reserve at the amount provided to agencies serving at least 251 Registered Indian children on reserve;<br><br>e. Increasing the service purchase amount in Directive 20-1 and EPFA to $200.00 per child from the current value of $100.00 per child, with an adjustment according to the consumer price index for fiscal years 2016-17 and forward;<br><br>f. Increasing funding to restore lost purchasing power in other items of the operations and prevention funding streams related to the Respondent's failure to provide a compounded annual inflation adjustment pursuant to the Consumer Price Index and provide adjustments according to |

[25] CHRC at para 433-434.
[26] CHRC Submissions at para 509.
[27] Caring Society Submissions at para 377.

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| In addition to funding, AANDC controls the quality and quantity of child and family services available to First Nations children on reserve in other ways. For example,<br>AANDC's decision to stop providing a cost of living adjustment in 1995 has had and continues to have considerable impacts on agencies' purchasing power, and thus on the availability and quality of culturally appropriate services on reserve.[28] | | the increase in the consumer price index for fiscal years 2016-17 and forward;<br><br>g. Not introducing any funding reductions or restrictions. |
| There are a number of issues with respect to the prevention funding provided to First Nations children and families under the 1965 Agreement.<br>First, given the cost-sharing design of the 1965 Agreement, AANDC has ultimate decision-making authority with respect to which services it agrees to cost-share. In other words, if Ontario decides to ―put an emphasis on prevention by making whatever legislative changes [are] necessary in order to bolster those programs, both on and off Reserves‖, AANDC could refuse to fund or reimburse these programs or services.<br>Second, the amount of prevention funding available depends on the nature of the ―protocol‖ that operates in a given area within the province of Ontario, and does not reflect the real or greater needs of First Nations.<br>For instance, in determining the prevention budget for fully-mandated Native child and family service agencies in northern Ontario, AANDC uses the ―ratio of Status Indian days of care to the total days of care as a proxy for how many people would be receiving the prevention service. Ms. Stevens testified that Anishinaabe Abinoojii's prevention budget has not been substantially increased since it was initially developed in the late 1970's, and is insufficient to meet the needs of the First Nations communities she serves. However, for agencies in southern Ontario, AANDC | 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*.[33] | 7. The Respondent, must, with respect to Ontario, update the schedule of the 1965 agreement to reflect the current version of the *Child and Family Services Act* (Ontario) and ensure funding for the full range of statutory services including band representatives, children's mental health and prevention services; |

[28] CHRC Submissions at para 400.
[33] CHRT Decision at para 458, sub-para 4.

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| assumes that approximately 80% of the First Nations population on reserve will be eligible to access services and ―cost-shareable‖. Finally, the 1965 Agreement does not ―account for the lack of surrounding health and social services in most First Nations communities [… which] are absolutely essential to providing preventive, supportive, and rehabilitative services to children and families at risk, whereas provincial child welfare agencies already ―have the benefit of these programs in their communities. Therefore, insofar as the availability of prevention funding under the 1965 Agreement is based on assumptions and varies from region to region as a result, it is inadequate to meet the real needs of First Nations communities in Ontario.[32] | | |
| | 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.[34] | 8. The Respondent must immediately provide $30,000.00 to the Aboriginal Peoples Television Network to transfer the tapes of the Tribunal hearings onto a publicly accessible format and provide sufficient funds to the National Centre for Truth and Reconciliation to store and manage public access to the tapes; |
| | | 9. In partnership with affected First Nations and Tribal Councils, the Respondent must review decisions to deny funding to support the development and operation of FNCFS agencies particularly with regard to the applications for new agencies by the Okanagan Nation Alliance and Carcross First Nations; |

[32] CHRC Submissions at paras 493-498.
[34] CHRT Decision at para 459.

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| | | 10. The Respondent must fund a new iteration of the Canadian Incidence Study of Reported Child Abuse and Neglect |
| Evidence suggests that the Respondent's practice of cutting funding from other programs areas such as housing to cover AANDC child welfare funding shortfalls actually increases child welfare risks for children. Dr. Blackstock testified:<br>''So, instead of increasing the overall envelope, which is what I think we would all like to see, what they're doing is they're taking funds from other programs, in this case infrastructure, and then rejigging that over to child welfare. What is the implication of that for kids? Well, remember that when I testified the first round the three major factors driving children into child welfare care under the neglect portfolio for First Nations are poverty, poor housing and substance misuse. So, if you're pulling money out of housing, you're actually exacerbating the risk factor at least of kids coming into care in the first place; what you should be doing is re-addressing this formula and increasing the funds sufficiently so that you're able to do it. There's no evidence that I've seen -- and, in fact, we'll go to other documents in my further testimony -- that say that there is an abundance of funds in the capital or infrastructure; in fact, they say there's dramatic under funding creating a crisis situation in those levels. So, it's really the equivalent of shuffling deck chairs on the Titanic and it's hard to see how this is in the best interests of children.''<br>These concerns were echoed by the Auditor General of Canada in her 2008 review of the Respondent's provision of First Nations child and family services. Specifically, the Auditor General recommended in section 4.74:<br>''Indian and Northern Affairs Canada should determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program. It should periodically review the program's budget to ensure that it | 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.[36] | 11. The Respondent must seek new funding to meet the obligations set out in the Tribunal's decision on the merits, including, but not limited to, the obligations described in this consent order and obligations towards provincial and territorial governments directly serving First Nations children (which are not specified in this consent order), and cease its practice of reallocating funding from other First Nations programs to address shortfalls in First Nations child and family services, education, social assistance and other programs; |

[36] CHRT Decision at para 390.

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| continues to meet program requirements and to minimize the program's financial impact on other departmental programs." [35] | | |

[35] Caring Society Submissions at paras 247-248.

## SCHEDULE "C"

## FEDERAL DEPARTMENT OF JUSTICE RATES FOR OUTSIDE COUNSEL

| Remuneration | |
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| **Years at Bar** | **Hourly Rates** |
| **Student / Paralegal** | Up to $50 |
| **0 to 2 years** | Up to $100 |
| **3 to 4 years** | Up to $120 |
| **5 to 6 years** | Up to $140 |
| **7 to 8 years** | Up to $160 |
| **9 to 10 years** | Up to $180 |
| **11 to 12 years** | Up to $200 |
| **13 to 14 years** | Up to $220 |
| **15 to 16 years** | Up to $240 |
| **17 to 18 years** | Up to $260 |
| **19 to 20 years** | Up to $280 |
| **More than 20 years** | Up to $350 |

Source: http://www.justice.gc.ca/eng/abt-apd/la-man/index.html