Tribunal File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO AND
AMNESTY INTERNATIONAL CANADA

Interested parties

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Overview

1. The Complainants have not established a *prima facie* case that federal funding of child welfare on reserve is discriminatory.[1] Their purported comparison of federal to provincial/territorial funding does not demonstrate adverse differential treatment or denial of a service under section 5 of the *Canadian Human Rights Act* ("the Act").[2]

2. The complaint is primarily based on the allegation that the federal government does not fund child and family service providers for First Nation children living on reserve to the same level that service providers off reserve are funded by the provincial and Yukon governments[3] and that such differential funding constitutes discrimination.

3. This allegation was not borne out by the evidence. In fact, there was no evidence 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. No provincial or territorial witnesses were called by the Complainants to substantiate their allegation that the federal government funds child welfare services on reserve in a discriminatory manner as compared to the rest of the country.

4. Instead, the Complainants' evidence focussed on establishing that an increase in federal funding and a change to existing funding models would facilitate the development of more First Nation Child and Family Agencies ("FNCFS Agencies") on reserve, more autonomy for those Agencies and the availability of a broader range of services. However, the evidence does not establish that First Nation children on reserve are receiving child welfare services at a discriminatory level as compared to children in the rest of the country. The evidence did not even establish that the proposed changes would lead to better outcomes for First Nation children

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1 The term "Complainants" encompasses the two Complainants, the First Nations Child and Family Caring Society and the Assembly of First Nations, as well as the Canadian Human Rights Commission and the two interested parties, the Chiefs of Ontario and Amnesty International.

2 Section 5, *Canadian Human Rights Act*, RSC. 1985, c. H-6

3 References to "territorial government" refers to the Yukon, which is the only territory encompassed in this complaint.

on reserve.

5. As an alternative argument, the Complainants allege that even if federal and provincial/territorial funding is reasonably comparable, it is still discriminatory because of the higher needs of First Nation children on reserve. Again, this was not borne out in the evidence, which suggests that while the needs of First Nation children on reserve are high, the need is equally high among First Nation children living off reserve. Accordingly, no *prima facie* case was established. 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 *Canadian Human Rights Act*, whether it relies on fiduciary duty arguments, international law principles or Jordan's Principle. The claim of discrimination is unfounded and should be dismissed.

PART I – FACTS

A. Background on federal funding for child welfare on reserve

6. The provision of child welfare services falls within provincial jurisdiction.[4] Around the 1950's, concerns arose with respect to the safety of children on reserve, as the provinces were not necessarily providing the full range of child welfare services to on reserve First Nation communities in their jurisdictions.[5]

7. As a means of responding to these concerns, the Respondent, the Department of Aboriginal Affairs and Northern Development Canada ("AANDC")[6] became involved as a matter of social policy by engaging provinces in discussions about ensuring the provision of child welfare services on reserve in exchange for federal cost-sharing agreements.[7] The only province that entered into such an agreement

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4 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 28; Also see: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45; *Communications, Energy and Paperworkers Union of Canada v. Native Child and Family Services of Toronto*, 2010 SCC 46

5 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9

6 The name of Aboriginal Affairs and Northern Development Canada has changed throughout the time period of this complaint and for ease of reference, will be referred to as the Respondent through these submissions.

7 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9

was the province of Ontario, which led to the development of the *1965 Welfare Agreement*.[8] This agreement is still in force today and addresses the provision and funding of child welfare on reserve as well as other social programs.[9]

8. Given the lack of interest from the other provinces to entering in cost-sharing agreements, the Respondent received policy authority from Cabinet to enter into funding arrangements with First Nation communities in the remaining jurisdictions who were interested in becoming service providers in their own communities.[10]

9. As there was no consistency in the funding arrangements being reached between the Respondent and the various First Nations to develop FNCFS Agencies, the Respondent began to work on a national system. The goal was to create uniformity and predictability in funding across the country while increasing the capacity of the First Nations to deliver child welfare services in their communities in a culturally appropriate manner.[11] The result was Directive 20-1, which was introduced in the early 1990's.[12]

10. At the time Directive 20-1 was introduced, there were approximately 23 FNCFS Agencies across the country; there are now 104.[13]

B. Federal funding for the First Nations Child and Family Services Program

11. The Respondent receives an allocation for all of its programming on a yearly basis from Treasury Board.[14] The total amount is approximately 7 billion dollars.[15] The Respondent uses this money to fund the various programs that offer services on reserve.

12. Funding for child welfare services on-reserve is provided through the First Nations

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8 *1965 Welfare Agreement*, HR-11, tab 214
9 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 28-9
10 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 29
11 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 30
12 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 30
13 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 50-51
14 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 73
15 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 73

Child and Family Services Program ("the FNCFS Program").[16] The purpose of the FNCFS Program is to fund FNCFS Agencies and programs that deliver child welfare services to First Nation children and families on reserve.[17]

13. The FNCFS Program is within the Respondent's Social Policy and Programs Branch, which manages and funds five social programs offered on reserve.[18] In addition to the FNCFS Program, the other four social programs are Income Assistance, National Child Benefit Re-Investment, Assisted Living and Family Violence Prevention.[19]

14. Funding for the social programs is provided through yearly appropriations by Parliament through Grants and Contributions.[20] The five social programs receive funding on an annual basis in the vicinity of $1.6 billion dollars from the overall allocation to the Respondent: the Income Assistance Program receives $830 million, the FNCFS Program receives $627-$630 million, the Assisted Living Program receives $92 million, National Child Benefit Reinvestment receives $50-$55 million and the Family Violence Prevention Program receives 30.1 million.[21]

15. While the monies are appropriated annually, the funds are ongoing, which means the Respondent knows that the core amount of money they receive for these programs will remain the same each year.[22]

16. In order to receive an increase in yearly funding for a social program, there has to be a decision by the Minister to make a policy change justifying the need for an increase in funding. The role of the Social Policy and Programs Branch is to provide research and options to the Minister and senior government officials to

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16 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 51
17 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 53
18 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 51-2, *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 19-20
19 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 51-2
20 Testimony of Sheilagh Murphy, Transcript vol 54, pgs 19-20
21 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pgs19-20; *How First Nation Child and Family Services works in each region*, R-13, tab 5; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
22 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 20-22

inform these decisions.[23]

17. There is no authority for a government department or a program to unilaterally make a substantive policy change to a program that would impact the amount of funding or the way in which government monies are spent.[24]

18. Once the Minister has made a decision with respect to the institution of a policy change, approval must then be sought and granted from Cabinet.[25] If Cabinet approves the policy change, the Respondent must then prepare a Treasury Board submission to receive funding authority.[26] The Treasury Board submission must provide specific details regarding how the funding will be used and the justification for the funding.[27] The Treasury Board process also requires the development of "Terms and Conditions" to establish the authority under which public monies can be used and sets out strict parameters for how this money can be spent.[28]

19. With respect to the FNCFS Program, the Terms and Conditions specify that the funding must be used for expenses relating to child welfare and cannot fund expenses covered by another department or program in the federal family.[29] For example, medical and education expenses fall outside the authorities of the FNCFS Program, as they are funded through another federal program or department.[30]

20. The Respondent is responsible for ensuring the funds disbursed through the FNCFS Program are being used in accordance with their governing Terms and Conditions, which means that the funds must be used for child welfare expenses, such as social work, child protection and prevention services.[31] This is part of the Respondent's general stewardship role for the accountability of public funds, which requires it to

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23 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 23-24
24 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 45-48, *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 82-84
25 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 23-24
26 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 84-6, *Testimony of Sheilagh Murphy*, Transcript, vol 54, pgs 20-24 and 45-46
27 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 86
28 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 85-6
29 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 86-7, 89-90
30 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 59, 89, 97
31 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 56

ensure all funds provided are spent within the authority given by the Executive.[32]

C. The Respondent's role in child welfare on reserve

21. There are three partners involved in the delivery of child welfare services on reserve: the federal government, the provincial and Yukon governments and First Nations.[33] The role of the federal government, through the Respondent, is to fund the FNCFS Program.[34] To fulfil this role, it develops funding agreements with the FNCFS Agencies, and in some cases the provinces and Yukon, and builds costing models for the funding allocations.[35]

22. The Respondent is not involved with and does not control decisions on what programs or services are offered by the FNCFS Agencies for child welfare on reserve. The Respondent's role is to ensure that public funds are used for child welfare expenditures in accordance with the applicable funding authorities.[36]

23. In 2012/13, the Respondent provided 627 million in funding to the FNCFS Program.[37]

D. The Provincial/Yukon governments' role in child welfare on reserve

24. The provincial and Yukon governments have legislative and regulatory authority for child welfare across Canada.[38] In each province or territory, the Director of Child Welfare can delegate their authority under the legislation to an individual service delivery society, agency, or social worker.[39] The decision on whether a society, agency or social worker receives delegated authority rests with the province

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32 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 57
33 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 53-4
34 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 55-56
35 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 55-56
36 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57, 59
37 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p12
38 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 62
39 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 63

or territory.[40]

25. The provincial/territorial governments are also responsible for ensuring that the delegated authorities delivering child welfare services, both on and off reserve, are acting in accordance with the legislation and regulations.

E. The First Nations' role in child welfare on reserve

26. Child welfare services and programs on reserve are primarily delivered by the FNCFS Agencies.[41] In some cases, there is no FNCFS Agency and child welfare services are delivered by a tribal council, a band, the province or Yukon governments. While provincial or territorial requirements set operational standards and dictate what programs and services must be offered to a community, decisions with respect to what additional programs and services are offered rests with the FNCFS Agencies, in accordance with their delegated authority.[42]

27. In determining what services to provide and how to deliver them, the FNCFS Agency decides what is "culturally appropriate" for their community.[43] The definition of what is culturally appropriate depends on the specific culture of each First Nation community.[44] The Respondent has no role in determining what is culturally appropriate. This is left solely within the discretion of the FNCFS Agency or the First Nations leadership.[45]

28. In addition to making the determination on what additional programs and services to offer, the FNCFS Agencies are responsible for the day-to-day administration of the agency, which involves hiring staff and management, setting a budget and making decisions on agency expenditures.

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40 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 63
41 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57-58
42 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 57-58
43 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61
44 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61
45 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 60-61

F. The FNCFS Program funding models

i. Directive 20-1

29. Directive 20-1 has two funding streams: maintenance and operations.[46] Maintenance is the basic reimbursement of the actual money spent by the FNCFS Agency on maintaining children in care out of the family home.[47] The categories of expenses included in maintenance are defined in the National Policy Manual.[48]

30. At the start of each year, there is a funding agreement that includes a maintenance budget based on the previous year's actual maintenance expenses.[49] Monthly or quarterly maintenance reports are provided that track the up to date expenditures to see whether they are in accordance with the expenses that were anticipated.[50]

31. The operations stream under Directive 20-1 is calculated through a formula that assigns fixed amounts for each organization, each member band and each child in the 0-18 population on-reserve, as well as other various fixed costs.[51] The final number from these calculations is how much the FNCFS Agency is funded for the operations stream. Operations is meant to cover the administrative and staffing expenses of running an agency, which includes expenses such as salaries and overhead. Under Directive 20-1, funding for prevention programs is also included in operations.

32. Directive 20-1 is currently in place in British Columbia, New Brunswick, Newfoundland and Labrador and the Yukon.[52]

ii. The Enhanced Prevention Focused Approach

33. In 2007, the Respondent sought and received authority to change its child welfare funding and develop a new funding model, the Enhanced Prevention Focused

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46 *Testimony of Barbara D'Amico*, Transcript vol 50, pg155
47 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 168, 172
48 *National Policy Manual*, HR-13, tab 272, *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 3-7
49 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 168
50 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 68
51 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 14-17; *Directive 20-1*, R-13, tab 2
52 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 141; see also *How First Nation Child and Family Services works in each region*, R-13, tab 5

Approach ("the EPFA").[53] The EPFA added an additional funding stream specifically for prevention based services, while also providing a new calculation for the operations stream that takes into account provincial data on child welfare expenditures.[54] The development of the EPFA reflects the underlying shift in social work practice, placing a greater focus on prevention services, as opposed to protection services.[55]

34. The EPFA implementation process begins with tripartite discussions between the provinces, First Nation communities and the Respondent.[56] From the tripartite discussions, the Tripartite Accountability Framework is developed, which is a framework to support all parties in moving forward with the transition to the EPFA.[57] It outlines the goals and objectives, performance indicators, roles and responsibilities of the parties, and can be used by the FNCFS Agencies as a benchmark when developing their business plans.[58] Although it is not signed, the Respondent seeks and obtains the endorsement of the provinces and the participating First Nations through Band Council resolutions or letters of endorsement.[59]

35. Once the framework is in place, the costing discussions take place. Prior to the costing discussions, the FNCFS Program requests all child welfare costing variables from the province."[60] This approach is taken because the provinces do not always use a funding formula that the Respondent can replicate.[61] The costing variables include information such as salary scales, future collective bargaining that could affect salary scales, and staffing ratios.[62]

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53 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 144-5
54 *1000 Child Template*, R-13, tab 10
55 *How First Nation Child and Family Services works in each region*, R-13, tab 5; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
56 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-152; see documents pertaining to tripartite meetings, regional round tables and technical working groups in R-13 and R-14, at tabs 25-37, 63-69, 72-86 and 91
57 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 147
58 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-7
59 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 146-8
60 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
61 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
62 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1

36. The costing variables from the provinces are worked into the operations and prevention formulas in order to meet the policy objective of providing funding for "reasonably comparable services" to what is available in off reserve communities.[63]

Differences between the EPFA and Directive 20-1

37. The funding under the EPFA is different than the funding under Directive 20-1.[64] While Directive 20-1 was developed by the federal government, the EPFA is developed in a tripartite setting that results in a formula tailored to each jurisdiction.[65]

38. Another central distinction is that the EPFA has three funding streams: maintenance, operations and prevention.[66] Under Directive 20-1, funding for prevention services is included in the operations stream. Further, under the EPFA, the FNCFS Agencies can move money around between these three streams.[67] The only caveat is that the money must be spent on child welfare expenses.[68]

39. Maintenance under the EPFA is primarily the same, as it still reimburses FNCFS Agencies for the actual amount spent on maintenance expenditures.[69] Under the EPFA, the FNCFS Agency receives funding for maintenance based on the previous year's actual expenditures for maintenance and the FNCFS Agency works within the full EPFA envelope, which is adjusted yearly.[70]

40. Any reduction in maintenance expenses will result in a surplus.[71] The FNCFS Agency determines how they wish to use the money and provides the FNCFS Program with an unexpended funds plan.[72] The only restriction on the FNCFS Agency's use of surplus money is that it is to be used for child welfare services; it

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63 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 150-1
64 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 152
65 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 56
66 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 155
67 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 155
68 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 157
69 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 169
70 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 169, 176
71 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 164, 169
72 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 174

cannot be used for expenses covered by another federal program.[73]

41. However, if the maintenance expenses exceed the amount the FNCFS Agency is funded there will be a deficit.[74] When this occurs, the FNCFS Program works with the FNCFS Agency to see if there is another source of funds to use towards this deficit, such as a surplus in one of the other streams of the FNCFS Agency's budget.[75] If there is no surplus, the FNCFS Program will pay for the increased expenses.[76]

42. Although maintenance funding has essentially remained the same, the formula for calculating operations funding under the EPFA has changed from the formula used under Directive 20-1. In the EPFA formula, funding is determined through various "line items," which are specific operations expenditures, such as funding for protection workers or travel costs.[77] Each line item is assigned an amount. This amount may be static, such as the funding for an Executive Director, or variable, such as the funding for child protection workers, which takes into account the provincial salary grids, provincial ratios of protection workers to children and the First Nations 0-18 population.[78]

43. Under the EPFA, there is also a new stream of funding for prevention services. As with the funding for operations under the EPFA, the funding for prevention is calculated through line items, such as prevention workers, that are assigned funding amounts based on provincial salary grids and provincial ratios of social workers to children.[79]

44. The calculation of funding for the line items in operations and prevention under the EPFA comes directly from discussions with the province on how they fund child welfare services off reserve.[80] This provincial data is then incorporated into the

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73 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 17-7
74 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 169
75 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 179
76 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 180-1
77 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 18-20; *1000 Child Template*, R-13, tab 10
78 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 18-66; *1000 Child Template*, R-13, tab 10.
79 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 66-8; *1000 Child Template*, R-13, tab 10
80 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 153-4 and v51, p18-20

formula in order to provide "reasonably comparable" funding.[81]

Implementation of the EPFA across Canada

45. The funding under the EPFA is structured as a five year roll out. At the start of the five years, a jurisdiction transitioning to the EPFA will receive a percentage of the anticipated total amount.[82] The amount increases each year until it reaches the full 100% of the EPFA increase and implementation.[83] At the end of the five years, the funding will continue at the same level; it is not cut off or stopped.[84]

46. Over the last six years, the Respondent has invested an additional $102.3 million into the FNCFS Program for EPFA.[85] This is in addition to the monies the FNCFS Agencies were already receiving under Directive 20-1.[86]

47. The EPFA is currently in place in Alberta, Manitoba, Saskatchewan, Quebec, Nova Scotia and Prince Edward Island.[87] The amounts currently received in each of these jurisdictions for child welfare as of 2012/13 are: Alberta – $129.8 million; Saskatchewan – $79.6 million; Quebec – $67.3 million; Nova Scotia – $15.9 million; and Prince Edward Island – $1.4million.[88]

48. In addition, the FNCFS Agency in Nova Scotia has received an additional $6

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81 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 153 and v51, p18-66

82 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 134

83 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 134

84 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 166-7

85 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18; *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 102, 132-3, 140

86 *Testimony of Barbara D'Amico*, Transcript vol 50, pgs 136-7; see also *Profile of Funding Approved*, R-13, at tab 15; and *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18

87 *Testimony of Barbara D'Amico*, Transcript vol 50, pg 102, 131-2; *How First Nation Child and Family Services works in each region*, R-13, tab 5

88 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p12-13; *Reports- CFS Stats- Cheat Sheet*, R-13, tab 22. Also see: *How First Nation Child and Family Services works in each region*, R-13, tab 5 for a detailed explanation of the EPFA implementation in these jurisdictions

million in funding per year since 2011 in order to respond to a crisis situation.[89]

49. The remaining jurisdictions will transition to the EPFA. While waiting for this transition, some of the provinces that are still under Directive 20-1 have received additional funding in excess of what is provided under the Directive 20-1 formula.

Transitional funding in BC prior to the EPFA

50. In BC, the FNCFS Agencies are receiving funding beyond what is provided in Directive 20-1. This transitional funding is an interim measure until the EPFA is implemented in BC and results from the "shift to actuals" in funding maintenance.[90]

51. Prior to April 1, 2011, delegated FNCFS Agencies were reimbursed for their maintenance costs on a "per diem" basis.[91] The per diem was an average daily rate based on the number of care days. FNCFS Agencies were able to generate surpluses under the per diem system, as the per diem rates were greater than the actual costs of keeping a child in care.[92]

52. The Auditor General's Report of May 2008 criticized the Respondent for not complying with its Treasury Board authority to reimburse actual costs of children in care.[93] In response, the Respondent transitioned FNCFS Agencies in BC to a reimbursement of actual costs of maintenance, beginning in April 2012.[94]

53. As the per diem method of paying for maintenance generated funding in excess of the actual costs for maintaining a child in care, many FNCFS Agencies had generated surpluses, which were used to supplement their operating budgets and for prevention programs. As part of the "shift to actuals", the Respondent calculated the surplus amount the FNCFS Agencies received under the per diem method and

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89 *How First Nation Child and Family Services works in each region*, R-13, tab 5; *Testimony of Barbara D'Amico*, Transcript vol 51, pg 107

90 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389; see also *Province as Service Provider*, R-13, tab 11; and *2014-2015 FNCFS Initial Budget*, R-14, tab 87

91 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

92 *Testimony of William McArthur*, Transcript vol 63, pgs 35-36

93 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

94 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389

allocated transitional funding to the FNCFS Agencies based on this amount.[95] As a result, the FNCFS Agencies in BC did not experience a reduction in the amount they had been receiving under the per diem system. 80% of the eligible transition funding was released annually until the FNCFS Agency exhausted its surplus and became eligible for 100% of the transition funds.[96]

54. Currently, all of the FNCFS Agencies in BC receive the full amount of transitional funding.[97] This is in addition to the funding received under Directive 20-1.[98]

Prevention services funding in New Brunswick prior to the EPFA

55. In New Brunswick, the FNCFS Agencies receive additional funding beyond what is provided in Directive 20-1.[99] This funding is for the Head Start and In Home Care programs and is approximately 1.4 million and 1.1 million respectively.[100]

56. Head Start funding is to support families in their homes.[101] In Home Care funds situations where a child remains in the home, although there is an open case with the FNCFS Agency, and includes a variety of services such as social work and case management.[102]

57. Both Head Start and In Home Care are precursors to the implementation of the EPFA and this funding is effectively used for prevention services.[103] Decisions on how to use this funding are made by the FNCFS Agencies.[104]

iii. The Ontario *1965 Welfare Agreement*

58. In Ontario, child welfare for First Nations on reserve communities is cost shared between the federal and provincial governments under the *1965 Welfare Agreement*,

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95 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
96 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
97 *Testimony of William McArthur*, Transcript vol 63, pgs 38-389
98 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18
99 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175; *How First Nation Child and Family Services works in each region*, R-13, tab 5
100 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
101 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
102 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
103 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175
104 *Testimony of Barbara D'Amico*, Transcript vol 51, pgs 169-175

rather than being calculated by a funding formula.

59. The terms of the Agreement essentially provide that the province of Ontario extends its welfare programs throughout the province and the federal government reimburses Ontario for a portion of the costs of specific programs identified in the Agreement. [105] The principle of the Agreement is that, as long as the service is available generally, on an equal basis on and off reserve in Ontario, it is cost shareable.[106] Child and family services are one of the social programs funded under this Agreement, which allows for reimbursement of provincial funding provided to child welfare agencies and organizations for prevention and protection services that are directly provided to First Nation children on reserve.[107]

60. The cost-sharing formula currently results in the provincial government billing roughly 92% of the cost of direct services back to the federal government.[108]

61. Prevention and Family Support Services, which were introduced by the Ontario government in the late 1970s, are cost shared up to approved contribution levels. As recently as 2005, the Respondent agreed to reimburse general increases to these prevention services.[109]

62. As the government of Ontario determines how child protection and prevention programs are funded, the federal government's role is essentially limited to ensuring that the agreed on funding is being provided and auditing the claimed expenses. There is no overall cap of expenditures under the 1965 Agreement.[110]

iv. Funding agreements with provinces to provide child welfare services

63. In Alberta and BC, the Respondent has agreements with the provincial governments to provide child welfare services directly to on reserve communities that are not

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105 *Testimony of Phil Digby*, Transcript vol 59, pg 15
106 *Testimony of Phil Digby*, Transcript vol 59, pg 77
107 *Testimony of Phil Digby*, Transcript vol 59, pgs 30-33
108 *Testimony of Phil Digby*, Transcript vol 59, pg 38; *Ontario Regional Aboriginal Affairs and Northern Development Regional Directive; Administrative Process Arrangement- Ministry of Community and Social Services for 2010-2011; Child Welfare Expenditure Summary- YTD Report 2011/12*, R-14, at tabs 58-60
109 *Testimony of Phil Digby*, Transcript vol 59, pgs 53-56
110 *Testimony of Phil Digby*, Transcript vol 59, pg 121

served by FNCFS Agencies. The Respondent reimburses the provinces for these costs.

Alberta Administrative Reform Agreement

64. In Alberta, provincial agencies provide child welfare services to six First Nation communities that are not affiliated with one of the 17 FNCFS Agencies,[111] pursuant to the "Arrangement for the Funding and Administration of Social Services ("Administrative Reform Agreement").[112] Alberta is reimbursed by the Respondent for these services.[113]

65. The Administrative Reform Agreement sets out the arrangements for funding and administration of various social services, including child welfare, applicable to First Nations on reserve.[114] Alberta sends a yearly billing report to the Respondent based on a formula has three components: program cost, direct administration, and indirect administration.[115] The formula does not, however, provide for 100% reimbursement.[116] The Respondent subjects the province's annual billings to compliance review and deducts ineligible items.[117]

66. The Respondent has approached Alberta to express its concerns with the Administrative Reform Agreement but Alberta has indicated it is not interested in reviewing the Agreement.[118]

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111 Prior to January 9 2014, there were 18 FNCFS Agencies and the province provided services to 6 First Nation communities not affiliated with one of the 18 FNCFS Agencies. After January 9, 2014, there were 17 FNCFS Agencies and the province provided services to 9 First Nation communities not affiliated with one of the 17 FNCFS Agencies

112 *Testimony of Carol Schimanke*, Transcript vol 61, pg 86 and vol 62, pgs 72-74; *How First Nation Child and Family Services works in each region*, R-13, tab 5; *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270

113 *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270

114 *Arrangement for the Funding and Administration of Social Services*, HR-13, tab 270, clause 7, Appendix II and Schedule A

115 *Alberta Children and Youth Services Administrative Reform Agreement, Child Welfare April 2008 to March 2009 Billing*, HR-12, tab 264; *Testimony of Carol Schimanke*, Transcript vol 62, pgs 2-3

116 *Testimony of Carol Schimanke*, Transcript vol 62, pgs 9-11

117 *Testimony of Carol Schimanke*, Transcript vol 62, pgs 46-47

118 *Testimony of Carol Schimanke*, Transcript vol 61, pgs188 and vol 62, pgs 46-47

BC Service Agreement

67. In British Columbia, there are 84 First Nation communities that receive their services from the provincial Ministry of Children and Family Development ("the MCFD"), as they are not affiliated with a delegated FNCFS Agency. [119]

68. In 1996, Canada and BC signed a Memorandum of Understanding ("MOU") to clarify their respective roles in funding child protection services.[120] BC was to administer the provincial child welfare legislation for the benefit of "Indian persons under the age of nineteen", while the Respondent was to reimburse the province for the cost of child protection services for any eligible child.[121]

69. The MOU was replaced by annual Service Agreements, starting in 2012.[122] Appendix A to the Service Agreement is a breakdown of costs billed by the MCFD to the Respondent for the services provided, although the MCFD does not provide any data to support its costing assertions.[123] Appendix B to the Service Agreement is a table, which sets out a costing exercise conducted by MCFD. Discussions have taken place between the province and the Respondent with respect to the nature and quality of the available source data to back up the MCFD's various cost assertions.[124]

G. The Respondent's funding of other social programs on reserve

70. The five social programs funded by the Respondent are all interconnected and aim to ensure the existence of a reasonably comparable social support system for First Nations living on reserve as compared to what is available off reserve.[125]

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[119] *Testimony of William McArthur*, Transcript vol 63, pgs 10-11 and 15-16; *How First Nation Child and Family Services works in each region*, R-13, tab 5

[120] *For the Funding of Child Protection Services for Indian Children, Between: British Columbia and Canada*, R-13, tab 8

[121] *For the Funding of Child Protection Services for Indian Children, Between: British Columbia and Canada*, R-13, tab 8

[122] *Service Agreement Between the Province of British Columbia and Canada*, HR-14, tab 399, clause 4.1; also see *Testimony of William McArthur*, Transcript vol 63, pgs 60-73

[123] *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

[124] *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

[125] *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 7

71. The Income Assistance Program provides for the basic needs of individuals who do not have income or employment, similar to what provinces would call social assistance or income assistance.[126] This program is delivered by First Nation communities to their members using provincial rates and eligibility from the jurisdiction in which they reside.[127]

72. The Assisted Living Program is available to low income individuals who require additional supports, including respite services and in-home care services.[128] This program funds the social elements for individuals in institutional care while the medical needs of these individuals would be funded through Health Canada.[129]

73. The National Child Benefit Reinvestment Program is a derivation of the Income Assistance Program and is also connected to the concept of providing financial support to low income families.[130] Instead of receiving an income assistance benefit for children, the Respondent moved to a tax system where all families in low income situations received benefits for their children through a "National Child Benefit Supplement."[131] As providers of income assistance, the Respondent and the provinces were supposed to take the savings realized by having families receiving those benefits, and reinvest these savings into programs that support low income families.[132]

74. Provinces have taken different approaches with the money and the Respondent follows what is done in any particular province.[133] Some jurisdictions use the money saved for reinvestment programs. This would result in First Nation communities applying for funding on a "project basis" – such as funding for a childcare program for parents who are working or attending school and who cannot afford daycare.[134]

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126 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
127 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
128 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 7-8
129 *Testimony of Sheilagh Murphy*, Transcript vol 54, p 8
130 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
131 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
132 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
133 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
134 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10

75. Other examples of programs funded by the Respondent with this money are child nutrition programs to ensure First Nation children are receiving breakfast or lunch at school; support to parents program that aims to help parents improve their parenting skills; and transition to work programs that offer support to parents who are trying to integrate or reintegrate into the workforce by funding the purchase of tools that might be necessary for employment.[135]

76. First Nations can also use some of the money from this program to provide cultural programming for low income children with the aim of helping them understand their culture and develop a sense of place in their communities as they grow up.[136]

77. The Family Violence Prevention Program has two components. The first is funding for 41 emergency shelters on reserve for women, children and men who are seeking respite in emergency situations. These shelters serve approximately 300 reserve communities across the country. The remaining communities seek these services from provincial based shelters. The other component of the Family Violence Prevention Program is the funding of prevention projects. Approximately $7 million of the total funding for this program is available to communities or groups of communities to use for prevention type activities to sensitize communities and individuals to the impact of violence within communities.[137]

78. Together, the five social programs function like a "suite of tools that communities can use in an integrated fashion to help individuals and families improve and make sure they have the income that they need and the supports they need."[138]

79. Other programs funded by the Respondent also have a role to play in supporting the health and well being of families and children. Notably, education funding has a role to play in improving outcomes for First Nation children by encouraging and supporting healthy development, higher education and better employment outcomes.[139] There is also a connection between the Respondent's infrastructure programs including funding for housing and water projects, and efforts to achieve

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135 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
136 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 8-10
137 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 11
138 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 19, 220- 221
139 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 222-223

better outcomes for First Nation children on reserve.[140]

H. Federal programs that benefit First Nation children on reserve

80. Other federal government departments have a role in supporting better outcomes for First Nation children living on reserve. Canada Revenue Agency provides benefits aimed at improving the financial situation for First Nation children in low income families. Human Resources Employment and Social Development Canada also has training and employment programs for low income families, as well as some daycare supports to facilitate a parent's ability to get the training required to enter into the workforce.[141]

81. Health Canada funds a wide network of programs aimed at improving the overall health and well being of First Nation on reserve.[142] The funding is broken into two major programs for First Nations on reserve: the Primary Health Care Program and the Supplementary Health Benefits Program, which is commonly known as the Non-Insured Health Benefits Program ("NIHB").[143] Health Canada also funds a third smaller program called the Health Infrastructure Support Program that supports the delivery of the primary health care programs on reserve.[144]

82. Within the framework of the Primary Health Care Program there are a vast number of sub-programs including Health Promotion and Disease Prevention. This sub-program is focused on healthy children, mothers and families. It is divided into a number of programs that focus on healthy pregnancy, infancy, and childhood development.[145] The Aboriginal Head Start Program falls within this sub-group and provides funding for early childhood development centres on reserve.[146]

83. Other sub-programs in the Primary Health Care Program are the Oral Health

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140 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 222-223
141 *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 224-225
142 *Testimony of Sheilagh Murphy*, Transcript vol 54, pg 223
143 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147; See also *First Nations and Inuit Health-Program Compendium*, R-14, tab 90 for a detailed discussion of the programs offered by Health Canada to First Nations living on reserve
144 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
145 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
146 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

Program and the Mental Wellness Program. The Mental Wellness Program focuses on three areas: addiction, general mental health and suicide prevention and Indian Residential Schools Resolution Health Support Program.[147]

84. As part of the addiction program, there are community based addiction programs on all First Nation reserves.[148] Not only is there a community based addictions worker in every community, but Health Canada also funds a network of 44 addiction centres across the country, plus eight youth solvent abuse treatment centres.[149] Health Canada also funds a smaller program focused directly on fetal alcohol syndrome.[150]

85. The second area that the Mental Wellness Program focuses on is general mental health and suicide prevention, in part by providing funding to every First Nation community for the Brighter Futures Program and the Building Healthy Communities Program.[151] There is also a suicide prevention program that funds projects across Canada.[152] Health Canada has recently started introducing mental wellness teams in each of the regions across the country to assist First Nations in addressing and responding to mental health concerns in individual communities. [153]

86. The third area in the mental wellness sub-program is the Indian Residential Schools Resolution Health Support Program, which supports families as they are going through the Independent Assessment Process.[154] It includes funding for cultural and elder supports as well as psychological counselling.[155]

87. The Healthy Living sub-program is focused on the prevention of chronic diseases such as diabetes.[156] There is also the Public Health Protection sub-program which is focused on the prevention of communicable disease and delivery of immunizations; and the Environmental Public Health sub-program, which primarily involves

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147 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
148 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
149 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
150 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
151 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
152 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
153 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
154 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
155 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
156 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

environmental health inspectors who monitor water quality and inspect facilities on reserve.[157]

88. Finally, there is the Primary Care sub-program, which has a clinical care component and a home and community care component.[158] The primary care is generally recognized as the first point of contact with the health services and is more of a treatment oriented type of service.[159] This program exists in remote communities where physician services may not be readily available.[160] There would be nursing stations staffed by specially trained nurses, and occasionally physicians, who would provide primary care to residents of the reserve.[161] There is also a home and community care component that provides care by nurses and trained personal care workers in the home. This is available in every First Nation community across the country and is managed directly by that community.[162]

89. The other major program funded by Health Canada is the NIHB program.[163] This program funds services and benefits for First Nations and Inuit across Canada regardless of whether they live on or off reserve and regardless of their ability to pay.[164] It covers costs related to prescription drugs; medical supplies and equipment, which would include items such as wheelchairs and other mobility devices; medical transportation to access health services that are not located on reserve; optometric services; dental services; and short-term mental health counseling.[165]

I. The impact of Jordan's Principle

90. In addition to the network of social programs and health care services available to First Nations living on reserve, the Respondent has implemented Jordan's Principle.

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157 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
158 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
159 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
160 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
161 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
162 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
163 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
164 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147
165 *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

This is a "child-first" principle passed by the House of Commons as a non-binding resolution. It was developed in response to the case of Jordan River Anderson, a First Nation child of the Norway House First Nation born with severe disabilities and complex needs, who was hospitalized from the time of birth.[166] Jordan reached a point in his case where he could have been transferred to a medical foster home in Winnipeg but there was a dispute between the federal and provincial governments regarding which government was responsible for paying for the supports required in the medical foster home.[167] Before the dispute was resolved, Jordan passed away in hospital.[168]

91. In honour of Jordan, the House of Commons passed motion 296, which states "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 Nation children."[169]

92. Following the resolution of the House of Commons, the Respondent was given the lead in implementing the motion.[170] The Respondent partnered with Health Canada, as both departments are key players in the funding of programs for First Nation children on reserve and each have programs that could be implicated in a Jordan's Principle case.[171]

93. Based on Jordan River Anderson's case, criteria for what would be a Jordan's Principle case were formulated by both departments and approved by Cabinet.[172] They are: 1) the child must be First Nation living or ordinarily resident on reserve; 2) there is a federal/provincial jurisdictional dispute over the service to be provided that has an impact on the continuity of care; 3) the child was assessed by health and social service professionals and found to have multiple disabilities requiring services from multiple service providers and 4) the service in question must be a

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166 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
167 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
168 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 9-13
169 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 12-13 and 16-17; *Motion 296 on Jordan's Principle*, HR-3, tab 20
170 *Testimony of Corinne Baggley*, Transcript vol 57, pg 13
171 *Testimony of Corinne Baggley*, Transcript vol 57, pgs13, 24-8; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs11-12
172 *Testimony of Corinne Baggley*, Transcript vol 57,pg 13

service that would be available to a child residing off reserve in the same location.[173]

94. Once these four criteria are met, the government that is first contacted ensures that financial support for the care of the First Nation child will continue while the governments work out a resolution to the jurisdictional dispute.[174]

95. The definition of Jordan's Principle cannot be expanded or altered without obtaining Cabinet approval and receiving new policy authority.[175]

96. With the input of the provinces, Jordan's Principle has been implemented across Canada, although the implementation varies in each jurisdiction.[176] British Columbia, New Brunswick, Saskatchewan and Manitoba have formal processes in place, while the remaining jurisdictions opted for an informal case-by-case approach.[177]

97. Jordan's Principle is not a program and does not have funding attached to it.[178] Rather it is a policy, or a process that sits on top of the existing programs that support First Nation children with disabilities.[179] The programs that may be involved, or implicated, in a Jordan's Principle case may be funded by the Respondent or Health Canada and can include, but are not limited to: Special Education, the FNCFS Program, Assisted Living, Income Assistance, Home and Community Care, and Non-Insured Health Benefits.[180]

98. The application of Jordan's Principle is not meant to change the authorities of the implicated programs but to ensure the First Nation child is able to access the services from these programs.[181] Although Jordan's Principle may involve a child in care, it does not apply solely to children in care, but rather to all First Nation

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173 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 13-14 and 17-20
174 *Testimony of Corinne Baggley*, Transcript vol 57, pg 15
175 *Testimony of Corinne Baggley*, Transcript vol 57, pg 29
176 *Testimony of Corinne Baggley*, Transcript vol 57, pg 37
177 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 37-8
178 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-30, 128; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
179 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-30
180 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 29-31
181 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 31-2

children on reserve.[182]

i. The Jordan's Principle approach

99. Case conferencing is the first step when a potential Jordan's Principle case comes to the attention of a focal point.[183] Focal points are federal government employees, either program specialists or program advisors, who work in the regional offices and are familiar with the programs that may be implicated in a Jordan's Principle case.[184] They are the point of first contact and are the ones to initiate the case conferencing and ensure all affected parties are included.[185] There are focal points for Health Canada and the Respondent in every province and Yukon.[186]

100. The purpose of case conferencing is to bring all involved parties together in order to find a solution to the underlying issue.[187] Case conferencing involves the affected parties, which usually includes the federal government, the provincial government, the service providers, and the family or their representative.[188]

101. Case conferencing is not limited to cases that meet the criteria for Jordan's Principle.[189] All cases that potentially raise a jurisdictional dispute are looked at and case conferencing is conducted in order to try and resolve the underlying issues.[190] Through the application of this approach, solutions have been found for many cases, even though they do not meet the federal definition of Jordan's Principle.[191]

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182 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 32-33
183 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 23, 84
184 *Testimony of Corinne Baggley*, Transcript vol 57, pg 81; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
185 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 81-2
186 *Testimony of Corinne Baggley*, Transcript vol 57, pg 82
187 *Testimony of Corinne Baggley*, Transcript vol 57, pg 85
188 *Testimony of Corinne Baggley*, vol 57, pgs 40-1; *Testimony of Sheilagh Murphy*, Transcript vol 54, pgs 11-12
189 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 23, 43
190 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 43-4
191 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 96-7; *JP Tracking Tool Preliminary Findings Chart*, R-14, tab 53

J. The Complaint

102. In 2007, the Complainants filed a complaint with the Canadian Human Rights Commission, alleging that the Respondent was providing inequitable levels of funding for child welfare on reserve, in violation of section 5 of the Act.[192]

103. In 2010, the Attorney General moved to dismiss the complaint on the basis that the substance of the complaint exceeded the scope of section 5 of the Act. The Tribunal dismissed the complaint on the basis that section 5 did not permit the comparison of the actions of two different service providers.[193] This decision was overturned on judicial review and this reversal was affirmed by the Federal Court of Appeal. The complaint was then referred back to the Tribunal for hearing.[194]

104. The hearing of the complaint commenced in February 2013 and proceeded over approximately 16 weeks and included testimony from 25 witnesses.

Part II – Issues

105. The issues for the Tribunal to determine are:

1. Comparison of federal and provincial funding does not prove a *prima facie* case of discrimination under section 5;
2. Even without a comparison, there is no proof of a *prima facie* case of discrimination under section 5; and
3. The remedies sought are inappropriate for this complaint.

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[192] *Complaint Form*, HR-1, tab 1
[193] *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75
[194] *Canada (Attorney General) v. Canadian Human Rights Commission, supra*

Part III – Argument

Preliminary issue: This complaint is beyond the scope of section 5 of the Act

A. No cross-jurisdictional complaints under the Act

106. Comparison between federal and provincial/territorial funding systems is not a valid comparison under the Act.

107. While the issue of whether this type of comparison was appropriate was addressed by the Federal Court of Appeal in its decision on the Respondent's appeal of the jurisdictional motion, the Court left open the possibility of having the Tribunal determine the appropriateness of the comparison in the context of the full hearing.[195]

108. There is a lack of cases where the Act or any other provincial human rights legislation has been used to make comparisons across jurisdictions. This may reflect recognition by the Courts and administrative bodies that statutes enacted by a given order of government cannot exceed their jurisdictional limits. In fact, the purpose clause of the Act states that it is limited to matters "within the purview of matters coming within the legislative authority of Parliament."[196]

109. On occasion, Courts have been called on to assess claims under section 15 of the *Charter of Rights and Freedoms* ("the Charter") that involve cross-jurisdictional comparisons. Even though such claims are more conceivable since the Charter is not jurisdictionally limited, they have not been successful. In *R. v. S.*, the Supreme Court of Canada dealt with a provision of the *Criminal Code* which permitted provincial attorneys general to provide certain "alternative measures" for young offenders. Ontario had not done so. In determining that there was no section 15 violation, as distinctions based on province of residence likely do not engage a "personal characteristic" similar to

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[195] *Canada (Attorney General) v. Canadian Human Rights Commission, supra,* at para 21

[196] *Canadian Human Rights Act*, RSC. 1985, c. H-6, section 2

those enumerated in section 15, the Court stated:

> Obviously, the federal system of government itself demands that the values underlying s. 15(1) cannot be given unlimited scope. The division of powers not only permits differential treatment based upon province of residence, it mandates and encourages geographical distinction. There can be no question, then, that unequal treatment which stems solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a s. 15(1) challenge on the basis only that it creates distinctions based upon province of residence. [197]

110. The section 15(1) case law supports the view that anti-discrimination law in Canada is not intended to address differences arising from the legitimate exercise of authority between two different jurisdictions, whether as between two provinces or as between a province and the federal government.[198] If the Charter, a constitutional document, is not a mechanism for equalizing differences between jurisdictions, then the Act, a quasi-constitutional federal statute cannot serve this function.

111. Even without the legal constraints barring cross-jurisdictional comparisons, there are also practical issues that make such a comparison unworkable. In the context of the present case for instance, there are variations in both the structure and services offered between the provinces. Further, there is nothing to prevent a province from increasing or decreasing its funding for its child welfare programs from time to time. This type of approach would also encroach on the federal government's ability to direct policy and public spending in accordance with its own priorities and spending choices.

112. The purported cross-jurisdictional comparison must also fail since it depends on the assumption that the provincial funding of child welfare across the country adequately addresses the needs of its recipients in a non-discriminatory way. There is no evidentiary basis for this assumption and the required analysis is

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197 *R. v. S.*(S.) [1990] 2 SCR 254, at para. 21

198 *R. v. S.*(S.) [1990] 2 SCR 254, at para. 21; See also *Haig v. Canada* [1993] 2 S.C.R. 995; *Chippewas of Nawash v. Canada*, 2000 CanLII 16536 (FC); aff'd at 2002 FCA 485; *Penner v. Danbrook*, [1992] 4 W.W.R. 386 at 390-91; and *Kelman v. Stibor* (1998), 55 C.R.R. (2d) 165 at 171

outside the jurisdiction of the Tribunal. Accordingly, the cross-jurisdictional analysis cannot form the basis of a complaint under section 5 of the Act and the complaint must fail.

B. No comparison between different service providers under the Act

113. Even without the cross-jurisdictional roadblock faced by this complaint, it is fundamentally flawed on the basis that it seeks to compare two different service providers. As was the case with cross-jurisdictional comparisons, there is a dearth of jurisprudence under the Act or any other human rights legislation where complainants have sought to compare different service providers serving two different publics. [199]

114. That said, there is jurisprudence in the employment context where the Federal Court overturned a Tribunal decision purporting to compare the discipline imposed on a female employee of one employer with a male employee of a subcontractor of the employer. The employee of the subcontractor was found to not be an appropriate comparator, as actions with respect to his employment were not within the control of the employer.[200]

115. The assertion in the present case is that the Respondent's funding must mirror that of numerous separate entities (the provincial and Yukon governments) over which it has no control. The claim cannot succeed as the Act cannot be used as a vehicle to equalize differences in treatment as between different entities serving different publics.

116. Accordingly the complaint should be dismissed, as it fails to make a valid comparison necessary for a section 5 analysis.

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[199] The Respondent does not concede it is a service provider for the purposes of section 5, which is discussed in greater detail in the analysis of the substantive claim.

[200] *Warren Gibson Ltd. v. Canada (Human Rights Commission)*, 2004 FC 1439, at para 21-24

Issue 1 – Comparison of Federal and Provincial Funding Does Not Prove a *Prima Facie* Case under Section 5

117. If the complaint survives the preliminary arguments, it still fails on its merits as the Complainants have failed to establish a *prima facie* case of discrimination under section 5 of the Act.

A. The test for discrimination under section 5

118. Complainants in proceedings before human rights tribunals bear the onus of showing a *prima facie* case of discrimination on a balance of probabilities. A *prima facie* case in this context 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.[201]

119. There is only one standard of proof in a civil case - that is proof on a balance of probabilities and there are no degrees of probability within that civil standard.[202] Failure to discharge this onus means the complaint has not been substantiated and will be dismissed.

120. If the Complainants succeed in demonstrating that a *prima facie* case exists, the onus then shifts to the Respondent to demonstrate either: 1) the alleged discrimination did not occur as alleged by providing a reasonable (non-pretextual) explanation; or 2) the conduct was somehow non-discriminatory or justified by one of the defences under the *Act*.[203] If the Respondent discharges this onus, the complaint will be dismissed as unsubstantiated. The Respondent is not required to justify what is not a *prima facie* case of discrimination.[204]

121. As this complaint is brought under section 5 of the Act, its specific requirements must be considered when determining whether a *prima facie* case has been established. The Federal Court of Appeal has also said that this test prevents

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201 *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 28("*O'Malley*").

202 *F.H. v. McDougall*, 2008 SCC 53

203 *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para 22; *Beattie and Louie v. Indian and Northern Affairs Canada,* 2014 CHRT 7, at paras 65-66

204 *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4, at para 54

consideration of the Respondent's explanation for the impugned conduct at the *prima facie* stage.[205] However, this does not preclude a determination of whether it is reasonable to infer the existence of the required link between any denial or adverse differentiation and a prohibited ground.[206]Nor does it preclude consideration of the complex socio- economic context that is engaged by this complaint.[207]

122. In assessing whether a *prima facie* test exists under section 5, the following must be established by the Complainants on the balance of probabilities:

    i. The Respondent was engaged in the provision of "services customarily available to the general public", within the meaning of section 5;

    ii. The Respondent either denied the service to the Complainants, or adversely differentiated against the Complainants in the provision of the services;

    iii. The denial of adverse differentiation was based on whole or in part on a prohibited ground of discrimination and/or had a disproportionate adverse impact on persons indentified by a prohibited ground of discrimination. [208]

123. In *Moore v BC (Education)*, the Supreme Court noted that in order to demonstrate *prima facie* discrimination, the complainants are required to show that they have a characteristic protected from discrimination under the human rights legislation; that they experienced an adverse impact as a result of the level of funding; and that the protected characteristic was a factor in the adverse impact they experienced.[209]

124. As a result, the Complainants in this case must show something more than that they possess one of the grounds protected under the Act and that there is a difference in how they have been treated. They must show that the protected ground has some nexus with the adverse impact they allege. They must also demonstrate that the adverse impact was experienced with respect to the service at issue.

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205 *Lincoln v. Bay Ferries Ltd., supra,* at paras 18 and 22

206 *Armstrong v. BC (Min. Of Health),* 2010 BCCA 56, at para 29

207 *Canada (Attorney General) v. Johnstone et al.*, 2014 FCA 110, at para 84; *Ontario (Disability Support Program) v. Tranchemontagne,* 2010 ONCA 593, at paras 89, 91

208 *Beattie and Louie v. Indian and Northern Affairs Canada, supra,* at para 54

209 *Moore v. BC (Education),* 2012 SCC 61, at para 33

125. In other words, the Complainants must not only show that they have experienced adverse impacts resulting from the levels of funding provided , but also that the protected characteristic they possess was a factor. A nuanced inquiry is required in order to properly assess "whether a distinction based on an enumerated ground that creates a disadvantage actually engages the right to equal treatment under the [Act] in a substantive sense."[210]

126. The Supreme Court has said there is a difference between discrimination and a distinction. Not every distinction is discriminatory.[211] It is not enough to impugn another's conduct on the basis that what was done allegedly failed to fully ameliorate the needs of individuals in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact that triggers the possibility of a remedy. And it is the Complainants who bear this threshold burden.[212]

127. In this case, the evidence demonstrates that the federal government is funding child welfare services that are regulated and administered by provinces and Yukon because those same provinces and territory choose not to fund such services. Even if an adverse impact resulting from the apparent failure of those provinces and the Yukon to fund child welfare for First Nation children living on reserve could be linked to a protected characteristic, the same cannot be attributed to the federal government's decision to address that failure by stepping in to fill the perceived funding gap created by others.

128. The Complainants have not met the threshold onus of establishing the existence of a *prima facie* case of discrimination, namely, that they have been disadvantaged by the Respondent's conduct based on stereotypical or arbitrary assumptions about aboriginal persons.

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210 *Tranchemontagne, supra*, at para 91

211 *McGill University Health Centre (Montreal General Hospital), supra*, at paras. 48-49

212 *McGill University Health Centre (Montreal General Hospital), supra*, at paras 48-49; *Honda Canada Inc. v. Keays*, 2008 SCC 39, at para 67; *Moore, supra*, at paras 33 and 60

B. The Respondent was not providing a service under section 5

129. As the Respondent does not provide a "service" within the meaning of section 5 of the Act, the complaint does not raise a *prima facie* case.

130. First, funding provided to FNCFS Agencies is not something "customarily available to the general public" as required by section 5 of the *Act*.

131. In *Gould v. Yukon Order of Pioneers,* the Supreme Court established a two-part analysis to interpret section 8(a) of the *Yukon Human Rights Act*, which prohibits any person from discriminating "when offering or providing services, goods, or facilities to the public":[213]

> The first step in the analysis involves a determination of what constitutes the "service", based on the facts before the court. Having determined what the "service" is, the next step requires a determination of whether the service creates a public relationship between the service provider and the service user. Inherent in this determination is a decision as to what constitutes "the public" to which the service is being offered, recalling that public is to be defined in relational as opposed to quantitative terms. In ascertaining a "public relationship" arising from a service, criteria including, but not limited to, selectivity in the provision of the service, diversity in the public to whom the service is offered, involvement of non-members in the service, whether the service is of a commercial nature, the intimate nature of the service and the purpose of offering the service will all be relevant. I would emphasize that none of these criteria operate determinatively; for example, the mere fact that an organization is exclusive with respect to the offering or providing of its service does not necessarily immunize that service from the reach of anti-discrimination legislation. A public relationship is to be determined by examining the relevant factors in a contextual manner.[214]

132. The scope of section 5 was further defined in *(Attorney General) v. Watkin.*[215] In *Watkin*, the Federal Court of Appeal expressly rejected the idea that all government actions come within the ambit of section 5 of the Act.[216] Instead, the Tribunal must first determine, on the basis of the evidence presented, what constitutes the

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213 *Gould v. Yukon Order of Pioneers* [1996] 1 S.C.R. 571

214 *Gould v. Yukon Order of Pioneers, supra,* at para 68

215 *Watkin v. Canada (AG),* 2008 FCA 170; also see *Forward v. Canada (Citizenship and Immigration),* 2008 CHRT 5; *Dreaver v. Pankiw,* 2009 CHRT 8, upheld in 2010 FC 555; *Andrews v. Indian and Northern Affairs Canada,* 2013 CHRT 21

216 *Watkin v. Canada (AG), supra*

"service" and whether it was provided in a discriminatory manner.[217]

> [...] There is, therefore, a requisite public relationship between the service provider and the service receiver, to the extent that the public must be granted access to or admitted to or extended the service by the service provider. There is a transitive connotation from the language employed by the various provisions; it is not until the service, accommodation, facility, etc., passes from the service provider and has been held out to the public that it attracts the anti-discrimination prohibition. [...]

133. The "transitive connotation" from the language of the various human rights statutes examined in *Gould* is present in section 5 of the Act in the words "in the provision of services."[218]

134. The funding at issue is provided on a government to government or government to agency basis and follows a process of discussion and implementation. Individual First Nation children and their families are not invited or expected to participate in the creation of these funding arrangements. They are not parties to the resulting contract and would normally be excluded by the doctrine of privity from seeking legal redress for alleged breaches.

135. As a result, the funding itself is not being held out as a service to the public. Rather, the benefit that is being held out as a service and offered to the public are the provincially mandated child prevention and protection services that the agencies (and not the Respondent) directly provide to individual First Nation children and their families. The delivery of services reflects the requirements of the applicable provincial child welfare schemes and the particular cultural context of the communities that the FNCFS Agency serves.

136. Contrary to the arguments of the Complainants, the Respondent does not "control" the services and programs delivered by the FNCFS Agencies. Control over issues such as whether a FNCFS Agency receives delegated authority or is in compliance with the statutory and regulatory requirements for delivery of child welfare services, rests with the provinces. The decisions on which services and programs to provide and the way in which they will be provided, is within the control of the

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217 *Watkin v. Canada (AG), supra*

218 *Canadian Human Rights Act, supra*, at s. 5

FNCFS Agency, under the supervision of the province/Yukon.

137. The role of the Respondent is limited to providing funding for child welfare on reserve and being accountable for the spending of those funds. In fulfilling this duty, the Respondent has responsibility to ensure that the funding provided to the FNCFS Agencies is being used for child welfare expenses, as required by the Terms and Conditions of the FNCFS Program.

138. Even if the Tribunal was to find that the provision of federal funding constitutes a service under section 5 of the Act, then the recipients of that service, and the victims of the practice, are the agencies that receive funding. These funding recipients are not individuals but artificial entities incapable of having their human dignity infringed and it is questionable whether they can suffer, let alone bring a claim of discrimination.[219]

139. The Complainants cannot establish the threshold issue to the section 5 analysis that the Respondent is providing a "service" by funding FNCFS Agencies. Accordingly, the complaint should be dismissed.

C. There is no denial or adverse differentiation in the provision of a service

140. Even if the funding provided by the Respondent is found to be a service, the Complainants have failed to show a denial of the service or adverse differentiation in the provision of that service.

i. There is no denial of a service under section 5

141. There is no evidence to support an allegation that child and family services are denied to First Nation children on reserve. While the Complainants allege that First Nation children living on reserve are "precluded from accessing, or have limited access to, child and family services", no specific examples or references to evidence were given to support this assertion.[220] Disagreement with the sufficiency or quality

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219 *Canada (Attorney General) v. Hislop*, 2007 SCC 10, at para 72

220 The sole reference to this argument is found in the *Closing Submissions of the Commission*, at para 419

of the services does not equate to a denial of service. This aspect of the claim should be dismissed as unfounded.

ii. There is no adverse differentiation under section 5

142. At the heart of this complaint is the allegation that the Respondent underfunds child welfare services on reserve compared to the funding provided by the provinces and Yukon to the off reserve population. The comparison between federal and provincial funding is one raised by the Complainants and is the cornerstone of the case they advanced.

143. Even assuming this is an appropriate and legitimate comparison to make; the allegation is not supported by the evidence before the Tribunal. In order to substantiate this allegation, the Complainants would have first had to demonstrate how much funding is provided by the Respondent and the provincial/Yukon governments for child welfare services. Only after the amount of funding for both is reliably established, could the Tribunal determine if there is even a difference and whether that difference amounts to adverse differentiation.

144. The Complainants failed to produce even one witness from a province or Yukon who was in a position to provide authoritative and reliable evidence as to how the provincial/Yukon governments fund child welfare services and how much funding is provided. Moreover, they provided no reliable documentary evidence addressing this issue.

145. The onus was on the Complainants to establish a *prima facie* case of adverse differentiation with respect to the funding of child welfare services on reserve and they failed to do so.

146. An adverse inference should be drawn against the Complainants. In civil cases, an unfavourable inference can be drawn, where, in the absence of an explanation, a party litigant fails to call a witness who would have knowledge of the facts and

would be willing to assist the party.[221] No such witness was called nor was any explanation for the failure to do so given.

147. No such adverse inference should be drawn against the Respondent. An adverse inference can only be drawn after a *prima facie* case has been established by the party bearing the burden of proof. The evidence lead by the Complainants has not established a *prima facie* case regarding levels of provincial funding.[222]

148. An example of the lack of evidence on how the provinces and Yukon fund was shown in the expert evidence of Dr. Trocmé, who testified that he had never researched how provinces fund their child welfare programs or done any research to compare the level and type of services offered federally as opposed to provincially.[223]

149. The Complainants' witnesses testified in large part about perceived differences between services and programs being offered by their individual FNCFS Agencies and those being offered in the surrounding off reserve communities. However, they provided little empirical evidence to substantiate their allegations, which were often anecdotal in nature.

150. As an example, Derald Dubois, the Executive Director for Touchwood Child and Family Services, asserted that the province of Saskatchewan funded programs, which were unavailable to the First Nations families in his community. However, on cross-examination, he admitted that the same type of programs, tailored to his community's cultural needs, were in fact, offered by Touchwood. [224]

151. Some of the Complainants' witnesses also testified about issues related to getting funding from the FNCFS Program for expenses such as mobility devices, mental health services and orthodontics[225] However, the evidence also revealed that funding for such medical expenses is available through programs offered by Health

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221 *Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, The Law of Evidence in Canada, 4th ed (Markham, Ont: LexisNexis, 2014*, pp. 386-387 at 6.450

222 *Dwyer v. Mark II Innovations Inc.*, 2006 CarswellOnt 1837, at para 4

223 *Testimony of Dr. Nico Trocmé*, Transcript vol 8, pgs 36-38

224 *Testimony of Derald Dubois*, vol 10, pgs 23-7 and 44-7

225 See for example, *Testimony of Raymond Shingoose*, Transcript vol 31, pgs 55-6 and 143-4; *Testimony of Darrin Keewatin*, Transcript vol 32, pgs 71-2 and 76-77; *Testimony of Cindy Blackstock*, vol 47, pgs 258-61

Canada.[226]

152. Moreover, the evidence revealed that expenses for children in care that are not covered by other federal programs are paid for by the FNCFS Program, even if they do not fall strictly within the FNCFS Program authorities.[227]

153. In any event, the experience of a few FNCFS Agencies does not inform the analysis of whether there is differential treatment. Some FNCFS Agencies are more successful than others for a wide range of reasons. Further, the difference between the level of services and programs offered might have little to do with funding and more to do with choices made by the FNCFS Agency about the type of services and programs they want to provide and other administrative issues affecting the overall budget.[228]

154. With respect to the perceived issues with the EPFA, some of the Complainant witnesses claimed that funds to cover deficits in the maintenance budget had to come from the operations or prevention streams of funding. However, the evidence from the Respondent demonstrated that increases in maintenance costs are covered by the FNCFS program.[229] Only if there is an overall surplus in the FNCFS Agency's budget at the end of a year will the FNCFS Agency be asked to use the surplus to off-set the increase in maintenance expenditures.[230]

155. Lastly, the allegation that funding under the EPFA is essentially the same as under Directive 20-1 is inaccurate. The Respondent's evidence demonstrated that operations funding under the EPFA and Directive 20-1 are calculated in a completely different manner with different funding formulas.[231]

156. Given the national context of this complaint, evidence from each jurisdiction was required to establish discrimination in funding levels. Without this evidence, there can be no reliable comparison of federal and provincial/Yukon government funding

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226 *First Nations and Inuit Health- Program Compendium*, R-14, tab 90; *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147

227 *Testimony of Barbara D'Amico*, vol 50, pgs 97-8, 122

228 See for example: *Mi'kmaw Family & Children's Services of Nova Scotia- Operational Review 2013*, R-13, tab 14

229 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 164-181

230 *Testimony of Barbara D'Amico*, Transcript, vol 50, pgs 164-181

231 *Testimony of Barbara D'Amico*, vol 50, pg 18-66

and thus, no basis to conclude the existence of adverse differentiation.

iii. The BC and Alberta agreements are not evidence of underfunding

157. In BC, the Respondent is billed for provincial delivery of child and family services on reserve through a Service Agreement between the Respondent and the province of BC that replaced the former Memorandum of Understanding. This Service Agreement cannot be considered credible evidence of how the province funds the off reserve population, as there is a lack of evidentiary support for how these expenses are calculated.[232]

158. In Alberta, the Complainants argue particular programs and/or services are reimbursed by the Respondent to the province, while the FNCFS Agencies do not receive funding for the same services or programs. However, this ignores the evidence that the FNCFS Agencies are not funded for specific programs but can instead use the overall amount of funding to offer the programs they determine are relevant and culturally appropriate for their population. In addition, many of the programs and services referenced in the Alberta agreement were in relation to health programs, which would be available through Health Canada and other social programs funded by the Respondent.[233]

159. As noted, the provincial and federal governments do not fund in the exact same manner. Any suggested differences in how the Respondent funds FNCFS Agencies as compared to the provincial agencies are a reflection of this difference and do not demonstrate that less funding is provided to the FNCFS Agencies.

iv. Reasonable comparability is an administrative term, not a test for adverse differentiation

160. The Respondent's policy objective of "reasonable comparability" is to ensure

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232 *Testimony of William McArthur*, Transcript vol 63, pgs 68-70

233 *Testimony of Darrin Keewatin*, Transcript vol 32, pgs 164-187; *Testimony of Carol Schimanke*, Transcript vol 62, pgs 2-18; *Testimony of Debra Gillis*, Transcript, vol 64, pgs 133-147; *First Nations and Inuit Health- Program Compendium*, R-14, tab 90

funding for child welfare services allows children on reserve to receive services in a comparable manner to services available off reserve, while recognizing the inherent differences in organizational structure between provinces and the federal government.[234] The goal of reasonable comparability ensures that First Nation communities maintain flexibility to design their own programs to the extent possible, for example in the area of prevention, while maintaining an overall comparable level of service to that offered in the provinces.[235]

161. The objective of "reasonable comparability" is not meant to require that mirror services are provided on and off reserve. The primary roadblock for such an exact comparison is the different organizational structures of the provincial and federal systems. While many of the provinces may provide a wide range of services to address the needs of children through one department, this is not possible at the federal level where several departments have a role to play in achieving better outcomes for First Nation children on reserve.[236] It does not mean, however, that First Nation children on reserve are not receiving these services. Rather it means they are receiving these services through a different organizational structure than those used by the provinces and Yukon.

162. An additional roadblock in measuring the comparability of federal funding to provincial funding is the role of First Nation communities, who receive the funding and make choices based on their priorities for how that money should be spent.[237] At the end of the day the goal remains to ensure comparable funding and to improve ways of measuring comparability with the provinces.[238]

v. The documentary evidence does not support a *prima facie* case

163. The Complainants rely on an assortment of internal government documents, which they assert are admissible for the truth of their contents, either as "public

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234 *Testimony of Sheilagh Murphy*, vol 54, pgs 73-4
235 *Testimony of Sheilagh Murphy*, vol 54 at pgs 73-4
236 *Testimony of Sheilagh Murphy*, vol 54, pgs 224-227
237 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pg 227
238 *Testimony of Sheilagh Murphy*, Transcript, vol 54, pg 231-232

documents" or admissions against interest by the Respondents. This assertion overshoots the mark.

164. The information in these documents are not admissions. At best, they reflect personal views of employees of the department at particular points in time. While these documents have been admitted into evidence, the Tribunal should access their weight contextually with reference to the Respondent's *viva voce* evidence regarding their proper interpretation.

165. When weighing the evidence, the Tribunal must also consider the scope of the author's authority to prepare the document in question.[239]

166. Further, the Complainants' reliance on the statements and views expressed in the federal and provincial Auditors General Reports and the provincial Children's Advocates' reports should be given minimal, if any weight. The authors of the documents have not been called to substantiate the documents or provide the context for the statements or opinions. These reports are not probative of the facts in issue and do not help the Tribunal decide if a claim of discrimination is founded.

167. Certain other third party reports relied upon by the Complainants, such as the *Blue Hills* report and the *Wen:de* reports, suggest a discrepancy between the levels of federal and provincial funding provided for child welfare. However, the authors of the *Blue Hills* report were not called to testify and the report itself includes several caveats as to its limitations.[240] Accordingly, the underlying methodology and credibility of the conclusions drawn in this report cannot be assessed.

168. Although some of the contributors to the *Wen:de* reports were called as witnesses, none were able to give substantive detailed evidence about the level of provincial funding compared to federal funding. The first of these witnesses, Dr. Blackstock, was unable to address the nature and extent of any research into the comparison of federal and provincial funding that might have been undertaken. Instead, she advised that another one of the authors, Prof. Loxley would be able to address this

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239 *Daum v. Schroeder*, 1996 CarswellSask 440 (Q.B.), at para 18

240 *First Nations Child and Family Services National Policy Review Funding Issues: Final Report*, HR-6, tab 66

issue.[241] However, in his testimony, Prof Loxley indicated he could not and admitted a lack of personal knowledge and experience with respect to this issue.[242] Similarly, Dr. Trocmé, another one of the authors, testified that he had never researched or undertaken any analysis of the differences between federal and provincial/territorial funding levels or models.[243]

169. In light of the above, the Tribunal should give little, if any weight, to the findings of those reports regarding the levels of provincial and federal funding of child welfare. Similarly, little weight should be given to the evidence of the Complainants' witnesses who relied on the conclusions and findings of those reports.

170. The Complainants have failed to establish a *prima facie* case through either their *viva voce* or documentary evidence. Accordingly the complaint should be dismissed.

Issue 2 – Even without a comparison, there is no *prima facie* case under section 5

A. The alternative argument cannot succeed

171. The Complainants' alternative argument - that even without a comparison group, federal funding for child welfare on reserve is still discriminatory - cannot succeed. Policy decisions regarding the expenditure of public funds are within the exclusive purview of the Executive. The task of the Tribunal in determining whether a *prima facie* case has been established is to determine whether adverse differentiation has been taken place. It is not to make determinations regarding the sufficiency of federal policy making, planning or spending priorities.

172. The Complainants' alternative argument also disregards the important role of comparison in a complaint of discrimination. Comparison is an essential feature of the analysis under human rights legislation. Relying on *Andrews*, the Supreme Court in *Battlefords and District Co-operative Ltd. v. Gibbs* stated:

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241 *Testimony of Cindy Blackstock*, Transcript vol 5, pgs 98-108
242 *Testimony of John Loxely*, Transcript vol 28, pgs 21-27
243 *Testimony of Dr. Nico Trocmé*, Transcript vol 8, pgs 36-38

> A finding of discrimination based on the imposition of a burden or the withholding of a benefit must be rooted in a comparison of the treatment received by a person with the treatment received by other persons.[244]

173. The legislation also reflects this necessity when it states that the purpose of the Act 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."[245]

174. In *Boulter v. Nova Scotia Power Incorporated*, the Nova Scotia Court of Appeal disagreed with the assertion that that comparator analysis is relevant only to direct discrimination in a Charter claim and is replaced for adverse effect discrimination by a need to show only that there is a failure to ameliorate the claimants' situation. The Court stated:

> The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would afford simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (on protected grounds) that is discriminatory.[246]

175. In *Withler v. Canada*, the Supreme Court emphasized that "Comparison plays a role throughout the [section 15] analysis." The Court went on to note:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[247]

176. The Complainants are essentially claiming that child welfare on reserve could be more effective if it was designed and/or funded differently or more substantially. However, the task of this Tribunal is to determine whether there is adverse differential treatment based on an enumerated ground, not whether a service or program for example, could be "better".

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244 *Battlefords and District Co-operative Ltd. v. Gibbs* [1996] 3 SCR 566, at para 29
245 *Canadian Human Rights Act, supra*, s. 2
246 *Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17, at paras 72-73; also see paras 52-83
247 *Withler v. Canada*, 2011 SCC 12, at paras 41, 61 and 62

177. Government is making a policy decision to provide funding at a macro-level and on a scale that covers not only a range of actual services and benefits but also the indirect administration costs of the FNCFS Agencies that are responsible for providing them. This decision reflects complex policy choices with regards to public spending. The provision of funding at such high policy level engages the balancing of competing interests and priorities. Such decisions are entitled to some considerable degree of deference and a margin of reasonableness.[248]

178. What started out as a complaint that the FNCFS Program provided inequitable funding in comparison to what provinces and territories provide to their child welfare agencies now includes a wide variety of allegations. The fact the Complainants now allege a range of generalized complaints demonstrates that their concerns are not really about alleged discrimination but with the general policy approach taken by the government – they have effectively launched the Tribunal on an inquiry of government policy, rather than an investigation into alleged discriminatory practices.[249]

B. There is no evidentiary support for the alternative argument

179. Aside from the legal issues confronting the Complainants, there is no evidentiary foundation to support their claim that the high number of First Nation children on reserve in care is a result of the Respondent's funding.

180. When asked if he could draw a conclusion as to whether the level of federal funding verses provincial funding was having an adverse impact for First Nation on reserve children, the Complainants' expert, Dr. Trocmé made it clear that one must be "very careful" in trying to compare funding on and off reserve. "It's not just an on/off Reserve distinction, it's also Reserve verses urban aboriginal distinction. You really are comparing apples and oranges."[250]

181. The evidence does not show a uniform number of children in care throughout the

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[248] See: *Moore v. BC (Education), supra*; *Armstrong v. BC (Min. Of Health), supra*; and *Tranchemontagne, supra*

[249] *Moore, supra*, at para 64

[250] *Testimony of Dr. Nico Trocmé*, Transcript, vol 8, pg 51

jurisdictions that are federally funded. If the Respondent's funding was in fact the cause of the numbers of children in care, it would be reasonable to assume that they would be the same throughout. However, there is a fluctuation on the numbers, with large jurisdictions such as BC and Saskatchewan having the lowest child in care counts of 3.6% and 3.7% respectively.[251]

182. What the evidence does show is that First Nation children are equally over-represented in the child welfare system whether they live on or off reserve, thus whether they are funded federally or by the provincial/territorial governments.[252]

183. The evidence also suggests that the reasons for higher rates of First Nation children in care are multifaceted and linked to a number of socio-economic factors. These factors include: poverty, substance abuse, housing, health and other issues. Such issues are often beyond the scope of child welfare policies.

184. Ascribing the high rates of First Nation children in care to insufficient federal funding of a particular suite of programs and services is unwarranted and in any event, overly simplistic as it fails to take into account the complex policy responses to a range of complex socio-economic issues.

C. Fiduciary duty principles are not applicable to the complaint

185. The Complainants allege that fiduciary duty and the honour of the Crown are engaged by the historical context and argue that these principles support a finding of discrimination. This argument is unsound in law and principle. There is also an absence of evidence to establish a breach of fiduciary duty.

i. A specific fiduciary duty is not engaged by this complaint

186. This complaint does not engage a specific fiduciary duty. While it is established that there is a general fiduciary relationship between the federal Crown and the

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251 *Breakdown of numbers of children in care and associated costs*, R-13, tab 16
252 *Testimony of Dr. Nico Trocmé*, Transcript, vol 8, pgs 26, 38-39, 45, and 46

aboriginal peoples of Canada,[253] not every aspect of that relationship gives rise to a specific fiduciary duty and it is not a source of plenary Crown liability covering all aspects of that relationship.[254]

187. The common law test for a fiduciary duty is found in *Alberta v. Elder Advocates of Alberta Society* and requires that: (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise the power or discretion so as to affect the beneficiary's legal and practical interests; and (3) the beneficiary is particularly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[255]

188. Most recently, the Supreme Court held that there were two possible ways to establish that the Crown owes a fiduciary duty to aboriginal peoples in a particular situation.[256] The first way involves a Crown undertaking discretionary control over a specific or cognizable Aboriginal interest in a particular situation ("the *Wewaykum* test").[257] The interest must be a pre-existing, communal Aboriginal interest in the land that is integral to the nature of the distinctive community and their relationship to the land.[258]

189. The *Wewaykum* test arises from the application of the principle of the honour of the Crown,[259] in which fiduciary obligations flow from the Crown's historical responsibilities with respect to the *sui generis* Aboriginal interest in land.[260] As a result, where the Crown assumes discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a unique fiduciary duty, rooted in the Crown's exclusive, trust-like control over the lands.

190. No such interest is asserted or demonstrated in this complaint. The Complainants

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253 *Guerin v. The Queen*, [1984] 2 S.C.R. 335

254 *Lac Minerals Inc. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p597; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Weywaykum Indian Band v. Canada*, 2002 SCC 79, at para 81

255 *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para 27

256 *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14

257 *Manitoba Métis Federation, supra*, at paras 49 and 51; *Haida Nations v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18; *Wewaykum, supra*, 2002 SCC 79, at paras 79-83

258 *Manitoba Métis Federation, supra*, at paras 53 and 59

259 *Haida Nation v. British Columbia (Minister of Forests), supra*, at para 18

260 *Wewaykum, supra,* at paras 78-79; *Guerin, supra,* at pp 382, 385, 387

have not presented any evidence to show how providing public monies to fund FNCFS Agencies delivering child welfare is connected in any way to or affects any land-based rights, or reflects a communal, pre-existing and distinctly Aboriginal interest as contemplated in the jurisprudence.

191. The second way to establish a fiduciary duty is by demonstrating that there is a Crown undertaking to act in the best interests of a beneficiary, that the beneficiary would be vulnerable to Crown control and that the beneficiary's legal or substantial practical interests stand to be adversely affected by the fiduciary's control or exercise of discretion ("the *Elder Advocates* test").[261]

192. The *Elder Advocates* test is based on the application of general principles of fiduciary law developed in the non Aboriginal context, in which persons who undertake to act in someone's best interests, to the exclusion of all other interests, may be found to owe specific fiduciary duties in appropriate situations governed by a sense of exclusive loyalty.[262]

193. In the *Elder Advocates* case, the Supreme Court stated that a general obligation to the public or to sectors of the public cannot establish an undertaking to act in the beneficiary's best interests, and it may be difficult to show that a defined person or class of persons is vulnerable to the fiduciary's exercise of power. These requirements are not satisfied by a situation where a public authority is granted a power that may have an impact on a person's well-being, property or security, or when entitlements are contingent on future government action. The Court also indicated that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances".[263]

194. In *Manitoba Métis Federation*, the Court noted that a Crown undertaking under the *Elder Advocates* test means that "the power retained by the Crown must be coupled

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261 *Alberta v. Elder Advocates of Alberta Society, supra*, at para 36; *Manitoba Métis Federation v. Canada (Attorney General), supra*, at para 50

262 *Elder Advocates Society, supra,* at paras 29-37; *Manitoba Métis Federation, supra*, at para 47

263 *Elder Advocates Society, supra*, at para 37

with an undertaking of loyalty to act in the beneficiaries' best interests".[264] This means that, in order to show a fiduciary duty, a beneficiary must provide evidence that the fiduciary intended to forsake all other interests in favour of those of the beneficiary.

195. The Complainants have not provided evidence to demonstrate that the Respondent undertook to act in the best interests of any alleged beneficiary (such as an individual aboriginal claimant, the FNCFS Agencies, or other recipients of funding for child welfare) to the exclusion of all other interests. Without such evidence, a finding of exclusive loyalty is not warranted.

196. The Complainants have failed to establish the existence of a fiduciary duty owed by the federal government with respect to the funding of child welfare services on reserve, let alone a breach of that duty.

ii. A breach of fiduciary duty is not applicable to an examination of alleged discrimination

197. Even if a breach of fiduciary duty was established, it does not inform the issue before the Tribunal, regarding whether discrimination has occurred.

198. The AFN acknowledges that a finding of discrimination does not depend on the existence of a fiduciary duty.[265] However, the AFN goes on to argue that a finding of a fiduciary duty is relevant to the determination of the complaint, as it creates a standard to ensure that the Crown protects the interests of First Nation children, treats Aboriginal people fairly, and does not profit at the expense of its beneficiaries.[266] These arguments fail to specifically address the issue of substantive discrimination and fail to demonstrate how a breach of the alleged fiduciary duty would support a finding of discrimination.

199. The Caring Society argues that the Crown-Aboriginal fiduciary relationship (or the related principle, the honour of the Crown) helps to explain and justify why courts should endorse a "liberal interpretation of laws affecting Aboriginal Peoples" that

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264 *Manitoba Métis Federation, supra*, at para 61
265 *Closing submissions of the AFN*, at para 448
266 *Closing submissions of the AFN*, at para 450

would support a finding of discrimination in this case[267] The underlying assumption of this argument is that the Crown's alleged fiduciary duty requires a liberal interpretation of the Act because the principle of the honour of the Crown requires a large and liberal interpretation of important documents, such as treaties and constitutional legislation. The Caring Society's arguments also assert that the liberal interpretation that should be given to the Act is the one proposed by them.

200. The arguments of the Caring Society misread the jurisprudence concerning the principle of "liberal interpretation" and conflate the related, but distinct, principles of fiduciary law and the honour of the Crown.

201. The Caring Society also argues that a breach of a fiduciary duty constitutes unlawful discrimination under the Act.[268] However, no support is given for how the Caring Society arrives at this conclusion. The argument appears to be that the Crown has a fiduciary relationship with Aboriginal people only because of their Aboriginal identity, and as a result, any Crown breach of this fiduciary duty towards an Aboriginal claimant must also be because of the claimant's Aboriginal identity.

202. This reasoning is not supported by case law. The Supreme Court has said that while the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty.[269] The source of a fiduciary duty does not come from a beneficiary's cultural or racial identity and a breach of fiduciary duty will always depend on the factual circumstances of each case, not on the claimant's identity.

203. Finally, the Caring Society conflates the principle of justification of an infringement of an existing aboriginal or treaty rights affirmed under s. 35 of *Constitution Act, 1982*, with the statutory defences under the Act.[270] Specifically, the Caring Society invokes the s. 35 justification principle to argue that any justification of discriminatory treatment should also account for the Crown's fiduciary relationship with Aboriginal peoples. For example, the Caring Society suggests that the

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267 *Closing submissions of the Caring Society*, at para 38
268 *Closing submissions of the Caring Society* at para 39
269 *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, at para 23
270 *Closing submissions of the Caring Society*, at para 40

discrimination justification "test" under the Act does not equate with the concept of a "public interest", but should incorporate the standard of a "compelling and substantial" legislative objective, as stated in the jurisprudence regarding the infringement and justification of s. 35 rights, notably in the *Sparrow* decision.[271]

204. This line of argument confuses separate and discrete legal principles that are engaged by very different factual scenarios. The approach taken by the Caring Society borrows different concepts from one scenario and incorporates them in another without any reasoned and principled analysis showing how this is possible or desirable. Such intermingling of these concepts does not assist the Tribunal in determining whether a prima facie case of discrimination has been established.

205. The guarantee of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982,* like the Charter, operates as a limit on federal and provincial legislative powers. The Charter forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I Charter rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose.[272]

206. These limits have nothing to do with whether or not the exercise of such power violates the provisions of the Act, or constitutes a defence under the statute.

207. The legal principles involving these claims of discriminatory and breach of fiduciary duty are distinct and should not be intermingled. Fiduciary law has evolved from the jurisdiction of the Courts of Chancery over trusts and confidences. The key consideration in fiduciary duty is whether one has the right to expect that the other will act in the former's interest to the exclusion of his own several interests.[273] In contrast, claims of discrimination are statutorily based and are not synonymous with actionable claims arising in equity or common law.

208. Human rights legislation is not enacted to determine claims that can, and should, be

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271 *Closing submissions of the Caring Society*, at para 41; *R v. Sparrow*, [1990] 1 SCR 1075
272 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 142
273 Michael Ng, *Fiduciary Duties*, 2013: Canada Law Book, at pp. 1-1- 1-9

brought before the courts for adjudication. Just as claims of discrimination are not actionable in common law courts, complaints asserting tortious conduct, breach of fiduciary duty and constitutional based claims do not fall within the ambit of the Tribunal to adjudicate. To expand the reach of the Tribunal in such a way would undermine the statutory regime which, for many victims of discrimination, is a more accessible and effective means by which to seek redress.[274]

D. International law principles do not establish a *prima facie* case

209. The Tribunal does not have the jurisdiction to assess alleged violations of international law, nor to provide remedies for any such alleged breaches. While international law can be helpful in interpreting concepts in the domestic context, it cannot change the scope of the Tribunal's jurisdiction.

210. The Complainants, however, are not relying on international law concepts to assist the Tribunal in interpreting relevant concepts within its purview but to advance the claim that the Respondent is in violation of its international obligations by virtue of its funding for child welfare on reserve. This is not the proper forum to advance such an argument and there is no jurisdiction within the governing statute for the Tribunal to make such a finding.

211. In any event, international human rights treaties that are binding on Canada may form the basis of an interpretive presumption of conformity between the treaty and ordinary legislation.[275] Thus, there is a presumption that the Act conforms to these international principles. The arguments of the Complainants go well beyond suggesting that the Act needs to be in conformity with international obligations. According to their arguments, any interpretation of the Act which finds that the complaint is unfounded, either through jurisdiction or lack of merit, violates this principle. This is not true.

212. With respect to the question of jurisdiction, while the legislative scheme is a major

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274 *Honda Canada Inc. v. Keays, supra*, at paras 65-66

275 *R. v. Hape*, 2007 SCC 26 at paras 53-54; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para 137; *Schreiber v. Canada (A.G.)*, [2002] 3 S.C.R. 269, at para 50; *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675 (C.A.), at para 64

element in the domestic fulfillment of international human rights obligations, the Complainants' arguments fail to recognize other available mechanisms. Complaints about government actions that do not fall within the scope of the Act can be brought under the Charter.[276] As a result, a determination that something does not fall within the ambit of the Act and the jurisdiction of the Tribunal does not constitute a violation of international law.

213. Amnesty International argues that under international law "it is not permissible to treat two groups inequitably" on the basis of their indigenous identity.[277] This argument does not assist the Complainants, as the Respondent in this case only funds one group.

214. Contrary to the claims of Amnesty International, it is not within the jurisdiction of the Tribunal to either find a breach of international obligations or order a remedy based on such an alleged breach.[278] To the contrary, the Tribunal's task is to determine whether or not there has been a breach of the Act and, if so, to order appropriate remedies as provided within the Act.

215. Accordingly, the general statements made about the requirements of international law advanced by the Complainants, even assuming they are accurate, which is not admitted but explicitly denied, do not assist the Tribunal in applying the Act to the facts of this complaint.

E. The federal response to Jordan's Principle is not applicable to this complaint

216. The federal response to Jordan's Principle does not demonstrate a *prima facie* case of discrimination. Not only is Jordan's Principle not a child welfare concept that has bearing on this complaint, an assessment of the validity of the federal response is beyond the scope of this complaint.

217. Jordan's Principle was passed as a non-binding resolution in the House of

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[276] *Matson v Canada (Indian and Northern Affairs)*, 2013 CHRT 13, at paras 152-154; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at para 66-71

[277] *Closing submissions of Amnesty International*

[278] *Closing submissions of Amnesty International*, at para 63

Commons that has led to the development of a process to deal with individual cases involving jurisdictional disputes. It is not a separate program and does not have separate funding. Rather, it is a policy that "sits on top of a program."[279]

218. Although it is meant to assist with the resolution of jurisdictional disputes that arise with respect to certain programs, Jordan's Principle is not equipped to address or amend the parameters of the implicated, existing program.[280]

219. Jordan's Principle would only be applicable in the child welfare context if there was a dispute between the federal and provincial government over who was responsible for paying for a service, and the child involved was a child in care.

220. In the *Pictou Landing* case, for example, the child welfare system was not at issue.[281] The First Nations child in that case was not in the care of a FNCFS Agency but was a child with severe disabilities living at home with his mother, who also required medical assistance.[282] The implicated programs were Health Canada's Home and Community Care Program and the Respondent's Assisted Living Program.[283] At issue was the amount of funding available through these programs.[284]

221. The Federal Court disagreed with the Respondent regarding what the appropriate normative standard of care was in Nova Scotia for medical care and respite services and thus how much funding should be available to this family through the federal programs.[285]

222. Since Jordan's Principle is not a child welfare concept and is not a part of the FNCFS Program, any consideration of its validity is beyond the scope of this complaint.

223. Even if Jordan's Principle was determined to be a relevant consideration to the

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279 *Testimony of Corinne Baggley*, Transcript vol 57, pg 30
280 *Testimony of Corinne Baggley*, Transcript, vol 57, pg 30
281 Although the Federal Court found Jordan's Principle was engaged, the Respondent did not concede this and argued it was not.
282 *Pictou Landing Band Council and Maurina Beadle v Attorney General of Canada*, 2013 FC 342, at paras 98-9 ("*Pictou Landing*")
283 *Pictou Landing*, *supra*, at paras 12-15
284 *Pictou Landing*, *supra*, at para 22
285 *Pictou Landing*, *supra*, at paras 96-98,105 and 111-7

Tribunal's analysis of the claim, there is no evidence to suggest that the Respondent's approach and implementation of Jordan's Principle resulted in discrimination against the Complainants. The fact the Complainants disagree with the Respondent's definition and implementation of Jordan's Principle does not mean it is invalid or discriminatory. Moreover, the evidence has shown that even when cases do not met the federal definition of Jordan's Principle, the Respondent still works with the parties to find a resolution to jurisdictional dispute.[286]

224. Jordan's Principle has also been implemented across the country. Although the Complainants take issue with the parameters of this implementation, it does not negate the fact the evidence clearly indicates Jordan's Principle has been implemented.[287]

The Complainants have failed to establish a *prima facie* case of discrimination

225. The Complainants failed to establish the existence of a *prima facie* case of discrimination. The evidence does not substantiate their allegation that federal funding for child welfare services on reserve is discriminatory compared to the funding provided by the provinces and Yukon government. In fact, there was no reliable evidence advanced to establish how and to what extent the provinces and Yukon fund their child welfare programs.

226. The Complainants also failed to prove their alternative argument that even without a comparator group, federal funding for child welfare is discriminatory because it fails to meet the higher needs of First Nation children. In fact the evidence established that no distinction can be drawn between the level of need experienced by First Nation children living on reserve as compared to those living off reserve, thus as between those funded federally and those funded provincially.

227. As the Complainants have not established a *prima facie* case of discrimination, the claim should be dismissed.

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286 *JP Tracking Tool Preliminary Findings Chart,* R-13, tab 53 and *Federal Focal Points Tracking Tool Reference Chart- Manitoba Region*, R-13, tab 54

287 *Testimony of Corinne Baggley*, Transcript vol 57, pgs 36-83, *Pictou Landing*, *supra*, at paras 84, 113

Issue 3 – The remedies sought are not appropriate for this complaint

228. Even if a claim of discrimination was established, the remedies being sought by the Complainants are not appropriate and should not be granted. The Supreme Court has held that a remedy should focus on addressing the actual impacts felt by the individual service recipients.[288] This requirement has not been met, as such a link must be established by evidence and not by personal views and conjecture.

A. The Complainants cannot dictate policy and funding decisions

229. 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. 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.

230. Jurisprudence also supports a less prescriptive approach in relation to government policy or legislative schemes.[289] The Tribunal has noted that in crafting remedies, courts and tribunals should be "sensitive to their role as judicial and quasi-judicial arbiters respectively. In particular, they should not 'fashion remedies which usurp the role of other branches of governance."[290]

231. The Complainants request for an order directing the Respondent to revise the funding framework for the FNCFS Program in accordance with their explicit instructions, intrudes too far into the responsibilities of Parliament and the executive.

232. In particular, the Caring Society's proposed remedies go well beyond what is within the scope of the Tribunal to order. They ask that the Respondent be ordered to convene a National Advisory Committee ("NAC"), which would include representatives from the Commission, the AFN and the Caring Society. The NAC would be responsible to "identify discriminatory elements" in the FNCFS Program

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288 *Moore, supra,* at para 64
289 *McAllister-Windsor v. Canada* , [2001] C.H.R.D. No. 4, at para 75
290 *Hughes v. Election Canada,* 2010 CHRT 4, at para 69

and given wide berth to make recommendations on amendments to its funding structure.[291] The NAC would also be responsible for monitoring the Respondent's implementation of these recommendations.[292]

233. The Caring Society is not simply asking for the Tribunal to grant relief, it is asking for the Tribunal to allow the Complainants to determine what the appropriate relief is and monitor its implementation. 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. This remedy is simply beyond the power of Tribunal or any other court to order.

234. The Caring Society also asks for an order that the Complainants be included in the tripartite discussions to be held between the provinces, the Respondent and the First Nations. This request is also inappropriate. The Complainants have not established what role they would play in these discussions or how their presence would benefit the process, especially considering the involvement of the First Nations in these discussions. The Complainants are not involved in the delivery of child welfare services on reserve and are not the recipients of such services. There is no evidence to even conclude that the First Nation children on reserve, or the FNCFS Agencies who provide the services have consented to their involvement in the process. Nor have they established how the proposed remedy would address the alleged discrimination.

235. The Complainants' request to impose a requirement that the two Complainant organizations be "consulted" on the remedies is also without merit. Although section 53(2)(a) of the Act provides a role for the Commission to the extent of "consultation" on "the general purposes of the measures" it does not require the consultation of other parties. There is nothing in the legislative scheme to support a requirement that the two Complainant organizations be included in the consultation process. The legislative scheme also does not require that the Tribunal receive the

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291 *Caring Society's Closing Submissions*, at para 494 and pgs 209-212
292 *Caring Society's Closing Submissions*, pg 209

Commission's "approval" before establishing remedies[293]

B. Decisions on what is culturally appropriate are best left to the FNCFS Agencies

236. The Caring Society argues that the collaborative involvement of the Commission, Complainants and Caring Society's member agencies is required to re-design the FNCFS Program due to their expertise with what is culturally appropriate.[294] This suggestion ignores the evidence that the decision on what is culturally appropriate rests with the FNCFS Agencies and is best determined by these Agencies based on individual community needs and concerns. There is no basis for the participation of the Complainants in this process and no evidence that they are better placed to make determinations on what is culturally appropriate.

237. Moreover, there is no indication that the individual FNCFS Agencies across the country or their respective governments are seeking the participation of the Complainants in this process.

C. There is no evidentiary foundation for a monetary award

238. The evidence before the Tribunal is insufficient to award the requested statutory maximum under special compensation for each child removed from their home since 2006.

239. This request is fundamentally flawed as it depends on the unproven premise that all these children were removed from their homes because of the Respondent's funding practices. To accept such an assertion requires a finding that had there been adequate/equal funding, no child would have been removed from his or her home. This bare assertion is unsupported in the evidence and overlooks the complex nature of the factors that lead to a child being removed from their home. The Complainants themselves have acknowledged that removal from the home is a valid approach in some cases to ensure the well being of a child.

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293 *Johnstone, supra*, at paras 121-122

294 *Caring Society's Closing Submissions*, at para 491

240. The Complainants did not even call evidence to demonstrate that any children were improperly removed from their home. There is also no evidence from any recipients of child welfare services on-reserve with respect to a service or program they did not receive or the adverse outcomes that flowed from this. The absence of individual Complainants, and related individual evidence, makes it impossible for the Tribunal to assess compensation on an individualized basis.

241. Although representative claims are permitted and groups of individual claimants need not provide specific evidence of expenses or effects on each member of the group, this is not a representative claim in that the Complainants have not established that they have the authority to speak on behalf of and or represent the interests of the children who were taken into care during the applicable time period. Even if it were a representative claim, there must still be some evidence of the impacts the discriminatory practice had on individuals that can be extrapolated to the other members of the group on a principled and defensible basis.[295] This type of factual basis is lacking.

242. The Caring Society is also seeking compensation for the alleged reckless and wilful behavior of the Respondent in respect of its funding of child welfare services on reserve. This claim is also unsupported by the evidence. The Respondent's funding of child welfare services has not remained static. Instead, it has changed to adapt to the shifts in social work practice and the costs of providing these services. The key example of this is the re-design of the funding formula to add an additional funding stream for prevention services.

243. The funding for the FNCFS Program as a whole has more than doubled in the last 15 years, increasing from 238 million in 1998/99 to in 627 million in 2012/13.[296]

244. The Respondent also continually assesses the FNCFS Program to determine how it can be improved. However, proposed improvements and increased spending must be considered and implemented within the larger federal context taking into

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295 *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135, at para 73

296 *Deck entitled "Better Outcomes for First Nations Children: Aboriginal Affairs and Northern Development Canada's Role as a Funder in First Nations Child and Family Services"*, R-13, tab 18, p3 and 12

consideration other social, political and fiscal issues facing the government as a whole.

245. In any event, the authority of the Complainants to receive and distribute funds on behalf of "victims" has not been established. As an advocacy organization, the Caring Society does not have a legal or direct relationship with the individuals on whose behalf they purport to request a remedy. The Complainants propose the money be put into a trust. However, if the Tribunal determined it was appropriate to recover this money for each child, then it should be delivered to them directly – not to the Complainants to decide how it is to be used.

246. The Caring Society also requests an award of five million dollars for the province of Ontario to implement prevention services. There is no evidence to support that such an award is warranted or that the amount requested is reasonable. In fact, the evidence demonstrates that prevention services have been implemented in Ontario since the 1970's and that AANDC reimburses prevention activities under the *1965 Welfare Agreement*.[297]

247. The Caring Society clearly disagrees with the Respondent's decisions regarding how to fund the FNCFS program and to what level and, in effect, with the Respondent's overall decision making regarding the spending of public funds. However, they have not demonstrated that the alleged underfunding of child welfare on reserve has been wilful or reckless.

D. Legal costs are not recoverable

248. The Tribunal does not have authority to award legal costs, pursuant to the Supreme Court's finding in *Mowat*.[298] However, this is essentially what the AFN is asking for in its request for "throw away" expenses relating to the documentary disclosure, including for counsel's appearance at the motion for production. These are clearly legal costs and as such, are beyond the power of the Tribunal to award.

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[297] *Testimony of Phil Digby*, Transcript vol 59, pgs 30, 50-9, 71-81

[298] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC53

E. Remedies must be applicable to the FNCFS Program

249. The Complainants request remedies that are beyond the scope of this complaint. In this respect, there are extensive remedies requested with respect to the implementation of Jordan's Principle. The Respondent's implementation of Jordan's Principle is not a relevant issue in this complaint, as it is not part of the funding for child welfare on reserve. An order respecting programs or policies other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal.

250. The fact the remedy request is over-broad is evidenced by the request of the Caring Society for an order that Jordan's Principle be applicable to all First Nation children (whether or not in care) and that this apply to all areas of funding (not just child and family services).

251. An order providing a remedy respecting programs other than child welfare is beyond the scope of the complaint and the remedial powers of the Tribunal. Accordingly, the Complainants request for a remedy to provide funding for items such as capital costs must be denied as funding for capital costs falls outside of the FNCFS Program and provides further illustration of the fact that this complaint is not properly constituted under section 5 of the Act.

Part IV – Order Sought

252. The Respondent respectfully requests this complaint be dismissed as unfounded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia this 3rd day of October, 2014.

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Part V – List of Authorities

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