Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (representing the Minister of Indigenous Services)

Respondent

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASK NATION

Interested Parties

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA MOTION RECORD

February 4, 2019

David P. Taylor
Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Tel: 613-288-0149
Email: dtaylor@conway.pro

Sarah Clarke ***Clarke Child & Family Law***
Barbara McIsaac, Q.C. ***Barbara McIsaac Law***

Tab Reference	Document Description
	Affidavits
1.	**Affidavit #4 of Doreen Navarro, affirmed January 28, 2019**
2.	**Affidavit of Andrea Auger, affirmed January 31, 2019**
3.	**Affidavit #5 of Doreen Navarro, affirmed February 4, 2019**
	Caring Society Exhibits from the October 30-31, 2018 cross-examination of Dr. Valerie Gideon
4.	**Tab 7: October 5, 2018 Indigenous Services Canada Jordan's Principle Standard Operating Procedures**
5.	**Tab 12: Caring Society Concerns re Jordan's Principle Compliance**
	Documents from the Canadian Human Rights Commission Book of Documents
6.	**Tab 57: United Nations Committee on the Rights of the Child Concluding Observations re Canada (2012)**
7.	**Tab 380: INAC Memo re Jordan's Principle (2007)**
	Transcripts of Evidence before the Tribunal
8.	**Excerpt from Volume 47 (February 11, 2014), examination-in-chief of Dr. Cindy Blackstock**
	Summary Statement drafted by the Caring Society and to which Canada does not object
9.	**Summary Statement re Major Capital**

Docket: T1340/7008

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NISHNAWBE ASKI NATION

AFFIDAVIT #4 OF DOREEN NAVARRO

I, Doreen Navarro, of the City of Ottawa, in the Province of Ontario, **SOLEMNLY AFFIRM THAT:**

1. I am employed as a legal assistant at Conway Baxter Wilson LLP/s.r.l., counsel for the complainant First Nations Child and Family Caring Society of Canada ("**Caring Society**") in this matter. Part of my responsibilities involve assisting David Taylor with the Caring Society file, both with respect to proceedings before the Canadian Human Rights Tribunal and with respect to consultations at the Consultation Committee for Child Welfare. I have knowledge of the facts

hereinafter deposed to except for those matters which are stated to be based upon information provided by others, all of which information I believe to be true.

Definition of First Nations child for the purpose of implementing the Tribunal's orders on Jordan's Principle

2. A copy of the Canadian Human Rights Commission Complaint Form filed jointly by the Assembly of First Nations and the Caring Society, dated February 23, 2007 is attached hereto as **Exhibit "A"**.

3. A copy of the Preliminary Disclosure Brief of the Caring Society and the Assembly of First Nations, dated June 5, 2009, is attached hereto as **Exhibit "B"**.

4. A copy of the Statement of Particulars of the Respondent, the Attorney General of Canada, dated July 22, 2009, is attached hereto as **Exhibit "C"**.

5. A copy of the Government of Canada's webpage entitled 'Submit a request under Jordan's Principle: Step 2. Who is covered", with a last modified date of July 26, 2018, and which was accessed online on January 27, 2019, is attached hereto as **Exhibit "D"**.

6. A copy of the Government of Canada's Response to the Descheneaux Decision, which is undated but which was accessed online on January 22, 2019, is attached hereto as **Exhibit "E"**.

7. A copy of Government of Canada's webpage titled 'Eliminating known sex-based inequities in Indian registration', with a last modified date of June 12, 2018, and which was accessed online on January 22, 2019, is attached hereto as **Exhibit "F"**.

8. A copy of an email chain with the subject line 'Jordan's Principle in Yukon', between staff at the First Nations Child & Family Caring Society of Canada and the Government of Canada, dated January 9, 2019, is attached hereto as **Exhibit "G"**.

Reallocation

9. On October 15, 2018, a draft of Indigenous Services Canada ("**ISC**") Policy on Internal Reallocation of Social, Housing, Education and Health Program Funds (the **"Reallocation**

Policy"), dated October 12, 2018 was sent to the Caring Society and the various parties by Joanne Wilkinson, Assistant Deputy Minister Reform of Indigenous Child and Family Services for ISC. A copy of Ms. Wilkinson's email and attached draft Reallocation Policy is attached hereto as **Exhibit "H"**.

10. On November 1, 2018, on behalf of the Caring Society, Cindy Blackstock provided comments on the draft Reallocation Policy, sending her comments to Ms. Wilkinson and the various parties. A copy of Dr. Blackstock's November 1, 2018 comments are attached hereto as **Exhibit "I"**.

11. On January 8, 2018, the Caring Society, along with the other parties, received an email from Ms. Wilkinson with the following attachments: (a) the Departmental responses to the Caring Society's comments on the draft Reallocation Policy; (b) *Budget Management Principles* – a high-level document intended to serve as overarching guidance to accompany the Reallocation Policy; and (c) the final version of the Reallocation Policy, approved by Indigenous Service Canada senior management as of December 2018. A copy of Ms. Wilkinson's email and attachments are attached hereto as **Exhibit "J".**

12. On January 16, 2019, Dr. Blackstock sought clarification from Ms. Wilkinson as to whether the copy of the Reallocation Policy circulated on January 8, 2019 was Canada's final position. In reply, Ms. Wilkinson stated that it was considered final. A copy of this email exchange is attached hereto as **Exhibit "K".**

Funding Agreements

13. On September 11, 2018, Paula Isaak (former Assistant Deputy Minister for Economic, Education and Society Development Programs and Polices for ISC) circulated to the Caring Society and the various parties a number of documents, including a sample agency funding agreement. A copy of Ms. Isaak's email and attached sample funding agreement are attached hereto as **Exhibit "L"**.

14. On September 25, 2018, the Caring Society commented on the sample agency funding agreement. A copy of the Caring Society's comments are attached hereto as **Exhibit "M"**.

15. On December 3, 2018, Ms. Wilkinson circulated the following: (a) Canada's response to the Caring Society's feedback on the sample funding agreement; (b) Notice of Acceptance of Request; and (c) the text deviation. A copy of Ms. Wilkinson's email and attachments are attached hereto as **Exhibit "N"**.

16. I am advised by David Taylor, counsel to the Caring Society, and I believe, that on January 17, 2019, the Institute of Fiscal Studies and Democracy's ("**IFSD**") Director, Governance and Institutions presented to the Consultation Committee on Child Welfare regarding the IFSD's "current state" report on its study of First Nations Child and Family Services Agencies' needs. A true copy of Dr. Gaspard's presentation is attached hereto as **Exhibit "O"**.

17. I am advised by Mr. Taylor, and I believe, that on January 18, 2019, Ms. Wilkinson provided the CCCW with the finalized Terms and Conditions for the First Nations Child and Family Services Program. A true copy of the finalized Terms and Conditions is attached hereto as **Exhibit "P"**.

AFFIRMED BEFORE ME this 28th day of January, 2019 in the City of Ottawa, in the Province of Ontario.

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Commissioner for taking affidavits

LSO #74274

DOREEN NAVARRO

This is Exhibit "A" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Human Rights Commission Complaint Form

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

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

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

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

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

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

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

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

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

Findings of the Wen:de series of reports include:

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

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

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

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

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

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

Regional Chief Lawrence Joseph
Assembly of First Nations
Guy Lonechild, Vice-Chief

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

This is Exhibit "B" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

WilsonChristen LLP
BARRISTERS

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

June 5, 2009

SENT BY OVERNIGHT COURIER

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

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

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

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

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

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

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

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

Yours truly,
WILSON CHRISTEN LLP

Jeffery Wilson
JW/jld
Enclosures

c.c. Cindy Blackstock
Candace Metallic

File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

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

Jeffery Wilson
WILSON CHRISTEN LLP
Barristers
137 Church Street
Toronto, Ontario M5B 1Y5
LSUC #17649K
Telephone: (416) 956-5622
Fax: (416) 360-1350
Email: jeffery@wilsonchristen.com

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

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

Telephone: (613) 995-1151
Fax: (613) 996-9661

TO: **Karen Cuddy**
Counsel
Justice Canada
Indian Residential Schools Team
90 Sparks Street, 3rd Floor
Ottawa, Ontario K1A 0H4

Telephone: (613) 996-1693
Fax: (613) 996-1810

AND TO: Guy Grégoire
Director, Registry Operations
Canadian Human Rights Tribunal
160 Elgin Street – 11th Floor
Ottawa, Ontario K1A 1J4

Attention: Nicole Bacon, Registry Officer

Telephone: (613) 995-7707
Fax: (613) 995-3484

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

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

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

TAB NO.

Court File No. T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

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Respondent

STATEMENT OF PARTICULARS, DISCLOSURE, PRODUCTION OF THE COMPLAINANTS

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

WILSON CHRISTEN LLP
Barristers
137 Church Street
Toronto, Ontario
M5B 1Y5

Jeffery Wilson
LSUC #17649K
Tel: (416) 956-5622
Fax: (416) 360-1350
Email: jeffery@wilsonchristen.com

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

Overview

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

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

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

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

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

Material Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Position on the Legal Issues

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

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

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

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

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

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

Section 5 CHRA "Service"

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

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

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

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

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

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

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

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

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

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

> **6.** In our view, there is a clear jurisdictional issue raised as to whether the relationship between the Diocese and its postulants can be characterized as a "service" within the meaning of s. 1 of the Code. That is not a pure question of law. A proper analysis of the issue can only be done on a factual record establishing, for example, the nature of the relationship between the Diocese and those it accepts as postulants, the mutual obligations and expectations between them, what is provided to the postulants by the Diocese, the basis upon which things are provided to postulants and the like. Those factual determinations are best made by the Tribunal, which would have the advantage of hearing live evidence on these issues if it thought it advisable. Also, the Tribunal has special expertise on issues of interpreting its home statute and the reviewing court would benefit from that opinion.[14]

Prohibited Ground of Discrimination

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

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

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

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

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

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

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

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

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

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

Relief Requested

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

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

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

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

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

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

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

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

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

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

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

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. 000196 INAC. "Maintenance."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. 001878 Implementation of a Prevention-Focused Approach

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

60. 001088 to 00192 and 00194

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

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

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

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

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

and

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

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

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

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

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

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

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

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

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

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

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

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

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

*Summons required

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

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

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

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

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

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

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

This is Exhibit "C" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

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

STATEMENT OF PARTICULARS OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

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

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1. This Statement of Particulars is in response to: (a) the Complainants' Statement of Particulars, undated but received June 8, 2009; and (b) the Statement of Particulars of the Canadian Human Rights Commission ("Commission") dated June 1, 2009.

2. The Respondent states its proper name is The Attorney General of Canada (representing the Minister of Indian Affairs and Northern Development).

3. The Complainants' Statement of Particulars is replete with references to anticipated evidence and argument, and those references should be struck out. Specifically, some or all of paragraph 14 and footnotes 3, 6 to 13, and 18 should be struck out as improper pleading of particulars.

A. Introduction and Overview

4. The Respondent denies the allegations in the Complainants' and Commission's Statements of Particulars unless expressly admitted herein.

5. In specific response to paragraphs 3 and 14(v) of the Complainants' Statement of Particulars, the Respondent has consistently denied the Complainants' allegations before the Commission, and now before the Tribunal, including in submissions filed. Further, when the Complaint was before the Commission, much of the correspondence with the Commission attempted to obtain clarification of the Complaint. On May 6, 2008, the Respondent provided its preliminary legal arguments with respect to jurisdiction, and clearly stated in its cover letter that it would provide its substantive position on the Complaint should the Commission decide to accept jurisdiction over the matter. As the Commission referred the matter directly to the Tribunal thereafter without investigation, the Respondent was not provided the opportunity to submit its substantive position on the Complaint to the Commission.

6. The Minister of Indian Affairs and Northern Development is responsible for the management of the Department of Indian Affairs and Northern Development ("Indian Affairs") and programs administered or funded by that Department. The Department commonly refers to itself as Indian and Northern Affairs Canada ("INAC") in its communications.

7. One program funded by Indian Affairs is child and family services for Indians, also known as First Nations persons, ordinarily resident on reserve ("Child and Family Services on reserve") in the provinces. Funding is provided by Indian Affairs to First Nations Child and Family service delivery agencies, Indian Bands ("First Nations"), Tribal Councils, (collectively referred to as "First Nations Service Providers") and provincial governments to provide Child and Family Services on reserve that are: (a) in accordance with the legislation and standards applicable in each province; and (b) reasonably comparable to child and family services provided off reserve in similar circumstances, and within Indian Affairs' authorities. Indian Affairs also provides funding to the Government of Yukon so that government can provide child and family services to all First Nations persons ordinarily resident in the Yukon as outlined in paragraph 12 of this Statement of Particulars.

8. This funding is provided pursuant to appropriations by Parliament and authorities received from Cabinet and Treasury Board. One of the directives that applies to some funding of child and family services is Directive 20-1, Chapter 5 (the "Directive"[1]) issued by Indian Affairs in or about 1990 and amended thereafter from time to time. The Directive applies in all provinces, except Ontario, Alberta, Saskatchewan, and Nova Scotia which are addressed in the following paragraphs. In addition, in some provinces funding is provided under both the Directive and other arrangements and agreements as elaborated upon in this Statement of Particulars. The Directive also applies in the Yukon. Funding is provided as a policy decision made by the federal government.

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[1] The INAC First Nations Child and Family Services: National Program Manual as of May, 2005; The Directive is found at Appendix "A" within the Manual.

9. In Ontario, Child and Family Services on reserve are provided by non-profit organizations designated by the province as Children's Aid Societies or by provincially-delegated First Nations Service Providers (collectively referred to as "Ontario Service Providers"). Ontario Service Providers are funded by the Province to provide child and family services to all families and children ordinarily resident in Ontario. The provincial funding is pursuant to a provincial funding formula. Ontario Service Providers provide Child and Family Services on reserve and off reserve in accordance with provincial legislation and standards. Ontario Service Providers provide Child and Family Services on reserve that are reasonably comparable to the services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances. Pursuant to the Memorandum of Agreement Respecting Welfare Programs for Indians of 1965 (1965 Welfare Agreement), Indian Affairs reimburses the province for the cost of child and family services according to a cost-sharing formula. Currently, Indian Affairs pays approximately 93% of the costs, which funding is at a level that permits the delivery of Child and Family Services on reserve in accordance with provincial legislation and standards. Ontario pays the difference to make up 100%, or approximately 7%, of the costs.

10. In Alberta, Saskatchewan and Nova Scotia, Child and Family Services on reserve are provided by the provincial government or provincially-delegated First Nations Service Providers (collectively referred to as "Alberta/Saskatchewan/Nova Scotia Service Providers") in accordance with provincial legislation and standards. Alberta/Saskatchewan/Nova Scotia Service Providers provide Child and Family Services on reserve that are reasonably comparable to the services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances. Indian Affairs funds Alberta/Saskatchewan/Nova Scotia Service Providers pursuant to the Directive, the Enhanced Prevention-Focused Approach (as elaborated upon below), and other arrangements and agreements that may be in place as elaborated upon in this Statement of Particulars. This funding is at a level that permits the delivery of Child and Family Services on reserve in accordance with provincial legislation and standards. In the case of First Nation Service Providers who have opted into the Enhanced Prevention-Focused Approach, funding arrangements are entered into between Indian Affairs and the First Nations Service Providers. The funding is provided to First Nations Service Providers in accordance with Business Plans prepared by the First Nations Service Providers, and which Business Plans become annexes to the Funding Arrangements. The Business Plans are supported by the province and are in accordance with Indian Affairs' financial accountability requirements.

11. In all other provinces, Child and Family Services on reserve are provided by the provincial government or provincially-delegated First Nations Service Providers (collectively referred to as "Other Provinces' Service Providers") in accordance with provincial legislation and standards. These Other Provinces' Service Providers provide Child and Family Services on reserve that are reasonably comparable to the services provided to First Nations and non-First Nations families and children

ordinarily resident off reserve in similar circumstances. Indian Affairs funds these Other Provinces' Service Providers pursuant to the Directive or other arrangement or agreement that may be in place as elaborated upon in this Statement of Particulars. The funding is at a level which permits the delivery of Child and Family Services on reserve in accordance with provincial legislation and standards. In the case of First Nations Service Providers, funding arrangements are entered into between Indian Affairs and the First Nations Service Providers that set out the funding levels for each year.

12. In the Yukon, very few First Nations people ordinarily reside on reserve. Indian Affairs provides funding under the Directive to the Government of Yukon so it can provide child and family services to all First Nations persons ordinarily resident in the Yukon. The Government of Yukon provides such services without making any distinction or differentiation between people or groups of people. The Government of Yukon provides child and family services in accordance with territorial legislation and standards. Indian Affairs' funding under the Directive permits the Government of Yukon to deliver child and family services to all First Nations families and children ordinarily resident in the Yukon in accordance with sound child and family service delivery principles and, in doing so, to take into account cultural considerations for First Nation people, the remoteness of some locations, and other particular circumstances of First Nations communities, families and individuals. The funding permits the Yukon Government to deliver child and family services to First Nations families and children ordinarily resident in the Yukon that are reasonably comparable to child and family services provided to all other persons ordinarily resident in the Yukon in similar circumstances.

13. Child and family services in the Northwest Territories and Nunavut are provided by or through those territorial governments with their own funding. Canada makes annual unallocated transfer payments to the governments of the Northwest Territories and Nunavut which make up a portion of their annual budgets, and those governments decide how and where to spend funds.

14. Outside of the Northwest Territories and Nunavut, there are 108 First Nations Service Providers in Canada, serving approximately 447 of 576 First Nations Bands.

15. Funding levels are determined in accordance with sound child and family service delivery principles and take into account cultural considerations for First Nations people, remote locations in some parts of Canada, and other particular circumstances of First Nations communities, families and individuals. Indian Affairs' funding permits First Nations Service Providers and provinces to deliver Child and Family Services on reserve that are reasonably comparable to child and family services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances.

16. Further, and in answer to paragraph 14(vi) of the Complainants' Statement of Particulars, the Respondent states that the funding structure or practices under the Directive, 1965 Welfare Agreement, Enhanced Prevention-Focused Approach, or any other arrangement or agreement that may be in place is not the cause of, and is not a contributor to, a high or growing number of First Nations children ordinarily resident on reserve in Canada or living anywhere in the Yukon being placed into protective care. Further, the funding is at a level that permits First Nations Service Providers to meet their statutory responsibilities.

17. Indian Affairs provides funding for Child and Family Services on reserve or anywhere in the Yukon and does not provide a service within the meaning of sections 3 and 5 of the *Canadian Human Rights Act*. Indian Affairs does not deny a service, or deny access to a service, on the ground of race, national or ethnic origin, or any other ground listed in section 3(1) of the *Canadian Human Rights Act*. Further, Indian Affairs does not differentiate adversely or discriminate in relation to any individual on the ground of race, national or ethnic origin, or any other ground listed in section 3(1) of the *Canadian Human Rights Act*. Sections 3 and 5 of the *Canadian Human Rights Act* are not engaged.

18. Indian Affairs provides funding only for on reserve child and family services and does not provide funding for off-reserve services, which are provided by provincial governments. The exception is in the Yukon where Indian Affairs provides funding for child and family services for all First Nations persons ordinarily resident in the Yukon.

19. Indian Affairs does not differentiate adversely or engage in discriminatory practices in the funding of child and family services, whether looked at internally as to the funding of Child and Family Services on reserve, or when Child and Family Services on reserve provided under the funding are compared to child and family services funded by provincial or territorial governments off reserve.

B. Material Facts

i) Response to Particular Paragraphs in the Complainants' Statement of Particulars

20. In answer to paragraph 6 of the Complainants' Statement of Particulars, Indian Affairs admits only that the Complainant the First Nations Child and Family Caring Society of Canada ("FNCFCS") is an incorporated non-profit organization.

21. In answer to paragraph 7 of the Complainants' Statement of Particulars, Indian Affairs admits only that the Complainant the Assembly of First Nations ("AFN") is a national political representative body of First Nations governments.

22. The Respondent requires further particulars in relation to the following aspects of the Complainants' claim:

a) In response to paragraph 3 and the reference to "compared to that received by all others"; paragraph 9 and the reference "comparable to those received by all other children and families"; paragraph 11 and the reference "comparable benefits that are available, and received, by all others", the Respondent states that the Complaint 2006/1060 filed with the Canadian Human Rights Commission on February 23, 2007 specifically stated that the comparison was to be between "First Nations children and families resident on reserve... compared to non-Aboriginal children." The Respondent seeks clarification and particulars as to who, specifically, the Complainants are identifying as the comparator group in this Complaint, including by the use of the words "all others", "all other children and families" and "by all others".

b) In response to paragraphs 9 and 10 in the Complainants' Statement of Particulars, and elsewhere in their Statement of Particulars, concerning the Complainants' reference to "culturally based" child and family services, the words "culturally based" do not appear in the Complaint 2006/1060 filed with the Canadian Human Rights Commission on February 23, 2007 or the *Canadian Human Rights Act*. The purpose of these words in the Statement of Particulars and their meaning is unclear, and they do not disclose a ground of complaint or basis for relief under the Act or otherwise. Indian Affairs provides funding so culturally appropriate child and family services can be provided by First Nations Service Providers, provinces, and the Yukon. The Respondent requires further particulars about what the Complainants mean by "culturally based" and the grounds or basis on which the words support the Complaint and relief sought.

c) In response to paragraph 9 of the Complainant's Statement of Particulars and the reference to "First Nations Child and Family Services Program", the Respondent requires clarification and particulars as to whether the Complaint relates only to funding provided by Indian Affairs under the Directive, or if the Complaint relates to all funding provided by Indian Affairs under the Directive, the 1965 Welfare Agreement, the Enhanced Prevention-Focused Approach, or any other arrangement or agreement that may be in place, or some combination of these various funding arrangements.

d) The Respondent requires clarification and particulars as to the temporal scope of the Complaint, as the Complainants have not identified a temporal scope, other than to make a request in paragraph 21(3)(a) for compensation dating back to 1989 for unnamed First Nations persons.

e) The Respondent understands that the Complainants take issue with the level of funding provided to First Nations Service Providers, provinces and the Yukon for the provision of child and family services, but requires

clarification and particulars as to whether the Complaint pertains to all funding (including Maintenance, which is reimbursed at actual costs), funding for Operations as a whole, funding of prevention services, or some combination of all three.

23. In further answer to paragraph 14 of the Complainants' Statement of Particulars (beyond what is pleaded in paragraphs 3 and 16 herein), the Respondent repeats that paragraph 14 should be struck out as pleading evidence and/or argument and, alternatively, if it is not struck out the evidence does not support the assertions made by the Claimants which will be shown at the hearing of this matter.

ii) Particulars of Indian Affairs Funding Child and Family Services

24. The funding provided under the Directive is to all First Nations Service Providers, the Yukon, and all provinces, except Ontario, Alberta, Saskatchewan and Nova Scotia. It has two components:

a) First, the service provider receives an annual fixed amount of funding for "Operations", which includes administration (e.g. staff salaries). Funding for prevention services is included in the Operations component. The quantum of funds provided for Operations is formula-driven, based on an amount per Indian child on reserve under the age of 19 years (ages 0 to 18 years inclusive), plus an amount per band, plus a fixed amount per Agency based upon the size of the agency, plus adjustments for the agency, band, and number of children amounts based upon remoteness.

b) Second, the service provider receives funding for "Maintenance", which reimburses actual costs of maintaining children in out-of-home placements (foster home, group home, or institution). The "Maintenance" portion of the funding is not fixed. Reimbursement is made in accordance with applicable terms and rates.

25. There is an alternative funding approach available under the Directive in which Maintenance funding is fixed, freeing up any surplus money to be moved to Operations. Prior to the introduction of the Enhanced Prevention-Focused Approach, seven First Nations Service Providers had elected to operate using this alternative funding model. With the introduction of the Enhanced Prevention-Focused Approach, only one First Nations Service Provider continues to operate under this alternative funding model.

26. The funding provided under the Directive is as follows:

a) In Newfoundland and Labrador, the provincial government provides all child and family services directly to three First Nations in the province. Indian Affairs has one funding arrangement with Newfoundland and Labrador for services

they provide to the Innu First Nations. In addition, Indian Affairs has a bilateral funding agreement with the Miawpukek First Nation.

b) In New Brunswick, Indian Affairs provides funding for child and family services to 11 First Nations Service Providers for 14 First Nations' on reserve communities. The First Nations Service Providers deliver all Child and Family Services on reserve for these 14 First Nations. Indian Affairs provides funding to the province for the provision of child and family services for one particular First Nation; the province in turn flows the funding to a Band-run child and family services program.

c) In Prince Edward Island, the province delivers protection related Child and Family Services on reserve, and a First Nations Service Provider provides the prevention component of child and family service on reserve. Indian Affairs provides funding under the Directive.

d) In Quebec, First Nations Service Providers deliver Child and Family Services on reserve to 19 of 27 First Nations communities. In the other 8 First Nations communities, Indian Affairs reimburses the Province of Quebec for its delivery of Child and Family Services on reserve.

e) In Manitoba, Indian Affairs funds First Nations Service Providers to provide Child and Family Services on reserve. Indian Affairs has no child and family services agreement with the province of Manitoba as the First Nations Service Providers deliver all Child and Family Services on reserve.

f) In British Columbia, Indian Affairs reimburses the province for its delivery of Child and Family Services on reserve pursuant to the terms of a Memorandum of Understanding. Maintenance rates are calculated based upon a provincial average daily per diem for care type, plus an administrative charge based upon provincial overhead costs, divided by total annual care days. With respect to First Nations Service Providers delivering Child and Family Services on reserve in British Columbia, Indian Affairs provides funding under the Directive. In practice, First Nations Service Providers in British Columbia receive funding based on the Directive for Operations, but are funded for maintenance according to a blended average provincial rate.

g) In the Yukon, Indian Affairs funds the Yukon Government to deliver child and family services to all First Nations persons ordinarily resident in the Yukon.

27. In Ontario, the province funds all Ontario Service Providers using a provincial funding formula. Indian Affairs reimburses the provincial government directly for the provision of Child and Family Services on reserve in accordance with the 1965 Welfare Agreement. Under the 1965 Welfare Agreement, Indian Affairs reimburses Ontario for a formula-based share of provincial costs for child welfare services to status Indian children ordinarily resident on reserve. For protection

services, the provincial Ministry of Children and Youth Services ("MCYS") funds the Ontario Service Providers based on the provincial funding framework. For prevention services, MCYS funds the Ontario Service Providers based on provincially established funding levels for Child and Family Intervention, Community Support Services and First Nation Initiatives. For both protection and prevention services, Indian Affairs currently reimburses the province approximately 93% of eligible expenditures in accordance with the formula contained in the 1965 Welfare Agreement, as amended from time to time.

28. In Alberta, the province has provided for many years, and continues to provide, child and family services to all children ordinarily resident on seven reserves. Indian Affairs reimburses Alberta based on funding formulas set out in the 1991 Arrangement for Funding and Administration of Social Services concerning various social services, including child and family services. The seven First Nations had, and continue to have, access to prevention services, referred to as the Alberta Response Model.

29. Also in Alberta, prior to April 2007, funding for Child and Family Services on reserve was provided under the Directive to First Nations Service Providers. Since April 2007, under what is known as the Enhanced Prevention-Focused Approach (also known as the Targeted First Nations Child and Family Services Funding Approach in Alberta) separate and additional funding for prevention measures has been provided by Indian Affairs to the First Nations Service Providers. The quantum of funds provided to a First Nations Service Provider now involves three streams: operations, maintenance, and prevention/least disruptive measures. To receive funding under the Enhanced Prevention-Focused Approach, the First Nations Service Provider must commit to a multi-year Business Plan with strategies and performance measures set by the First Nations Service Providers themselves. The Business Plan must be supported by the province and be in accordance with Indian Affairs' financial accountability requirements

30. In Saskatchewan, prior to April 2008, funding of Child and Family Services on reserve was under the Directive. Indian Affairs entered into separate funding arrangements with First Nations Service Providers, which in turn delivered Child and Family Services on reserve. One First Nations community did not have a First Nations Service Provider and therefore received child and family services directly from the Province of Saskatchewan.

31. In Nova Scotia, prior to April 2008, Indian Affairs funded one First Nations Service Provider (Mi'kmaw Child and Family Services of Nova Scotia), which delivered child and family services to all provincial residents ordinarily resident on reserve. Indian Affairs provided funding under a bilateral funding agreement between Indian Affairs and the First Nations Service Provider, but was also a party to a tripartite child and family service funding arrangement with Nova Scotia and the First Nations Service Provider which sets out roles and responsibilities.

32. From and after April 2008, in Saskatchewan and Nova Scotia, funding is in accordance with the Enhanced Prevention-Focused Approach (as described above in relation to Alberta).

33. Self-governing First Nations that have included child and family services in their Self-Government Agreements are not eligible for federal funding under the Directive, the Enhanced Prevention-Focused Approach, or other similar arrangements or agreement. Their funding is provided under and in accordance with their respective Self-Government Agreement.

34. Some First Nations Service Providers in Canada carry annual budget surpluses from federal funding.

35. All funding provided under the Directive, 1965 Welfare Agreement, Enhanced Prevention-Focused Approach, or other arrangement or agreement that may be in place is for the purpose of allowing First Nations Service Providers, provincial governments, and the Government of Yukon to provide Child and Family Services on reserve (or anywhere in the Yukon) that are reasonably comparable to child and family services provided to First Nations and non-First Nations families and children ordinarily resident off reserve in similar circumstances.

36. Indian Affairs does not provide any services. It provides funding only so that others may provide services.

37. In addition to funding provided through Indian Affairs, other federal government departments provide funding for programs and benefits for families and children on reserve, including Health Canada and the Canada Revenue Agency.

iii) Response to Complainants' Statement of Particulars concerning Jordan's Principle

38. In response to paragraph 13 of the Complainants' Statement of Particulars wherein reference is made to Jordan's Principle, Jordan's Principle is a 'child first' approach, which engages various health and social services and not solely child and family services. The Government of Canada response to the House of Commons Private Members Motion on Jordan's Principle provides that where a First Nations child who is ordinarily resident on reserve has multiple disabilities requiring intervention by multiple service providers, and at the same time where there is a dispute over whether the federal or provincial government or a federally funded or provincial agency should fund or provide those services or needs, the agency of first contact will provide immediate services and the provincial and federal governments will resolve funding issues as between them later.

39. There is no adverse differentiation or discrimination in the provision of funding for child and family services in accordance with Jordan's Principle. It is plainly an

arrangement to ensure that immediate needs are attended to without delay that otherwise could be caused by funding issues as between governments.

40. Further, there is no contravention of Jordan's Principle by the Government of Canada. Implementation of Jordan's Principle does not rest with one level of government, but necessarily requires cooperation amongst all levels of government.

C. Position on Legal Issues

41. The Complainants are not entitled to receive child and family services, and never have been, as neither of them is a First Nations person ordinarily resident on reserve (they are corporate entities). Further, neither Complainant is a First Nations Service Provider and are not eligible to receive funding from Indian Affairs for child and family services. The Complainants therefore do not have standing to pursue a complaint alleging discrimination under the *Canadian Human Rights Act* as neither Complainant is a victim within the meaning of the *Act*.

42. Funding is the provision of money to others. Indian Affairs does this in the context of Child and Family Services on reserve in all Provinces and for all First Nations persons ordinarily resident in the Yukon.

43. Providing a service means to take action in relation to and provide work or advice to others. Indian Affairs does not do this in the context of child and family services.

44. Indian Affairs provides funding for the provision of child and family services. It does not decide or control which services are provided or how those services are to be provided. The details of providing child and family services are determined by the entity providing the services, acting in accordance with the applicable provincial or territorial legislation.

45. In *Watkin v. Canada*, 2008 FCA 170 the Federal Court of Appeal stated at paragraphs 28 and 33:

> [28] That said, not all government actions are services. Before relief can be provided for discrimination in the provision of 'services', the particular actions complained of must be shown to be 'services'.
>
> and
>
> [33]...regard must be had to the particular actions which are said to give rise to the alleged discrimination in order to determine if they are services..., and the fact that the actions are undertaken by a public body for the public good cannot transform what is ostensibly not a service into one. Unless they are 'services', government actions do not come within the ambit of section 5.

46. Indian Affairs provides funding for two groups of people only, that is, First Nations families and children ordinarily resident on reserve in the provinces and for all First Nations persons ordinarily resident in the Yukon. Indian Affairs does not make a distinction or draw an adverse differentiation within these groups beyond establishing funding province by province and for the Yukon. Funding province by province and for the Yukon is to ensure that funding enables service providers to provide Child and Family Services on reserve and in the Yukon that are reasonably comparable to provincially funded services off reserve and meet provincial and territorial standards. The only differentiation or distinction between groups made by Indian Affairs is based on geography (province/territory of residence), which does not constitute a prohibited ground under the *Canadian Human Rights Act*.

47. In seeking to make a human rights comparison between funding levels on and off-reserve, the Complainants' analysis fails for lack of a comparator group. The comparison is sought to be made by looking at acts performed by more than one entity: the federal government, which provides funding for child and family service providers on reserve and in the Yukon, and the various provincial governments, which provide off reserve funding. This proposed comparison of actions taken by more than one actor is inappropriate. The comparison must be between the way a single actor treats two or more different groups, rather than a comparison between the way one actor treats one group, and a separate actor treats another group.

48. Moreover, the comparison with off reserve child and family services funding is not valid because Indian Affairs does not control the quality, nature, and funding structure of child and family services provided by the provinces.

49. The Complainants have not made out allegations that support a case of adverse differentiation or discrimination on any basis, let alone a basis within the governing statute, and the Complaint should be summarily dismissed or, alternatively, dismissed following a hearing.

50. With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering, and for expenses for certain services) and 21(5) of the Complainants' Statement of Particulars, the requested relief is beyond the jurisdiction of the Tribunal.

51. Further to the relief sought in paragraph 21(4) of the Complainants' Statement of Particulars, assuming the requested relief is within the Tribunal's jurisdiction to order, which is denied, there is no basis to award full recovery of the Complainants' legal expenses.

52. No compensation should be awarded under s. 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meets the definition of "victim" within the meaning of the section. In the alternative, any compensation awarded under s. 53(2)(e) should

be limited to a maximum of $40,000 (calculated as follows: the maximum amount available, $20,000, multiplied by the number of Complainants, two, equals $40,000).

53. Further, any findings as to this Complaint should be only as to acts or omissions which occurred no more than one year prior to the date of receipt of the Complaint by the Commission in February 2007, pursuant to section 41(1)(e) of the *Canadian Human Rights Act*.

D. Relief Requested

54. The Complaint be dismissed including as to the allegations pertaining to:

a) child and family services, and

b) Jordan's Principle.

55. Costs to the Respondent.

56. Such further and other relief as may seem just.

Dated at the City of Ottawa, in the Province of Ontario, this 22nd day of July 2009.

Karen Cuddy

for Mitchell R. Taylor, Q.C., Karen Cuddy, Erin Smith
Counsel for the Respondent,
The Attorney General of Canada

This is Exhibit "D" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Government of Canada / Gouvernement du Canada

Submit a request under Jordan's Principle: Step 2. Who is covered

Important

If a child needs **immediate** care, please call 911 or your local emergency services number, or visit the nearest health facility.

Step 2. Who is covered

Jordan's Principle is available to all First Nations children in Canada.

A First Nations child under the age of majority in their province/territory of residence can access Jordan's Principle. It does not matter where the First Nations child lives in Canada.

At this time, Jordan's Principle applies only to First Nations children. Please contact us if you're not sure how to help an Indigenous child who needs access to products, supports and services.

← Previous

Next →

Date modified:
2018-07-26

This is Exhibit "E" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Government of Canada / Gouvernement du Canada

The Government of Canada's Response to the Descheneaux Decision

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Introduction

On August 3, 2015, the Superior Court of Quebec rendered its decision in the Descheneaux case. The court found that several paragraphs and one subsection relating to Indian registration (status) under section 6 of the *Indian Act* unjustifiably violate equality provisions under section 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*) because they perpetuate a difference in treatment in eligibility to Indian registration between Indian women as compared to Indian men and their respective descendants. The court struck down these provisions, but suspended the implementation of its decision for a period of 18 months, until February 3, 2017, to allow parliament to make the necessary legislative amendments. This period was subsequently extended to December 22, 2017.

In its decision, the court also advised (in obiter) that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneaux case.

The Descheneaux decision highlights the continued residual sex-based inequities in Indian registration that were carried forward following the 1985 comprehensive changes to Indian registration and band membership under the *Indian Act* through Bill C-31. Some of these inequities were not fully addressed in 2011 as part of the *Gender Equity in Indian Registration Act* (Bill C-3).

On July 28, 2016, the Government of Canada announced its response to the Descheneaux decision, to eliminate known sex-based inequities in Indian registration through legislative amendments to the *Indian Act*, following engagement on the proposed changes with First Nations and other Indigenous groups.

The Descheneaux Case

IIn 2011, three members of the Abénakis of Odanak First Nation in Quebec, Stéphane Descheneaux, Susan Yantha and Tammy Yantha filed litigation in the Superior Court of Quebec challenging the Indian registration provisions under section 6 of the *Indian Act* as being unconstitutional and in contravention of the *Charter*.

The plaintiffs argued that the current registration provisions perpetuate different treatment in entitlement to Indian registration between Indian women as compared to Indian men and their respective descendants. They also argued that amendments to the *Indian Act* under the 2011 Gender Equity in Indian Registration Act (Bill C-3) in response to the 2009 decision of the British Columbia Court of Appeal in the McIvor case did not go far enough in addressing sex-based inequities in Indian registration.

The Descheneaux case deals with two specific situations of residual sex-based inequities in Indian registration affecting cousins and siblings.

The "cousins" issue relates to the differential treatment in how Indian status is acquired and transmitted among cousins of the same family, depending on the sex of their Indian grandparent, in situations where their grandmother was married to a non-Indian prior to 1985. This results in different abilities to acquire and pass on status between the maternal and paternal lines.

Although the 2011 Gender Equity in Indian Registration Act (Bill C-3) removed the inequality directly affecting the grandchildren of Indian women who had married non-Indians in certain circumstances, it did not address a further inequality that directly affected the great-grandchildren of such women. Therefore, it did not bring matrilineal entitlement to Indian registration into line with that of patrilineal entitlement in similar circumstances.

The "siblings" issue concerns the differential treatment in the ability to transmit Indian status between male and female children born out of wedlock to an Indian father between the 1951 and 1985 amendments to the *Indian Act*. Indian women in this situation cannot pass on status to their

descendants unless their child's father is a status Indian. However, Indian men in similar circumstances can pass on status to their children regardless of whether they parent with a non-Indian.

The Descheneaux Decision

On August 3, 2015, the Superior Court of Quebec ruled in favour of the plaintiffs, finding that paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the *Indian Act* unjustifiably infringe section 15 of the Charter. The court declared these provisions to be of no force and effect but suspended its decision for a period of 18 months (until February 3, 2017, then to December 22, 2017) to allow Parliament time to make the necessary legislative amendments. [1]

In its decision, the court also warned that legislative amendments to address inequities in Indian registration not be limited to the specific facts in the Descheneauxcase.

The Government of Canada's Response

In July 2016, the Government of Canada began engagement with First Nations and other Indigenous groups on the proposed legislative amendments to address the sex-based inequities found in the Descheneaux decision, as well as other sex-based inequities in Indian registration.

As part of the engagement, the federal government invited and provided funding to interested First Nation and Indigenous organizations to work with the government to bring together individuals and groups to discuss the proposed legislative changes.

Engagement sessions took place across Canada over summer and fall 2016. Participation in these sessions was inclusive of:

- First Nations, Métis, and non-status Indians
- First Nation chiefs, councillors, administrators and community members
- Representatives and members of Treaty and Nation organizations, and regional and national Indigenous organizations, including women's organizations.

A draft of the legislative proposal was also shared with First Nations and other Indigenous groups and posted on the INAC website for information purposes prior to the introduction of the legislation in Parliament.

Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)* was introduced in the Senate of Canada on October 25, 2016.

The amendments initially proposed under Bill S-3 were to address the inequities identified in the Descheneaux decision and other known sex-based inequities in Indian registration:

- **Cousins Issue:** Address the differential treatment of cousins whose grandmother lost status due to marriage with a non-Indian, when that marriage occurred before April 17, 1985 (see Annex A).
- **Siblings Issue**: Address the differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985 (see Annex B).
- **Issue of Omitted Minors:** Address the differential treatment of minor children, who were born of Indian parents or of an Indian mother, but lost entitlement to Indian Status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985 (see Annex C).

The Standing Senate Committee on Aboriginal Peoples began its study of Bill S-3 on November 22, 2016. The Standing Committee on Indigenous and Northern Affairs also undertook a pre-study of the bill beginning November 21, 2016.

During the Standing Senate Committee deliberations, witnesses and senators expressed concerns regarding the level of engagement with First Nations, Indigenous groups and affected individuals prior to the introduction of the bill. Concerns were also raised on whether the bill addressed all known sex-based inequities in Indian registration.

The Senate suspended consideration of Bill S-3 and recommended that the government seek an extension of the February 3, 2017 court order, to continue the engagement process.

On January 20, 2017, the government sought and was granted a five-month extension of the suspension of the Descheneaux decision by the Superior Court of Quebec, to July 3, 2017.

The court extension allowed the Government of Canada to:

- Further engage with First Nations, Indigenous groups and affected individuals on Bill S-3;
- Hold technical meetings with legal experts;
- Confirm that the proposed amendments outlined in the bill provide the appropriate remedies for the situations found in the *Descheneaux* decision; and
- Ensure that the bill addresses other known situations of sex-based inequities.

The Standing Senate Committee resumed its study of Bill S-3 on May 9, 2017, and adopted a number of amendments to the bill, many of which were introduced and/or supported by the government. They include:

- New categories for entitlement for Indian status to address the sex-based inequities that are created as a result of the remedies for the cousins and siblings issues in Bill S-3 (see Annexes D-G);
- Modifications to the remedy for the siblings issue were made to ensure that no new inequities are created for individuals affected by this issue;
- A new provision to the Indian Act to provide flexibility for the Indian Registrar to consider various forms of evidence in determining eligibility for registration in situations of an unstated of unknown parent or other ancestor in response to the Ontario Court of Appeal decision in the *Gehl* case; and [2]

- New provisions for the Minister to report to parliament on the design and progress of the collaborative process on broader issues related to Indian registration, band membership and First Nations citizenship, and on the implementation of the bill.

However, the Government was not able to support the amendment that was adopted by the Senate that would register all descendants of entitled individuals, born prior to April 17, 1985, under paragraph 6(1)(a) of the *Indian Act*. Such a unilateral change was outside the scope of Bill S-3 and should not be passed absent adequate consultation and information on the practical implications.

On June 21, 2017, the House of Commons passed Bill S-3 at Third Reading with the following changes:

- The Senate amendment that would register all descendants of entitled individuals, born prior to April 17, 1985, under paragraph 6(1)(a) was removed from the bill;
- The long title of the bill was changed from An Act to amend the *Indian Act* (elimination of sex-based inequities in registration) to "An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)"; and
- A reference was added in the bill that consultations under the collaborative process would also be conducted through the lens of the *United Nations Declaration on the Rights of Indigenous Peoples.*

The Senate did not pass the bill before adjourning for the summer recess on June 22, 2017. As a result, Bill S-3 did not receive Royal Assent by July 3, 2017.

On June 27, 2017, the Superior Court of Quebec denied the government's request for another six-month extension to ensure that the registration provisions struck down by the court in Descheneaux did not become inoperative on July 3, 2017. The government appealed the decision with the Quebec Court of Appeal obtaining a second extension of the suspension period until December 22, 2017.

In the summer of 2017, Stewart Clatworthy was contracted by the Government of Canada to produce demographic estimates on the number of individuals that would become newly entitled to Indian registration based on various scenarios of amendments to the Indian registration provisions. Consult his full report: An Assessment of the Population Impacts of Select Hypothetical Amendments to Section 6 of the *Indian Act*.

On November 7, 2017, Senator Peter Harder introduced legislative changes to Bill S-3 in the Senate that will remove additional sex-based inequities that were not initially addressed. The key change will see the removal of the 1951 cut-off from the *Indian Act* with a delayed coming-into-force date to ensure proper consultations are completed. This amendment was supported by the Government of Canada and will effectively extend entitlement to Indian status, under subsection 6(1) of the *Indian Act*, to descendants of women who were removed from bands list or not considered as an Indian, prior to 1951, due to marriage going back to 1869.

On November 9, 2017, the Senate adopted Bill S-3, with the new amendment, and referred it back to the House of Commons who adopted iton December 4, 2017. The bill received Royal Assent on December 12, 2017, and all its provisions, except those related to the removal of the 1951 cut-off, came into force on December 22, 2017.

Conclusion

The Government of Canada remains committed to eliminating all forms inequities in Indian registration. In keeping with reconciliation and the renewal of the nation-to-nation relationship, the Government of Canada remains committed to moving forward with the consultations on the broader issues relating Indian registration, band membership and First Nations citizenship with First Nations and other Indigenous groups under the Collaborative Process.

The co-design of the collaborative process began on October 31, 2017. This will ensure that the formal consultations with First Nations and other Indigenous groups on the broader-related issues can begin around April 2018.

Annex I of this document provides comprehensive information on Frequently Asked Questions relating to this initiative.

Annex A: The Cousins Issue

Addressing the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985

Figure 1a: Maternal line (situation of Stéphane Descheneaux)

This is Exhibit "F" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Government of Canada / Gouvernement du Canada

Eliminating known sex-based inequities in Indian registration

Learn what the Government of Canada is doing to ensure equity between the sexes in Indian registration.

Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général)* received royal assent on December 12, 2017, and parts of it came into force on December 22, 2017. This includes immediately extending entitlement to Indian status to individuals affected by inequities relating to the different treatment of cousins, siblings or minors who were omitted from historic lists. Further amendments will come into force at a later date, once consultations on how best to implement these changes are completed. These further amendments will extend status under subsection 6(1) of the Indian Act, to descendants of women who were removed from band lists or not considered Indian due to marriage to a non-Indian man going back to 1869.

To apply for Indian status under Bill S-3 visit: Are you applying based on the 2017 changes to the Indian Act?

In the summer of 2017, Stewart Clatworthy was contracted by the Government of Canada to produce demographic estimates on the number of individuals that would become newly entitled to Indian registration based on various scenarios of amendments to the Indian registration provisions. Consult his full report: An Assessment of the Population Impacts of Select Hypothetical Amendments to Section 6 of the *Indian Act*

Choose a topic:

What is the Descheneaux decision?

On August 3, 2015, the Superior Court of Quebec announced its decision in the *Descheneaux v (versus). Canada (Procureur général)* case. The court found that several paragraphs and one subsection dealing with Indian registration (status) under section 6 of the *Indian Act* unjustifiably violate equality rights under the *Canadian Charter of Rights and Freedoms*. This is because these paragraphs and subsection perpetuate a difference in treatment between Indian women and Indian men and their descendants in Indian registration.

The court struck down these provisions, but suspended the implementation of its decision for a period of 18 months, until February 3, 2017, to allow parliament to make the necessary changes to the act. This period was subsequently extended to December 22, 2017.

What issues with the *Indian Act* were raised in the Descheneaux case?

The Descheneaux case deals with two specific situations of sex-based inequities in Indian registration, which affect:

- cousins
- siblings

The "cousins" issue relates to the different treatment in how Indian status is gained and passed on among cousins of the same family. It depends on the sex of their Indian grandparent in situations where the grandmother was married to a non-Indian before 1985. This results in different abilities to gain and pass on status between the maternal and paternal lines.

The "siblings" issue concerns the different treatment in the ability to pass on Indian status between male and female children born out of wedlock between the 1951 and 1985 amendments to the *Indian Act*. Indian women in this situation cannot pass on status to their descendants unless their child's father is a status Indian. However, Indian men in similar circumstances can pass on status to their children regardless of the other parent's status.

The Descheneaux decision highlights the residual sex-based inequities in Indian registration that were carried forward through Bill C-31's comprehensive changes to Indian registration and band membership under the *Indian Act* in 1985. Some inequities were not fully addressed in 2011 by the *Gender Equity in Indian Registration Act* (Bill C-3).

What is the Government of Canada's response to the Descheneaux decision?

On July 28, 2016, in response to the Descheneaux decision, the Government of Canada launched an engagement process with First Nations and other Indigenous groups across Canada to discuss proposed legislative changes to the registration provisions of the *Indian Act*.

Engagement sessions were held across Canada, in cooperation with First Nation Treaty and Nation organizations, as well as regional and national organizations representing the interests of First Nations, First Nations women, Métis and non-status Indians.

Legislative amendments to the *Indian Act* were drafted to address sex-based inequities in Indian registration in response to the Descheneaux decision through Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général)*.

The Government of Canada is aware that sex-based inequities in Indian registration is one of a number of issues relating to Indian registration and band membership under the *Indian Act* that are of concern to First Nations and other Indigenous groups.

Some of these issues involve distinctions in Indian registration that are based on family status and ancestry or date of birth, and involve such matters as adoption, the 1951 and second-generation cut-offs, unstated or unknown parent and voluntary deregistration. Other matters relate to broader policy questions, such as Canada's continued role in determining Indian status and band membership. These are complex issues and often subjective in nature as they focus on issues relating to culture and ethnicity and finding the appropriate balance between individual and collective rights. Impacted individuals and communities bring a wide range of views on how to address these matters.

In keeping with Canada's commitment to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples, the government will not act unilaterally to bring about legislative change in respect of the broader-related and complex issues. These issues will be discussed as part of a collaborative process on broader issues related to Indian registration, band membership and First Nations citizenship, with a view to future reform.

The Government of Canada sought input from First Nations and Indigenous groups to co-design the consultations under the collaborative process from October 31, 2017 to March 31, 2018. The co-design phase provided First Nations and Indigenous groups an opportunity to determine how the consultation process would take place, the issues to be examined under this process, and the types of activities to be undertaken by participants. The report to parliament on the design of a collaborative process on Indian registration, band membership and First Nation citizenship summarizing the input received was tabled in parliament on May 10, 2018.

Consultations were launched on June 12, 2018.

What is Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général)*?

Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général), was introduced in direct response to the Descheneaux decision. The legislative amendments brought forward by Bill S-3 eliminate the sex-based inequities identified by the court in the Descheneaux case as well as other sex-based inequities in registration.

Bill S-3 addresses sex-based inequities in the Indian registration provisions of the *Indian Act* for the following situations:

- the cousins issue: differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian before April 17, 1985
- the siblings issue: differential treatment of women who were born out of wedlock to Indian fathers between September 4, 1951 and April 17, 1985
- the issue of omitted minor children: differential treatment of minor children who were born of Indian parents or of an Indian mother, but could lose entitlement to Indian status, between September 4, 1951 and April 17, 1985, if they were still unmarried minors at the time of their mother's marriage
- the unstated or unknown parent issue: in response to the Ontario Court of Appeal's *Gehl* decision, which deals with unstated/unknown parent issue, Bill S-3 provides flexibility for the Indian Registrar to consider various forms of evidence in determining eligibility for registration in situations of an unstated or unknown parent, grand-parent or other ancestor.

Bill S-3 also includes the requirement for the Minister of Crown-Indigenous Relations and Northern Affairs to report to Parliament on the collaborative process on broader issues related to Indian registration, band membership and First Nations citizenship, and on the implementation of the bill.

The Minister is required to report to Parliament on the:

- design of the consultations within five months of royal assent
- on the status of the consultations within twelve months of royal assent
- on the implementation of the bill within three years of royal assent .

The bill also includes provisions that will remove the 1951 cut-off in respect of the cousins. This amendment will come into force at a later date, once consultations with First Nations are completed. Once in force, all descendants born prior to April 17, 1985 (or of a marriage prior to that date) of women who were removed from band lists or not considered Indians because of their marriage to a non-Indian man will be entitled to 6(1) status. This will include circumstances prior to 1951 and in fact, will remedy inequities back to the 1869 *Gradual Enfranchisement Act*.

Bill S-3, except for the provisions related to the removal of the 1951 cut-off, came into force on December 22, 2017.

What are the next steps?

The Government of Canada remains committed to eliminating all forms of inequity in Indian registration and to moving forward with the collaborative process on the broader issues relating to Indian registration, band membership and First Nations citizenship with a view to future reform.

Consultation activities will be held over the coming months. For updates, consult the consultation plan for updates or contact aadnc.fncitizenship-citoyennetepn.aandc@canada.ca.

As required by Bill S-3, a report to parliament will be tabled by June 12, 2019 on the consultations.

Related links

- Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Consultation Plan
- The Government of Canada's Response to the Descheneaux Decision
- Bill S-3, An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général)
- Plain Text Description of Bill S-3, Bill S-3, *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c (contre). Canada (Procureur général)*
- Descheneaux c (contre). Canada (Procureur général) – Cour supérieur du Québec

Date modified: 2018-06-12

This is Exhibit "G" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: "MacPhail, Heather (HC/SC)" <heather.macphail@canada.ca>
Date: January 9, 2019 at 09:19:06 EST
To: Cindy Blackstock <cblackst@fncaringsociety.com>
Subject: FW: Jordan's Principle in Yukon

Hi Cindy – I had the incorrect email address for you. Please see the exchange regarding children in Yukon below.

Heather

From: MacPhail, Heather (HC/SC)
Sent: 2019-01-09 9:11 AM
To: 'bmathews@fncaringsociety.com'
Cc: Gideon, Valerie (HC/SC); Steeves, Sarah M (HC/SC); Gillis, Leila (HC/SC); 'cblackstock@fncaringsociety.com'
Subject: FW: Jordan's Principle in Yukon

Hi Brittany,

I am following up to your email exchange with Valerie Gideon regarding eligibility for Jordan's Principle in Yukon.

Indigenous Services Canada recognizes the unique complexities in Yukon given that there are no 'reserves', and where the majority of the First Nations are self-governing.

First Nations children from self governing First Nations in Yukon are eligible for services and supports through Jordan's Principle. This includes children that are not yet registered for Indian status, when the First Nation provides written confirmation of their citizenship.

If you have any further questions or comments, please let me know.

Heather

Heather MacPhail

A/Regional Director, Operations
Northern Region/First Nations and Inuit Health Branch
Department of Indigenous Services Canada/Government of Canada
Heather.MacPhail@canada.ca. Tel: 613-946-0909/Mobile: 613-301-5984

Directrice régional des opérations par Int.
Région du Nord/Direction Générale de la Santé des Premières Nations et des Inuits
Ministère des Services aux Autochtones Canada/Gouvernement du Canada
Heather.MacPhail@canada.ca / Tél. 613-946-0909/ Cellulaire: 613-301-5984

From: Gideon, Valerie (HC/SC)
Sent: 2019-01-08 11:22 AM
To: MacPhail, Heather (HC/SC)
Cc: Gillis, Leila (HC/SC)
Subject: Fw: Jordan's Principle in Yukon

Hey Heather - see below. Can you find what yourself or Sarah had sent a few months ago.
Valerie Gideon, Ph.D.
Senior Assistant Deputy Minister/Sous-ministre adjointe principale
FNIHB/DGSPNI
Indigenous Services Canada/Service aux Autochtones du Canada
Tel: 613-957-7701
Cell: 613-219-4104
@valerie_gideon

From: Gideon, Valerie (HC/SC) <valerie.gideon@canada.ca>
Sent: Tuesday, January 8, 2019 11:20 AM
To: Brittany Mathews; Gillis, Leila (HC/SC)
Cc: Cindy Blackstock; Dumulon, Louis (HC/SC)
Subject: Re: Jordan's Principle in Yukon

Hi Brittany - we have a response to this which we can resend and have some language in the SOP's as well. Have cc-ed Louis to send the clarification for you.

Valerie Gideon, Ph.D.
Senior Assistant Deputy Minister/Sous-ministre adjointe principale
FNIHB/DGSPNI
Indigenous Services Canada/Service aux Autochtones du Canada
Tel: 613-957-7701
Cell: 613-219-4104
@valerie_gideon

From: Brittany Mathews
Sent: Tuesday, January 8, 2019 11:02 AM
To: Gideon, Valerie (HC/SC); Gillis, Leila (HC/SC)
Cc: Cindy Blackstock
Subject: Jordan's Principle in Yukon

Good morning Valerie,

The Caring Society office has received a query regarding Jordan's Principle eligibility for First Nations kids in the Yukon. As you know, Yukon is a unique case in that there are no reserves. In this situation, should a First Nations child who is a member of their respective First Nation but be considered non-status qualify for Jordan's Principle? Also, if the child's First Nation be self-governing, can they still qualify for Jordan's Principle?

Jennifer has confirmed that she had seen a case in which a child considered non-status qualified for Jordan's Principle with a letter from their First Nation confirming their membership. Is this a standard procedure?

Thank you,

Brittany Mathews
Reconciliation and Research Coordinator
First Nations Child & Family Caring Society of Canada
bmathews@fncaringsociety.com
613-230-5885

www.fncaringsociety.com
@caringsociety

This is Exhibit "H" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: Wilkinson, Joanne (AADNC/AANDC) <joanne.wilkinson@canada.ca>
Sent: Monday, October 15, 2018 6:47 PM
To: 'Cindy Blackstock' <cblackst@fncaringsociety.com>; 'Brian.Smith@chrc-ccdp.gc.ca' <Brian.Smith@chrc-ccdp.gc.ca>; 'Maggie Wente' <MWente@oktlaw.com>; Lorna Martin <lornam@afn.ca>; 'akosuam@falconers.ca' <akosuam@falconers.ca>; 'afiddler@nan.on.ca' <afiddler@nan.on.ca>; Bobby Narcisse <bnarcisse@nan.on.ca>; David Taylor <DTaylor@conway.pro>; Jon Thompson <JonThompson@afn.ca>; 'MOrr@afn.ca' <MOrr@afn.ca>; 'Robert.Frater@justice.gc.ca' <Robert.Frater@justice.gc.ca>; 'swuttke@afn.ca' <swuttke@afn.ca>; Gideon, Valerie (HC/SC) <valerie.gideon@canada.ca>; 'jabram@aiai.on.ca' <jabram@aiai.on.ca>; 'SDearman@oktlaw.com' <SDearman@oktlaw.com>; 'Salza.Jiwa@chrc-ccdp.gc.ca' <Salza.Jiwa@chrc-ccdp.gc.ca>; 'Zgeneral@aiai.on.ca' <Zgeneral@aiai.on.ca>; 'evelisa.genova@coo.org' <evelisa.genova@coo.org>; 'swellman@afn.ca' <swellman@afn.ca>
Cc: Buist, Margaret (AADNC/AANDC) <margaret.buist@canada.ca>; Kaitlin Ritchie <KRitchie@oktlaw.com>; Nafziger, Lisa (AADNC/AANDC) <lisa.nafziger@canada.ca>; 'constance.marlatt@justice.gc.ca' <constance.marlatt@justice.gc.ca>; Conn, Keith (HC/SC) <keith.conn@canada.ca>; Gasca2, Daniela (AADNC/AANDC) <daniela.gasca2@canada.ca>
Subject: Reallocation Policy

Dear Partners,

I am writing to provide the attached draft departmental policy on reallocation, in line with the February orders, for your review/comment by October 29, 2018, if possible.

I also understand that you are waiting for a response on your comments related to several other items, including Capital and draft agreement templates. I apologize for the delay and will send them as soon as possible, as well as the updated document tracking list.

If you wish to receive a hard copy of this document, please let Lisa Nafziger (copied on this email) know, and she will have it sent to you.

Thank you,

Joanne

Date stamp: October 12, 2018

ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds

1. Context

1.1. In January 2016, the Canadian Human Rights Tribunal ("the Tribunal") found that the Canadian Government was discriminating against First Nations children in the way that it funded child welfare services on reserve, and ordered the Government to end this discrimination (2016 CHRT 2, "the Decision").

1.2. Between April 2016 and February 2018, the Tribunal issued four remedial orders to further clarify the actions the Government should take to implement the Decision. The fourth of these was released on February 1, 2018 (2018 CHRT 4) and included two orders relating to the reallocation of funds for social programs and housing.

1.3. The Government has committed to fully implementing of all of the Tribunal's orders.

2. Policy Statement

2.1. In compliance with 2018 CHRT 4, paragraph 422, Indigenous Services Canada will, *"Stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the Decision by February 15, 2018."*

2.2. In compliance with 2018 CHRT 4, paragraph 424, Indigenous Services Canada will, *"Evaluate all its Social Programs for Indigenous peoples by **April 2, 2018**, in order to determine and ensure any reallocation is necessary and does not adversely impact First Nation children and families."*

2.3. Objectives

2.3.1. To ensure compliance with the Tribunal order on reallocation; and

2.3.2. To ensure that First Nation children and families benefit from the full allocation of funding intended for implicated ISC programs.

3. Effective Date

3.1. This policy takes effect on February 8, 2018.[1]

3.2. This is an evergreen policy that will be reviewed and updated to ensure on-going compliance with all Canadian Human Rights Tribunal orders on child welfare.

4. Application

4.1. As per the order, this policy applies to the social and housing programs at Indigenous Services Canada (ISC). Although not referenced specifically by the Tribunal, this policy will also be applied to ISC education and health programs, given the adverse impact that reallocations from these programs could have on First Nations children and families.

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[1] As per an email notice sent by the ISC Chief Financial Officer, Paul Thoppil, and the Assistant Deputy Minister for Education and Social Development Programs and Partnerships, Paula Isaak, on February 8, 2018.

4.2. This policy applies only to *internal* funding transfers made by the Department; it does not apply to funding management decisions made by recipients.
4.3. This policy applies to both A- and B-Base Grants and Contributions funding. A complete description of the implicated programs is included in Section 5, below.

5. Definitions

For the purpose of this policy:

5.1. *Social programs* include: the First Nations Child and Family Services Program; the On-Reserve Income Assistance program; the Assisted Living Program; and the Family Violence Prevention Program.

5.2. *Education programs* include: Elementary and Secondary Education Program; High-Cost Special Education Program; First Nation Student Success Program; New Paths for Education Program; Education Partnerships Program; First Nation and Inuit Cultural Education Centres Program; Post-Secondary Student Support Program and University and College Entrance Preparation Program; Post-Secondary Partnerships Program; First Nation and Inuit Youth Employment Strategy – Skills Link Program; First Nation and Inuit Youth Employment Strategy – Summer Work Program; and Indspire.

5.3. *Housing programs* refers to the On-Reserve Housing Program.

5.4. *Health programs* include: First Nations and Inuit Health Branch Programs (including, but not limited to, the Jordan's Principle – Child First Initiative; and the Healthy Child Development program).

5.5. Adverse Impact:

In the context of this policy, "adverse impact" refers to a negative consequence to First Nations children or their families that could result from a "permanent" funding transfer out of the social, education, housing, and health programs outlined above. This includes, but is not limited to, a reduction in services that could reasonably be expected to increase the likelihood of a child being apprehended by Child and Family Services.

5.6. Permissible Reallocation

For the purpose of this policy, unless otherwise restricted in program direction (e.g. Budget Management Regime) financial transfers between and across ISC programs are considered permissible in the following circumstances:

5.6.1. If the transfer is between programs not listed in this policy;
5.6.2. If the transfer is from a program not listed in this policy, into a program that is listed in the policy;
5.6.3. When the transfer involves a program listed in this policy but is a temporary measure taken to address program/operational funding needs (cash management);
5.6.4. When it has been clearly documented that funds for a program listed in this policy cannot be spent for their intended purpose at a national level and cannot be carried forward to the next fiscal year by the recipient, region, or program (i.e. a program has an end-of-year surplus);
5.6.5. When the transfer is supported by a policy decision (e.g. a change in program authorities); or

5.6.6. When flexibility is otherwise required to meet the needs of First Nations children and families and it can be clearly documented that a permanent reallocation from a program listed in this policy will not have an adverse impact on First Nations children and families.

5.7. Cash management:

5.7.1. "Cash management" refers to the temporary movement of funds from one program to help address a lack of immediate funding in another.

5.7.2. Once replacement funds are available, monies are returned so that all programs have access to their full allocation.

5.7.3. Any cash management out of implicated ISC programs will be reimbursed as soon as replacement funds are available and operational requirements allow.

5.7.4. Cash management can be multi-year if approved by the Program Director General and the Chief Finances, Results, and Delivery Officer Sector (CFRDO).

6. Policy and Operational Requirements

6.1. Regional Director Generals are responsible for managing the budgets for implicated programs in a manner that is aligned with the rulings of the Tribunal, the procedures outlined in this policy, and any associated directives or guidelines. This includes:

6.1.1. Attesting, on a monthly basis in response to a report produced by CFRDO that transfers out of the implicated programs in their regions reflect "temporary" cash management. The attestation must also include the resource management plan to return the funds back to the implicated program;

6.1.2. Obtaining Program ADM and CFRDO ADM approval for "permanent" reallocations from implicated programs; and

6.1.3. Providing an attestation to CFRDO when undertaking an approved permanent reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence, and indicate that no adverse impact on First Nations children and families is anticipated as a result of the reallocation.

6.2. ESDPP Child and Family Services National Policy Team is responsible for:

6.2.1. Reporting to the Tribunal on the implementation of the reallocation orders from a national perspective;

6.2.2. In collaboration with CFRDO providing guidance to program areas on the implementation of this reallocation policy;

6.2.3. Working with CFRDO to develop tools and processes to support the implementation of this policy; and

6.2.4. Providing updates as required to relevant departmental committees, in collaboration with CFRDO.

6.3. CFRDO Sector is responsible for:

6.3.1. Distributing a monthly report of transfers from implicated programs, by region and group, to Program Directors and Regional Directors General;

6.3.2. Keeping record of all responses to the monthly report and the additional attestations on reallocations, for the purpose of monitoring, oversight, and reporting to the Tribunal;

6.3.3. Conducting ongoing analyses of social, housing, education, and health program funding requirements as needed; and

6.3.4. Working with ESDPP to develop additional tools and processes to support the implementation of this policy.

6.4. ESDPP, FNIHB, and Regional Operations Sector Program Directors (HQ) are responsible for:

6.4.1. Managing the budgets for implicated programs in a manner that is aligned with the rulings of the Tribunal, the procedures outlined in this policy, and any associated directives or guidelines;

6.4.2. Attesting, on a monthly basis in response to a report produced by the CFRDO that transfers out of their budgets for the implicated programs reflect "temporary" cash management. The attestation must also include the resource management plan to return the funds back to the implicated program;

6.4.3. Obtaining Program ADM and CFRDO ADM approval for "permanent" reallocations from implicated programs;

6.4.4. Providing an attestation to CFRDO when undertaking a reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence; and should indicate that no adverse impact on First Nations children and families is anticipated as a result of the transfer;

6.4.5. Working with CFRDO to identify sources of funds outside of the implicated programs to address unanticipated budget pressures; and

6.4.6. Providing oversight, in collaboration with CFRDO on financial management decisions made by Regions in relation to this policy.

7. Consequences

7.1. The Canadian Human Rights Tribunal has the authority to make binding orders. Canada has committed to fully implement the orders of the Canadian Human Rights Tribunal concerning the First Nations Child and Family Services Program, including those related to the reallocation of ISC program funding.

8. References

8.1. 2016 CHRT 2: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do?r=AAAAAQALMjAxNiBDSFJUIDIB

8.2. 2018 CHRT 4: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/308639/index.do?r=AAAAAQALMjAxOCBDSFJUIDQB

This is Exhibit "I" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From:	Cindy Blackstock <cblackst@fncaringsociety.com>
Sent:	Thursday, November 01, 2018 12:53 PM
To:	Wilkinson, Joanne (AADNC/AANDC); Jonathan Thompson; Maggie Wente; Akosua Matthews; David Taylor; Sarah Clarke; Stuart Wuttke; Martin Orr; Gideon, Valerie (HC/SC)
Cc:	Nafziger, Lisa (AADNC/AANDC); Legault, Lisa (AADNC/AANDC)
Subject:	Re: Reallocation
Attachments:	Reallocation Caring Society comments.docx

Hello Joanne

I am attaching the Caring Society's comments on reallocation but need to stress that we are providing these comments absent any clarity from INAC on what "temporary" and "not permanent" mean in this document.. As you are aware, Paula Isaak testified under oath two days ago that "temporary" cash management can run over multiple fiscal years. This would have the effect of denying children and First Nations communities of vital funds for a long period of time. This is particularly problematic given the complete absence of any federal plan to eradicate the inequalities in other service areas and the lack of federal action on the Spirit Bear Plan.

To be clear, we are not consenting to any reallocation or cash management or any action with similar effect that is not specifically time limited in number of calendar days. At present, Canada's approach seems to lack a substantive approach to eliminating the discrimination in the reallocation policy (cash management policy) that incentivized the admission of children into care and created other hardships.

We look forward to receiving a far more specific definition of "temporary" and "not permanent" from Canada and look forward to your comments on our recommendations.

Regards

Cindy

From: Joanne Wilkinson <joanne.wilkinson@canada.ca>
Date: Friday, October 26, 2018 at 11:31 AM
To: Cindy Blackstock <cblackst@fncaringsociety.com>
Cc: "Nafziger, Lisa (AADNC/AANDC)" <lisa.nafziger@canada.ca>, "Legault, Lisa (AADNC/AANDC)" <lisa.legault@canada.ca>
Subject: Reallocation

Hi Cindy,

Thank you for the email and I'm happy to provide the following background and information on this point.

Indeed, I do understand that in its 2008 Report, the OAG recommended that the Department should determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program, and periodically review the program's budget to ensure that it continues to meet program requirements and minimize the program's financial impact on other departmental programs.

In response, the Department agreed to regularly update its estimate of the cost of delivering the program as well as to review periodically the program budget in the context of overall priorities and program requirements.

Canada increased the program budget through investments in Budgets 2016 and 2018. The FNCFS program is no longer funded through reallocations from other programs.

In response to your point about reallocating since 2016, I understand that this issue has been discussed at previous Consultation Committee Meetings, where it has been noted that the Department is currently cash managing the announced increase in funding from Budget 2018 since these funds have not yet been received by the Department - Budget 2018 funds only come to the Department once a Treasury Board Submission for the item is approved.

In the reallocation policy that you are reviewing, this cash-management process is referred to in section 5.7.

I hope this is helpful.

Cheers,
Joanne

Original Message
From: Cindy Blackstock <cblackst@fncaringsociety.com>
Sent: Monday, October 22, 2018 7:26 AM
To: Wilkinson, Joanne (AADNC/AANDC)
Subject: Reallocation

Hi Joanne

We are reviewing Canada's reallocation policy at the moment. In addition to the questions already posed, we are aware that in 2008 the OAG recommended to Canada that they cease reallocations to fund CFS and just budget for the program properly. Canada agreed to the recommendation but failed to implement the policy.

Can you confirm DISC's current position in this recommendation and, if relevant, explain why Canada views the OAG recommendation as unworkable?

Also Margaret Buist advises us that Canada has been reallocating since 2016 to fund CFS. I am not clear why this would be necessary particularly as Canada could draw down more of the 1.4 Billion announced in 2018 versus reallocating. Can you explain why Canada does not just draw down from budgeted funds instead of reallocating?

Thanks
Cindy

Sent from my iPhone

Date stamp: October 12, 2018

ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds

1. Context

1.1. In 2008, the Auditor General of Canada concluded that budget reallocations within the former Indian and Northern Affairs Canada from programs such as community infrastructure and housing to programs such as child welfare have meant that spending in areas like housing has not kept pace with population growth, leading to an accelerated deterioration of community infrastructure. INAC accepted the recommendation but failed to implement it.

Commented [A1]: See 2008 Report of the Auditor General of Canada at 4.72 and 2016 CHRT 2 at para. 373

1.2. In 2009, the House of Commons Standing Committee on Public Accounts noted that it was troubled by the continuing problem of reallocations within the former Indian and Northern Affairs Canada and recommended that a funding model be developed to meet the full costs of all of the Department's funding requiremntequirementss.

Commented [A2]: March 2009 report of the Standing Committee on Public Accounts at p. 11.

1.3. In January 2016, the Canadian Human Rights Tribunal ("the Tribunal") found that the Canadian Government was discriminating against First Nations children in the way that it funded child welfare services on reserve and in its approach to Jordan's Principle, and ordered the Government to end this discrimination (2016 CHRT 2, "the Decision").

1.4. Between April 2016 and February 2018, the Tribunal issued four remedial orders to further clarify the actions the Government should take to implement the Decision. The second of these was released on September 14, 2016 and urged Indigenous and Northern Affairs Canada to eliminate the practice of reallocating funding from other First Nations programs to address shortfalls in child welfare services on reserve. The fourth of these was released on February 1, 2018 (2018 CHRT 4) and included two orders relating to the reallocation of funds for social programs and housing.

Commented [A3]: 2016 CHRT 16 at para. 61.

1.5. The Government has committed to fully implementing of all of the Tribunal's orders.

2. Policy Statement

2.1. In compliance with 2016 CHRT 16, paragraph 61 and 2018 CHRT 4, paragraph 422, Indigenous Services Canada will, *"Stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the Decision by February 15, 2018."*

2.2. In compliance with 2018 CHRT 4, paragraph 424, Indigenous Services Canada will, *"Evaluate all its Social Programs for Indigenous peoples by **April 2, 2018**, in order to determine and ensure any reallocation is necessary and does not adversely impact First Nation children and families."*

2.3. Objectives

2.3.1. To ensure compliance with the Tribunal orders on reallocation; and

2.3.2. To ensure that First Nation children and families benefit from the full allocation of funding intended for implicated ISC programs.

3. Effective Date

3.1. This policy takes effect on February 8, 2018.[1]

3.2. This is an evergreen policy that will be reviewed and updated to ensure on-going compliance with all Canadian Human Rights Tribunal orders on child welfare.

4. Application

4.1. As per the order, this policy applies to the social and housing programs at Indigenous Services Canada (ISC). Although not referenced specifically by the Tribunal, this policy will also be applied to ISC education, ~~and~~ health and infrastructure programs, given the adverse impact that reallocations from these programs could have on First Nations children and families. in keeping with the Tribunal's conclusion in the Decision and remedial orders that Canada's reallocation of funds from programs that address underlying risk factors for First Nations children is problematic.

4.2. This policy applies only to *internal* funding transfers made by the Department; it does not apply to funding management decisions made by recipients.

4.3. This policy applies to both A- and B-Base Grants and Contributions funding. A complete description of the implicated programs is included in Section 5, below.

5. Definitions

For the purpose of this policy:

5.1. *Social programs* include: the First Nations Child and Family Services Program; the On-Reserve Income Assistance program; the Assisted Living Program; and the Family Violence Prevention Program.

5.2. *Education programs* include: Elementary and Secondary Education Program; High-Cost Special Education Program; First Nation Student Success Program; New Paths for Education Program; Education Partnerships Program; First Nation and Inuit Cultural Education Centres Program; Post-Secondary Student Support Program and University and College Entrance Preparation Program; Post-Secondary Partnerships Program; First Nation and Inuit Youth Employment Strategy – Skills Link Program; First Nation and Inuit Youth Employment Strategy – Summer Work Program; and Indspire.

5.3. *Housing programs* refers to the On-Reserve Housing Program.

5.4. *Health programs* include: First Nations and Inuit Health Branch Programs (including, but not limited to, the Jordan's Principle – Child First Initiative; and the Healthy Child Development program).

5.5. *Infrastructure programs* include: First Nations Enhanced Education Infrastructure Fund, Capital Facilities and Maintenance Program, First Nations Infrastructure Fund, First Nations Infrastructure Investment Plan, First Nations Waste Management Initiative, First Nations Schools [other?]

Commented [A4]: 2016 CHRT 2 at para. 390, 2008 OAG Report at 4.72; 2009 Public Accounts Committee report at p. 11

Commented [A5]: 2016 CHRT 2 at paras. 373 and 390, 2016 CHRT 16 at para 61, 2018 CHRT 4 at paras. 271-276

Commented [A6]: Please identify any programs that are excluded from the list under each respective program and why

Commented [A7]: 2016 CHRT 2 lists the "National Child Benefit Reinvestment Program", which is not included in this list. What is the status of that program?

[1] As per an email notice sent by the ISC Chief Financial Officer, Paul Thoppil, and the Assistant Deputy Minister for Education and Social Development Programs and Partnerships, Paula Isaak, on February 8, 2018.

Date stamp: October 12, 2018

5.6. Adverse Impact:

In the context of this policy, "adverse impact" refers to a negative consequence to First Nations children or their families that could reasonably result from a "temporary" or "permanent" funding transfer out of the social, education, housing, and health programs outlined above. This includes, but is not limited to, a reduction in services that could reasonably be expected to increase the likelihood of a child being ~~apprehended~~ removed by Child and Family Services.

5.7. Permissible Reallocation

For the purpose of this policy, unless otherwise restricted in program direction (e.g. Budget Management Regime) financial transfers between and across ISC programs are considered permissible in the following circumstances:

5.7.1. If the transfer is between programs not listed in this policy;

5.7.2. If the transfer is from **a program** not **listed** in this policy, into a program that is listed in the policy;

5.7.3. When the transfer ~~involves~~ is from a program listed in this policy but is a temporary measure taken to address program/operational funding needs (cash management) and the transfer will not result in an adverse impact on First Nations children and families;

5.7.4. When it has been clearly documented that funds for a program listed in this policy cannot be spent for their intended purpose at a national level and cannot be carried forward to the next fiscal year by the recipient, region, or program (i.e. a program has an end-of-year surplus that cannot be carried forward to the next fiscal year);

5.7.5. When the transfer is supported by a policy decision (e.g. a change in program authorities) that will not result in an adverse impact on First Nations children and families; or

5.7.6. When flexibility is otherwise required to meet the needs of First Nations children and families and it can be clearly documented that a permanent reallocation from a program listed in this policy will not have an adverse impact on First Nations children and families.

5.8. Cash management:

5.8.1. "Cash management" refers to the temporary movement of funds from one program to help address a lack of immediate funding in another.

5.8.2. Once replacement funds are available, monies are returned so that all programs have access to their full allocation.

5.8.3. Any cash management out of implicated ISC programs will be reimbursed ~~as soon as replacement funds are available and operational requirements allow~~ and in within ~~any event within~~ 30 days of the temporary re-allocation.

~~5.8.4. Cash management can be multi-year if approved by the Program Director General and the Chief Finances, Results, and Delivery Officer Sector (CFRDO).~~

6. Policy and Operational Requirements

6.1. Regional Directors Generals are responsible for managing the budgets for implicated programs in a manner that is ~~aligned~~in compliance with the rulings of the Tribunal; and is aligned with the procedures outlined in this policy; and any associated directives or guidelines. Where the is a conflict between a Tribunal order and the procedures outlined

Commented [A8]: If there is an adverse impact the transfer should not happen on a temporary or permanent basis

Commented [A9]: In her Oct 19, 2018 email, Joanne Wilkinson specified these as being "departmental core services", "those programs under Regional Operations with the exception of on-reserve housing" and "programs from other government departments"

What other programs besides on-reserve housing reside in Regional Operations? Do any of those programs address underlying risk factors for First Nations children and families?

Commented [A10]: Awaiting list of programs from INAC that are "not listed"

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Commented [A11]: Need a definition of temporary

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Commented [A12]: Cash management transfers are still problematic where they will result in adverse impacts for First Nations children and families. Meeting one pressing need by allowing another pressing need to go unfunded does not address the AG's 2008 recommendation, the PAC's 2009 recommendation, or the CHRT's orders.

Commented [A13]: These policy decisions are limited by the CHRT orders, the CHRA, the Charter and UNDRIP.

Will this be back-stopped by a policy lens and framework aimed at preventing the development and implementation of discriminatory policies, programs and practices that can perpetuate systemic barriers to First Nations child development and well-being?

Commented [A14]: This needs to be tightened up - it is not appropriate to

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Commented [A15]: Multi-year cash management regarding social programs, education programs, housing programs, health programs, and infrastructure programs is not appropriate. The Auditor General's and Public Accounts Committee's recommendations:

AG Recommendation (4.74): Indian and Northern Affairs Canada should determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program. It should periodically review the program's budget to ensure that it continues to meet program requirements and to minimize the program's financial impact on other departmental programs.

PAC recommendation (p. 11): That Indian and Northern Affairs Canada determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements.

Where reallocations from the listed programs is multi-year, Canada would not be taking the opportunity to fund the full costs of both the listed program and the program towards which the reallocation was directed by reversing the reallocation

in this policy and or any associated directives and guidelines, the Tribunal orders will govern. This ~~includes~~management includes:

6.1.1. Attesting, on a monthly basis in response to a report produced by the Chief Finances Results and Delivery Officer Sector (CFRDO) that transfers out of the implicated programs in their regions reflect "temporary" cash management that will not result in an adverse impact on First Nations children and families. The attestation must also include the resource management plan to return the funds back to the implicated program within 30 days;

6.1.2. Obtaining Program ADM and CFRDO ADM approval for "permanent" reallocations from implicated programs that will not result in an adverse impact on First Nations children and families; and

6.1.3. Providing an attestation to CFRDO when undertaking an approved permanent reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence, and indicate that no adverse impact on First Nations children and families is anticipated as a result of the reallocation, as well as the basis on which the Regional Director General has reached this conclusion.

6.2. ESDPP Child and Family Services National Policy Team is responsible for:

6.2.1. Reporting to the Tribunal on the implementation of the reallocation orders from a national perspective;

6.2.2. In collaboration with CFRDO providing guidance to program areas on the implementation of this reallocation policy;

6.2.3. Working with CFRDO to develop tools and processes to support the implementation of this policy; and

6.2.4. Providing updates as required to relevant departmental committees, in collaboration with CFRDO.

6.3. CFRDO Sector is responsible for:

6.3.1. Distributing a monthly report of transfers from implicated programs, by region and group, to Program Directors and Regional Directors General;

6.3.2. Keeping records of all responses to the monthly report and the additional attestations on reallocations, for the purpose of monitoring, oversight, and reporting to the Tribunal;

6.3.3. Conducting ongoing analyses of social, housing, education, ~~and~~ health, and infrastructure program funding requirements as needed; and

6.3.4. Working with ESDPP to develop additional tools and processes to support the implementation of this policy.

6.4. ESDPP, FNIHB, and Regional Operations Sector Program Directors (HQ) are responsible for:

6.4.1. Managing the budgets for implicated programs in a manner that is ~~aligned~~in compliance with the rulings of the Tribunal, and is aligned with the procedures outlined in this policy, and any associated directives or guidelines;

6.4.2. Attesting, on a monthly basis in response to a report produced by the CFRDO that transfers out of their budgets for the implicated programs reflect "temporary" cash management. The attestation must also include the resource management plan to return the funds back to the implicated program within 30 days;

Commented [A16]: Who will gives assistance to Regional Directors General in evaluating adverse impacts on First Nations children and family, given that ISC has yet to demonstrate its expertise in this area and training has not yet been put into place?

Commented [A17]: On what frequency will the reports occur?

Once the Tribunal no longer has jurisdiction, to whom will reports continue?

Commented [A18]: How will oversight work once the Tribunal no longer has jurisdiction?

Commented [A19]: Does CFRDO have expertise on these program requiremnts

6.4.3. Obtaining Program ADM and CFRDO ADM approval for "permanent" reallocations from implicated programs that will not result in an adverse impact for First Nations children and families;

6.4.4. Providing an attestation to CFRDO when undertaking a reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence; and should indicate that no adverse impact on First Nations children and families is anticipated as a result of the transfer, as well as the basis for that conclusion;

6.4.5. Working with CFRDO to identify sources of funds outside of the implicated programs to address unanticipated budget pressures and to restore temporary reallocations within the 30-day timeframe; and

6.4.6. Providing oversight, in collaboration with CFRDO on financial management decisions made by Regions in relation to this policy.

7. Consequences

7.1. The Canadian Human Rights Tribunal has the authority to make binding orders. Canada has committed to fully implement the orders of the Canadian Human Rights Tribunal concerning the First Nations Child and Family Services Program and Jordan's Principle, including those related to the reallocation of ISC program funding.

8. References

8.1. 2008 OAG Report: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_04_e_30700.html#hd5j

8.2. 2009 Public Accounts Report : http://www.ourcommons.ca/Content/Committee/402/PACP/Reports/RP3731041/402_PACP_Rpt07/402_PACP_Rpt07-e.pdf

8.3. 2016 CHRT 2: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do?r=AAAAAQALMjAxNiBDSFJUIDIB

8.4. 2016 CHRT 16: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/181627/index.do

8.5. 2018 CHRT 4: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/308639/index.do?r=AAAAAQALMjAxOCBDSFJUIDQB

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This is Exhibit "J" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: Wilkinson, Joanne (AADNC/AANDC) <joanne.wilkinson@canada.ca>
Sent: Tuesday, January 8, 2019 4:45 PM
To: 'Cindy Blackstock (cblackst@fncaringsociety.com)' <cblackst@fncaringsociety.com>; 'Brian.Smith@chrc-ccdp.gc.ca' <Brian.Smith@chrc-ccdp.gc.ca>; 'MWente@oktlaw.com' <MWente@oktlaw.com>; 'lornam@afn.ca' <lornam@afn.ca>; 'akosuam@falconers.ca' <akosuam@falconers.ca>; 'afiddler@nan.on.ca' <afiddler@nan.on.ca>; 'bnarcisse@nan.on.ca' <bnarcisse@nan.on.ca>; David Taylor <DTaylor@conway.pro>; 'Jon Thompson' <JonThompson@afn.ca>; 'MOrr@afn.ca' <MOrr@afn.ca>; 'Robert.Frater@justice.gc.ca' <Robert.Frater@justice.gc.ca>; 'swuttke@afn.ca' <swuttke@afn.ca>; Gideon, Valerie (HC/SC) <valerie.gideon@canada.ca>; 'Joel Abram <jAbram@aiai.on.ca> (jAbram@aiai.on.ca)' <jAbram@aiai.on.ca>; 'SDearman@oktlaw.com' <SDearman@oktlaw.com>; 'Salza.Jiwa@chrc-ccdp.gc.ca' <Salza.Jiwa@chrc-ccdp.gc.ca>; 'sarah@childandfamilylaw.ca' <sarah@childandfamilylaw.ca>; 'Zgeneral@aiai.on.ca' <Zgeneral@aiai.on.ca>
Cc: 'KRitchie@oktlaw.com' <KRitchie@oktlaw.com>; Nafziger, Lisa (AADNC/AANDC) <lisa.nafziger@canada.ca>; 'constance.marlatt@justice.gc.ca' <constance.marlatt@justice.gc.ca>; Conn, Keith (HC/SC) <keith.conn@canada.ca>; Gasca2, Daniela (AADNC/AANDC) <daniela.gasca2@canada.ca>; Johnston, Odette (AADNC/AANDC) <odette.johnston@canada.ca>; Ayoub, Rachelle (AADNC/AANDC) <rachelle.ayoub@canada.ca>
Subject: Update - Reallocation Policy
Importance: High

Good day everyone,

Thank you for your comments on the *ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds*.

Attached you will find the following documents for your information:

1. The Department's responses to the Caring Society's comments on the draft Reallocation Policy;
2. *Budget Management Principles* – a high-level document intended to serve as overarching guidance to accompany the Reallocation Policy; and
3. The final version of the Reallocation Policy, approved by ISC senior management as of December 2018.

Thank you,
Joanne

Date stamp: December 21, 2018

ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds

1. Context

1.1. In 2008, the Auditor General found that Canada had been addressing increasing costs for the First Nations Child and Family Services (FNCFS) Program by reallocating from other programs, and that this was an unsustainable approach that had adverse impacts on other departmental programs, including housing. The Auditor General recommended that Indian and Northern Affairs Canada determine the full costs of meeting the policy requirements of the First Nations Child and Family Services Program and periodically review the program's budget to ensure that it continues to meet program requirements and to minimize the program's financial impact on other departmental programs. In response, the Department agreed to regularly update its estimate of the cost of delivering the program with the new approach on a province-by-province basis, over the next five years.

1.2. In 2009, the House of Commons Standing Committee on Public Accounts released a response to the 2008 Auditor General's Report on the FNCFS Program. The Committee expressed concern regarding reallocation within the former Indian and Northern Affairs Canada and recommended that the Department determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements.

1.3. In January 2016, the Canadian Human Rights Tribunal ("the Tribunal") found that the Canadian Government was discriminating against First Nations children in the way that it funded child welfare services on reserve, and in its approach to Jordan's Principle, and ordered the Government to end this discrimination (2016 CHRT 2, "the Decision").

1.4. Between April 2016 and February 2018, the Tribunal issued four additional rulings to further clarify the actions the Government should take to implement its 2016 Decision. The second of these, released on September 14, 2016, stated that, "While the reallocation of funding from other First Nations programs to address shortfalls in the FNCFS Program may be outside the four corners of this complaint... the Panel urges INAC to eliminate this practice" (61). The fourth was released on February 1, 2018 (2018 CHRT 4) and included additional orders relating to the reallocation of funds for social programs and housing.

1.5. The Government has committed to fully implementing the Tribunal's orders.

2. Policy Statement

2.1. In compliance with 2016 CHRT 16 (paragraph 61) and 2018 CHRT 4 (paragraph 422) Indigenous Services Canada will, *"Stop unnecessarily reallocating funds from other social programs, especially housing, if it has the adverse effect to lead to apprehensions of children or other negative impacts outlined in the Decision by February 15, 2018."*

2.2. In compliance with 2018 CHRT 4, paragraph 424, Indigenous Services Canada will, *"Evaluate all its Social Programs for Indigenous peoples by **April 2, 2018**, in order to determine and ensure any reallocation is necessary and does not adversely impact First Nation children and families."*

2.3. Objectives

2.3.1. To ensure compliance with the Tribunal orders on reallocation; and

2.3.2. To ensure that First Nation children and families benefit from the full allocation of funding intended for implicated ISC programs.

3. Effective Date

3.1. On February 8, 2018, an email directive was sent to ISC staff, indicating that it was no longer permitted to reallocate social program funding to cover shortfalls.[1]

3.2. The formal Reallocation Policy and accompanying procedures take effect on December 21, 2018, following approval by the ISC Senior Management.

3.3. This is an evergreen policy that will be reviewed and updated to ensure on-going compliance with all Canadian Human Rights Tribunal orders on child welfare.

4. Application

4.1. As per the order, this policy applies to the social and housing programs at Indigenous Services Canada (ISC). Although not referenced specifically by the Tribunal, this policy will also be applied to ISC education and health programs, given the adverse impact that reallocations from these programs could have on First Nations children and families, and in keeping with the Tribunal's conclusion in the Decision and remedial rulings that Canada's reallocation of funds from programs that address underlying risk factors for First Nations children is problematic.

4.2. This policy applies only to *internal* funding transfers made by the Department; it does not apply to funding management decisions made by recipients.

4.3. This policy applies to both A- and B-Base Grants and Contributions funding. A complete description of the implicated programs is included in Section 5, below.

5. Definitions

For the purpose of this policy:

5.1. *Social programs* include: the First Nations Child and Family Services Program; the On-Reserve Income Assistance program; the Assisted Living Program; and the Family Violence Prevention Program.

5.2. *Education programs* include: Elementary and Secondary Education Program; High-Cost Special Education Program; First Nation Student Success Program; New Paths for Education Program; Education Partnerships Program; First Nation and Inuit Cultural Education Centres Program; Post-Secondary Student Support Program and University and College Entrance Preparation Program; Post-Secondary Partnerships Program; First Nation and Inuit Youth Employment Strategy – Skills Link Program; First Nation and Inuit Youth Employment Strategy – Summer Work Program; and Indspire.

[1] This email directive was sent by the ISC Chief Financial Officer, Paul Thoppil, and the Assistant Deputy Minister for Education and Social Development Programs and Partnerships, Paula Isaak.

5.3. *Housing programs* refers to the On-Reserve Housing Program.

5.4. *Health programs* include: First Nations and Inuit Health Branch Programs (including, but not limited to, the Jordan's Principle – Child First Initiative; and the Healthy Child Development program).

5.5. Adverse Impact:

In the context of this policy, "adverse impact" refers to a negative consequence to First Nations children or their families that could reasonably result from a "temporary" or "permanent" funding transfer out of the social, education, housing, and health programs outlined above. This includes, but is not limited to, a reduction in services that could reasonably be expected to increase the likelihood of a child being removed by Child and Family Services.

5.6. Permissible Reallocation

For the purpose of this policy, unless otherwise restricted in program direction (e.g. Budget Management Regime) financial transfers between and across ISC programs are considered permissible in the following circumstances:

5.6.1. If the transfer is between programs not listed in this policy;

5.6.2. If the transfer is from a program not listed in this policy, into a program that is listed in the policy;

5.6.3. When the transfer is from a program listed in this policy but is a temporary measure taken to address program/operational funding needs (cash management) and the transfer will not result in an adverse impact on First Nations children and families;

5.6.4. When it has been clearly documented that funds for a program listed in this policy cannot be spent for their intended purpose at a national level and cannot be carried forward to the next fiscal year by the recipient, region, or program (i.e. a program has an end-of-year surplus that cannot be carried forward to the next fiscal year);

5.6.5. When the transfer is supported by a policy decision (e.g. a change in program authorities) that will not result in an adverse impact on First Nations children and families; or

5.6.6. When flexibility is otherwise required to meet the needs of First Nations children and families and it can be clearly documented that a permanent reallocation from a program listed in this policy will not have an adverse impact on First Nations children and families.

5.7. Cash management:

5.7.1. "Cash management" refers to the temporary movement of funds from one program to help address a lack of immediate funding in another.

5.7.2. Once replacement funds are available, monies are returned so that all programs have access to their full allocation.

5.7.3. Any cash management out of implicated ISC programs will be reimbursed as soon as replacement funds are available and operational requirements allow.

5.7.4. Cash management can be multi-year if approved by the Program ADM, the ADM Regional Operations, and the Chief Finances, Results, and Delivery Officer (CFRDO) Sector.

6. Policy and Operational Requirements

6.1. Regional Director Generals are responsible for managing the budgets for implicated programs in a manner that is in compliance with the rulings of the Tribunal and aligned with the procedures outlined in this policy, and any associated directives or guidelines. Where there is a conflict between a Tribunal order and the procedures outlined in this policy and/or any associated directives and guidelines, the Tribunal orders will govern. This management includes:

6.1.1. Attesting, on a monthly basis in response to a report produced by CFRDO that transfers out of the implicated programs in their regions reflect "temporary" cash management that will not result in an adverse impact on First Nations children and families. The attestation must also include the resource management plan to return the funds back to the implicated program;

6.1.2. Obtaining Program ADM, ADM Regional Operations, and CFRDO approval for "permanent" reallocations from implicated programs that will not result in an adverse impact on First Nations children and families; and

6.1.3. Providing an attestation to CFRDO when undertaking an approved permanent reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence, and indicate that no adverse impact on First Nations children and families is anticipated as a result of the reallocation as well as the basis on which the Regional Director General has reached this conclusion.

6.2. ESDPP Child and Family Services National Policy Team is responsible for:

6.2.1. Reporting to the Tribunal on the implementation of the reallocation orders from a national perspective;

6.2.2. In collaboration with CFRDO providing guidance to program areas on the implementation of this reallocation policy;

6.2.3. Working with CFRDO to develop tools and processes to support the implementation of this policy; and

6.2.4. Providing updates as required to relevant departmental committees, in collaboration with CFRDO.

6.3. CFRDO Sector is responsible for:

6.3.1. Distributing a monthly report of transfers from implicated programs, by region and group, to Program Directors and Regional Directors General;

6.3.2. Keeping record of all responses to the monthly report and the additional attestations on reallocations, for the purpose of monitoring, oversight, and reporting to the Tribunal;

6.3.3. Assisting the programs in conducting ongoing analyses of social, housing, education, and health program funding requirements as needed; and

6.3.4. Working with ESDPP to develop additional tools and processes to support the implementation of this policy.

6.4. ESDPP, FNIHB, and Regional Operations Sector Program Directors (HQ) are responsible for:

6.4.1. Managing the budgets for implicated programs in a manner that is in compliance with the rulings of the Tribunal, and is aligned with the procedures outlined in this policy and any associated directives or guidelines;

6.4.2. Attesting, on a monthly basis in response to a report produced by the CFRDO that transfers out of their budgets for the implicated programs reflect "temporary" cash management. The attestation must also include the resource management plan to return the funds back to the implicated program;

6.4.3. Obtaining Program ADM, ADM Regional Operations, and CFRDO approval for "permanent" reallocations from implicated programs that will not result in an adverse impact for First Nations children and families;

6.4.4. Providing an attestation to CFRDO when undertaking a reallocation out of an implicated program. This attestation should: include a clear rationale as to why the reallocation is necessary, as well as any supporting evidence; and should indicate that no adverse impact on First Nations children and families is anticipated as a result of the transfer, as well as the basis for that conclusion;

6.4.5. Working with CFRDO to identify sources of funds outside of the implicated programs to address unanticipated budget pressures;

6.4.6. Providing oversight, in collaboration with CFRDO on financial management decisions made by Regions in relation to this policy; and

6.4.7. Coordinating the ongoing analysis of funding requirements for their programs.

7. Consequences

7.1. The Canadian Human Rights Tribunal has the authority to make binding orders. Canada has committed to fully implement the orders of the Canadian Human Rights Tribunal concerning the First Nations Child and Family Services Program and Jordan's Principle, including those related to the reallocation of ISC program funding.

8. References

8.1. 2008 OAG Report: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_04_e_30700.html#hd5j

8.2. 2009 Public Accounts Report : http://www.ourcommons.ca/Content/Committee/402/PACP/Reports/RP3731041/402_PACP_Rpt07/402_PACP_Rpt07-e.pdf

8.3. 2016 CHRT 2: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/127700/index.do?r=AAAAAQALMjAxNiBDSFJUIDIB

8.4. 2018 CHRT 4: https://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/308639/index.do?r=AAAAAQALMjAxOCBDSFJUIDQB

Indigenous Services Canada
Budget Management Principles

This document provides an overview of the principles that guide budget management at Indigenous Services Canada (ISC), and that serve as the foundation for the ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds. These principles are founded on financial management practices for public entities in Canada, and are informed by the Indigenous Services context, specifically.

- ISC works collaboratively with partners to improve access to high quality services for First Nations, Inuit, and Métis.

- ISC budget management decisions seek to: respond to needs and emerging pressures; sustain ongoing service delivery; optimize funding and benefits to Indigenous communities, and implement Government priorities.

- The Deputy Minister of ISC is responsible for monitoring the financial management performance of the Department and instituting risk-based internal controls to ensure accountability and results.

- To support the Deputy Minister in meeting these responsibilities, ISC continually monitors and forecasts program demand to meet program funding needs and legal obligations. Budgets are determined based on anticipated needs, which are normally established through historical trends and forecasting. On occasion, the Deputy Minister may recommend to the Minister, through established government processes and authorities, to seek additional funding for the year to respond to unforeseen pressures or address increases in anticipated needs.

- Unforeseen pressures normally fall into the following categories, by order of priority:
    1. Emergency/Health & Safety (e.g. response to natural disasters such as fires and floods);
    2. Legal obligations; and
    3. Service funding.

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

- Consistent with government authorities, ISC Programs may also temporarily reallocate funds within a fiscal year to address cash flow challenges (advancing initiatives that have been approved but for which dedicated funds have not yet been received). Funds are returned later in the year to the original source, once funding is received.

- Consistent with government authorities, the ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds will provide guidance to ADMs, Program Managers, and Regions, on what is permissible in the context of the implementation of the CHRT orders.

- The Department is committed to transparency to Canadians on its results and expenditures through reporting to Parliament through the Departmental Results Report and the Public Accounts of Canada. ISC adheres to the Departmental Results Framework of the Government of Canada which defines the Department's core responsibilities and explains how it achieves outcomes, with the provision of data and performance information.

ISC Policy in Internal Reallocation of Social, Housing, Education, and Health Program Funds
Departmental responses to Caring Society comments
(Received November 1, 2018)

Caring Society comment #1
Change 1.1 to read as follows:
In 2008, the Auditor General of Canada concluded that budget reallocations within the former Indian and Northern Affairs Canada from programs such as community infrastructure and housing to programs such as child welfare have meant that spending in areas like housing has not kept pace with population growth, leading to an accelerated deterioration of community infrastructure. INAC accepted the recommendation but failed to implement it.
ISC response #1
We have updated the Caring Society's proposed language for 1.1 to be consistent with the text of the OAG recommendations. Please see attached updated draft.

Caring Society comment #2
Change 1.2 to read as follows:
In 2009, the House of Commons Standing Committee on Public Accounts noted that it was troubled by the continuing problem of reallocations within the former Indian and Northern Affairs Canada and recommended that a funding model be developed to meet the full costs of all of the Department's funding requirements.
ISC Response #2
We have included the Caring Society's proposed language with minor changes to provide additional context on the report. Please see attached updated draft.

Caring Society comment #3
Change 1.3 to include a reference to Jordan's Principle.
ISC Response #3
Accepted; change has been made.

Caring Society comment #4
Change 1.4 to include a reference to the reallocation paragraphs in 2016 CHRT 16:

Between April 2016 and February 2018, the Tribunal issued four remedial orders to further clarify the actions the Government should take to implement the Decision. The second of these was released on September 14, 2016 and urged Indigenous and Northern Affairs Canada to eliminate the practice of reallocating funding from other First Nations programs to address shortfalls in child welfare services on reserve. The fourth of these was released on February 1, 2018 (2018 CHRT 4) and included two orders relating to the reallocation of funds for social programs and housing.
ISC Response #4
We have adapted the Caring Society's proposed language for 1.4 to be consistent with the references to reallocation in 2016 CHRT 16. Please see attached updated draft.

Caring Society comment #5

Change 2.1 to include a reference to 2016 CHRT 16.

ISC Response #5

Accepted; change has been made. Please see attached updated draft.

Caring Society comment #6

Change 2.3.1 so it refers to "orders" in the plural.

ISC Response #6

Accepted; change has been made. Please see attached updated draft.

Caring Society comment #7

Change section 4.1 so that "Infrastructure" is included as one of the programs under the policy.

ISC Response #7

In its orders, the Tribunal calls on Canada to stop unnecessarily reallocating from social programs and housing. The social programs listed by the Tribunal are: the Family Violence Prevention Program; Income Assistance; Assisted Living; First Nations Child and Family Services; and the National Child Benefit Reinvestment Program. The policy includes the first four programs and housing, and goes beyond the Tribunal's orders by including education and health programming. The National Child Benefit Reinvestment Program wound down in 2016 and was replaced by the Canada Child Benefit; this program is managed by Canada Revenue Agency.

Caring Society comment #8

Change section 4.1 to include additional text on the context of the Tribunal's orders.

ISC Response #8

Accepted; change has been made. Please see attached updated draft.

Caring Society comment #9

For section 5: "Please identify any programs that are excluded from the list under each respective program and why."

ISC Response #9

Please see ISC Response #7.

Caring Society comment #10

For 5.1: "2016 CHRT 2 lists the 'National Child Benefit Reinvestment Program' which is not included in this list. What is the status of that program?"

ISC Response #10

This program wound down in 2016; it was replaced by the Canada Child Benefit, which is managed by Canada Revenue Agency.

Caring Society comment #11

Create a new section that outlines implicated ISC infrastructure programs.

ISC Response #11

Please see ISC Response #7.

Caring Society Comment #12

In section 5.5 include a reference to "temporary" funding transfers, given that "if there is an adverse impact the transfer should not happen on a temporary or permanent basis."

ISC Response #12

Accepted; change ~~to 5.5~~ has been made. Please see attached updated draft.

Caring Society Comment #13

Replace "apprehended" in 5.5. with "removed."

ISC Response #13

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #14

For 5.6.1 and 5.6.2: "What other programs besides on-reserve housing reside in Regional Operations? Do any of those programs address underlying risk factors for First Nations children and families?"

ISC Response #14

ISC Regional Offices work closely with First Nations in the funding and delivery of "essential" programs, including education, government, social assistance, First Nation child and family services and housing. For further information, please see ISC Responses #7 and #9.

Caring Society Comment #15

For 5.6.3: "Need a definition of "temporary."

ISC Response #15

For cash management transactions, the Department will return funds as soon as operationally possible. Any transactions spanning more than one fiscal year will require the approval of the Program Assistant Deputy Minister, the Senior Assistant Deputy Minister of Regional Operations and the Chief Finances, Results, and Delivery Officer.

Caring Society Comment #16

Change 5.6.3 to include a reference to adverse impacts on First Nations children and families.

ISC Response #16

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #17

Change 5.6.4 to include "that cannot be carried forward to the next fiscal year."

ISC Response #17

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #18

For 5.6.5: In this section, ISC indicates that future "policy decisions" could be used as a rationale for permitting funding transfers out of the programs governed by this policy. The Caring Society indicates that any such policy decisions must be "limited by the CHRT orders, the CHRA, the Charter and UNDRIP," and "back-stopped by a policy lens and framework aimed at preventing the development and implementation of discriminatory policies, programs and practices that can perpetuate systemic barriers to First Nations child development and well-being."

ISC Response #18

Canada has committed to the full implementation of the CHRT orders, and remains committed to upholding the CHRA, the Charter, and the UNDRIP. The development of a policy lens and framework as suggested by the Caring Society could be discussed at the CCCW within the context of the plan for addressing discrimination.

Caring Society Comment #19

Change 5.6.5 to include a reference to adverse impacts on First Nations children and families.

ISC Response #19

Accepted; changes to 5.6.5 have been made. Please see attached updated draft.

Caring Society Comment #20

For 5.7: Citing the Auditor General's 2008 report, the Caring Society indicated that "Multi-year cash management regarding social programs, education programs, housing programs, health programs, and infrastructure programs is not appropriate."

ISC Response #20

In line with the findings of the Auditor General's Report, ISC has committed to ensuring adequate funding for the FNCFS program. For cash management transactions, the Department will return funds as soon as operationally possible. Any transactions spanning more than one fiscal year will require the approval of the Program Assistant Deputy Minister, the Senior Assistant Deputy Minister of Regional Operations and the Chief Finances, Results, and Delivery Officer.

Caring Society Comment #21

Change 5.7.3 to read:

Any cash management out of implicated ISC programs will be reimbursed ~~as soon as replacement funds are available and operational requirements allow~~ within 30 days of the temporary re-allocation.

ISC Response #21

A thirty-day limit does not allow the Department sufficient flexibility to address emerging program pressures (e.g. the need to divert funds to address a natural disaster or to protect funds from lapsing due to unforeseen project delays).

Caring Society Comment #22

Remove section 5.7.4 because, "Multi-year cash management regarding social programs, education programs, housing programs, health programs, and infrastructure programs is not appropriate."

ISC Response #22

Please see Responses #20 and #21.

Caring Society Comment #23

Change 6.1 to read:

Regional Directors General are responsible for managing the budgets for implicated programs in a manner that is ~~aligned~~ in compliance with the rulings of the Tribunal and is aligned with the procedures outlined in this policy and any associated directives or guidelines. Where there is a conflict between a Tribunal order and the procedures outlined in this policy and/or any associated directives and guidelines, the Tribunal orders will govern.

ISC Response #23

Accepted; changes have been made. Please see attached updated draft.

Caring Society Comment #24

Change 6.1.1 to read:

Attesting, on a monthly basis in response to a report produced by the Chief Finances Results and Delivery Officer Sector (CFRDO) that transfers out of the implicated programs in their regions reflect "temporary" cash management that will not result in an adverse impact on First Nations children and families. The attestation must also include the resource management plan to return the funds back to the implicated program within 30 days.

ISC Response #24

The text for 6.1.1 has been updated to align with ISC Response #21. Please see attached updated draft.

Caring Society Comment #25

Change 6.1.1 to include a reference to adverse impacts on First Nations children and families.

ISC Response #25

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #26

Change 6.1.3 to include a reference to the documentation required for a permanent reallocation.

ISC Response #26

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #27

For 6.2.: "Who will give assistance to Regional Directors General in evaluating adverse impacts on First Nations children and family, given that ISC has yet to demonstrate its expertise in this area and training has not yet been put into place?"

ISC Response #27

We are open to discussions with the Consultation Committee on the best way to prepare and support senior management in assessing the possibility of adverse impacts for First Nations children and families.

Caring Society Comment #28

For 6.2.1 and 6.3.2: "On what frequency will [reporting to the Tribunal on the implementation of the reallocation orders] occur? And "once the Tribunal no longer has jurisdiction, to whom will the reports continue?"

ISC Response #28

The Department is open to discussions with the Consultation Committee on how to make the information related to reallocation as transparent as possible. For example, the Department's monthly monitoring and tracking as proposed in the draft policy could continue after the Tribunal has relinquished jurisdiction if desired by the Parties.

Caring Society Comment #29

Change 6.3.3 to include "infrastructure."

ISC Response #29

Please see ISC Response #7.

Caring Society Comment #30

For 6.3.3: "Does CFRDO have expertise on these program [funding] requirements?"

ISC Response #30

We have amended this section to read, "*Assisting the programs in* conducting ongoing analyses..." (emphasis added). Please see attached updated draft.

Caring Society Comment #31

Change 6.4.1 to ensure consistency with previous language.

ISC Response #31

Accepted; changes have been made. Please see attached updated draft.

Caring Society Comment #32

Change 6.4.2 to include a time limit of 30 days for repayment.

ISC Response #32

Please see ISC Response #21.

Caring Society Comment #33

Change 6.4.3 to include a reference to adverse impacts on First Nations children and families.

ISC Response #33

Accepted; changes have been made. Please see attached updated draft.

Caring Society Comment #34

Change 6.4.4 to ensure consistency with previous language.

ISC Response #34

Accepted; change has been made. Please see attached updated draft.

Caring Society Comment #35

Change 6.4.5 to read:

Working with CFRDO to identify sources of funds outside of the implicated programs to address unanticipated budget pressures and to restore temporary reallocations within the 30-day timeframe.

ISC Response #35

Please see ISC Response # 21.

Caring Society Comment #36

Change 7.1 to include a reference to Jordan's Principle.

ISC Response #36

Accepted; change has been made. Please see attached updated draft.

This is Exhibit "K" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: "Wilkinson, Joanne (AADNC/AANDC)" <joanne.wilkinson@canada.ca>
Date: January 16, 2019 at 16:51:47 EST
To: "'Cindy Blackstock'" <cblackst@fncaringsociety.com>, Jon Thompson<JonThompson@afn.ca>
Cc: "Johnston, Odette (AADNC/AANDC)" <odette.johnston@canada.ca>, "Gideon, Valerie (HC/SC)" <valerie.gideon@canada.ca>
Subject: RE: Reallocation

Hello again,

With regard to your first point, the reallocation policy and associated budget management principles have been approved by ISC's Senior Management Committee and are considered final as of December 2018. They have also been tabled with the department's Financial Management Committee and, once we have a French version completed, further communications to managers and employees will be undertaken.

Respecting your second point, the department has drawn down the annual amount for 2018-19 identified in Budget 2018.

Thanks very much,
Joanne

From: Cindy Blackstock [mailto:cblackst@fncaringsociety.com]
Sent: Wednesday, January 16, 2019 10:05 AM
To: Wilkinson, Joanne (AADNC/AANDC); Jon Thompson
Subject: Reallocation

Hello Joanne

Thank you for sending the reallocation policy. We are reviewing it carefully and had a couple of questions to ask:

1) I note it was sent to us for information only does this mean that this document reflects Canada's final position on the matter?

2) Has the 1.4 billion been drawn down from Treasury Board yet?

Thanks

Cindy

Cindy Blackstock, PhD
Executive Director, First Nations Child and Family Caring Society of Canada
Professor, School of Social Work, McGill University
Suite 401, 309 Cooper Street, Ottawa, ON K2P 0G5
www.fncaringsociety.com
(613) 230-5885 info@fncaringsociety.com Twitter: @Caringsociety

This is Exhibit "L" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: Isaak, Paula (AADNC/AANDC) <paula.isaak@canada.ca>
Sent: Tuesday, September 11, 2018 4:33 PM
To: 'Cindy Blackstock' <cblackst@fncaringsociety.com>; 'Maggie Wente' <MWente@oktlaw.com>; Lorna Martin <lornam@afn.ca>; 'akosuam@falconers.ca' <akosuam@falconers.ca>; David Taylor <DTaylor@conway.pro>; Jon Thompson <JonThompson@afn.ca>; 'MOrr@afn.ca' <MOrr@afn.ca>; 'Robert.Frater@justice.gc.ca' <Robert.Frater@justice.gc.ca>; 'swuttke@afn.ca' <swuttke@afn.ca>; Gideon, Valerie (HC/SC) <valerie.gideon@canada.ca>; 'jabram@aiai.on.ca' <jabram@aiai.on.ca>; 'SDearman@oktlaw.com' <SDearman@oktlaw.com>; 'salza.jiwa@chrc-ccdp.gc.ca' <salza.jiwa@chrc-ccdp.gc.ca>; 'afiddler@nan.on.ca' <afiddler@nan.on.ca>; Bobby Narcisse <bnarcisse@nan.on.ca>; 'Brian.Smith@chrc-ccdp.gc.ca' <Brian.Smith@chrc-ccdp.gc.ca>
Cc: 'linda.sandy@coo.org' <linda.sandy@coo.org>; Buist, Margaret (AADNC/AANDC) <margaret.buist@canada.ca>; Kaitlin Ritchie <KRitchie@oktlaw.com>; Nafziger, Lisa (AADNC/AANDC) <lisa.nafziger@canada.ca>; Hove, Johanna (AADNC/AANDC) <johanna.hove@canada.ca>; 'constance.marlatt@justice.gc.ca' <constance.marlatt@justice.gc.ca>; Conn, Keith (HC/SC) <keith.conn@canada.ca>
Subject: September 5 CCCW meeting follow up

Due to technical difficulties, I am resending this email to ensure everybody has received the email.

Dear Partners,

I am sending the attached items for your review: a) 2 agency funding agreements; b) an interim appeals process flow chart; c) an interim appeals process checklist; d) a draft letter to small agencies on salary adjustments; and e) a chart to track documents shared and input received.

Sample Agreements
In order to ensure the funding agreement respects the CHRT Decisions and to alleviate administrative burden for recipients, ISC has developed the CHRT - Notice of Acceptance of Requests (NARs) and the CHRT - Text Deviations.

The NAR is used for Recipients that are already under an existing funding agreement with ISC. It avoids ISC having to amend a funding agreement and simply requires the signature of a delegated ISC official. It alleviates burden on the recipient and expedites reimbursement of claims to Recipients. The Text Deviation is used when Agencies are required to enter into a new funding agreement with ISC (two signatures required since it is the first time an agreement is put into place).

The NAR and the Text Deviation permit Canada to:

- Reimburse costs retroactively from January 26, 2016 to March 31, 2018;
- Amend the Annex 4 – Payment Plan of the Agreement where it accepts a request (claim) of the Recipient;

- Waive the requirement in section 14 of the Agreement that the overall amount of funding for an initiative cannot increase (i.e. the department can increase the amount to be funded allowing recipients to receive funding on actuals);
- Waive the requirement in section 2.14 of Annex 3 (Conditions of Payment – DIAND funding) of the Agreement that any amount that the Recipient spends that is more than the maximum FIXED amount for an initiative is the responsibility of the Recipient (i.e. Recipients under agreements with a FIXED funding approach for cost categories under the CHRT Recipient Guide are no longer responsible for their debts since ISC is reimbursing based on actuals).

Attached are two sample funding agreements – one that includes the CHRT-NARs, and another that includes the Text Deviation.

Interim Appeals Process
Until an appeals process is agreed upon, ESDPP has developed an interim appeals process. This process will be adjusted as per discussion at the CCCW meeting on September 5. Please also note that the Recipient Guide for Actuals will be amended to indicate that recipients have the right to appeal full or partial denials, and that once an full appeal process is in place, all recipients will be informed of the process. We would appreciate your comments by September 28.

Draft Letter to Small Agencies
I'd ask that you also review the draft letter to small agencies that confirms eligibility for retroactive funding and actual funding for all staff salaries to a level comparable to provincial wages and benefits. Again, we would appreciate any comments by September 28.

Chart
The Caring Society asked us to prepare a chart and track when documents are sent by ISC and when comments are received. Please let us know if this chart works. We are in the process of setting up the Secretariat to coordinate ESDPP and FNIHB documentation.

Thank you,
Paula

Table of Contents

FUNDING AGREEMENT

2018 - 2021

Funding Agreement

Between

Her Majesty the Queen in Right of Canada,
For the purposes of this Agreement, the Minister of Indian Affairs and Northern Development and the Minister of Indigenous Services represent Her Majesty the Queen in Right of Canada.

This Agreement refers to this party to the Agreement as the

"Government of Canada".

And

This Agreement refers to this party to the Agreement as the

"Recipient".

Part 1 - The purpose and scope of the Agreement

1 The purpose of the Agreement

1.1 The Recipient wishes to undertake an initiative and receive funds from the Government of Canada to assist with the costs, and agrees to account for the use of all funds provided and the results achieved with these funds

1.2 The Government of Canada wishes to provide funds to support the Recipient's identified objectives for the initiative.

1.3 This Agreement describes the rules that apply to the funding being provided for an initiative and the duties of the Recipient and the Government of Canada under this Agreement.

2 The parts that make up the Agreement

2.1 "Agreement" means:

(a) all the sections of this Agreement
(b) the Annexes that are part of this Agreement:
Annex 1 - Definitions of Words and Terms Underlined in the Agreement
Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding
Annex 3 - Conditions of Payment - DIAND/DISC Funding
Annex 4 - Payment Plan
Annex 5 - Reporting Requirements and Due Dates - DIAND/DISC Funding
(c) any amendments to and notices under this Agreement that are made according to its terms.

3 The scope of the Agreement

3.1 This Agreement is the complete agreement between the parties and replaces all previous negotiations, agreements, commitments, written correspondence, and discussions between the Government of Canada and the Recipient about its subject matter.

4 Duration of the Agreement

4.1 Unless this Agreement ends early, the duration of this Agreement is from the **1st** day of **April, 2018** until the **31st** day of **March, 2021**.

Part 2 - Government of Canada funding

5 Government of Canada funding

5.1 The Government of Canada will make payments to the Recipient, according to the terms of this Agreement:

(a) for the purpose(s) set out in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding,
(b) up to the maximum amounts set out in Annex 3 - Conditions of Payment - DIAND/DISC Funding, and
(c) following the payment schedule in Annex 4 - Payment Plan.

5.2 If this Agreement covers more than one fiscal year, Annex 4 - Payment Plan will set out a payment schedule for the first fiscal year and the Government of Canada will, by notice, before each subsequent fiscal year, provide a revised payment schedule for that fiscal year.

6 Funding legislation and federal funding programs

6.1 An obligation on the Government of Canada to make a payment under this Agreement is dependent on an appropriation of funds by the Parliament of Canada for the fiscal year in which the payment is to be made, regardless of any other provision in this Agreement.

6.2 Any federal department providing funding under this Agreement may change or end the funding when:

(a) the Treasury Board of Canada changes or ends the funding program through which the funding is being provided,
(b) the Minister presiding over that department changes or ends the funding program through which the funding is being provided, or
(c) the Parliament of Canada changes the funding levels of that department for the fiscal year in which the funding was to be provided.

7 Funds to be withheld - failure to file required reports

7.1 The Government of Canada may withhold funds from the Recipient when the Recipient has not submitted, by the due date, any financial or other report required by this Agreement or by a predecessor funding agreement between the Recipient and a federal department providing funding under this Agreement. The default provisions of this Agreement may also apply.

7.2 The Government of Canada will pay the withheld funds to the Recipient within 45 days of the required reports being submitted by the Recipient and accepted by the Government of Canada, subject to the provisions on Overspending (section 16.1) and Overpayments owing to the Government of Canada (section 17.1).

Part 3 - Recipient duties

8 General duties

8.1 The Recipient must:

(a) provide each program or service, or carry out each activity, according to the terms in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding, and
(b) track the receipt and use of funds according to the terms in Annex 3 - Conditions of Payment - DIAND/DISC Funding and
(c) give notice (section 38, Notices in writing) promptly to any federal department that is providing over $100,000 funding for an initiative under this Agreement when the Recipient receives funding assistance from any other federal department, or any provincial, territorial, or municipal government for the same initiative. The Government of Canada may require the Recipient to pay back to the Government of Canada any amount of funding from DIAND or DISC that the Government of Canada considers a duplication of funding from another source.

9 The use of Government of Canada funds

9.1 The Recipient must use the funds provided by the Government of Canada for the eligible costs of each initiative described in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.

9.2 The Recipient must not loan any of the funds provided by the Government of Canada under this Agreement unless permitted to do so in an annex to this Agreement

10 Record-keeping duties

10.1 The Recipient must keep financial records, including accounts, and non-financial records for each initiative.

10.2 The Recipient must maintain financial records in a way that substantiates the financial reports required under this Agreement. These records must also allow for audit as required by section 25.1 (Financial records to allow for audit).

10.3 The Recipient must store these financial and non-financial records, including all original supporting documentation, for 7 years. The 7 years start to run on the April 1st that follows the last fiscal year to which a record relates.

11 Reporting duties

11.1 By the reporting due dates set out in Annex 5 - Reporting Requirements and Due Dates – DIAND/DISC Funding, the Recipient must provide to DISC:

(a) the financial reports required by the Reporting Guide for each fiscal year, or part of the year, that is within the time period covered by this Agreement, and

(b) any other required reports including those identified in Annex 5 - Reporting Requirements and Due Dates - DIAND/DISC Funding and described in the Reporting Guide or in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.

11.2 The Recipient must also provide any other federal department that is providing funding under this Agreement with all the required reports identified in the annex relating to that funding.

11.3 The Recipient may request, in writing to the relevant funding department, **before** the due date, a deadline extension for providing a report required by the Agreement. The written request must explain the circumstances beyond the Recipient's control that prevent the Recipient from meeting the due date. The Government of Canada may agree to an extension and, if it so decides, will provide the Recipient with a written notice setting out the new due date.

11.4 The Government of Canada will notify the Recipient that it has received the Recipient's financial report within 30 days of receiving it.

11.5 If this Agreement covers more than one fiscal year, the Government of Canada will provide by notice a revised Annex 5 - Reporting Requirements and Due Dates - DIAND/DISC Funding for each new fiscal year. The Annex for the previous fiscal year will continue to apply in respect of that fiscal year.

12 Recipient accountability for the obligations in this Agreement

12.1 The Recipient may not assign, delegate, or subcontract any of its obligations under this Agreement and may not transfer funds to an agency to carry out or manage all or part of any initiative funded under this Agreement.

Part 4 - Funding management

13 Timing of payments for eligible costs

13.1 Annex 4 - Payment Plan sets out the amounts and the timing of payments for the Recipient's eligible costs under this Agreement. The Recipient must use the funds provided for the purpose, in the amounts, and during the timeframe detailed in Annex 4.

14 Changes in funding needs or timing - no increase in maximum payable

14.1 When the Recipient becomes aware that advance payments to be made for an initiative according to the schedule in Annex 4 - Payment Plan are no longer accurate and that there is a need for funds sooner or there will be a delay before some funds are required, the Recipient must notify the relevant funding department promptly and propose appropriate amendments to Annex 4. A change in the amount or timing of an advance payment may not increase the overall amount of funding for an initiative.

14.2 The relevant funding department will notify the Recipient of its acceptance or rejection of the proposed adjustment within 30 days. When the funding department agrees to make an adjustment, it will send a Notice of Cash Flow Adjustment to the Recipient and attach the appropriately amended Annex 4

15 Changes in funding affecting the amount payable - adjustment factor

15.1 When the amount of funding to be provided to the Recipient changes according to an adjustment factor set out in Annex 2 - Program, Services, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding, the relevant funding department will send the Recipient a Notice of Budget Adjustment with the appropriately amended Annex 3 and Annex 4 - Payment Plan.

16 Overspending - Recipient's responsibility

16.1 The Recipient is responsible for any expenses that the Recipient has incurred for an initiative which are more than the amount of funding provided for eligible costs under this Agreement.

17 Overpayments owing to the Government of Canada

17.1 Any amount that the Recipient is required to pay back to the Government of Canada or that the Recipient otherwise owes to the Government of Canada is a debt due to the Government of Canada. The debt becomes payable when the Government of Canada notifies the Recipient of the debt. After giving this notice, the Government of Canada may set off the debt against any amount payable to the Recipient under this Agreement or any other agreement through which a federal department provides funding to the Recipient.

17.2 Without limiting the default (section 18) or termination (section 29) provisions of this Agreement, the Recipient must repay the Government of Canada any overpayment of funds provided to the Recipient according to the provisions in Annex 3 - Conditions of Payment - DIAND/DISC Funding and Annex 4 - Payment Plan.

17.3 An overpayment may occur, for example, when:

(a) the Recipient did not spend all the funds provided by the Government of Canada,

(b) the Recipient did not spend funds on eligible costs during the fiscal year in which they were allocated to be spent and Annex 3 does not allow any other option,

(c) the Recipient spent funds on an expense that is not an eligible cost, or

(d) the Government of Canada made an overpayment in error.

17.4 The Recipient may include payment of the debt due to the Government of Canada with its financial report identifying the overpayment.

17.5 The Government of Canada will charge interest on overdue amounts owing under this Agreement in accordance with the *Interest and Administrative Charges Regulations*, SOR/96-188, made under the *Financial Administration Act*.

Part 5 - Default under this Agreement

18 Circumstances of default

18.1 The Recipient is in default of this Agreement when:

(a) the Recipient defaults on any of its obligations set out in this Agreement or in any other funding agreement with a federal department providing funding under this Agreement,

(b) the Recipient's independent auditor gives a disclaimer of opinion or adverse opinion of the financial statements of the Recipient required under this Agreement or under any previous funding agreement between the Recipient and a federal department providing funding under this Agreement which required an independent audit,

(c) a Minister representing the Government of Canada in this Agreement is of the opinion, after having reviewed the Recipient's financial reports and any other financial information, that the Recipient's financial position puts an initiative at risk, or

(d) the Recipient becomes bankrupt or insolvent, goes into receivership, takes the benefit of any statute relating to bankrupt or insolvent debtors, ceases operations, or ceases to be a corporation in good standing under the applicable laws of Canada or of a province or territory.

19 Commitment to communicate

19.1 In the event that the Recipient is in default, the parties will communicate or meet to review the situation.

20 Remedies on default

20.1 Despite section 19.1, in the event that the Recipient is in default of this Agreement, the Government of Canada may take one or more of the following actions:

(a) require the Recipient to develop and implement a Management Action Plan within 60 calendar days, or within another time agreed to by the parties in writing,
(b) require the Recipient to seek advisory support from a source and of a type acceptable to the Government of Canada,
(c) withhold any funds otherwise payable under this Agreement,
(d) require the Recipient to take any other reasonable action necessary to remedy the default,
(e) take such other reasonable action as the Government of Canada deems necessary, including any remedies which may be set out by a federal department in an Annex to this Agreement, or
(f) terminate this Agreement.

20.2 Despite the reference to the Government of Canada in section 20.1, the remedies set out there may be exercised by any one or more of the federal departments providing funding to the Recipient under this Agreement.

21 Disclosure of financial records to other departments

21.1 Without limiting the Government of Canada's right to conduct an audit under section 24 or its options under section 20 (Remedies on default), when the Recipient defaults on an obligation under this Agreement to make a financial report available to a requesting federal department that is providing funding under this Agreement, DIAND or DISC may provide the relevant financial reports to that federal department.

Part 6 - Information and the publication of information

22 Disclosure of information by the Government of Canada

22.1 The Government of Canada may make public:
(a) the name of the Recipient,
(b) the amount of funding provided under this Agreement, and
(c) the general nature of each initiative described in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.

22.2 Section 22.1 does not limit the rights or obligations that the Government of Canada has to disclose information.

23 Publicity about funding

23.1 Either the Government of Canada or the Recipient may propose to the other party a joint public announcement or the development of joint communication materials that recognize the Government of Canada's funding for an initiative under this Agreement. Communication materials may include public events, media releases, interviews, speeches, publications, signage, websites, advertising, and promotional materials.

23.2 The party making the proposal will provide time for the other party to respond in writing before the communication release or event. The party receiving the proposal will respond as soon as reasonably possible to facilitate attendance and to allow for the timely production and distribution of the communication material.

Part 7 - Government of Canada audit and evaluation

24 Government of Canada right to audit and evaluate

24.1 Any federal department that provides funding under this Agreement, individually or with any other federal department that provides funding under this Agreement, may:
(a) audit the records of the Recipient or any agency to assess compliance with this Agreement or to confirm the integrity of any information reported to the Government of Canada under this Agreement, or
(b) audit or evaluate the Recipient's management and financial control practices in relation to this Agreement or the effectiveness of any or all of the initiatives funded under this Agreement.

24.2 The Government of Canada will decide on the number, scope, coverage, and timing of any audit(s) or evaluation(s).

24.3 An audit or evaluation may be carried out by one or more auditors or evaluators employed by or on contract to the Government of Canada.

24.4 When an audit or evaluation under this section takes place, the Recipient must cooperate in the conduct of the audit or evaluation and, upon request, assist the auditor(s) or evaluator(s) and provide them with the information that they require including by:

(a) providing them with:
  (i) access to all records relating to this Agreement and to the funding provided under this Agreement, including all original supporting documents, and
  (ii) any other information that they may require with respect to these records,
(b) allowing them to inspect these records,
(c) allowing them to make copies or extracts of these records unless that is prohibited by law,
(d) providing them with records maintained under any previous agreement by which the Government of Canada provided funding to the Recipient and which, in the opinion of the auditors or evaluators, may be relevant to the audit or evaluation,
(e) providing them with access to the Recipient's premises, and
(f) in the case of an audit,
  (i) directing anyone who has provided the Recipient with accounting or record-keeping services to provide copies of those accounts and other records to the auditor(s).

24.5 The audit and evaluation opportunities that this section gives to any federal department that provided funding under this Agreement and the duties that it imposes on the Recipient continue for 7 years after the termination or expiry of the Agreement.

25 Financial records to allow for audit

25.1 The Recipient must maintain financial records, including accounting documentation, regarding all funding provided by the Government of Canada in a way that will allow for audit.

Part 8 - Legal considerations

26 Relationship between the Recipient and the Government of Canada

26.1 This Agreement does not and is not intended to create an agency, association, employer-employee, or joint venture relationship between the Recipient and the Government of Canada. The Recipient may not suggest that it does.

26.2 The Government of Canada's rights, remedies and obligations under this Agreement may be carried out by any Minister representing the Government of Canada in this Agreement, as determined by the Government of Canada.

27 Amendments to this Agreement

27.1 This Agreement may only be amended by a written agreement signed by the Government of Canada and the Recipient. Except, the Government of Canada may amend this Agreement without the agreement of the Recipient when it makes a change to:

(a) extend a reporting due date under section 11.3,
(b) funding under section 6.1 and 6.2,
(c) the Payment Plan by a Notice of Cash Flow Adjustment (section 14.2), or
(d) an amount of funding by a Notice of Budget Adjustment (section 15.1).

28 Dispute resolution

28.1 The parties agree to attempt to resolve disputes with respect to this Agreement through negotiation or another appropriate dispute resolution process, except that a dispute resolution process will not be used regarding:

(a) a Recipient budget decision made in accordance with this Agreement,
(b) the amount of funding provided under this Agreement, and
(c) a Government of Canada audit or evaluation.

28.2 Using negotiation or another dispute resolution process will not suspend or delay a Government of Canada decision that the Recipient is in default or any action taken by the Government of Canada under section 6 (Funding legislation and federal funding programs) or section 20 (Remedies on default).

28.3 In the event that the parties are unable to resolve the dispute through negotiation and agree to use mediation, the Government of Canada and the Recipient will share the costs of mediation equally. The Recipient must not use funds provided under the Agreement to cover any mediation costs.

28.4 No one may use any information from discussions, meeting notes, offers of settlement, or other oral or written communications from a dispute resolution process in any legal proceedings unless the law requires it. This restriction does not apply to information or communications that would have been admissible or subject to discovery rules in a legal proceeding if the dispute resolution process had not taken place.

29 Termination of the Agreement

29.1 Without limiting section 6 (Funding legislation and federal funding programs) or section 20 (Remedies on default), a party wishing to terminate this Agreement must communicate its intentions to the other party. The parties must:

(a) try to resolve any dispute following the process in section 28, when applicable, and
(b) agree to a winding up timeframe that will not jeopardize the initiative(s).

29.2 Once the requirements of section 29.1 have been met, the party wishing to terminate the Agreement under that section must give the other party at least 60 days written notice. The notice must include the reason for its decision to terminate the Agreement.

29.3 In the case of the termination of this Agreement, including termination under section 20 (Remedies on default):
(a) the Recipient must provide the Government of Canada with the financial reports required under section 11 (Reporting duties) within 120 days of the termination date of this Agreement,
(b) the Recipient must return to the Government of Canada any funds provided under this Agreement that were unspent by its termination date and must repay any debts owed to the Government of Canada under this Agreement as required by section 17 (Overpayments owing to the Government of Canada), and
(c) unless the Government of Canada and the Recipient agree otherwise in writing, the Government of Canada will pay any amount it owes the Recipient under this Agreement up to its termination date or may set off any amount owed to the Recipient against any amount the Recipient owes it under this Agreement or under any other funding agreement between the Recipient and the Government of Canada.

29.4 This section survives the termination or expiry of this Agreement.

30 Obligations that continue after the Agreement ends

30.1 In addition to the sections which specifically state that the section continues to apply after the termination or expiry of the Agreement, the obligations in the following sections also survive the termination or expiry of this Agreement:
(a) section 10, Record-keeping duties,
(b) section 11, Reporting duties,
(c) section 12, Recipient accountability for obligations in the Agreement,
(d) section 16, Overspending,
(e) section 17, Overpayments owing to the Government of Canada,
(f) section 21, Disclosure of financial records to other government departments,
(g) section 22, Disclosure of information by the Government of Canada,
(h) section 23, Publicity about funding, and
(i) section 25, Financial records to allow for audit.

31 Written waiver required

31.1 A party's waiver in relation to this Agreement is only valid when that party has put the waiver in writing.

31.2 A party does not lose a right to take action under this Agreement because it waived its right to act on a previous occasion.

32 Right to indemnity, protection from liability

32.1 The Recipient will indemnify the Government of Canada, its Ministers, officers, employees, servants, agents, successors, and assigns from any claims, liabilities, and demands arising directly or indirectly from:

(a) any act, omission, or negligence of the Recipient or any agency acting for the Recipient,
(b) any breach of this Agreement by the Recipient, or
(c) the fulfillment, in whole or in part, or the non-fulfillment of any of the Recipient's obligations under this Agreement.

32.2 The Recipient will not hold the Government of Canada liable for any losses it may experience from any claims, liabilities, and demands that may arise as a result of the Recipient, or any agency acting for the Recipient, entering into any loan, capital lease, or other long-term obligation.

32.3 The right to indemnity and the liability protection this section provides to the Government of Canada continues after the end of this Agreement.

33 Insurance

33.1 The Recipient is responsible for deciding on the need for insurance coverage for its own protection and to cover its obligations under this Agreement.

34 Legislation and government documents

34.1 In this Agreement, a reference to federal legislation means the federal legislation in force at the time of the signing of this Agreement and includes any subsequent amendments to it. A reference to Government of Canada documents means the Government of Canada documents available at the time of the signing of this Agreement and their replacements.

34.2 The Government of Canada will publish a Reporting Guide for each fiscal year before the fiscal year begins. The Government of Canada may amend a Reporting Guide during the fiscal year only if the amendment arises from a requirement of the Treasury Board of Canada. The Government of Canada will promptly inform the Recipient of any such amendment.

34.3 The laws of Canada and the laws of the province or territory in which the initiative(s) funded under this Agreement takes place will be used to interpret this Agreement.

35 Definitions

35.1 Words and terms that have a special meaning in the Agreement are underlined and defined in Annex 1 - Definitions of the Words and Terms that are Underlined in the Agreement.

36 Aids to usability

36.1 The Table of Contents, section headings, and Index are not part of this Agreement and are not to be used to interpret this Agreement. They are in place to help the reader to find topics more easily.

37 Effect of the Agreement on the parties

37.1 This Agreement is binding on the Recipient and the Government of Canada, and their respective administrators and successors.

Part 9 - Notices

38 Notices in writing

38.1 When this Agreement requires one party to give the other party a notice, request, or direction, it must be in writing, and addressed as indicated in this section.

38.2 The notice may be delivered in one of the following ways with the date of the notice being as indicated:

(a) by personal delivery in which case the date of the notice will be the date on which it was delivered,

(b) by registered mail or courier, in which case the date of the notice is the date the addressee party acknowledged receipt of the notice,

(c) by facsimile or electronic mail, in which case the date of the notice is the date upon which the notice was transmitted and its receipt by the other party can be confirmed.

38.3 Either party may change the address information in this Agreement by providing notice to the other party.

38.4 For the purpose of this Agreement, a notice is to be addressed to:

(a) the Recipient at:

(b) DIAND/DISC at:

Attention: Director, Funding Services

Part 10 - Warranties and conditions required on signing the Agreement

39 Recipient warranties

39.1 The Recipient warrants that any person lobbying on its behalf is registered as required by the *Lobbying Act*.

39.2 The Recipient warrants that no member of the House of Commons or the Senate of Canada will have a share or part of any benefit arising from this Agreement that is not also available to the general public.

39.3 The Recipient warrants that no individual to whom the post-employment provisions of the *Conflict of Interest Act*, the *Conflict of Interest and Post-Employment Code for Public Office Holders*, the *Values and Ethics Code for the Public Sector*, the *Values and Ethics Code for the Public Service*, the *Policy on Conflict of Interest and Post-Employment*, or the values and ethics code of any Federal Department apply will derive any benefit from this Agreement unless the individual is in compliance with all the applicable post-employment provisions.

39.4 The Recipient warrants that it is a corporation in good standing under the applicable laws of Canada or of a province or territory and that it will remain in good standing during this Agreement.

Signed on behalf of Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development and the Minister of Indigenous Services, by:

Director, Funding Services
Ontario Region

Signed by the Recipient's authorized representative(s):

"I have the authority to bind the corporation."

"I have the authority to bind the corporation."

"I have the authority to bind the corporation."

"I have the authority to bind the corporation."

"I have the authority to bind the corporation."

DIAND/DISC Witness:

Date:

Witness:

Date:

Annex 1 - Definitions of Words and Terms underlined in the Agreement

In this Agreement, unless otherwise stated, the following words and terms have the noted meaning.

adjustment factor	a pre-determined factor, set out in Annex 2 - Program, Services, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding, which recognizes a cost component which is unknown to the parties at the time of signing the Agreement and which may affect the amount of funding for an initiative.
agency	an authority, board, committee, or other entity that the Recipient has authorized to act on its behalf as allowed by this Agreement.
capital asset	a tangible item that is purchased, constructed, developed, or otherwise acquired and: (a) is held for use in the production or supply of goods or the delivery of services, or to produce business outputs (b) is intended to be used on a continuing basis (c) has a useful life that extends beyond the Recipient's fiscal year, and (d) is not intended for resale in the ordinary course of operations.
capital costs	the reasonable and direct costs of design, acquisition, construction, expansion, modification, conversion, transportation, installation, and insurance during construction of a capital asset, as well as the cost of licensing and franchising fees, incurred by a Recipient.
cash flow	periodic payments that the Government of Canada makes to the Recipient in accordance with the schedule in Annex 4 - Payment Plan.
contribution	funding under this Agreement. Under contribution funding: > - all payments made by the Government of Canada must match the eligible costs incurred by the Recipient and accounted for as required by this Agreement - unexpended funds must be repaid to the Government of Canada unless otherwise specified in the Agreement, and - payments received and used for non-eligible costs, must be repaid to the Government of Canada.
delivery requirements	the description of an initiative and its expected outcomes set out as part of this Agreement in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.
DIAND	Department of Indian Affairs and Northern Development which is also known as Indigenous and Northern Affairs Canada or INAC.
DISC	Department of Indigenous Services Canada
eligible costs	reasonable expenses to support an initiative according to the requirements of that initiative as set out in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding. For example, "eligible costs" may include capital costs, costs of related infrastructure development, costs of shares and assets, operating costs, marketing costs, costs of engaging consultants and other qualified professionals, and costs associated with providing financial and business services.
fiscal year	unless otherwise stated, "fiscal year" is the Government of Canada's fiscal year which is the one-year period beginning on April 1 of one calendar year and ending on March 31 of the next calendar year.
grant	funding that a Recipient may use for an initiative as long as the Recipient continues to meet the eligibility requirements.
initiative	a program, service, or activity described in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding, towards which the Government of Canada is providing funding support under this Agreement.
Management Action Plan	a plan developed by the Recipient and acceptable to the Government of Canada and any amendments to the plan developed by the Recipient and acceptable to the Government of Canada, that sets out the measures the Recipient will take to remedy a default under this Agreement.
Notice of Budget Adjustment	a notice that the Government of Canada sends to the Recipient that changes a funding amount in accordance with an adjustment factor in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.

Reporting Guide	a document published by the Government of Canada, for each fiscal year, that describes the content of the reports that the Recipient must provide to DISC with regards to the activities funded under this Agreement and that describes the content of the financial and related reports that the Recipient must provide to DISC. http://www.aadnc-aandc.gc.ca/reportingguide
set off (a debt)	an approach to the payment of a debt when both parties owe each other money. The amount owing to one is reduced by the amount owing to the other. For example, A owes B $1000 and B owes A $1500. The set off approach allows A to discharge the debt to B leaving B owing A $500.

Annex 3 - Conditions of Payment - DIAND/DISC Funding

Basic funding principles
Recipients must:
- use funds for the initiative(s) identified in Annex 2 (section 9.1)

- use funds only for eligible costs up to the maximum allowed (section 9.1)

- use funds in the fiscal year for which they were provided (section 13)

- cover any overspending that occurs when initiative costs are greater than the amount of initiative funding provided by the Government of Canada (section 16)
- report on the use of funds as required (section 11)

Note:
- any overpayment is a debt due to the Government of Canada (section 17)

1 General matters

1.1 Subject to the terms of this Agreement, the Government of Canada will, in each fiscal year, pay to the Recipient up to the amounts set out in Annex 4 - Payment Plan for DIAND and DISC funding for that fiscal year.

1.2 The Payment Plan in Annex 4 identifies the maximum amounts for each initiative for each fiscal year.

1.3 Subject to the terms of this Agreement, the Government of Canada will make payments to the Recipient according to the provisions in section 2 (Payment specifics).

1.4 Depending on the circumstances, payments may be:

- advanced to the Recipient,
- reimbursed after the Recipient meets the conditions set out below under "Payment request requirements",
- held back until the Recipient has met the conditions set out below under "Holdback requirements".

1.5 When the Recipient fails to report on an eligible cost as required by this Agreement, any funds advanced to the Recipient for that cost will be deemed to be an overpayment which must be paid back to the Government of Canada.

2 Payment specifics

Advance payments, if applicable

2.1 The Government of Canada will make periodic payments to the Recipient according to the cash flow set out in the Payment Plan in Annex 4.

Payment request requirements, if applicable

2.2 N/A

Holdback requirements, if applicable

2.3 N/A

Set Contribution Funding, SET

2.4 Any amount of DIAND or DISC funding identified as SET in the Payment Plan in Annex 4 must be spent on eligible costs of the specified initiative in the fiscal year for which the amount is provided.

2.5 Any amount that the Recipient spends that is more than the maximum SET amount for an initiative for the specified fiscal year is the responsibility of the Recipient.

Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factor(s) - DIAND/DISC Funding

DISC - PROGRAM/SERVICE/ACTIVITY

Initiative *program *service *activity	Delivery Requirements	Adjustment Factor(s)
First Nation Child and Family Services	The Recipient will administer the First Nations Child and Family Services Program in accordance with Provincial or Territorial legislation. as well as DIAND/DISC's *First Nations Child and Family Services Program National Guidelines* and any other current approved program documentation issued by DIAND/DISC as amended from time to time.	The budget is established at the start of the Agreement and may be adjusted during the life of the agreement based on approved budget levels.

2.6 Any amount of DIAND or DISC SET funding set out in the Payment Plan in Annex 4 that has been paid to the Recipient is an overpayment that the Recipient must pay back to the Government of Canada when:

(a) the Recipient has not provided the required reports concerning the funds, or

(b) the Recipient has not spent the amount in the fiscal year for which it is provided on an eligible cost of the specified initiative.

Flexible Contribution Funding, FLEX

2.7 Any amount of DIAND or DISC funding identified as FLEX in the Payment Plan in Annex 4 must be spent on eligible costs of the specified initiative, in the fiscal year for which the amount is provided.

2.8 Any amount that the Recipient spends that is more than the maximum FLEX amount for an initiative for the specified fiscal year is the responsibility of the Recipient.

2.9 Any amount of DIAND or DISC FLEX funding set out in the Payment Plan in Annex 4 that has been paid to the Recipient is an overpayment of FLEX funding that the Recipient must pay back to the Government of Canada when:

(a) the Recipient has not provided the required reports concerning the funds,

(b) the amount is spent on an expense that is not an eligible cost of the specified initiative,

(c) the Recipient has not spent the funds, as permitted by this Agreement, by the expiry or termination of this Agreement, or

(d) unless section 2.10 applies to the amount, the amount is not spent in the fiscal year for which it was provided.

2.10 The Recipient may spend an unexpended FLEX amount provided for an initiative in one fiscal year in the next fiscal year when:

(a) the next fiscal year starts before this Agreement ends,

(b) the Recipient identifies the unexpended amounts in its financial reports,

(c) the unexpended amount is spent on eligible costs of the same initiative,

(d) this Agreement has not expired or has not been terminated before the amount is spent , and

(e) the Recipient is not in default of this Agreement or any other agreement through which DIAND or DISC provides funding to the Recipient.

2.11 Where any requirement of section 2.10 is not met, the unexpended FLEX amount is an overpayment of FLEX funding that the Recipient must pay back to the Government of Canada.

2.12 Any overpayment of unexpended FLEX funding must be paid back to the Government of Canada by the earliest of these events:

- the end of the initiative, as set out in the Payment Plan in Annex 4,
- the expiry of this Agreement, or
- the termination of this Agreement.

Fixed Contribution Funding, FIXED

2.13 Any amount of DIAND or DISC funding identified as FIXED in the Payment Plan in Annex 4 must be spent on eligible costs of the specified initiative in the fiscal year for which the amount is provided.

2.14 Any amount that the Recipient spends that is more than the maximum FIXED amount for an initiative for the specified fiscal year is the responsibility of the Recipient.

2.15 Any amount of DIAND or DISC FIXED funding set out in the Payment Plan in Annex 4 that has been paid to the Recipient is an overpayment of FIXED funding that the Recipient must pay back to the Government of Canada when:

(a) the Recipient has not provided the required reports concerning the funds,

(b) the amount is spent on an expense that is not an eligible cost of the specified initiative, or

(c) the amount is not spent in the fiscal year for which it was provided.

2.16 Without limiting the remedies (section 20) or termination (section 29) provisions of this Agreement the Recipient will be released from the obligation under 2.15 (c) to repay an unexpended FIXED amount when:

(a) the Recipient has fulfilled all of the delivery requirements of this Agreement for the specified initiative in the fiscal year for which the amount was provided,

(b) the amount is spent in the next fiscal year either:

(i) on an activity that is similar to and has the same purpose as the specified initiative, or

(ii) in accordance with a plan for spending the amount that is submitted by the Recipient to [DIAND] [DISC] within 120 days of the end of the fiscal year in which the amount was to have been spent and that the Government of Canada accepts by way of notice to the Recipient, and

(c) the Recipient reports on the use of the amount as required by the Reporting Guide.

2.17 Where any requirement of section 2.16 is not met, the unexpended FIXED amount is an overpayment that the Recipient must pay back to the Government of Canada .

2.18 A failure to comply with an accepted plan under section 2.16 is a default under the Agreement and the default provisions apply.

2.19 When the Recipient retains or spends funds under section 2.16, the following sections of the Agreement apply in respect of those funds:

- section 10, record-keeping duties
- section 11, reporting duties
- section 12, accountability for obligations
- section 18, default
- section 20, remedies on default
- section 24, audit and evaluation
- section 25, financial records to allow for audit
- section 28, dispute resolution
- section 31, written waiver required
- section 32, right to indemnity, protection from liability
- section 33, insurance
- section 38, notices
- section 39.3, conflict of interest provisions regarding former federal officials

Grant Funding, GRANT

2.20 If the Recipient no longer meets the Government of Canada eligibility requirements for any DIAND or DISC funding identified as GRANT in the Payment Plan in Annex 4, the Government of Canada may require the Recipient to pay back to the Government of Canada any amount up to the full amount of that GRANT funding that has been paid to the Recipient.

3 Unexpended funds repayment - more than one funding source

3.1 When the Recipient has to repay money to the Government of Canada under this Annex, the Recipient must follow these allocation rules:

(a) When the Recipient has received funding from more than one source for the same initiative but to cover different types of initiative expenses, the Recipient must repay amounts advanced under this Annex that were not used for the initiative expenses set out in Annex 2 - Program, Service, and Activity Delivery Requirements and Adjustment Factors - DIAND/DISC Funding.

(b) When the Recipient received funding from more than one source for the same initiative to cover the same types of initiative expenses, the Recipient must calculate the percent of the total initiative funding that was received from DIAND and DISC and repay the same percent from all the unexpended funds.

Annex 4 - Payment Plan:
1.0 - Program/Service Budgets, Authorities and Schedule of Monthly Payments Plan

As Of 2018/09/11

[illegible]

Fiscal Year: 2018-2019

ISC (Non-FNIHB) and DIAND

Seq	01 APR	02 MAY	03 JUN	04 JUL	05 AUG	06 SEP	07 OCT	08 NOV	09 DEC	10 JAN	11 FEB	12 MAR	POOL	Holdback	Allocation Total
SET CONTRIBUTION FUNDING (SET)															
PROGRAM ACTIVITY - FUNCTIONAL AREA GROUP - FUNCTIONAL AREA															
Social Development															
Program Activity: [illegible] FAMILY SERVICES [illegible]															
Functional Area Group: CHILD AND FAMILY SERVICES - [illegible]															
Functional Area: OPERATIONS - CFS - [illegible] (Fund: [illegible]; Cost Center: [illegible])															
[illegible]	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00		

TOTAL 2018-2019 SET CONTRIBUTION FUNDING (SET)

0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

TOTAL 2018-2019 ISC (NON-FNIHB) AND DIAND

0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

TOTAL 2018-2019

0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

GRAND TOTAL

Annex 4 - Payment Plan:
2.0 - Cash Flow by Fiscal Year by Department

As Of 2018/05/31

Budget	Pending	2018-2019	Total
ISC (from FRIMS) and OAND			
	Total		
Total			

Agreement No:

Annex 4 - Payment Plan:
3.0 - Cash Flow by Month and Year - ALL FUNDING by type and month

As Of 20[illegible]/11

Set Contribution

	April	May	June	July	August	September	October	November	December	January	February	March	Post	Holdback	Total
2010-2011		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	
Total		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	-

Annex 4 - Payment Plan:
4.0 - Cash Flow by Month - Current Year - All Funding by Month and Department

As Of 2015/09/11

Arrangement:
Arrangement Year:
Recipient:
Project No:

ISC (non-FNIHB) and DIAND

Funding	Total	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	Fiscal	Recipient's
Self Contribution			$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Total			$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00

Annex 5 - Reporting Requirements and Due Dates - ISC (non-FNIHB)/DIAND Funding

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TEXT DEVIATION REQUEST FORM
General Application

Tracking Number <TPCOE>
CIDM #: <TPCOE>

Regional/Sector Input

Submitted By:	Julie L'Ecuyer	Region/Sector	FNCFS-ESDPP	Date:	Feb 27, 2018
Agreement Model to amend:	☐ First Nations/Tribal Councils ☐ Project version ☐Streamlined		X Other Recipients ☐ Provincial/Territorial Governments ☐ Canada Common Funding Agreement		
GCIMS Model/Agreement Number:			Fiscal year(s): 2017/18 & 2018/19		
Type of Deviation:	☐ Legacy ☐ Forward Looking ☐ Other		X Must Have ☐ Innocuous X Program Specific (other than Delivery Standards/Requirements)		X First Time ☐ Repeat Request
Scope of Deviation:	☐ National X Regional **(For Ontario Region Only)**				
Description of Deviation:	The following adjustments to the national model text are to be applied to any new funding agreements **with Delegated Agencies (Ontario region only)**: - To include Annex A provisions - where funding is provided for the reimbursement of eligible incurred costs, retroactive to January 2016 - To include the following adjustment factor in the Programs, Service, and Activity Delivery Requirements and Adjustment Factors section of the Agreement "Funding level may be adjusted based on the Recipient actual needs." - To remove the section 2.14 of Annex 3 - Conditions of Payment – DIAND funding : 2.14 Any amount that the Recipient spends that is more than the maximum FIXED amount for an initiative for the specified fiscal year is the responsibility of the Recipient				
Rationale:	- Annex A provisions are to provide context and clarify the intent on the requirement to comply with the February 2018 Canadian Human Rights Tribunal ruling concerning a remedies order for First Nations Child and Family Services for the retroactive reimbursement of eligible actual costs, - Adjustment Factor and removal of section 2.14 of Annex 3 of the Funding Agreement Model for Recipient – Other are required to ensure that the maximum amount of funding to be provided to the recipient under the Agreement can be adjusted based on the needs of the Recipient and eligible actual costs can be reimbursed to comply with the CHRT Order.				
Risk and Impact Associated with not approving:	- Without the Annex A provisions - lack of clarity on the intent or reason for the funding provided to reimburse eligible incurred costs, retroactive to January 2016 - Without the adjustment factor and with the section 2.14 in the agreement, DISC will not be in a position to meet the CHRT Order i.e to reimburse eligible actual costs not previously funded in the Agreement (deficit under the responsibility of the Recipient).				
Legal comments (Region/HQ):	<insert legal comments here>				
HQ Program/Sector support:		Originator			
Approved By	Margaret Buist	Director General, Child and Families Branch		FEB 27 2018 (Date)	

Transfer Payment Center of Expertise Input

Date Received:	March 9, 2018	Date to Present for Approval:	March 13, 2018
TPCOE Comments	<insert TPCOE comments here> Approved based on legal Review		
Legal TPCoE Comments	The TPAS legal advisor was consulted in the development of the wording for the Notice of Acceptance of Request (NAR #004082, 004083, 004119, 004147) relating to the CHRT Order to reimburse eligible actual costs not previously funded. This legal advice for the NAR was applied to develop the wording of this text deviation		

DG PTP Working Group Record of Decision

Date of Meeting			
Record of Decision:			
Approved		Conditions:	<insert conditions>
Not Approved		Conditions:	<insert conditions>
Refer to ADM Committee		Comments/Conditions:	
Approved by:		(enter name, title and date of approval)	(signature)

ADM PTP Steering Committee Record of Decision

Date of Meeting			
Record of Decision:			
Approved		Conditions	<insert conditions>
Not Approved		Conditions	<insert conditions>
Approved by:		(enter name, title and date of approval)	(signature)

ANNEX A

WHEREAS provisions (see Annex A) to be included in new funding agreements with Delegated Agencies where funding is provided for the reimbursement of eligible incurred costs, retroactive to January 2016

Adjustment to Funding agreement for Recipient - Other:

Under - Part 1 – The purpose and Scope of the Agreement
1. The purpose of the Agreement

To include:

1.1 In response to a letter from DISC to the Recipient dated *insert current date* relating to a February 1, 2018 ruling of the Canadian Human Rights Tribunal, the Recipient has asked DISC to reimburse certain actual costs

1.2 The Recipient has certified that these costs have not already been covered by funding from any federal government department (including DISC), or by any provincial, territorial, or municipal government funding

1.3 The Government of Canada accordingly wishes to reimburse the following costs by providing funding under the Agreement
   a) $xxxx for costs incurred in the 2015-2016 fiscal year,
   b) $xxxx for costs incurred in the 2016-2017 fiscal year, and
   c) $xxxx for costs already incurred in the 2017-2018 fiscal year,

This is Exhibit "M" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From: Andrea Auger
Sent: September 25, 2018 3:13 PM
To: Isaak, Paula (AADNC/AANDC)
Cc: Cindy Blackstock
Subject: Feedback - Sample New Funding Agreement

Dear Paula,

Please find attached a document outlining questions/concerns with regard to the document "Sample new funding agreement." I tried as best as possible to organize by section of the agreement. Let us know if you have any questions.

All the best,

Andrea Auger
Reconciliation and Research Manager
First Nations Child & Family Caring Society of Canada
www.fncaringsociety.com
613-230-5885
Twitter: @Caringsociety
Facebook: /CaringSociety
Instagram: spiritbearandfriends

Caring Society Feedback – "Sample new funding agreement"

Section 6 (Funding legislation and federal funding programs)

This clause effectively entitles Canada to terminate the Agreement in the following circumstances:

a. if Parliament opts not to vote funds that would fund the agreement (section 6.1);
b. if Treasury Board changes or ends the program (section 6.2(a));
c. if the Minister changes or ends the program (section 6.2(b)); or
d. if Parliament changes funding levels (section 6.2(c)).

Generally, we find this problematic, particularly if the recipients are FNCFS Agencies or Ontario First Nations (re: Band Representatives), as it creates the possibility for a conflict with 2018 CHRT 4 (i.e., a funding agreement for actuals is terminated for one of the four reasons above, and the FNCFS Agency or Ontario First Nation purports to consent to this by signing the funding agreement).

We do not see how the Minister or Treasury Board (sections 6.2(a) and (b)) can have the ability to end "the program" where the recipient is an FNCFS Agency or an Ontario First Nation (re: Band Representatives) since "the program" (funding at actuals) is in response to a legal order requiring the Ministry to do just that.

If something similar to section 6 is present in Jordan's Principle funding agreements, our concerns apply there as well.

Our view is that 6.2(a) and 6.2(b) should at least be removed for funding agreements with FNCFS Agencies and Ontario First Nations that are part of the implementation of 2018 CHRT 4. For CWJI funding recipients, if Canada's plan is to make this initiative durable, then 6.2(a) and 6.2(b) should be removed for them as well. For actuals, i.e. funding in keeping with 2018 CHRT 4, Treasury Board deciding to no longer fund at actuals or the Minister deciding to no longer fund at actuals would be a breach of 2018 CHRT 4, and so too should be a breach of the funding agreement.

While we realize that 6.1 and 6.2(c) are clauses that simply reflect limitations on Her Majesty's or the Minister's constitutional authority (i.e., the executive cannot bind Parliament), they may be taken as the recipient agreeing to the possibility of funding ending. Funding agreements with FNCFS Agencies and Ontario First Nations that are implementing 2018 CHRT 4 should include a "non-derogation clause" to the effect of the presence of 6.1 and 6.2(c) not limiting any of the recipient's rights to take legal recourse against Canada if Parliament fails to appropriate funds for the activities contemplated in the funding agreement.

Section 7.2 – Withholding Funds due to failure to file reports

Regarding 7.2, the time limit for providing withheld funds after submission of missing reports is 45 days. To be consistent with the approach for reimbursement of actuals, this should be 15 days. Does Canada have any explanation for why 30 extra days are required for these payments?

Section 11 – Reporting Duties

This section, and all references in the agreement to reports, are somewhat confusing due to Annex 5, which states "No required reports for this arrangement." If there are no reports required, why do section 11 and other provisions referencing reports remain?

If these provisions remain, we have the following more specific questions:

11.1(b) – what are the "any other required reports" that are referenced? The use of the word "including" in this clause implies that there may be others beyond those identified in Annex 5 and described in the Reporting Guide or in Annex 2.

11.3 - We would like to see some wording provided to say that the Government of Canada will not unreasonably refuse agreement to a deadline extension.

The Caring Society would like to see provisions in the funding agreement that provide for funding for completing business plans for FNCFS Agencies and Ontario First Nations implementing 2018 CHRT 4 as an actual cost, as those recipients must complete those reports to receive CHRT-ordered funding and the reports can take significant time and effort to complete.

Section 16 - Overspending

Section 16.1 states that the recipient is responsible for costs that are greater than the eligible costs. In looking at the definitions in Annex 1, it is not clear that "eligible cost" includes "actual costs" for FNCFS Agencies and Ontario First Nations. What assurances can ISC give that greater-than-forecast actual costs will not be construed as "overspending"?

Section 17 – Overpayment Provisions

With regard to the overpayment provisions in section 17, how do these apply to FNCFS Agency requests for funding at actuals where actual expenses were less than forecast?

To the extent that an actual expenditure that is less than forecast is counted as an "overpayment" (for instance prevention services in respect of a child that end earlier than expected) and the surplus is set-off against future actuals needs as per 17.1 that would not be problematic. However, the repayment schedule provisions in 17.2 do not make sense in the context of actuals-based funding. We are also concerned about section 17.5 allowing interest to be charged against overpayments.

Section 28 – Dispute Resolution

Regarding dispute resolution, 28.1(b) states that a dispute resolution process will not be used regarding "the amount of funding provided under this Agreement." This should be removed or amended so that it does not cover an FNCFS Agency or Ontario First Nation implementing 2018 CHRT 4 either (a) appealing a denial through ISC's interim appeal process or the eventual independent appeal process; (b) seeking relief to enforce 2018 CHRT 4 if Canada refuses to fund at actuals; or (c) seeking judicial review in Federal Court.

Section 34 – Legislation and Government Documents

In 34.1, there should be an obligation on the part of the Government of Canada to inform recipients under the funding agreement of amendments to federal legislation or changes to Government of Canada documents (as already exists in 34.2 in relation to amendments to the reporting guide).

Annex 2 – Adjustment Factors

In addition to the issue raised earlier by Dr. Blackstock regarding the reference to the Program National Guidelines (i.e. the concern that the program guidelines can change after the recipient has consented to the funding agreement), Annex 2 also references "the program" being provided in accordance with Provincial or Territorial legislation. If ISC is looking to enable First Nations jurisdiction, a reference to the program being provided in accordance with First Nations jurisdiction, where applicable, should also be made in this Annex, as that is an alternate scenario not provided for.

Annex 3 – Conditions of Payment

Annex 3 – how will it be determined what funding will be treated as "set" (sections 2.4-2.6), "flex" (sections 2.7-2.12), or "fixed" (sections 2.13-2.19)?

Provisions for funding in sections 2.5 (set funding), 2.8 (flex funding), and 2.14 (fixed funding) raise the same concerns as section 16.1 re: "overspending," as it states that amounts over the "maximum" are the recipient's responsibility. How will this apply to actuals costs per 2018 CHRT 4 that are higher than forecast?

If "fixed" funding models are to be used, the Caring Society is concerned that the 120-day notice period required under section 2.16(b)(ii) for spending funds in the next fiscal year will hamper the ability to change plans from December-March (assuming that the fiscal year is April-March). Is ISC amenable to a shorter notice period for "fixed" funding models?

This is Exhibit "N" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

From:	Wilkinson, Joanne (AADNC/AANDC) <joanne.wilkinson@canada.ca>
Sent:	Monday, December 03, 2018 1:03 PM
To:	'cblackst@fncaringsociety.com'; 'Brian.Smith@chrc-ccdp.gc.ca'; 'mwente@oktlaw.com'; 'lornam@afn.ca'; 'akosuam@falconers.ca'; 'afiddler@nan.on.ca'; 'bnarcisse@nan.on.ca'; 'dtaylor@conway.pro'; 'Jon Thompson'; 'morr@afn.ca'; 'robert.frater@justice.gc.ca'; 'swuttke@afn.ca'; Gideon, Valerie (HC/SC); Joel Abram <jAbram@aiai.on.ca> (jAbram@aiai.on.ca); 'sdearman@oktlaw.com'; 'salza.jiwa@chrc-ccdp.gc.ca'; 'sarah@childandfamilylaw.ca'; 'Zachariah General'
Cc:	'kritchie@oktlaw.com'; Nafziger, Lisa (AADNC/AANDC); 'constance.marlatt@justice.gc.ca'; Conn, Keith (HC/SC); Gasca2, Daniela (AADNC/AANDC); 'Odette.johnson@canada.ca'
Subject:	Response to comments Caring Society on Agreement language
Attachments:	_-_FUNDING_AGREEMENT_-_PARTIES_FEEDBACK.DOCX; _NEW_2018-2019 _TEXT_DEVIATION_FOR_NEW_FUNDING_AGREEMENT_WITH_ISC.DOC; _2018-2019 _NEW_NAR_OTHER_RECIPIENT_TYPE_(FOR_AGENCIES).docx; _TRACKING_ACTIVE_DOCUMENTS_SENT_AND_COMMENTS_RECIEVED.docx

Good day,

Thank you for providing comments on the template funding agreement. The attached document provides responses (highlighted yellow text) to help clarify or answer comments that you provided. You will also find attached the revised CHRT Notice of Acceptance of Request (NAR) and Text Deviation.

ISC Funding Agreements (for information)

1. ISC responses to Caring Society Feedback for "Sample new funding agreement".
2. Notice of Acceptance of Request.
3. Text Deviation.
    - *These two documents are for the purposes of changing language of the Funding Agreement (existing is #10 and new is #11) to reflect the implementation of the CHRT orders and to reimburse eligible actual FNCFS costs to recipients.*

You will also find attached the updated active documents tracker.

Thank you,
Joanne

Caring Society Feedback – "Sample new funding agreement"

Section 6 (Funding legislation and federal funding programs)

This clause effectively entitles Canada to terminate the Agreement in the following circumstances:

a. if Parliament opts not to vote funds that would fund the agreement (section 6.1);
b. if Treasury Board changes or ends the program (section 6.2(a));
c. if the Minister changes or ends the program (section 6.2(b)); or
d. if Parliament changes funding levels (section 6.2(c)).

Generally, we find this problematic, particularly if the recipients are FNCFS Agencies or Ontario First Nations (re: Band Representatives), as it creates the possibility for a conflict with 2018 CHRT 4 (i.e., a funding agreement for actuals is terminated for one of the four reasons above, and the FNCFS Agency or Ontario First Nation purports to consent to this by signing the funding agreement).

We do not see how the Minister or Treasury Board (sections 6.2(a) and (b)) can have the ability to end "the program" where the recipient is an FNCFS Agency or an Ontario First Nation (re: Band Representatives) since "the program" (funding at actuals) is in response to a legal order requiring the Ministry to do just that.

If something similar to section 6 is present in Jordan's Principle funding agreements, our concerns apply there as well.

Our view is that 6.2(a) and 6.2(b) should at least be removed for funding agreements with FNCFS Agencies and Ontario First Nations that are part of the implementation of 2018 CHRT 4. For CWJI funding recipients, if Canada's plan is to make this initiative durable, then 6.2(a) and 6.2(b) should be removed for them as well. For actuals, i.e. funding in keeping with 2018 CHRT 4, Treasury Board deciding to no longer fund at actuals or the Minister deciding to no longer fund at actuals would be a breach of 2018 CHRT 4, and so too should be a breach of the funding agreement.

While we realize that 6.1 and 6.2(c) are clauses that simply reflect limitations on Her Majesty's or the Minister's constitutional authority (i.e., the executive cannot bind Parliament), they may be taken as the recipient agreeing to the possibility of funding ending. Funding agreements with FNCFS Agencies and Ontario First Nations that are implementing 2018 CHRT 4 should include a "non-derogation clause" to the effect of the presence of 6.1 and 6.2(c) not limiting any of the recipient's rights to take legal recourse against Canada if Parliament fails to appropriate funds for the activities contemplated in the funding agreement.

ISC Response: Canada remains committed to the full implementation of the Canadian Human Rights Tribunal rulings on child welfare. At the same time, it is still a requirement for Canada to have the ability to terminate an agreement. *The Financial Administration Act* and the Policy on Transfer Payments require departments to include these clauses in contribution agreements because it allows a department to terminate agreements only in exceptional circumstances:

a. if Parliament opts not to vote funds that would fund the agreement (section 6.1);
b. if Treasury Board changes or ends the program (section 6.2(a));
c. if the Minister changes or ends the program (section 6.2(b)); or
d. if Parliament changes funding levels (section 6.2(c)).

For the reasons mentioned above, the clauses need to remain in the agreement.

Section 7.2 – Withholding Funds due to failure to file reports

Regarding 7.2, the time limit for providing withheld funds after submission of missing reports is 45 days. To be consistent with the approach for reimbursement of actuals, this should be 15 days. Does Canada have any explanation for why 30 extra days are required for these payments?

ISC Response: The 15-day time period is for the payment of retroactive and actual claims. The 45-day time period is needed for the reconciliation and assessment of reports and the processing of payments.

Section 11 – Reporting Duties

This section, and all references in the agreement to reports, are somewhat confusing due to Annex 5, which states "No required reports for this arrangement." If there are no reports required, why do section 11 and other provisions referencing reports remain?

ISC Response: As this is a template, Annex 5 indicates no required reports for this arrangement. Actual agreements would not contain this clause and in relation to the implementation of CHRT Orders, only one report (DCI #1208367 / FNCFS annual report) is required to account for funding received through claims.

If these provisions remain, we have the following more specific questions:

11.1(b) – what are the "any other required reports" that are referenced? The use of the word "including" in this clause implies that there may be others beyond those identified in Annex 5 and described in the Reporting Guide or in Annex 2.

ISC Response: In relation to the implementation of CHRT Orders on actuals, only one report is required from Agencies to account for funding received through claims ("DCI #1208367 / FNCFS annual report") and one report from the Ontario First Nations for Band Representative Services ("DCI #4548549 / Activities and Expenditures Report").

11.3 - We would like to see some wording provided to say that the Government of Canada will not unreasonably refuse agreement to a deadline extension.

ISC Response: The deadline extension is for Recipients to provide the reports to ISC. In cases where a Recipient is not in position to provide a report on time, ISC assesses the situation and will not unreasonably refuse an extension.

The Caring Society would like to see provisions in the funding agreement that provide for funding for completing business plans for FNCFS Agencies and Ontario First Nations implementing 2018 CHRT 4 as an actual cost, as those recipients must complete those reports to receive CHRT-ordered funding and the reports can take significant time and effort to complete.

ISC Response: As mentioned in the draft Terms and Conditions under the Eligible Initiatives and Projects section, Recipients will be resourced to support the development of new or modified plans.

Section 16 - Overspending

Section 16.1 states that the recipient is responsible for costs that are greater than the eligible costs. In looking at the definitions in Annex 1, it is not clear that "eligible cost" includes "actual costs" for FNCFS Agencies and Ontario First Nations. What assurances can ISC give that greater-than-forecast actual costs will not be construed as "overspending"?

ISC Response: As outlined in the Recipient Guide (s), recipients are able to submit claims to cover all eligible expenses greater than first forecasted if needed. The Notice of Acceptance of Request and the Text Deviation have been modified to make this clearer. Please see attached documents.

Section 17 – Overpayment Provisions

With regard to the overpayment provisions in section 17, how do these apply to FNCFS Agency requests for funding at actuals where actual expenses were less than forecast?

To the extent that an actual expenditure that is less than forecast is counted as an "overpayment" (for instance prevention services in respect of a child that end earlier than expected) and the surplus is set-off against future actuals needs as per 17.1 that would not be problematic. However, the repayment schedule provisions in 17.2 do not make sense in the context of actuals-based funding. We are also concerned about section 17.5 allowing interest to be charged against overpayments.

ISC Response: In the case of a surplus by a recipient, as outlined in the Recipient Guide(s), if a recipient submits a plan indicating how the funds will be spent, that the funds should not be repaid to ISC, but spent as per the plan. Interest will not be charged for overpayment on CHRT claims. The Notice of Acceptance of Request and the Text Deviation have been modified to make this clearer. Please see attached documents.

Section 28 – Dispute Resolution

Regarding dispute resolution, 28.1(b) states that a dispute resolution process will not be used regarding "the amount of funding provided under this Agreement." This should be removed or amended so that it does not cover an FNCFS Agency or Ontario First Nation implementing 2018 CHRT 4 either (a) appealing a denial through ISC's interim appeal process or the eventual independent appeal process; (b) seeking relief to enforce 2018 CHRT 4 if Canada refuses to fund at actuals; or (c) seeking judicial review in Federal Court.

ISC Response: To support the implementation of the CHRT Orders, a dispute resolution process is being developed in consultation with the Parties. Once the dispute resolution process is completed, the Notice of Acceptance of Request and the Text Deviation will be modified to make this clearer.

Section 34 – Legislation and Government Documents

In 34.1, there should be an obligation on the part of the Government of Canada to inform recipients under the funding agreement of amendments to federal legislation or changes to Government of Canada documents (as already exists in 34.2 in relation to amendments to the reporting guide).

ISC Response: As noted, section 34.2 outlines that Canada will inform recipients of changes to operational documents. The Notice of Acceptance of Request and the Text Deviation have been modified to provide assurance that Canada will inform recipients of amendments to federal legislation that affect the delivery of the First Nations Child and Family Services Program. Please see attached documents.

Annex 2 – Adjustment Factors

In addition to the issue raised earlier by Dr. Blackstock regarding the reference to the Program National Guidelines (i.e. the concern that the program guidelines can change after the recipient has consented to the funding agreement), Annex 2 also references "the program" being provided in accordance with Provincial or Territorial legislation. If ISC is looking to enable First Nations jurisdiction, a reference to the program being provided in accordance with First Nations jurisdiction, where applicable, should also be made in this Annex, as that is an alternate scenario not provided for.

ISC Response: As previously stated, until a policy change is made, ISC cannot reference the program being provided in accordance with First Nations jurisdiction.

Annex 3 – Conditions of Payment

Annex 3 – how will it be determined what funding will be treated as "set" (sections 2.4-2.6), "flex" (sections 2.7-2.12), or "fixed" (sections 2.13-2.19)?

ISC Response: As per the implementation of the CHRT Orders, if ISC creates a new agreement with a recipient, the funding methodology used is "either fixed or flex". In cases where an existing agreement is already active, a Notice of Acceptance of Request will be used to flow funding. This notice will indicate that the funding level may be adjusted based on the recipient actual needs. The text used in the Notice of Acceptance of Request is below.

For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 2.14 of Annex 3 (Conditions of Payment - DIAND funding) of the Agreement that any amount that the Recipient spends that is more than the maximum FIXED amount for an initiative is the responsibility of the Recipient.

Provisions for funding in sections 2.5 (set funding), 2.8 (flex funding), and 2.14 (fixed funding) raise the same concerns as section 16.1 re: "overspending," as it states that amounts over the "maximum" are the recipient's responsibility. How will this apply to actuals costs per 2018 CHRT 4 that are higher than forecast?

ISC Response: In the case of a surplus by a Recipient, as outlined in the Recipient Guide(s), if a Recipient submits a plan indicating how the funds will be spent, the funds should not be repaid to ISC, but spent as per the plan. Interest will not be charged for overpayment on CHRT claims. The Notice of Acceptance of Request and the Text Deviation have been modified to make this clearer. Please see attached documents.

If "fixed" funding models are to be used, the Caring Society is concerned that the 120-day notice period required under section 2.16(b)(ii) for spending funds in the next fiscal year will hamper the ability to change plans from December-March (assuming that the fiscal year is April-March). Is ISC amenable to a shorter notice period for "fixed" funding models?

ISC Response: The 120-day period is for a Recipient to submit a plan on how they will spend the funds carried over and not the time they have to spend the funds. To support the implementation of the CHRT Orders, the Notice of Acceptance of Request and the Text Deviation have been modified to make this clearer. Please see attached documents.

Additional clarifications relating to the CHRT Notice of Acceptance of Request (NAR) and Text Deviation for payment on actuals:

In order to ensure the funding agreement respects the CHRT Decisions and to alleviate administrative burden for recipients, ISC has developed the CHRT - Notice of Acceptance of Requests (NARs) and the CHRT - Text Deviations.

The NAR and the Text Deviation permit Canada to reimburse costs retroactively from January 26, 2016 to March 31, 2018 and for planned or incurred costs in 2018-2019 and moving forward.

The NAR is used for Recipients that are already under an existing funding agreement with ISC. It avoids ISC having to amend a funding agreement and simply requires the signature of a delegated ISC official. It alleviates burden on the recipient and expedites reimbursement of claims to Recipients. It is applied retroactively.

The Text Deviation is used when Agencies are required to enter into a new funding agreement with ISC (two signatures required since it is the first time an agreement is put into place).

CHRT TEXT DEVIATION REQUEST FORM FOR AGREEMENT
General Application

Tracking Number <TPCOE>
CIDM #: <TPCOE>

Regional/Sector Input

Submitted By:	FNCFS-ESDPP	Region/Sector	FNCFS-ESDPP	Date:	Nov 21, 2018
Agreement Model to amend:	□ First Nations/Tribal Councils **X Other Recipients** □ Project version □ Provincial/Territorial Governments □ Streamlined □ Canada Common Funding Agreement				
GCIMS Model/Agreement Number:			Fiscal year(s): 2018/19		
Type of Deviation:	□ Legacy X Must Have □ Forward Looking □ Innocuous □ Other X Program Specific (other than Delivery Standards/Requirements)			X First Time □ Repeat Request	
Scope of Deviation:	□ National **X Regional**				
Description of Deviation:	WHEREAS provisions to be included in new funding agreements with Delegated Agencies where funding is provided for the reimbursement of eligible planned or incurred costs in fiscal year 2018-2019.				

Adjustments to new funding agreement for Recipient - Other:

- To insert at the end of section 1.1 of the Agreement: **"In response to a letter from ISC to the Recipient dated** *[insert correct date]* **relating to a February 1, 2018 ruling of the Canadian Human Rights Tribunal, the Recipient has asked ISC to reimburse certain actual costs."**

- To insert at the end of section 1.3 of the Agreement: **"The Government of Canada accordingly wishes to reimburse the following costs by providing funding under the Agreement**

  a) **"$xxx for incurred costs in the 2015-2016 fiscal year (from January 26, 2016 to March 31, 2016)"**
  b) **"$xxx for incurred costs in the 2016-2017 fiscal year"**
  c) **"$xxx for incurred costs in the 2017-2018 fiscal year"**
  d) **"$xxx for planned or incurred costs in the 2018-2019 fiscal year"**

- To insert at the end of section 14.1 of the Agreement: **"Section 14.1 is not applicable as per FNCFS CHRT ruling".**

- To insert at the end of section 14.2 of the Agreement: **"Section 14.2 is not applicable as per FNCFS CHRT ruling".**

- To insert at the end of section 16.1 of the Agreement **"Section 16.1 is not applicable as per FNCFS CHRT ruling".**

- To insert at the end of section 17.2 of the Agreement **"Section 17.2 is not applicable as per FNCFS CHRT ruling".**

- To insert at the end of section 17.5 of the Agreement **"Section 17.5 is not applicable as per FNCFS CHRT ruling".**

- To insert at the end of section 34.1 of the Agreement: **"Canada will inform recipients of amendments to federal legislation that affect the delivery of the First Nations Child and Family Services Program."**

- To insert in Annex 2 of the Agreement in the adjustment factor section under the following Initiative- First Nation Child and Family Services-: **"Funding level may be adjusted based on the Recipient actual needs."**

- To insert in Annex 3 of the Agreement at the end of section 2.14: **" Section 2.14 of Annex 3 is not applicable as per FNCFS CHRT ruling".**

- To insert in Annex 3 of the Agreement at the end of section 2.16(b)(ii): **"Section 2.16(b)(ii) of Annex 3 is not applicable as per FNCFS CHRT ruling since recipient can provide their plan before or after the 120 days."**

CHRT TEXT DEVIATION REQUEST FORM FOR AGREEMENT
General Application

Tracking Number	<TPCOE>
CIDM #:	<TPCOE>

Regional/Sector Input

Rationale:	- The provisions are to provide context and clarify the intent on the requirement to comply with the February 2018 Canadian Human Rights Tribunal ruling concerning a remedies order for First Nations Child and Family Services for the reimbursement of eligible actual costs. - Adjustment Factor and waivers listed under "the description of deviation section" of this document are required to ensure that the maximum amount of funding to be provided to the recipient under the Agreement can be adjusted **based on the needs** of the Recipient and the eligible actual costs can be reimbursed to comply with the CHRT Order.
Risk and Impact Associated with not approving:	- Without the provisions - lack of clarity on the intent or reason for the funding provided to reimburse the 2018-2019 eligible planned or incurred costs. - Without the Adjustment Factor and waivers listed under "the description of deviation section" of this document , ISC will not be in a position to meet the CHRT Order i.e. to reimburse eligible actual costs not previously funded in the Agreement. (Deficit under the responsibility of the Recipient).
Legal comments (Region/HQ):	<insert legal comments here>

HQ Program/Sector support:		Originator	
Approved By			
		DG, Child and Families Branch	(Date)

Transfer Payment Center of Expertise Input

Date Received:		Date to Present for Approval:	
TPCOE Comments	<insert TPCOE comments here>		
Legal TPCoE Comments	<insert Legal TPCoE comments here>		

DG PTP Working Group Record of Decision

Date of Meeting			
Record of Decision:			
Approved		Conditions:	<insert conditions>
Not Approved		Conditions:	<insert conditions>
Refer to ADM Committee		Comments/Conditions:	
Approved by:		(enter name, title and date of approval)	**(signature)**

ADM PTP Steering Committee Record of Decision

Date of Meeting			
Record of Decision:			
Approved		Conditions:	<insert conditions>
Not Approved		Conditions:	<insert conditions>
Approved by:		(enter name, title and date of approval)	**(signature)**

CHRT - NOTICE OF ACCEPTANCE OF REQUEST

[NOTE: TO BE USED TO REIMBURSE ELIGIBLE ACTUAL FNCFS COSTS TO DELEGATED AGENCIES UNDER THE FUNDING AGREEMENT MODEL FOR RECIPIENT OTHER]

RECIPIENT NAME: [/:RecipientName]
AGREEMENT NO.: [/:ArrangementNumber]
FISCAL YEAR: 2018 - 2019
NOTICE OF ACCEPTANCE OF REQUEST NO.: [/:AdjustmentNumber]

1. The purpose of this notice

1.1 The [/:RecipientName] (the "Recipient") entered into a funding agreement with Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development effective on the ___ day of _____, 20__ (the "Agreement").

1.2 As a result of Canada's Orders in Council P.C. 2017-1464 and P.C. 2017-1465, the Minister of Indigenous Services – who presides over the Department of Indigenous Services Canada ("ISC") – also represents Her Majesty the Queen in Right of Canada ("Canada") in the Agreement.

1.3 In response to a letter from ISC to the Recipient dated [insert correct date] relating to a February 1, 2018 ruling of the Canadian Human Rights Tribunal, the Recipient has asked ISC to reimburse certain actual costs.

1.4 Canada accordingly wishes to reimburse the following costs by increasing funding provided under the Agreement:

a) "$ xxx for incurred costs in the 2015-2016 fiscal year (from January 26, 2016 to March 31, 2016)"
b) "$ xxxx for incurred costs in the 2016-2017 fiscal year"
c) "$ xxx for incurred costs in the 2017-2018 fiscal year"
d) "$ xxx for planned or costs incurred in the 2018-2019 fiscal year"

1.5 Section 14 of the Agreement permits Canada to amend Annex 4 - Payment Plan of the Agreement where it accepts a request of the Recipient.

1.6 For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 14 of the Agreement that the overall amount of funding for an initiative may not increase in accordance with such a request.

[Note: Where FIXED funding was used to provide funding for an initiative for which additional funding is to be provided to reimburse eligible actual costs, the following paragraph is to be included]

1.7 For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 16 of the Agreement that the Recipient is responsible for any expenses that the Recipient has incurred for an initiative which are more than the amount of funding provided for eligible costs under this Agreement.

1.8 For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 17.2 of the Agreement that without limiting the default (section 18) or termination (section 29) provisions of this Agreement, the Recipient must repay the Government of Canada any overpayment of funds provided to the Recipient according to the provisions in Annex 3 – Conditions of Payment – ISC funding [COMMENT] [when funding includes from other federal departments, add in the other Annexes which set out funding arrangements [/COMMENT] and Annex 4 – Payment Plan.

1.9 For the purpose of the reimbursement provided under this notice only, Canada will not charge interest on overdue FNCFS CHRT amounts owing under this Agreement (relating to section 17.5) in reference with the Interest and Administrative Charges Regulations, SOR/96-188, made under the *Financial Administration Act*.

1.10 For the purpose of the reimbursement provided under this notice only and relating to section 34 of the Agreement, Canada will inform recipients of amendments to federal legislation that affect the delivery of the First Nations Child and Family Services Program.

1.11 For the purpose of the reimbursement provided under this notice only, Canada clarified that for FNCFS program adjustment factor in Annex 2 (Programs, Service, and Activity Delivery Requirements and Adjustment Factors) of the Agreement that funding level may be adjusted based on the Recipient actual needs.

1.12 For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 2.14 of Annex 3 (Conditions of Payment - DIAND funding) of the Agreement that any amount that the Recipient spends that is more than the maximum FIXED amount for an initiative is the responsibility of the Recipient.

In the case of a surplus by a recipient, as outlined in the CHRT FNCFS Recipient Guides, if a recipient submits a plan indicating how the funds will be spent, the funds should not be repaid to ISC, but spent as per the plan.

1.13 For the purpose of the reimbursement provided under this notice only, Canada waives the requirement in section 2.16(b)(ii) of Annex 3 (Conditions of Payment - DIAND funding) of the Agreement that the amount spent in the next fiscal year and in accordance with a plan for spending the amount that is submitted by the Recipient to ISC within 120 days of the end of the fiscal year in which the amount was to have been spent and that ISC accepts by way of notice to the Recipient. The plan can be submitted before or after 120 days.

1.14 The amount of funding for [/:insert program, service or activity for which funding is adjusted] for fiscal year 2018 -2019 (including of reimbursement of retroactive costs) identified in Annex 4 - Payment Plan of the Agreement will accordingly be increased in the amount of [/:write out amount of adjustment] dollars ($____).

2. Notice

2.1 Canada therefore notifies the Recipient that:

a) Annex 4 - Payment Plan of the Agreement is deleted and replaced with Annex 4 - Payment Plan attached to this notice.

b) All other terms and conditions of the Agreement continue in full force and effect.

c) This Notice forms part of the Agreement.

This Notice has been executed by a duly authorized representative of Canada.

_____

[Insert name and title of authorized representative]

_____

Date

Active List of FNCFS Program Documents sent by ISC and Comments Received by Parties

Date Sent	Document Title	Comments Requested	Comments Received			
			Caring Society	COO	AFN	NAN
August 2, 2018	Capital Options	August 15, 2018	August 2, September 5, October 1	September 28		
July 25, 2018; August 17, 2018	Recipient Guide for Actuals	August 24, 2018	July 27, August 3, 21, 22			
August 23, 2018	Ontario 2018-19 Recipient Guide for Band Representatives	August 31, 2018	August 25	September 28	August 29	
	Ontario Guide for Prevention/Operations		August 25	September 28	August 29	
August 30, 2018	Draft Guidance Document for the CWJI	September 7, 2018	September 11	September 28		
September 11, 2018	Agency Funding Agreements	September 28, 2018	September 25			
September 27, 2018	Interim Prevention Reporting Tool	October 5, 2018	October 16			
October 15, 2018	ISC Policy on Internal Reallocation of Social, Housing, Education, and Health Program Funds	October 29	November 1			
November 9, 2018	Recipient Guides (National+ Ontario Recipient Guide for Band Representatives and for Prevention/Operations)	For information				
	Updated CWJI guidelines	For information				
December 3, 2018	Agreements, Text Deviation and Notice of Acceptance of Request (NAR)	For information				

This is Exhibit "O" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Enabling First Nations children to thrive

Kevin Page

Helaina Gaspard

January 17, 2019

IFSD
IFPD

Project overview

REQUESTED ACTION	COMPLETED ACTION
Develop reliable data collection, analysis and reporting methodology for analyzing the needs of First Nations Child and Family Services (FNCFS) agencies, in alignment with the Canadian Human Rights Tribunal (CHRT) rulings on discrimination against First Nations (FN) children in care (CIC).	IFSD undertook primary data collection with a 105-question survey. IFSD is privileged to have learned from a representative **76%** of FNCFS agencies.

REQUESTED ACTION	COMPLETED ACTION
Provide technical expertise to analyze agency needs, provide strategic advice on how best to monitor and respond to actual agency needs from fiscal and governance perspectives, with an approach informed by understanding, existing research, the contractor's own research and analysis of assessments done by agencies and communities.	Based on agency data and related analysis, IFSD reported on current and future costs and made recommendations for a needs-based future state for FNCFS, with a focus on prevention, poverty, capital, employees and IT.

REQUESTED ACTION	COMPLETED ACTION
Analyze the needs assessments completed by agencies and communities, create a baseline definition of agency resource inputs and outputs and identify missing data, complete a cost analysis and prepare a final report.	IFSD reviewed existing needs assessments and concluded that this information was not collected and completed in a systematic manner and would not support the development of costing and performance assessment.

Findings and analysis

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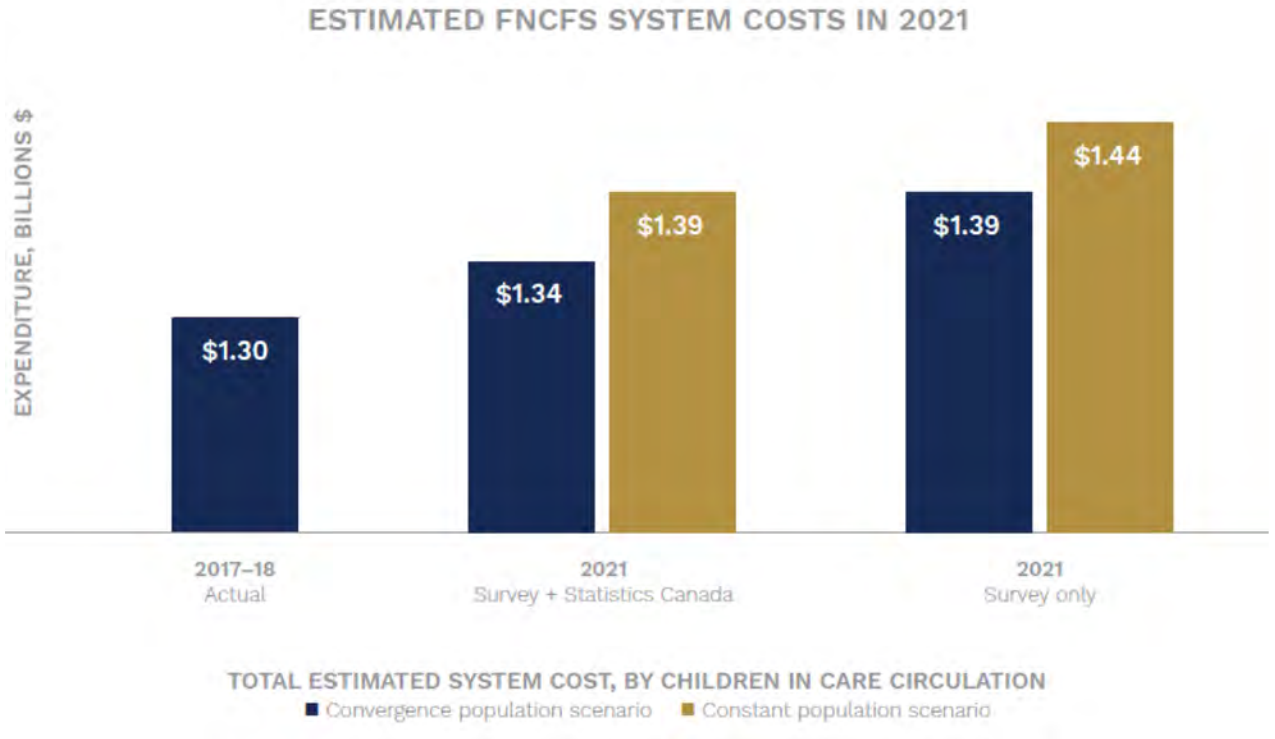
Current state overview

TOTAL BUDGET (N=77) All sources of funds, rounded	**$965,000,000**
Estimated total system cost, rounded (n=104)	$1,300,000,000
Average budget per agency (n=77) All sources of funds, rounded	$12,000,000
Total children in care (n=82)	15,786

AVERAGE COST/CIC (N=76), ROUNDED	**$63,137**
Average prevention (federal only)/per capita (total population served) (n=55), rounded	$416

Total system cost

- Under a no-policy change assumption, inflation and population alone would drive a total system cost increase of between **$40 million to $140 million** by 2021, depending on population scenario assumptions used, from $1.3 billion in 2017-18.



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Observations

- Agency characteristics transcend provincial boundaries and funding formulas.
- Contextual differences (poverty, intergenerational trauma, etc.) impact communities and the work of FNCFS agencies.
- Agency budgets are most tightly correlated with children in care (unsurprising, given the structure of the current system).
- Funding gaps exist in prevention, capital, employees and IT.

Future state vision

- Consultations with agencies and experts defined a new vision for FNCFS. Future policy and cost analysis were undertaken through this lens.

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POVERTY
44% of communities served by agencies have median household incomes below their provincial poverty line.
—
Raising those households to their provincial poverty line would cost roughly $205M.
—
The gap to raise these households to the median household incomes of their provinces is roughly $2.6B.
PREVENTION
Per person spending on prevention ranges from $800–$2,500 with total annual costs of $224M to $708M.
CAPITAL
A one-time capital investment ranging from approx. $116M to $175M for a facility equivalent to their headquarters.
SALARIES
62% of agencies report being unable to remunerate at provincial salary levels.
—
Net fiscal costs for equalizing salaries to provincial levels requires further studies.
TECHNOLOGIES
Annual IT spending based on industry standards should range from $65M–$78M.

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Next steps

1. Establish a performance framework to underpin the First Nations Child and Family Services system across Canada;
2. Develop a range of options with regards to the funding models that would support an enhanced performance framework; and,
3. Transition to a future state in full consideration of data, human capital and governance requirements.


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uOttawa

This is Exhibit "P" referred to

in Affidavit #4 of Doreen Navarro

Affirmed before me this 28th day of January, 2019

Commissioner for taking Affidavits, etc.

Contributions to provide women, children and families with Protection and Prevention Services

1. Introduction

Through its Social Development Program, Indigenous Services Canada (the Department) administers the provision of social services that contribute to individual, family and community well-being for First Nations. Eligible program recipients include First Nations, First Nations organizations, provinces and territories, and other service providers authorized by the Department and on consent of First Nations. The Department provides funding for social services on reserve including the **Family Violence Prevention Program (FVPP)** and the **First Nations Child and Family Services (FNCFS)** program.

FNCFS oversees and provides contribution funds for the ongoing provision of culturally-appropriate prevention, protection and well-being services for First Nations children[1] and families on reserve. In the case of child protection and band representatives in Ontario, services are provided in accordance with the legislation and standards of the province or territory of residence.[2] The safety and best interest of the child are paramount in the provision of these services. FVPP funding is intended for family violence services responsive to community needs. The primary objective of FVPP is to support women, children and families living on-reserve with family violence shelter services through funding to core shelter operations. The secondary objective is to support family violence prevention activities through funding to Indigenous communities and organizations. FVPP also funds prevention and awareness activities for Indigenous communities and organizations (First Nations, Métis and Inuit) off-reserve. These programs are intended for Indigenous people.

The FNCFS program is now intended to emphasize the use of preventive, early intervention and least intrusive measures in order to respond to child maltreatment (abuse or neglect), support for family preservation and well-being, maintenance of family, cultural and linguistic connections for children in care, former children in care (post-majority), and community wellness using a community supported approach. It also promotes a collaborative relationship between communities and agencies. The introduction of a new funding stream within FNCFS for Community Well-being and Jurisdiction Initiatives (CWJI) is designed to enable projects of up to five years in duration to expand the availability of prevention and well-being initiatives that are responsive to community needs, and to support First Nations in developing and implementing jurisdictional models.

[1] Children are defined as persons under the age of majority, i.e., the age at which a person is granted the rights and responsibilities of an adult, in accordance with provincial or territorial legislation. Services may also be provided to First Nations youth formerly in care after they reach the age of majority pursuant to legislative provisions regarding post-majority care.

[2] As provinces and territories have jurisdiction over child and family services, all child and family service providers must be delegated or in the process of delegation by the province or territory and must comply, at minimum, with provincial or territorial legislation and standards.

With program reform, services under the FNCFS program will be provided on the basis of substantive equality to address the specific needs and circumstances of First Nations children and families living on-reserve – including their cultural, historical and geographical needs and circumstances – in a manner that accounts for cost drivers related to inflation and increased needs or numbers of children in care and their families. The program also needs to provide paramountcy to the safety and best interest of the child. In order to provide equal opportunity and achieve equitable results and outcomes, the program supports variations in service requirements and methods of service provision.

Fixed and flexible funding approaches through contribution agreements are available for the FNCFS program, as described in the Directive on Transfer Payments (Appendix K: Transfer Payments to Aboriginal Recipients). CWJI projects will also be managed through multi-year contribution agreements. The CWJI is a funding stream of FNCFS, whereas the FVPP is a distinct but complementary program.

Should this Treasury Board Submission be approved, these terms and conditions will be effective immediately upon approval.

2. Authority

FVPP and FNCFS are delivered under the authority of the *Department of Indian Affairs and Northern Development Act*, R.S.C., 1985, c. I-6, s.4., which provides the Minister of Indian Affairs and Northern Development with powers, duties and functions that extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to:
(a) Indian affairs;
(b) Yukon, the Northwest Territories and Nunavut, and their resources and affairs; and,
(c) Inuit affairs.

The Canadian Human Rights Tribunal orders relating to the FNCFS program are as follows:

- The Tribunal's January 26, 2016 Order (2016 CHRT 2) to cease its discriminatory practices with respect to First Nations child welfare and reform the FNCFS program and *1965 Agreement* to comply with the Tribunal's findings.
- The Tribunal's April 26, 2016 Order (2016 CHRT 10) to immediately take measures to address:
    - incentives in the FNCFS program to remove children from their homes and communities;
    - the funding of FNCFS agency operations budgets based on assumptions regarding population thresholds and children in care;
    - reductions in operations budgets for small and remote FNCFS agencies that affect these agencies' ability to provide effective programming, respond to emergencies, and put some small and remote agencies at risk of closing;
    - bringing the FNCFS program in line with current provincial child welfare legislation and standards;

- the need for adjustments to funding for inflation/cost of living or changing service standards to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of services provided off-reserve; and
- funding deficiencies for items such as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives and least disruptive measures.

- The Tribunal's September 14, 2016 Order (2016 CHRT 16):
  - not to decrease or further restrict funding for First Nations child and family services;
  - to determine budgets for each FNCFS Agency based on an evaluation of that Agency's distinct needs and circumstances, including an appropriate evaluation of remoteness;
  - to establish the assumption of 6% of First Nations children in care and 20% of families in need of services as minimum assumptions only and to determine funding for FNCFS agencies with rates of First Nations children in care and families in need exceeding these assumptions in accordance with the actual level of children in care and families in need;
  - to cease formulaically reducing funding for FNCFS agencies serving fewer than 251 eligible children and instead determine funding based on actual service level needs, regardless of population level; and
  - to cease requiring FNCFS agencies to recover cost overruns related to maintenance from prevention or operations streams.
- The Tribunal's May 26, 2017 Order (2017 CHRT 14) to immediately implement the full meaning and scope of Jordan's Principle.
- The Tribunal's February 1, 2018 Order (2018 CHRT 4) to:
  - eliminate that aspect of the FNCFS program's funding formulas/models that creates an incentive resulting in unnecessary apprehension of First Nations children from their families and/or communities and cease its discriminatory practice of not fully funding the cost of prevention/least disruptive measures, building repairs, intake and investigations and legal fees in child welfare;
  - to provide funding on actual costs for least disruptive measures/prevention, building repairs, intake and investigations and legal fees in child welfare;
  - to provide funding on actual costs for child service purchase in child welfare;
  - to provide funding on actual costs for small FNCFS agencies; and
  - to provide funding on actual costs for Band Representative Services for Ontario First Nations.

Authority is also conveyed through the following:

- *Cabinet decision (December 1965)* - Social services delivery agreement with the Province of Ontario (resulting in the "1965 Memorandum of Agreement Respecting Welfare Programs for Indians," also known as the 1965 Welfare Agreement (Ontario);
- *Cabinet decision (March 1997)* to consider the Innu people at the communities of Sheshatshiu and Davis Inlet as if they were Registered Indians on reserve land, for the purpose of providing them with programs and services;
- "Administrative Reform Agreement with the Province of Alberta (1991)," also known as the "Alberta Reform Agreement;"

- *Cabinet decision (December 2004)* - Stabilization for First Nations Child and Family Services;
- *Cabinet decision (February 2007)* - National policy authorities and incremental investments for the First Nations Child and Family Services program in Alberta;
- *Treasury Board decision (March 2007)* - National transfer payment authorities and incremental investments for the First Nations Child and Family Services Program in Alberta;
- *Treasury Board decision (April 2007)* - Approval of renewed national transfer payment terms and conditions for the First Nations Child and Family Services Program and incremental investments in Alberta 2007-2008; and,
- *Treasury Board decision (October 2016)* - Funding to support urgent investment in the First Nations Child and Family Services Program.
- Policy authority for the FVPP is also found in Budget 2012, Budget 2013 and Budget 2016.

3. Purpose, Objectives and Expected Results

Indigenous Services Canada provides funding for social services on reserve including the Family Violence Prevention Program and the First Nations Child and Family Services Program. These two programs mainly aim to fund protection and prevention services for women, children and families ordinarily resident on-reserve. First Nations, provincial or territorial representatives and other recipients who receive funding provide on reserve residents and Yukon First Nations with individual and family services that are developed and implemented in collaboration with partners. The intention of these programs is to assist First Nation individuals and communities to become more self-sufficient; protect individuals and families at risk of violence; and to provide prevention supports that allow individuals and families to better care for their children. First Nations that are engaged in advancing their own development are better equipped to leverage opportunities made available by their communities and actively contribute to the broader Canadian economy and society.

FNCFS outcomes focus on safe, healthy children and families being supported by communities able to identify and address child and family needs.

Immediate (one to two years):
- First Nations families have greater access to culturally-appropriate prevention and early intervention services.
- First Nations service providers have adequate and predictable resources that allow for the development and delivery of culturally based child welfare standards and services including prevention services.

Intermediate (three to five years):
- Continuity of family, community and cultural connections is preserved for First Nations children in care.
- First Nations children in care achieve permanence and stability.

Ultimate (five years and beyond):

- The over-representation of First Nations children in care is decreased compared to the proportion of non-Indigenous children in care in the overall population of children in Canada.
- The safety and well-being of First Nations children are improved.

4. Eligible Recipients

Eligible Recipients	**FNCFS – Agencies**	**FNCFS – CWJI**	**FVPP**
FNCFS agencies or Societies[3].	Yes	No	Yes
Other delegated/designated providers of child and family service providers, including provincially (or Yukon) delegated/designated agencies and societies.	Yes	No	No
Provinces and Yukon territory.	Yes	No	Yes
Chiefs and Councils of First Nation bands recognized by the Minister of Indigenous Services Canada, Tribal Councils, First Nations, and First Nation organizations.	Yes	Yes	Yes
First Nation communities, First Nations authority, board, committee or other entity created by Chief and Council for purposes such as providing social services or health care.	No	Yes	Yes
Indigenous communities and organizations (First Nations, Métis and Inuit) off-reserve.	No	No	Yes
Incorporated shelters	No	No	Yes

Prevention services may be delivered by non-delegated service providers. Communities who undertake prevention related activities and projects through the CWJI stream of funding can do so without being delegated as well.

[3] Those would include agencies in the process of obtaining delegation, and those that are recognized by provinces in the delivery of CFS.

5. Eligible Initiatives and Projects

FNCFS Agencies

a. **Planning**

Multi-year Plans are being introduced for the 2019-20 fiscal year that will support new or existing strategic planning and coordination of efforts among child welfare service providers. Each delegated FNCFS agency is required to develop a multi-year Plan for Child and Family Services to describe the agency's response to identified needs and priorities within the community, including how service delivery will be coordinated with other service providers, and provide the expected outcomes. The Plans will also provide the FNCFS program with a better understanding of agency priorities over the medium-term and how to best support these priorities going forward. Agencies will be resourced to support the development of new or modified plans.

Services delivered by the agency should take into account the distinct needs and circumstances of the First Nations children and families served – including their cultural, historical and geographical needs and circumstances – in order to ensure substantive equality in the provision of child and family services. The Plans will assist with the integration of prevention services that an agency and potentially communities or other services providers are delivering to families.

In certain cases, FNCFS agencies may work with organizations to support First Nations children in care off reserve, including when children are being reunited with families who reside on reserve.

b. **Prevention:**

- Development and delivery of child maltreatment prevention services – which may be at primary, secondary and/or tertiary levels – that are evidence-informed, culturally-appropriate, address identified risk factors, and build protective capacities within families and communities. (CWJI projects can be funded with the intention to build a greater evidence base for culturally-specific interventions)
    - Primary prevention services are aimed at the community as a whole and include the ongoing promotion of public awareness and education on the healthy family and how to prevent or respond to child maltreatment.
    - Secondary prevention services are triggered when a child is identified as at risk of child maltreatment and intervention could help avoid a crisis.
    - Tertiary prevention services target specific families when a crisis or risks to a child have been identified and are designed to be least disruptive measures that attempt to mitigate the risks of separating a child from his or her family, rather than separate the child from his or her family. These services also assist families to address risks so that children in care can be reunified with their families as quickly as possible.
- Training for staff to ensure culturally-based standards for child and family service delivery.

- Cultivation of community social health and well-being through activities that address inequalities in the determinants of health, promote reductions in adverse childhood experiences, address addictions and mental health concerns that are placing children at risk, meet the needs of children and youth with disabilities and special needs, promote positive culturally-based parenting skills, provide family support, promote healthy child/youth development, and enable family preservation, especially through early intervention to avoid a more intrusive approach (such as removal from the family home).

c. **Child Protection, Guardianship and Support:**
   - Child protection services are triggered when a child's safety or well-being is at risk. Child protection includes those services related to:
     - public education on child maltreatment;
     - assessments/investigations of child maltreatment reports (including after-hours services);
     - intervention planning (including family case conferencing);
     - alternative dispute resolution services/proceedings (e.g., family group conferencing)
     - family court;
     - supervision orders;
     - guardianship and voluntary/special needs custody agreements;
     - post-majority services for former youth in care;
     - placement, support and supervision for children/youth who cannot live safely in the family home while measures are taken with the family to remedy the situation (e.g., kinship, foster or group care, residential treatment, support for Elders and extended family members caring for children, independent living);
     - adoption and custom care;
     - reunification services;
     - extended services for youth transitioning out of care; and,
     - alternative care resource development, training, support and monitoring.
   - Activities also may include community liaison and outreach, cultural/language interpretation, legal services, court support, family preservation, placement planning, standards development and implementation, policy development and implementation, and evaluation activities.
   - Culturally-based standards can be developed and applied by First Nations for child welfare.

Community Well-being and Jurisdiction Initiatives

a. **Community Well-being Initiatives:**
   - Targeted prevention and well-being services that support children and families in the home and community (e.g., parent education programs, family enhancement/preservation supports, cultural and traditional supports, in-home supports, respite care, services for mental health and addictions, community-wide prevention efforts);
   - Provision of wrap-around services and integration of service delivery with other relevant federal/provincial sectors or programs, such as health, education, social services, public safety/corrections, and/or youth services; and,

- Repatriation and reunification of children and youth in care with their families and home communities, including support for youth transitioning out of the child welfare system.

b. **Jurisdiction Initiatives:**
- Support the development and implementation of First Nation-based jurisdiction that includes child and family safety and well-being, as well as structures, processes, and services to support full and proper jurisdictional implementation;
- Support bilateral meetings with federal and/or provincial governments;
- Research and development of First Nations child and family safety and well-being interventions; and,
- Expand the range of jurisdictional models to recognize the exercise of First Nations jurisdiction that meets or exceeds provincial/territorial standards.

Family Violence Prevention Program

a. **Core shelter operations:**
Core operating funding to an existing network of family violence shelters serving First Nation communities. The formula calculates a core operating budget for each shelter based on the province of operation, size and geographical location using four expenditure factors: staff salaries and benefits; operational and administrative costs, and where applicable, funds to cover the costs associated with remoteness and emergency needs.

b. **Prevention and awareness:**
Family violence prevention activities targeting Aboriginal communities and organizations such as public outreach and awareness, conferences, seminars, workshops, support groups, and community needs assessments.

c. **Reimbursement of provincial/territorial bills:**
In some provinces and Yukon, where service delivery arrangements currently exist, reimbursement of the actual costs of maintaining an individual or family ordinarily resident on-reserve in a provincial/territorial family violence shelter at provincial/territorial per diem rates and rules. Contribution amounts to provinces and Yukon Territory are based on the actual costs of maintaining an individual or family ordinarily resident on-reserve in some provincial and Yukon family violence shelters based on provincial/territorial per diem rates and rules.

d. **National Aboriginal Circle Against Family Violence (NACAFV):**
Core funding for NACAFV to provide support to shelters and their staff through training forums, gatherings and development/distribution of resources and research.

Retroactivity
Under these terms and conditions, excluding the FVPP, and for the period of January 26, 2016 to March 31, 2018, the FNCFS program will reimburse actual costs incurred for eligible activities, as identified by the Tribunal.

6. Type and Nature of Eligible Expenditures
Note: These expenses should support the activities stated in section 5.

FNCFS Agencies:

Care and Maintenance

The costs must relate to children ordinarily resident on reserve, registered under the *Indian Act* or who are entitled to be registered.

- Allowances for assessment;
- Crisis Line;
- Placement development: recruiting, assessing, training, supporting, monitoring and evaluating care providers;
- Direct client costs;
- Costs for children in alternative care;
- Purchases on behalf of children in care;
- Special needs assessment and testing;
- Non-medical services to children with behavioural problems;
- Non-medical, limited-duration services;
- Other provincially-approved purchases and professional services where funding from other sources was not received in whole or in part for that activity;
- Establishment and maintenance of Registered Education Saving Programs when necessary to comply with provincial legislation/policy;
- Formal customary care and adoption;
- Post-adoption subsidies and supports;
- Family support costs;
- Reunification services;
- Land-based/cultural activities and equipment;
- Recreational and other activities to meet needs of children living at home; and
- Post-majority care services.

Planning and Operations

- Community consultations;
- Design of service and delivery models;
- Financial policy research;
- Development of service standards;
- Determination of staffing requirements and plans;
- Negotiation of agreements;
- Security services;
- Workplace safety;
- After-hour emergency services;
- Coordination of services at the community level.

Administrative Needs

- Costs for training forums, workshops, outreach, awareness;
- Professional and paraprofessional services;
- Interpretation services;
- Development of client and management information systems;

- Staff recruitment and professional development costs;
- Staff salaries and benefits;
- Honoraria for Elders or Knowledge Keepers;
- Staff travel and transportation;
- Employee Assistance Programs;
- Administrative overhead;
- Audits, monitoring, program research, policy development, evaluation;
- Board/committee operations;
- Professional development;
- Orientation and training of local committees, boards of directors and agency staff;
- Provisions to ensure privacy, security and proper management of records;
- Insurance.

Legal Services

- Corporate legal services;
- Legal services related to the provision of child and family services (including inquests);
- Legal services for child representation.

Infrastructure Purchase, Maintenance and Renovations

- Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services.
- Purchase and maintenance of vehicles suitable for the transportation of children and families support the delivery of FNCFS services.
- Purchase and maintenance of information technology equipment and systems that are tailored to child and family services delivery;
- Establishment and maintenance of an agency office;
- Purchasing and maintenance of equipment and furniture;
- Operations, minor maintenance (e.g. general repairs, painting, plumbing, minor electrical)
- Janitorial and ground maintenance services;
- Renovations/repairs to the building structure, structural foundations, etc.;
- Repair/replacement of roofing, siding etc.;
- Repairs replacement of Heating system, Cooling system, Ventilation system, Electrical system, Water system, Plumbing system, Back-up generators, etc.;
- Repairs/replacement to/of the floors;
- Repairs/repainting to/of the walls, ceiling, etc.;
- Repairs/replacement to/of windows, doors, etc.;
- Repairs/renovations to the toilets, bathrooms;
- Repairs/renovations to the kitchen (including replacement of cupboards, counters, etc.);
- Repairs/renovations to storage space;
- Repairs/renovations related to improved indoor environmental quality including:
- Air quality (e.g. vent replacement),
- Thermal comfort (e.g. replacement of thermostats),
- Acoustics (e.g. wall insulation),

- Day lighting (e.g. additional windows, replacing/installing additional light fixtures to simulate external light for centers in the north, etc.)
- Pollutant source control (e.g. water purification systems);
- Use of low-emission materials and building system controls, etc.; and,
- Fixtures and Equipment required by Fire Regulations including Fire alarms, Fire doors, Exit signs, Fire extinguishers, First aid kits, Earthquake kits, etc.
- Repairs/renovations to the parking lot;
- Repairs/renovations to external alleys, paths, etc.;
- Repairs/renovations to external structures;
- Permanent Signage;
- Outdoor play structures/space; and,
- Porch, deck, fences, etc.

Note: In regards to the purchase and sale of buildings FNCFS terms and conditions are consistent with those of the First Nations Infrastructure Fund. These are:

Where asset is sold, leased, encumbered or disposed of within:	**Return of contribution (in current dollars):**
2 Years after Project completion	100%
Between 2 and 5 Years after Project completion	55%
Between 5 and 10 Years after Project completion	10%

Band Representatives in Ontario

- Salary and benefits;
- Honorarium/ Per diem;
- Travel (Accommodations and meals);
- Long distance telephone calls;
- Client transportation (non-medical);
- Family support services; and,
- Court fees and disbursements and court-ordered costs related to child protection cases.

<u>Community Well-being and Jurisdiction Initiatives:</u>

Planning and Operations

- After-hour emergency services;
- Workplace safety;
- Provisions to ensure privacy, security and proper management of records;
- Coordination of services at the community level;
- Crisis Line;
- Direct client costs;
- Other provincially-approved purchases and professional services where funding from other sources was not received to cover the entire cost of the related activity;
- Family support costs;
- Special needs assessment and testing;
- Non-medical services to children with behavioural problems;

- Non-medical, limited-duration services;
- Interpretation services;
- Land-based/cultural activities;
- Recreational and other activities to meet needs of children living at home;
- Post-majority care services; and,
- Parenting courses and anger management courses.

Administrative Needs

- Staff recruitment and professional development costs;
- Staff salaries and benefits;
- Employee Assistance Programs;
- Staff travel and transportation;
- Professional development;
- Board/committee operations;
- Administrative overhead;
- Audits, monitoring, program research, policy development, evaluation;
- Insurance;
- Costs for training forums, workshops, outreach, awareness;
- Policy positions;
- Professional and paraprofessional services.

Legal Services

- Corporate legal services;
- Legal services related to the provision of child and family services.

Infrastructure Purchase, Maintenance and Renovations

- Capital costs for:
    - Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services;
    - Purchase and maintenance of vehicles suitable for the transportation of children and families support the delivery of FNCFS services;
    - Purchase and maintenance of information technology equipment and systems that are tailored to child and family services delivery.
- Operations, minor maintenance (e.g. general repairs, painting, plumbing, minor electrical);
- Janitorial and ground maintenance services.

Where asset is sold, leased, encumbered or disposed of within:	**Return of contribution (in current dollars):**
2 Years after Project completion	100%
Between 2 and 5 Years after Project completion	55%
Between 5 and 10 Years after Project completion	10%

Family Violence Prevention Program:

Eligible Expenditures	Core Shelter Operations	Prevention and awareness
Staff salaries and benefits	Yes	Yes
Professional development (including membership and conference fees)	Yes	Yes
Board/committee operations	Yes	Yes
Direct client costs	Yes	No
Operations, minor maintenance, upgrading and repairs of facilities	Yes	No
Overhead administration costs	Yes	Yes
Crisis Line	Yes	No
Staff travel and/or transportation	Yes	Yes
Off-hour emergency services	Yes	No
Costs for training forums, workshops, outreach, awareness (including instructional and information materials)	Yes	Yes
Recruitment costs	Yes	Yes
Professional/ Paraprofessional services	Yes	Yes
Legal services fees and costs	Yes	Yes
Insurance	Yes	No
Audits, monitoring, evaluation and policy development	Yes	Yes

In addition to the above eligible expenditures for FVPP, Provincial/Territorial Bills which include the actual costs of maintaining individuals or families ordinarily resident on reserve in some provincial or Yukon shelters, where service delivery arrangements currently exist according to provincial/territorial per diem rates and rules will be reimbursed.

7. Stacking Limits

The stacking limit is the maximum level of funding to a recipient from all sources (including federal, provincial/territorial, and/or municipal) for any one activity, initiative or project. The limit is 100 percent of eligible costs[4].

[4] The Children's Special Allowance is not used to fund child welfare services generally, and is not to be considered as a source of revenue by the program for stacking purposes

8. Method for Determining the Amount of Funding

FNCFS Agencies
Funding for prevention, protection, maintenance, legal services, child service purchase amounts, intake and investigations, building repairs, as well as for agency operations costs for small FNCFS agencies, is based on the actual needs of the children and families served by FNCFS agencies, as reflected by expenditures in these categories.

Community Well-being and Jurisdiction Initiatives
Funding for CWJI projects is determined at the regional level based on the specific needs, circumstances and goals of the community, as well as on the nature and duration of the activities described in the project proposal.

Family Violence Prevention Program
Based on established funding formula for shelter operations and provincial/territorial bills and proposals for prevention and awareness as outlined in the National Social Programs Manual. Contribution amounts are based on a national shelter funding formula. The formula calculates a core operating budget for each shelter based on the province of operation, size and geographical location using four expenditure factors: staff salaries and benefits; operational and administrative costs, and where applicable, funds to cover the costs associated with remoteness and emergency needs. Effective April 1, 2012 contribution amounts are be based on strategic funding approaches to support project proposals subject to funding availability.

9. Maximum Amount Payable

The program's funding methodology is being reformed as per orders from the Canadian Human Rights Tribunal (CHRT). While the department has a temporary exception to item 8 of Appendix E of the Directive on Transfer Payments, from an operational perspective the maximum amount payable is currently considered to be the maximum amount of a given claim of actual eligible expenditures that meets the reasonableness requirements included in section 10 (Basis for Payment). Once the revised funding methodology has been established, or in three years (whichever is earlier), the Department will return to the Treasury Board with a maximum amount payable that adheres to the Policy on Transfer Payments.

FVPP Maximum Amounts Payable Per Recipient (000s):

Eligible Recipients	Core shelter operations	Prevention and awareness
Chiefs and Councils of First Nation bands	$1,000	$1,500
Tribal councils	$1,000	$1,500
FNCFS Agencies and Societies	$1,000	$1,500
First Nations authority, board, committee or other entity approved by Chiefs and Councils	$1,000	$1,500
Provinces/Territory	Negotiated Amount	N/A
Incorporated shelters	$1,000	$1,500
Aboriginal communities and organizations	N/A	$1,500

10. Basis for Payment

Payments will be made in accordance with the type of funding arrangement, and will be guided by departmental policies as reflected in the contribution agreement. Where it is advantageous to the success of the activities, the Department shall offer fixed or flexible funding approaches for contributions to Indigenous recipients, in accordance with Appendix K of the *Directive on Transfer Payments*. Basic payment principles applicable to FNCFS and FVPP specify that:

- funds be used for eligible activities and cost categories as specified in the contribution agreement;
- costs charged to the program not exceed any maximums specified in the agreement;
- funds be used within the period and to address the needs for which they were provided; and,
- financial reporting requirements specified in the contribution agreement be met.

Notwithstanding the above, for FNCFS, costs for maintenance will continue to be reimbursed based on actual costs incurred. In addition, the Department will reimburse actual costs for the following expenses when agencies have not already received funding through another federal program (including another program of Indigenous Services Canada), or any provincial, territorial, or municipal government funding source for that activity:

- prevention;
- intake and investigations services;
- legal fees;
- building repairs;
- full eligible agency operations costs for small agencies; and,
- child service purchase costs.

The six areas above are those the Tribunal has ordered the program to pay on actuals. A detailed National Recipient Guide detailing how recipients may claim retroactive costs in these areas has been shared with recipients to support them in accessing funds as ordered by the Tribunal.

In this respect, the reasonableness of a particular cost will be established by determining whether the expense was:

- necessary to ensure substantive equality and the provision of culturally-appropriate services, given the distinct needs and circumstances of the individual child and his or her family, including their cultural, historical and geographical needs and circumstances, for instance, by taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services;
- deemed by the recipient to be necessary for the best interest of the child;
- generally recognized as normal and necessary for the conduct of the activity; and,
- aligned with restraints and requirements of generally accepted accounting principles, arm's length bargaining, federal/provincial/local laws and regulations, and/or Certified Accountant terms.

Advance payments will be permitted, based on a forecast of cash flow provided by the recipient and supported by the Community Plan. Progress payments will be subject to periodic reports of activities and expenditures, as specified within the funding agreement, which will be reviewed and validated by the Department. Officials will ensure that all applicable requirements are met prior to processing a payment.

Holdback requirements, if applicable, will be determined based on risk assessment, and may be up to 20% of the total contribution.

Final payment will be contingent on the receipt by the Department of the final activity, performance and financial reports, as specified in the agreement.

Funding under the FNCFS and FVPP programs is targeted and cannot be used for any other purposes.

11. Application Requirements and Assessment Criteria

Before entering into a funding arrangement, (for either FNCFS or FVPP) ISC shall confirm its authorities to enter into an agreement with the recipient and to fund the proposed activities. The departmental review procedures for verifying eligibility, entitlement and application approval (including risk assessments) are detailed in relevant departmental program directives and procedures. As these terms and conditions are new as they relate to the FNCFS program (which includes the CWJI funding stream) specific requirements for this program include, but may not be limited to:

FNCFS Agencies or Societies, Other delegated/designated providers of child and family service providers, including provincially delegated/designated agencies and societies, Provinces and Yukon territory:

- Legal Entity's Name, Address and Telephone;
- Provincial delegation document/certification (Those wishing to only provide prevention services, are not required to have a delegation agreement in place);
- For Corporations: Incorporating Documents (Articles of Incorporation or Letters Patents), By-laws,
- Band Council Resolution for each community being represented/serviced;

- Disclosure of any involvement of former public servants who are subject to the *Conflict of Interest and Post-Employment Code for Public Office Holders* or the *Conflict of Interest and Post-Employment Code for the Public Service*; and,
- Multi-year Plan identifying community's needs, planned activities, performance measures and reporting requirements; along with evidence of consultation and collaboration with communities.

- **Communities (CWJI):** A mandate, as evidenced by a Band Council Resolution (BCR), or other formal mandate for initial agreements, upon renewal of agreements or for the addition of any new initiatives, as required by the program;
- A Multi-Year Community Plan that identifies the community's needs, defines its capacity to respond, and outlines its programs and services, performance measures and reporting requirements to address priorities; and,
- Evidence of demonstrated capacity in areas such as financial and administrative experience to deliver the programs and services.

12. Performance Measurement and Reporting

Performance Measurement

To ensure that a balanced approach is implemented and that the reporting burden is minimized, a reliable performance data collection, analysis and reporting methodology is being developed that will meet the respective needs of the recipients, the communities, the provinces/territories, and the Department. The methodology will be developed collaboratively with the parties to the Canadian Human Rights Tribunal complaint, the National Advisory Committee, and other partners as appropriate, including the provinces/Yukon. Funding recipients will be required to provide to the Department only the performance data required for mandatory reporting on program performance and achievement of program outcomes.

Until the methodology is finalized and implemented, data will continue to be collected by recipients using various methods and sources, and will meet requirements set out in the Reporting Guide[5]. Frequency of financial and performance reporting will be specified in the contribution agreement, but all recipients will be required to report at least annually on their Community Plan for Child and Family Services or CWJI project plan. Financial reviews will be conducted to ensure each recipient submits financial reports in accordance with its funding agreement specifications. An annual audited financial statement will be required in all cases.

Financial Reporting

Financial reporting requirements will be determined based on the recipient's circumstances and the type of funding agreement. Appropriate financial reporting obligations, including frequency, will be contained within each funding agreement.

[5] This document may be found at: http://www.aadnc-aandc.gc.ca/eng/1385559716700/1385559777677

As per the Department's Management Control Framework, annual reviews will be undertaken to ascertain whether funds provided are being expended for the purposes intended, and whether a recipient's financial situation is sufficiently stable to enable continued delivery of funded activities. Where any instability is due to the Department's funding structures or levels of funding, the Department will take measures to mitigate and remediate these risks.

13. Official Languages

Where a program supports activities that may be delivered to members of either official language community, i.e., where there is significant demand, the recipient is required to provide access to services in both official languages. In addition, the Department will ensure that the design and the delivery of programs respect the obligations of the Government of Canada as set out in the *Official Languages Act*.

14. Redistribution of Contributions

Recipients may redistribute contributions, as per the terms of their funding agreements. Redistributions should be done in line with program objectives, eligibility criteria and eligible expenses. In doing so, however, recipients will not act as agents of the federal government. Where a recipient further distributes contribution funding to another service delivery organization (i.e., an authority, board, committee, or other entity authorized to act on behalf of the recipient), the recipient will remain liable to the Department for the performance of its obligations under the funding agreement. Neither the objectives of the programs and services nor the expectations of transparent, fair and substantively equivalent services will be compromised by any redistribution of contribution funding.

15. Other Terms and Conditions

Land-less Bands and Non-Reserve Communities
Subject to an annual review, the Department will maintain a list of land-less bands and non-reserve communities that are eligible to receive program funding, as contained in the FNCFS Program Guidelines.

Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

AFFIDAVIT OF ANDREA AUGER

I, Andrea Auger, of the City of Ottawa, in the Province of Ontario, **SOLEMNLY AFFIRM THAT:**

1. I am a member of the Pays Plat First Nation and am the Reconciliation and Research Manager of the complainant, the First Nations Child and Family Caring Society of Canada ("the Caring Society"). As such, I have personal knowledge of the matters hereinafter deposed to, save and except for those matters stated to be on information and belief and where so stated, I believe them to be true.

2. I have worked at the Caring Society since 2008. In addition to my work assisting First Nations children and families seeking services under Jordan's Principle, I also attend meetings of the Jordan's Principle Operations Committee ("JPOC") on behalf of the Caring Society.

3. On October 14, 2018, Cindy Blackstock, the Caring Society's Executive Director, sent partial feedback on the October 5, 2018 version of Indigenous Services Canada's ("ISC") Jordan's Principle Standard Operating Procedures ("SOPs") to Valerie Gideon, ISC's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch ("FNIHB").

4. On October 16, 2018, I sent Dr. Gideon the Caring Society's complete feedback on the October 5 version of the SOPs. On November 9, 2018, ISC circulated a new version of the SOPs.

5. I attended the December 18, 2018 meeting of JPOC, where I expressed concern that the Record of Decision for the November 9, 2018 meeting (which I attended) indicated that the SOPs had been approved. A more accurate statement is that the SOPs could be used while the parties continued to provide feedback.

6. On January 4, 2019 Dr. Blackstock provided preliminary feedback regarding the SOPs, reiterating feedback that had not been included from the previous version. On January 8, 2019, I provided the Caring Society's complete feedback on the SOPs to Dr. Gideon and to Leila Gillis, ISC's acting Director for Jordan's Principle within FNIHB.

7. On January 22, 2019, Ms. Gillis advised the Caring Society that responses to its comments on the SOPs would be brought to the February 15, 2019 JPOC, with the result from that meeting being brought to the Consultation Committee on Child Welfare. Ms. Gillis advised that a new version of the SOPs would be created after CCCW consideration, with the next version expected in March 2019.

AFFIRMED BEFORE ME this 31st day of January, 2019 in the City of Ottawa, in the Province of Ontario.

Commissioner for taking affidavits

David P. Taylor
LSO# 63508Q

ANDREA AUGER

Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO,
AMNESTY INTERNATIONAL and
NISHNAWBE ASKI NATION

AFFIDAVIT #5 OF DOREEN NAVARRO

I, Doreen Navarro, of the City of Ottawa, in the Province of Ontario, **SOLEMNLY AFFIRM THAT:**

1. I am employed as a legal assistant at Conway Baxter Wilson LLP/s.r.l., counsel for the complainant First Nations Child and Family Caring Society of Canada ("**Caring Society**") in this matter. Part of my responsibilities involve assisting David Taylor with the Caring Society file, both with respect to proceedings before the Canadian Human Rights Tribunal and with respect to consultations at the Consultation Committee for Child Welfare. I have knowledge of the facts

hereinafter deposed to except for those matters which are stated to be based upon information provided by others, all of which information I believe to be true.

2. On February 4, 2019, I accessed online the Department of Justice Canada report titled "Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System". I attach a copy of chapter 3 of that report, titled "Challenges and Criticisms in Applying s. 718.2(e) and the Gladue Decision" to my affidavit as **Exhibit "A"**. This document can be accessed at https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p3.html.

3. On February 4, 2019, I accessed online the Canadian Human Rights Commission's November 2011 submissions to the United Nations Committee on the Rights of the Child, made in the context of Canada's third and fourth periodic reports to that Committee. A copy of these submissions is attached to my affidavit as **Exhibit "B"**. This document can be accessed at https://www.chrc-ccdp.gc.ca/sites/default/files/rightsfofthechild_droitdelenfant-eng.pdf.

AFFIRMED BEFORE ME this 4th day of February, 2019 in the City of Ottawa, in the Province of Ontario.

D. Burke-Lachaine
Commissioner for taking affidavits

Doreen Navarro
DOREEN NAVARRO

Debra Ann Burke-Lachaine, a Commissioner, etc., Province of Ontario, for Conway Baxter Wilson LLP/s.r.l., Barristers and Solicitors. Expires December 18, 2020.

This is Exhibit "A" referred to

in Affidavit #5 of Doreen Navarro

Affirmed before me this 4th day of February, 2019

D. Burke-Lachaine

Commissioner for taking Affidavits, etc.

Debra Ann Burke-Lachaine, a Commissioner, etc.,
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,
Barristers and Solicitors. Expires December 18, 2020.

Canada

Department of Justice

Notice

We have received reports of people receiving emails claiming to be from the Department of Justice. These emails are fraudulent and should be deleted. The Department of Justice does not issue summons via email. Learn more.

Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System

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3. Challenges and Criticisms in Applying s. 718.2(e) and the Gladue Decision

Despite the Court's decision in *Gladue,* and its subsequent call to action in *Ipeelee*, *Gladue* principles are perceived by Indigenous offenders to be ineffective and inconsistently applied (Iacobucci 2013; Pfefferle 2008 Roach 2009). Non-Indigenous offenders have benefited more from the 1996 sentencing reforms than Indigenous offenders, and overincarceration has worsened since *Gladue* (MacIntosh and Angrove 2012, p. 33).

A 2008 study conducted by Welsh and Ogloff (2008) evaluated the impact of s. 718.2(e) by analyzing a sample of 691 sentencing decisions, chosen both before and after the enactment of s. 718.2(e). The analysis sought to determine the extent to which Indigenous status was correlated with judges' sentencing decisions. Using hierarchical regression analyses, the study concluded that Indigenous status alone did not significantly predict the likelihood of receiving a custodial disposition relative to aggravating and mitigating factors or sentencing objectives cited by judges. Instead, aggravating and mitigating factors, such as offence seriousness, prior criminal history and the offender's plea, were significantly related to sentencing decisions.

Welsh and Ogloff (2008) suggest that s. 718.2(e) and its interpretation by the Supreme Court "underestimate the true complexity of the over-representation problem" (p. 512). The authors note that interactions between Indigenous status and the aggravating and mitigating factors mentioned may explain why Indigenous status alone does not seem to significantly influence sentencing decisions. They echo critiques made in the aftermath of *Gladue* that sentencing may not be the

appropriate means to remedy overrepresentation. Indeed, the Court's response to this critique is one that other authors have also found dissatisfying (MacIntosh and Angrove 2012; Gevikoglu 2013). Constance MacIntosh and Gillian Angrove write,

> "The Court explains that 'sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders', but there is no further explanation as to how this will practically happen (p. 130)."

Gladue should not be regarded as a panacea for overrepresentation, but rather as a contribution to the efforts required. Nonetheless, questions about how sentencing can address overrepresentation point to the challenges of implementing *Gladue* principles in a meaningful and effective way. Although a number of programs and initiatives, subsidized by the federal and provincial governments, support efforts to reduce overrepresentation through sentencing, Parliament's goal of eliminating Indigenous overrepresentation within a generation remains far from fulfillment. This section will explore the challenges to the implementation of *Gladue* principles, as well as critiques of whether *Gladue* principles are a sufficient or appropriate solution.

3.1 Challenges to Implementation

3.1.1 "Reconciling" Retributive and Restorative Approaches

For Roach and Rudin (2000), *Gladue* was significant because it recognized the restorative purpose of sentencing codified in s. 718.2, which added reparation to victims and the community, and the promotion of responsibility in the offender alongside the traditional purposes of denunciation, deterrence, separation, and rehabilitation. The addition of restorative justice to the principles of sentencing was meant, in part, to address the criminal justice system's over-reliance on incarceration (Roach and Rudin 2000, p. 363).

The Court offers a general definition of restorative justice in *Gladue*:

> "In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime (para 71)."

Critique in the aftermath of the *Gladue* decision found the Court's emphasis on restorative justice to be contradictory with the traditional sentencing principles of denunciation, separation, and deterrence. Some authors viewed retributive and restorative approaches to justice as irreconcilable

– essentially arguing that judges would not be able to both adopt *Gladue* principles and adhere to traditional sentencing principles (Haslip 2000; Pfefferle 2008).

However, the statement that traditional sentencing purposes remain relevant seems only to indicate that *Gladue* does not force judges to use a restorative sanction in every case involving an Indigenous offender, to the detriment of deterrence, denunciation, and separation. The essential direction is that judges consider, to the extent possible, different alternatives when sentencing an Indigenous offender. In addition, the Court was clear that restorative sentences should not be seen as more lenient sentences, as there is "widespread consensus" that incarceration does not necessarily achieve the traditional goals of sentencing (para 57, 72).

Are Conditional Sentences Restorative?

Along with s. 718.2(e), conditional sentences were introduced into the *Criminal Code* during the 1996 legislative reforms. There is no consensus on whether conditional sentences should be seen as a restorative suggestion. For example, Quigley (1999) views conditional sentences as a helpful tool that would allow judges to reconcile retributive and restorative approaches to sentencing. On the other hand, Williams (2008) considers conditional sentences to be primarily in line with criminal law's punitive purposes of denunciation and deterrence, rather than serving a rehabilitative purpose. Williams (2008) argues that conditional sentences are an alternative to incarceration that relocates imprisonment "from the dedicated institutions to the defendant's community" (p. 84-85). They are usually lengthier than carceral sentences, and accompanied by "stringent, punitive restrictions on liberty," breaches of which would result in the offender's incarceration (Williams 2008, p. 84-85).

Roach and Rudin (2000) similarly caution against the conditional sentence's potential of "net-widening" (p. 375). They suggest that post-*Gladue*, judges are more likely to impose conditional sentences, which may have onerous and unrealistic "healing" conditions. Indigenous offenders would then "find themselves disproportionately breached and imprisoned, perhaps for a longer period than if they had been sent directly to jail," which would worsen, rather than reduce overrepresentation (p. 375).

Nonetheless, conditional sentences have the potential to offer greater flexibility and rehabilitation. In her analysis of the application of *Gladue* principles in sentencing Indigenous women, Cameron (2008) questioned why conditional sentences were not given in the cases of *R v Norris* and *R v Moyan*. In these cases, a conditional sentence would have afforded both women the ability to parent their child, work, as well as participate in education and treatment programs.

Defining Restorative Justice as it applies to the Criminal Law

The confusion around reconciling retributive and restorative approaches to justice points to confusion around the meaning of restorative justice itself, as applied to the criminal law. Justice Melvyn Green (2012) explains that restorative justice is most often applied in Canadian Courts as a model "focused on reparative or compensatory sanctions" (p. 8). The language of *Gladue*, however,

suggests an alternate view that sees restorative justice as "a comprehensive theory of justice in itself," which does not see rehabilitation and reintegration as sentencing objectives to be balanced against deterrence and denunciation. Instead,

> "These conventionally opposing principles are facets of a holistic 'restorative' exercise that includes the offended community and the community of the offender in the process of adjudication as well as the determination of appropriate sanctions" (p. 8).

In other words, restorative justice is not just one consideration or one kind of sanction, but rather an alternate theoretical approach to justice. While there is no universally agreed upon definition of restorative justice, the Federal-Provincial-Territorial Working Group on Restorative Justice defines restorative justice as:

> "An approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime." [13]

Chartrand and Horn (2016) define restorative justice as:

> "An approach to crime and conflict that brings the victim, the offender, members of the larger community, and oftentimes professional service providers together into a non-hierarchal setting in order to collectively address a harm that was committed and to set a path towards reconciliation between all relevant parties. (p. 3)"

In practice, as section 4 will explore in greater detail, restorative justice programs tend to be community-based. While there is no single approach to restorative justice, common types of programming include victim/offender mediation, family group conferencing, and various "circle" programs (Chartrand and Horn 2016).

Green (2012) sees *Gladue* as placing a duty on all justice system participants – not only sentencing judges – to work towards a more restorative process. The comprehensive restorative justice theory, which focuses on community repair and healing, is also seen as more consistent with Indigenous approaches to justice (p. 8). [14]

Restorative justice in relation to Indigenous legal tradition

In its discussion of Indigenous sentencing approaches, the Supreme Court specified that it did not want to imply that all Indigenous communities shared the same understanding of justice or the same approaches to sentencing. [15] However, Gevikoglu (2013) argues that by characterizing Indigenous legal tradition as primarily restorative, the Court conflates Indigenous justice with Western notions of restorative justice, and with each other. The language in *Gladue* sets up Indigenous approaches to

criminal justice in opposition to the Canadian Criminal Justice system, which has been primarily retributive. Indeed, aforementioned concerns about the difficulty of reconciling retributive and restorative justice is consistent with Gevikoglu's analysis, even though Indigenous and Canadian approaches to criminal justice do not necessarily contradict. For example, Professor Michael Jackson has laid out an alternative framework of Indigenous justice which complemented, instead of contradicting the Canadian criminal justice system.

Gevikoglu's concern is that Western notions of restorative justice may not be sufficient to ensure that Indigenous offenders are sentenced in a way that is "appropriate in the circumstances for the offender because of his/her aboriginal heritage or connection" – a key factor in remedying over incarceration, according to *Gladue*. In *Ipeelee*, the Court states that sentencing options other than incarceration can play "a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime" (para 128). Yet, it does not discuss what options other than incarceration might be, it does not refer to anything from the Inuit or Dena legal traditions, and ends up just reducing both Ipeelee and Ladue's sentences. While restorative justice allows for practices like diversion and sentencing circles to exist in certain spaces within the framework of the criminal justice system, Indigenous communities are not afforded much more autonomy in the sentencing process (Gevikoglu 2013).

Although a detailed comparative analysis of the relationship between restorative justice and Indigenous legal tradition is outside the scope of this report, a number of key differences are highlighted here. Chartrand and Horn (2016) note that restorative and Indigenous legal tradition generally have similar underlying principles, in that both can be described as aiming to achieve community healing, reconciliation, and the reintegration of the offender. However, there are several material differences between the two.

First, Indigenous legal traditions are generally a source of complex mechanisms, both proactive and reactive, that produces and maintains stability and order in Indigenous communities. Prior to the imposition of Western law, Indigenous legal tradition "shaped behavior, guided relationships, and addressed conflict" through kinship – which Chartrand and Horn describe as producing "multidirectional legal obligations towards everyone and everything" (2016, p. 6). While Indigenous legal traditions are diverse, a common theme through most are the idea of law being interconnected, intertwined, and rooted in relationships between people and to nature (p. 5-6). In addition, Indigenous legal traditions still had a retributive element - where kinship responsibilities were disregarded, communities utilized sanctions and penalties, which were generally enforced by family or community members (p. 7). Finally, Indigenous legal traditions placed a high importance on spirituality (p. 13).

As the imposition of Western law and colonial policies have displaced and disrupted kinship practices (p. 11), both the Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples have called for the "recognition, revitalization, and full integration and implementation" of Indigenous legal tradition alongside Canadian law (p. 8). Chartrand and Horn (2016) trace an ongoing relationship between Indigenous and Restorative justice – Indigenous legal tradition was influential in the early development of underlying principles,

values, and programs of restorative justice. Restorative justice has similarly influenced the programs and processes of modern Indigenous justice – where Indigenous legal traditions would have been punitive historically, programs today take a more restorative approach. As both Indigenous and Restorative justice continues to be integrated into the Canadian criminal justice system, the relationship between the two will undoubtedly continue to evolve.

3.1.2 Judicial Discretion Limited by Mandatory Minimum Sentences

Due to the addition of mandatory minimum sentences to the *Criminal Code* in recent years, many authors have expressed concern that *Gladue* and *Ipeelee* may see very limited application. [16] Parkes (2012) writes that mandatory minimums are "deeply at odds" with the principles expressed in *Ipeelee*: that sentencing should be a flexible and highly individualized process to ensure proportionality (p. 22). Although judges still retain discretion over some detention decisions, such as bail hearings, their "hands are tied" in many areas and they have limited ability to craft sentences that consider the "unique circumstances" facing Indigenous offenders (MacIntosh and Angrove 2012, p. 34).

With mandatory minimums, as access to conditional sentences is also restricted, discretion in sentencing shifts from judges to Crowns prosecutors (Rudin 2012, p. 4-5). In deciding the offence that an accused is charged with, prosecutors indirectly determine the length and type of sentence that an offender will receive (Rudin 2012). This is particularly troubling because unlike a judge's sentence which that can be appealed, a prosecutor's decision can only be reviewed for abuse of process (Parkes 2012, p. 25). While there is no empirical research in Canada yet on the effects of this transfer of discretionary power, in the United States, mandatory minimums have had disproportionately adverse effects on racialized minorities (Parkes 2012). *Gladue* and *Ipeelee* acknowledge both the blatant and systemic discrimination faced by Indigenous people in the criminal justice system. Despite the lack of empirical data, it is clear that Indigenous people "are less likely than other accused to benefit from the exercise of prosecutorial discretion" (Parkes 2012, p. 25; Rudin 2012).

Due to the disproportionate impact that mandatory minimum sentences will have on Indigenous people, Parkes (2012) sees potential s. 7, s. 12, and s. 15 *Charter* challenges being raised by Indigenous offenders. Rudin (2012) similarly sees the potential for s. 15 *Charter* challenges based on *Gladue* principles:

> "The existence of systemic discrimination towards Aboriginal people means that section 15 requires that judges ensure that in making the decision they alone are empowered to make -- the sentencing decision -- they are not contributing to the discrimination faced by Aboriginal people (p. 8)."

3.1.3 Inadequate Resources

The implementation of *Gladue* principles require additional resources at every step of the sentencing process, as additional obligations are required of judges, defense counsel, prosecutors, correctional officials, as well as community organizations. Judges need additional information about the Indigenous accused's background, as well as available and appropriate alternatives to incarceration or to the traditional sentencing process. Indigenous justice initiatives and programs also need to exist and be adequately resourced in the offender's community. The lack of resources – both in the preparation of pre-sentence information, and in the availability of alternatives to incarceration – is a crucial impediment to remedying over incarceration.

3.1.3.1 The preparation of Gladue reports

Gladue requires sentencing judges to consider systemic and background factors of the offender, and the types of sentencing procedures and sanctions that are appropriate in the circumstances. In the aftermath of *Gladue*, some authors were uncertain about who fell under s.718.2(e). There was initial confusion about whether and how systemic and background factors were relevant to the offences of individuals who were not "culturally" or "visibly" Indigenous (Pfefferle 2008). Subsequent case law, particularly *Ipeelee*, has been clear that no causal link needs to be established between an offender's Indigenous background and the offence committed. *Gladue* factors must be considered for all self-identified Indigenous people – regardless of whether they have status, live on- or off-reserve – unless the individual waives the right to have such factors considered (Parkes et al. 2012). In a recent decision, the Ontario Court of Appeal found that it was an error to dismiss the offender's Indigenous background, even though he was adopted by a white family and had no "apparent" connection to his heritage (*R v Kreko*).

It is undoubtedly challenging for judges to determine the relevant background factors in sentencing, especially as the experiences of Indigenous offenders are diverse and dynamic in an ever-changing society. For example, Brian Pfefferle (2008) points out that courts often dismissed *Gladue* factors when an offender's background is criminal, failing to take into account the effects of living in Indigenous communities with high crime rates. The provision of pre-sentence information is such a key determinant of the effectiveness of *Gladue* that Rudin (2008) considers it a reason that s. 718.2(e) has not reduced overrepresentation.

In some jurisdictions, GladueReports are written with the specific purpose of providing information relevant to s. 718.2(e). These reports highlight the circumstances of the Indigenous offender and how these circumstances relate to the systemic factors that may be responsible for the individual's involvement with the criminal justice system (Rudin 2005). Unlike the average pre-sentence report, Gladue Reports are written after a number of extensive meetings with an "empathic peer", a process that is often challenging, but also restorative (Green 2012). They provide the offender with the opportunity to "critically contemplate his or her personal history and situate it in the constellation of family, land and ancestry that informs identity and worth" (Green 2012, p. 9).

Currently, independent Gladue Reports are available in British Columbia, Alberta, Ontario, Québec, Nova Scotia, and Northwest Territories (Department of Justice Canada 2013). In Manitoba, a few private agencies prepare Gladue Reports, at the request of and with funding from Legal Aid. In

Saskatchewan, there was a pilot project involving assistance from British Columbia in providing training for writing Gladue Reports. By the completion of the two year pilot project, 25 Gladue Reports had been written. A final phase of the pilot project is still underway; capturing oral histories from Elders is underway by the University of Saskatchewan. The University intends to maintain this database of oral histories, and make it available free of charge to those tasked with preparing Gladue Reports. Prince Edward Island similarly is in the process of instituting a pilot program. The remaining provinces and territories have no organized and funded Gladue Report-writing program, or no Gladue Reports at all. It is important to note that even where the service is available, the accessibility of Gladue Reports is subject to the availability of resources, varies greatly amongst these jurisdictions, and is far from widespread implementation. Specialized Gladue Courts spend significantly more time on each case than other courts in the same city (Knazan 2003). At the Gladue Court at Old City Hall in Toronto, due to the additional time and resources needed, Gladue Reports are only made when Crown is seeking a sentence of at least 90 days for an out-of-custody client or 6 months for an in-custody client (Aboriginal Legal Services Toronto). In British Columbia, Gladue Reports can only be prepared by people who have been trained by the Legal Services Society. Cuts to legal aid from 2001-onwards has placed significant constraints on the ability of the Legal Services Society to authorize GladueReports for Indigenous offenders, which are now only funded by legal aid in limited circumstances (Barnett and Sundhu 2014).

In jurisdictions without Gladue reporting programs, no independent information will be submitted by the defence on behalf of the accused. Instead, information about the offender's background is added to pre-sentence reports, generally prepared by correctional services (Department of Justice Canada 2013). Without specific training and awareness for the unique background circumstances of Indigenous offenders, inadequately prepared information can actually undermine *Gladue* principles and perpetuate systemic discrimination (Parkes 2012). Defence counsel, probation officers, and parole officers do not always have the cultural competency or training to elicit a complete picture of the circumstances of the offender (Rudin 2005; Rudin 2008). In some jurisdictions, probation officers are entitled to a set number of hours to prepare Gladueinformation (Rudin 2005; Rudin 2008). This is an issue especially because Indigenous individuals may be reluctant to relate their experiences to court personnel, given the distrust that characterizes the relationship between Indigenous peoples and the justice system (Turpel-Lafond 1999).

Furthermore, Parkes (2012) argues that adding *Gladue* factors to pre-sentence reports is ineffective because the latter has a fundamentally different purpose. Pre-sentence reports are meant to provide risk assessment to the court of the offender's likelihood to reoffend. In contrast, a Gladue Report provides "culturally situated information which places the offender in a broader socio-historical context… and reframes the offender's risks/need by holistically positioning the individual as part of a community and as a product of many experiences" (Parkes 2012, p. 24).

Parkes (2012) explains that *R v Knott* illustrates how inadequate Gladue information can actually undermine efforts to reduce over incarceration. In writing the decision to order a suspended sentence for an Indigenous man convicted of aggravated assault, Justice McCawley addressed the inadequacy of the pre-sentence report that was prepared. Justice McCawley noted that although Mr. Knott's pre-sentence report mentioned general *Gladue* factors, they were not linked to his particular

experiences – such as the crucial factor that his grandparents were residential school survivors (para 19). The report also concluded that Knott was at a high risk to reoffend, but Justice McCawley found the assessment to be erroneous because the factors considered were not put into context:

"When one puts some of the concerns which might otherwise carry significant weight in context a very different picture emerges. Mr. Knott was found to be supportive of crime due to his reported antisocial behaviour and to demonstrate "a pattern of generalized trouble in the sense he reported financial problems, has never been employed for a full year, has been suspended and expelled, has two non-rewarding parents, could make better use of his time and has few anticriminal friends." In my view these are exactly the kinds of systemic issues that need to be considered in the appropriate context.

For example, Mr. Knott's lack of a history of employment to a large extent can be explained by his taking on the care of his grandparents who raised him and, to all intents and purposes, were his parents..." (para 23-24)

As *R v Knott* demonstrates, when *Gladue* factors are added to pre-sentence reports, but not contextualized in the experience of Indigenous communities, they are actually seen as risk factors justifying incarceration. As such, drawing probation officers' attention to these factors may unintentionally discriminate against Indigenous offenders instead of reducing over incarceration. This perhaps explains why 76% of offenders sentenced to a repeat offence received a shorter sentence when a GladueReport was prepared, compared to offenders without GladueReports (Barnett and Sundhu 2014).

Thus, although Gladue information must always be requested where the liberty of an Indigenous accused is at stake, such requests are inconsistent and reports may be written improperly, which may actually undermine *Gladue* principles (Pfefferle 2008). This significantly hinders judges' ability to consider background and systemic circumstances affecting Indigenous offenders in order to determine appropriate bail conditions and sentences.

3.1.3.2 Lack of appropriate alternative processes or sanctions

Gladue states that regardless of an Indigenous accused's place of residence, and even if community programs are not readily available, judges must make the effort to find alternative processes or sanctions. Judges are challenged to create new sentencing options and to adapt existing measures such as counselling, community service, fines, treatment and monitoring programs to the reality of Indigenous offenders.

However, the lack of culturally appropriate sentencing processes and alternatives to incarceration undoubtedly affects the effective implementation of *Gladue* principles (Welsh and Ogloff 2008; Haslip 2000; Parkes et al. 2012). Roach and Rudin (2000) note, for example, that in *R v Wells*, the offender was sentenced to imprisonment instead of a conditional sentence in part because of the lack of anti-sexual assault programming in his immediate community. This issue is particularly acute for individuals living in urban areas who may have little or no connection to an Indigenous

community (Pfefferle 2008). Without adequate resourcing of alternatives to imprisonment, even the implementation of thorough Gladue Reports across Canada would likely have little effect in reducing overrepresentation (Truth and Reconciliation Commission of Canada 2015).

As section 4 will explain further, a number of Gladue Courts have been set up, notably in Ontario and in British Columbia. Generally, these courts allow Indigenous accused who plead guilty to be diverted to an alternative community-based sentencing process that decides upon a "plan of care" for the individual (Green 2012). Where Gladue Courts do not exist, an Indigenous accused would go through the traditional sentencing process, the result of which may be a conditional sentence. There is a crucial difference between the two sanctions: whereas non-compliance with a condition in a "plan of care" is brought back to the Community Council, breach of a conditional sentence likely results in incarceration (Roach and Rudin 2000).

Justice Melvyn Green (2012) is critical that even at the Gladue Court at Old City Hall, if an accused person is not diverted to Community Council and does not have a Gladue Report prepared, they will receive a "boilerplate" plan of care. He argues that to truly adhere to *Gladue* principles requires more than just referring the individual to Indigenous programming, where it is available. Rather, it

> "[r]equires the inclusion of First Nations and Inuit peoples in the creation and practice of models of criminal justice that are grounded in and legitimated by customary law and tradition." (p. 10)

Considering the diversity of Indigenous communities and experiences of Indigenous offenders, a multitude of programs and initiatives will need to be established as no one model of Indigenous justice will uniformly apply to all. Turpel-Lafond (1999) warns that without proper resourcing, successful Crown appeals of "unduly lenient" *Gladue* sentences will undermine the development of alternative sanctions (p. 375). It is also important that resources are distributed holistically, across programs at all steps of the criminal justice process (p. 376). In return, successful implementation of *Gladue* will diminish resources spent on incarceration (Roach and Rudin 2000).

3.2 Critical Responses to the Application of *Gladue*

3.2.1 Impact on the Community

Prior to *Gladue*, the Alberta Court of Appeal had expressed the view that s. 718.2(e) could be detrimental to the safety of victims of crime (Roach and Rudin 2000). Such a view, of course, assumes that incarcerating the offender will be safest for victims, when in reality, short and recurrent prison sentences have done little to ensure the safety of the victim and of the community (Roach and Rudin 2000). Just as restorative approaches to sentencing should not be viewed as more "lenient", they should also not be assumed to be less "safe." In theory, restorative justice balances the needs of offenders, victims, and community (*R v Gladue*, para 71-72).

There is nonetheless concern that making Indigenous identity a determining factor in sentencing will mean that Indigenous communities, which already suffer from higher than average crime rates, will receive less protection from the law (Gevikoglu 2013). As Justice Rothstein writes in his dissenting opinion, “Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal” (*R v Ipeelee,* para 131). Gevikoglu (2013) argues that by framing the opposition to *Gladue* as based in intolerance, and only addressing “race-based discount” critiques in *Ipeelee*, the Court overlooks the concerns of Indigenous communities.

As *R v Morris* demonstrates, this concern is more pronounced and complex for victims of gender-based violence and domestic abuse. In *R v Morris*, Crown appealed the Provincial Court of British Columbia’s sentence of two years of probation for Mr. Morris’s violent assault and unlawful confinement of his common law spouse. Mr. Morris was the former Chief of the Liard Band in Watson Lake. While he was assessed by a psychologist as being at low risk for violent offence generally, he was considered at high risk for future spousal violence. At trial, his sentencing had been adjourned for 4 months in order to give the community time to formulate submissions. The community held a talking circle with elders, members of the community, the victim, the accused, and their families. On the day of sentencing, however, due to the victim’s apprehension about making sentencing recommendations for the Court, the talking circle was more of a general discussion.

A summary of the talking circle submitted to the judge recommended healing and counselling over incarceration. At the same time, the Liard Aboriginal Women’s Society submitted a letter, signed by 50 people, expressing concerns over the sentencing process. The letter expressed fear that as Mr. Morris was a former Chief in the community, Aboriginal Leadership will “use their power and authority to retaliate against those who find the courage to speak out against violence.” It also noted that many Kaska women have “extreme feelings of anxiety and vulnerability” in light of the case. Noting the offence’s divisive impact on the community, the sentencing judge imposed a suspended sentence with two years of probation.

The BC Court of Appeal overturned the suspended sentence. Justice Finch wrote that in attempting to give effect to his understanding of Aboriginal justice, the sentencing judge “lost sight of the court’s overriding duty” to order a sentence proportional to the gravity of the offence and the degree of responsibility of the offender (para 56). Not only is the severity of an offence aggravated when it is committed against a spouse (para 59), Mr. Morris’s assault was pre-meditated, with no drug and alcohol involved. And though he was identified as an Indigenous offender, the trial court did not properly assess systemic and background factors that brought Mr. Morris to court. As such, the suspended sentence was unfit because “it sends a completely wrong message to the victim, the offender and the community” (para 62). Noting the community’s lack of capacity to address domestic violence in a traditional and restorative way, Mr. Morris was sentenced to 12 months of incarceration with two years of probation.

The sentence given to Mr. Morris at trial level appears to be consistent with Gevikoglu (2013)’s criticism of *Gladue* and *Ipeelee*: “the particularized focus on Indigenous identity takes on a character that subsumes other considerations, including differences within Indigenous communities” (p. 8). Of course, as the BC Court of Appeal decision explained, s. 718.2(e) does not require Indigenous

identity to be the *most* determinative factor in sentencing, it is meant to be considered with all other relevant sentencing principles and factors. As well, a correct application of restorative justice approaches promoted by *Gladue* will take into account the needs of the offender, the victim, and the community. Finally, *Gladue* may only be successful when communities are able to establish initiatives and programs that effectively deal with issues of poverty, substance abuse, family breakdown, the effects of residential schools and other systemic causes of crime (Turpel-Lafond 1999).

3.2.2 Overrepresentation within the framework of reconciliation

As *Gladue* and *Ipeelee* have explained, s. 718.2(e) is a remedial measure. Its purpose is to remedy Indigenous over incarceration, and it aims to do so through utilizing a different method of analysis in sentencing that pays special attention to the background and systemic factors of Indigenous offenders, and the types of sentencing procedures and sanctions that are culturally appropriate.

While the causes of over incarceration are multiple and complex, a root cause is undoubtedly the cumulative effects of colonialism and its ongoing legacy. The Royal Commission on Aboriginal Peoples (1996) concluded that the impacts of colonialism most effectively explained the prevalence of socio-economic disadvantage among Indigenous communities, which has led to the overrepresentation of Indigenous people in prisons. Similarly, the Aboriginal Justice Inquiry of Manitoba (1991) attributes higher crime rates to “the despair, dependency, anger, frustration, and sense of injustice prevalent in Aboriginal communities,” which stem from the trauma and loss of culture experienced by families and communities as a result of colonial policies over the past century.

The ongoing discrimination faced by Indigenous people in the criminal justice system, seen as a legacy of colonialism, is explained by the Aboriginal Justice Inquiry of Manitoba following the police killing of an Indigenous man in a city street. Commissioner Paul Chartrand was quoted as saying:

> “Aboriginal over-representation is the end point of a series of decisions made by those with decision-making power in the justice system. An examination of each of these decisions suggest that the way that decisions are made within the justice system discriminates against Aboriginal people at virtually every point.”

The Truth and Reconciliation Commission of Canada similarly notes in the context of parole eligibility that while criminal records are typically a reliable risk predictor, “systemic discrimination related to poverty and the legacy of residential schools undoubtedly disadvantages Aboriginal offenders” (Truth and Reconciliation of Canada 2015, p. 177).

Indeed, *Gladue* considerations are meant to remedy over incarceration through addressing the impacts and legacy of colonialism; yet, considering the intimate interconnection of the two issues, critics have questioned if *Gladue* principles in sentencing are sufficient. The Royal Commission on Aboriginal Peoples concluded that Indigenous self-governance over the “substance and process of justice” in the criminal justice system is essential in a new nation-to-nation relationship. Recognizing

that “it has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism” (Aboriginal Justice Inquiry of Manitoba 1991), some authors argue that greater Indigenous self-determination over the criminal justice system is necessary to remedy over incarceration in the long term.

In making the case for Indigenous self-governance, the Commission rejected the “indigenization” of the criminal justice system: the practice of maintaining existing state structures, but with Indigenous staff and programs, such as diversion and Indigenous courtworkers (Gevikoglu 2013; Rudin 2005). Instead, Indigenous communities should be given the resources – in terms political power, legal jurisdiction, and financial support – to develop criminal justice frameworks in accordance with Indigenous legal traditions (Royal Commission on Aboriginal Peoples 1996; Aboriginal Justice Inquiry of Manitoba 1991; Gevikoglu 2013; Rudin 2005). In that sense, Gevikoglu views s. 718.2(e) as a limited solution, symbolizing “a constitutional and socio-legal compromise: a space within the criminal justice system for Indigenous legal approaches” (p. 6).

Rudin (2005) expresses a similar sentiment. He explains that because the colonial experience took away the right and the ability of Indigenous people to govern and maintain order in their own communities, restorative justice responses to criminal justice must be developed by Indigenous people. After all,

> “The impacts of colonialism cannot be remedied by having non-Aboriginal organisations whether they be government or non-governmental organisations, tell Aboriginal people what they and cannot do; that process, however well meaning, just perpetuates the colonial experience.” (p. 95)

As a remedial solution formulated within the existing criminal justice system structures, s. 718.2(e) is potentially problematic in that it risks essentializing Indigenous identity. According to Gevikoglu (2013), essentialism is the idea “that individuals who share the same characteristics possess a shared, constant biological nature or essence,” and which ascribes “to group members a common experience of oppression that is culturally and historically invariable” (p. 8). Though the diversity of Indigenous communities is briefly acknowledged in *Gladue* and *Ipeelee*, the many different cultures and legal traditions are nonetheless all encompassed by “aboriginal.” [17]

This, Gevikoglu argues, is essentialism. In setting up a framework for differential treatment in sentencing based on Indigenous identity, *Gladue* puts courts in the position of determining the relevant background and systemic circumstances of Indigenous offenders. In other words, using Indigenous identity in sentencing means that courts are constructing Indigenous identity in law. Gevikoglu views *Gladue* as characterizing Indigenous persons as “victimized by systemic and direct discrimination, suffering from dislocation, and substantially affected by poor social and economic conditions” (p. 9). *Ipeelee* even suggests that Indigenous persons are victimized by their experiences to the point of having diminished moral culpability – as Gevikoglu points out, the only other categories with diminished criminal liability are youth and the mentally ill. The recognition of

structural constraints and social context in sentencing, of course, is not universally thought of as incompatible with autonomy and free will (Sylvestre 2013; Ozkin 2012). Nonetheless, considering the way that Indigenous identity has been used in colonial laws and policies in the past, it is

> "Important to consider the impact that both appropriating Indigenous identity and essentializing that identity as victimized, dislocated and poor has on Indigenous communities' and offenders' agency in the sentencing process" (Gevikoglu 2013, p. 9).

For critics of *Gladue*, the pertinent concern is whether and how s. 718.2(e), which has the potential of essentializing Indigenous identity, will enable Indigenous people to have greater power and autonomy in the criminal justice system. Currently, decisions of who is diverted and when processes like sentencing circles are utilized are still made by police, Crown prosecutors, or judges within the non- Indigenous justice system. Practitioners within the criminal justice system must acknowledge that *Gladue* has the potential of harming Indigenous offenders, and be aware of how Indigenous individuals, communities, and legal traditions are characterized in their work (Gevikoglu 2013, p. 13).

The Truth and Reconciliation Commission of Canada (2015) called upon federal, provincial, and territorial governments commit to the elimination of the over incarceration of Indigenous people in the criminal justice system. It also endorsed the United Nations Expert Mechanism on the Rights of Indigenous People recommendation that "substantive changes are required within the criminal legal system in relation to Indigenous peoples' rights to their land, territories, and natural resources; political self-determination; and community well-being" (p. 204). As Gladue Courts and various community-based Indigenous justice programming continues to be implemented, at the very least, Indigenous voices must be included in the creation and development of these processes. More work is undoubtedly needed to examine how over incarceration can be addressed in conjunction with the broader constitutional question of reconciliation and nation-to-nation.

3.2.3 Overlooking Gender Dimensions of Crime and Victimization

Finally, critics have expressed concern about the gender-neutral nature of the *Gladue* analysis, especially, as overrepresentation is growing more quickly among Indigenous women than men. The s. 718.2(e) analysis set out in *Gladue* ignores intersectionality: for Indigenous women, the systemic experiences of colonialism is compounded by, and inseparable from, gender inequality. The interaction between gender and Indigenous identity means that sentencing approaches that remedy the over incarceration of Indigenous women do not fit neatly into the dichotomy of "traditional" and "western" (Gevikoglu 2013; Cameron 2008; Williams 2008).

Cameron (2008) argues that Gladueinformation needs to incorporate gender analysis because Indigenous women disproportionally experience indicators of colonialism set out in *Gladue*, yet the impact is often less visible to judges. Some gender-specific *Gladue* considerations highlighted by Cameron include:

1) Parenting

Many Indigenous women are the sole or primary caregiver in their family: In 2006, 18% of Indigenous women aged 15 and over were heading families on their own, compared with 8% of non-Indigenous women (Statistics Canada 2011a). Considering the legacy of family separation and high rates of child apprehension that form the experience of Indigenous communities, women should be given alternatives to incarceration where possible so that they can continue to parent their children. [18]

2) Displacement

Indigenous women's displacement from their reserves is a result of discrimination by both state policy and their own communities. The *Indian Act* undermined and removed Indigenous legal orders, in which women held positions of power and had access to resources, and replaced them with structures that "uniformly devalued women and placed men in positions of power and control". The *Act* included provisions that took away "Indian" status from Indigenous women who married non-Indigenous men. Without status, women were no longer able to access resources, such as on-reserve housing, cultural resources, interaction with elders, subsidies for education, and land claim settlement resources.

Although these provisions were changed in 1985, "Indian" status recovery still has a second generation cut-off. At the same time, *Indian Act* band council litigates against women's efforts to rejoin their community. The result is that Indigenous women, their children, and grandchildren are displaced to urban areas – as of 2006, 72% of Indigenous women live off-reserve. Not only does this mean that Indigenous women lack access to resources and a connection to their ancestral land – which for many Indigenous cultures, is intimately tied to a sense of belonging and cultural identity, but living in urban areas also means greater risk of poverty, systemic and direct racism, and sexual exploitation.

3) Violence

Experiencing violence and trauma is linked to substance abuse, as well as poverty and homelessness, two factors mentioned in *Gladue.* Indigenous women are three times more likely to experience violence than non-Indigenous women (Statistics Canada 2011b). Of Indigenous women who experienced intimate partner violence (IPV), close to half reported the most severe forms of violence, such as being sexually assaulted, beaten, choked, or threatened with a gun or a knife (ibid.). Many female offenders commit violent crime in self-defence, or after having been subject to IPV. Cameron argues that existing legal mechanisms like "battered women syndrome", the self-defence argument, and principles of provocation should be applied rigorously by judges to address this "gendered legacy of colonialism."

4) Poverty

Indigenous women's poverty is exacerbated by higher rates of underemployment and, where women are employed, the wage gap. Disproportionate levels of poverty forces Indigenous women, particularly in urban areas, to resort to illegal work such as dealing drugs or sex work, for their own

and their children's survival.

Cameron analyzes the cases *Gladue*, *Moyan*, and *Norris*, noting the shortcomings of the Court's gender-neutral approach. Ms. Gladue, whose offence was decontextualized from her history of intimate partner violence, was portrayed as an aggressor. The court also did not consider the effects of displacement – it is mentioned that she lives off-reserve, but no further information is provided. In *Moyan*, s. 718.2(e) was not applied because Ms. Moyan did not engage in what the judge perceived to be a traditional cultural lifestyle, which Cameron notes is not actually the point of considerations of systemic and background factors. Sentencing should have instead considered how Ms. Moyan was affected by experiences of colonialism. For Ms. Norris, although it was noted that she was controlled by her former partner who profited from her drug-trafficking, the court did not contextualize how her dependence and fear of her former partner made her "vulnerable to criminal survival strategies."

Despite the fact that conditional sentences have been extended to covering serious crimes, including violence against Indigenous women, it was unfortunately not ordered in all three cases, even though it would have given the women the freedom to parent, work, and participate in education, counselling, and treatment programs. Not taking gender-specific mitigating factors into account, Cameron argues, leads to unfair decisions because women are "forced to take full personal responsibility for circumstances that are clearly related to their experiences of colonialism." As a result, they are separated from their children, which further exacerbates the cumulative impact of colonialism.

On the other hand, Toni Williams (2008) observes that the criminal justice system has at times used intersectional analysis in a way that contributed to the over incarceration of Indigenous women. In the 1990s, law enforcement shifted to a risk-based model that aimed to pre-empt crime rather than responding to individual offences after the fact; it did so by focusing on populations predicted or perceived to be problematic. The same identity factors that signify mitigating experiences of colonialism in *Gladue* were deemed to be sources of criminogenic risk/needs in Correctional Services Canada' prisoner assessment and classification. Toni Williams explains the conundrum this creates in sentencing:

> "When faced with an Aboriginal woman who embodies what the criminalization process deems to be criminogenic risk/needs, the sentencing judge is asked to justify a non-carceral sanction in terms of those same aspects of the defendant's intersectionalized identity that point to incarceration as necessary to contain and manage her risk of re-offending."

Criminalization and law enforcement, which necessarily divides people into "good" and "bad", "dangerous" and "innocent", creates a difficult binary for Indigenous women, who are often both victims and victimizers. Through an analysis of 18 first instance cases involving Indigenous women, Toni Williams observes that Indigenous women's intersectional identity may not do much to mitigate their sentences, because of how identity factors have been incorporated into sentencing decisions based in controlling risk.

Of the 18 cases analyzed, 8 were carceral sanctions, 9 were conditional sentences, and 2 were stand-alone probation orders on top of time served. Those receiving incarceration and conditional sentences had similar offences – for example, 5 of the women who were incarcerated and 5 with conditional sentences had killed someone. All the defendants who were convicted of homicides and assaults knew the victim, and almost all were spouses or former spouses, or children, which is consistent with research indicating that women's violence tend to be inflicted on family members. While judges take judicial notice of the history of colonialism, the decisions analyzed do not explicitly discuss the discrimination of Indigenous people in Canada. Women's criminality in the cases analyzed is linked to experiences of childhood violence, substance dependency, socio-economic disadvantage, displacement, and family dysfunction, which are not explicitly attributed to a legacy of colonialism and ongoing discrimination.

Toni Williams observes that for decisions of non-carceral sentences, judges constructed sanctions in two ways. In some instances, non-carceral sentences were seen as healing rather than punitive. Although Indigenous women's identity is equated to substantial levels of risk/need, judges felt that restorative and rehabilitative sanctions were a better fit. For others, non-carceral sentences were deemed as equally punitive. Offenders are characterized as risks "containable" by sanctions such as conditional sentences. For sentences of incarceration, criminogenic risk and punitive objectives are prominent. Indigenous identity is either minimized, or linked to greater risk/needs. In one instance, because the offender was characterized as high risk, prison was constructed in the decision as a space of safety, stability and support that would allow the offender to escape from her dangerous community. This characterization, of course, did not mention the discrimination and lack of culturally appropriate services in prisons mentioned in *Gladue*.

It appears that on the one hand, emphasis on the identity of Indigenous women means that s. 718.2(e) will more likely mitigate the offender's sentence. On the other hand, without contextualization in the history of colonialism, the use of identity factors in sentencing creates the risk of perpetuating the stereotypical narrative that Indigenous women are inherently suffering from economic deprivation, substance abuse, family and community dysfunction, and male violence, all of which point to high risk for criminality. Toni Williams worries that this would represent Indigenous women's offences "as over-determined by ancestry, identity and circumstances, exactly the type of representation of compromised moral agency that feeds stereotypes about criminality." In other words, there is a risk of essentializing Indigenous women's identity. This points again to the importance of resources being allocated to Gladue reports which effectively contextualizes community and identity factors within the societal and systemic factors in which they are situated.

3.3 Other Considerations

3.3.1 Application to Offenders with FASD

Based on the recognition in *Ipeelee* that background and systemic factors may diminish the culpability of Indigenous offenders, Milward (2014) argues that courts should move towards needs-based sentencing for Indigenous accused with Fetal Alcohol Spectrum Disorder (FASD).

Incarcerating FASD offenders is theoretically problematic because the prevalence of FASD in Indigenous communities is a legacy of colonialism. Practically, it is problematic because as many as 60-75% of FASD subjects are prone to attention deficits and impulsivity – making the deterrent effect to incarceration a challenge for FASD offenders, especially considering the lack of FASD-specific treatment programs in correctional facilities.

Through an analysis of case law, Milward (2014) notes that many judges are applying *Gladue* factors in sentencing – recognizing that FASD is caused by substance abuse, which is a result of colonial policies. The challenges, as Justice Watson of the Alberta Court of Appeal notes in *R v Ramsay*, are in accurately accessing the moral blameworthiness of the offender, and "balancing the protection of the public against the feasibility of reintegrating the offender into the community" (para 50). Such a balanced assessment requires in depth information about the accused person's condition – which falls within the requirements of *Gladue* and the scope of Gladue reports. Additionally, considering that the breach of a probation condition is a criminal offence, special attention should be paid to the sanction imposed, since a person with FASD may not be able to adhere to the terms of a probation order or conditional sentence due to impulsivity. Probation officers and other court personnel need to have greater awareness of FASD.

Finally, a study of qualitative interviews with justice professionals with FASD experience – including Indigenous lawyers, provincial court judges, correctional psychologists, and correctional educators – pointed to the pressing need for more resources (Milward 2014). Milward specifically emphasizes the importance of providing resources to Indigenous communities so that they have the capacity to provide programs and services for Indigenous persons with FASD. [19]

3.4 Application to Bail

As mentioned above, outside of sentencing, *Gladue* applies to all situations where an Indigenous person's liberty is at stake. [20] In the bail context, *Gladue* was found to be relevant in *R v Wesley* in British Columbia and *R v Pittawanakwat* in Ontario at the trial level, and *R v Robinson* at the appellate level. Currently, an Indigenous accused's background is considered for bail decisions in eight provincial and territorial jurisdictions (Department of Justice Canada 2013). [21]

The right to reasonable bail is entrenched in s. 11(e) of the *Charter*, and is closely connected to other entrenched constitutional rights such as the presumption of innocence (s. 11(d)), the right not to be arbitrarily detained or imprisoned (s. 9), and the right to liberty and security (s. 7). Section 11(e) means both that restrictions attached to bail, such as the quantum of any monetary element, should be reasonable, and that an accused person has a right not to be denied bail without "just cause" (Rogin 2014). [22] To uphold this right, courts should ensure that pre-trial release is the norm, and that both onerous bail restrictions and pre-trial detention are used as a last resort (*R v Hall*). Indeed, the "ladder principle," which guides bail practices in Canada, favours pre-trial release as early as possible, on the least onerous grounds. The subsequent steps on the ladder are release with non-monetary conditions, release with various monetary conditions, and finally detention as a last resort. Prosecutors must show sufficient cause for each step of the ladder (*R v Anoussis*).

Despite these principles, in the last decade, the remand custody population has consistently been greater than the population of actually sentenced offenders in Canada – a situation that many are calling a bail crisis (Statistics Canada 2016; Rogin 2014). In 2014/2015, 57% of the custodial population were in remand custody, awaiting a bail hearing or awaiting trial (Statistics Canada 2016). Indigenous accused are over-represented in this population. Rogin (2014) analyzed 25 reported bail cases involving Indigenous accused between 2002-2014, arguing that not only does the bail crisis disproportionately affect Indigenous people, but that *Gladue* factors have been applied in a way that exacerbates the crisis.

As acknowledged by the Supreme Court in *Gladue,* Indigenous accused are more likely to be denied bail due to, among other factors, bias in the criminal justice system (para 65). [23] Rogin argues that current bail practices are not adhering to the ladder principle, particularly for marginalized individuals. Discretion in bail decisions imports "inherent biases and discriminatory attitudes", as the assessments of risk of flight and to public safety "is impacted by factors such as race, class, Aboriginal heritage, [and] ability" (p. 44). Such perceived risk is managed by the use of sureties and increasingly onerous pre-trial release conditions (Rogin 2014, p. 44). Considering the socio-economic conditions and existing criminal records of many Indigenous accused, they are often unable to access pre-trial release, or are released with overly stringent bail conditions (Kellough and Wortley 2002; Rudin 2005).

Rogin's analysis of cases concludes that the application of *Gladue* to bail has been sporadic and lacking in clarity, deemed relevant in some cases and not explicitly recognized in others. As *Gladue* is a framework for sentencing, applying it to bail hearings without adaptation could violate the presumption of innocence. For example, examining background factors that brought the person before the court is inappropriate in the bail context because such evidence is meant to diminish an offender's moral culpability in sentencing. It would not only take more time to provide such information – which would prolong the amount of time that Indigenous accused persons spends in pre-trail custody compared to non- Indigenous accused, but it also presupposes that the accused will be found guilty. Rogin similarly critiques references to rehabilitation and restorative justice in bail hearing decisions, which justify onerous release conditions "more directed at 'reforming' the accused than with concerns related to the law of bail" (p. 80). It is problematic if pre-trial release conditions begin to look like a probation order or conditional sentence, since at this point the accused has not been convicted of an offence and hence does not require "reform." [24]

Echoing Gevikoglu (2013), Rogin notes also that courts tend to over-emphasize Indigenous heritage when applying *Gladue* without drawing connections to the legacy of colonialism. Ultimately, Rogin is concerned that the misapplication of *Gladue* could perpetuate the same stereotypes and biases which contributes to the over incarceration of Indigenous persons in the criminal justice system:

> "However unintended, the erosion of the presumption of innocence for Aboriginal accused re-enforces a bias that Aboriginal people are 'criminals', more likely to commit crimes, and more likely to be guilty than their non-Aboriginal counterpart." (p. 55)

Additionally, being denied bail leads to criminalization through pre-trial custody. Accused persons charged with minor offences may need to wait months in pre-trial custody, but may face little to no jail time if they plead guilty (Rogin 2014; Rudin 2015). The incentive to plead guilty is troubling: an innocent accused person could be criminalized through pre-trial custody, and should they be charged with an offence in the future, they will have even less possibility of accessing bail. Needless to say, this further exacerbates the bail crisis and the over incarceration of Indigenous persons.

Rogin concludes with recommendations for the application of *Gladue* to bail. Instead of examining factors that brought the accused person before the court and considering ways to rehabilitate and to adhere to restorative justice, bail courts should consider the factors and practices that disproportionately affect Indigenous peoples and contribute to their over incarceration. These factors include racial bias and the tendency to over-charge Indigenous persons in policing, the over-reliance on sureties, and the use of overly stringent forms of release. In order for the application of *Gladue* to bail to serve its intended purpose, the framework must be adapted to the bail process so as to not erode the presumption of innocence for Indigenous accused, and in a way that acknowledges the systemic bias in the bail process.

Footnotes

13 This definition is adapted from Cormier 2002.

14 P. 8

15 Para 73

16 For example, Bill c-2 in 2005 and Bill c-10 in 2012.

17 According to Indigenous and Northern Affairs Canada, there are more than 630 First Nations communities in Canada, representing more than 50 Nations and Indigenous languages, not including Métis and Inuit peoples. Online: <http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795>.

18 Correctional Services Canada has a Mother-Child program, which allows some women to keep young children with them while incarcerated. However, due to policy changes in 2008 to eligibility requirements, participation in the program has been minimal. Online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/index-en.aspx#s12>.

19 Milward cites the Central Urban Metis Federation Wellness Centre and the Community Council Program in Toronto as programs that have been successful for offenders with FASD.

20 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534; *United States v Leonard*, 2012 ONCA 622 affirmed in *R v Anderson*, 2014 SCC 41.

21 Alberta, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, and the Yukon.

22 Rogin cites *R. v. Pearson*, [1992] 3 S.C.R. 665, *R. v. Morales*, [1992] 3 S.C.R. 711 and affirmed in *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 at para. 16.

23 See also Aboriginal Justice Inquiry of Manitoba (1991); *R v Summers*; Kellough and Wortley's (2002) study which concluded that Indigenous persons in Manitoba were less likely to be released on bail than non-Indigenous persons.

24 See Rogin (2014)'s discussion of *R v Robinson*, R v P.(D.D.), *R v Misquadis-King*, and *R v Pierce*

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Date modified:
2018-10-16

This is Exhibit "B" referred to

in Affidavit #5 of Doreen Navarro

Affirmed before me this 4th day of February, 2019

D. Burke-Lachaine

Commissioner for taking Affidavits, etc.

Debra Ann Burke-Lachaine, a Commissioner, etc.,
Province of Ontario, for Conway Baxter Wilson LLP/s.r.l.,
Barristers and Solicitors. Expires December 18, 2020.

CANADIAN HUMAN RIGHTS COMMISSION
COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Submission to the Committee on the Rights of the Child

By

The Canadian Human Rights Commission

November 2011

Aussi offert en français sous le titre
Mémoire présenté au Comité des droits de l'enfant par la Commission canadienne des droits de la personne

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1 INTRODUCTION

The Canadian Human Rights Commission (hereinafter referred to as "the Commission") is Canada's national human rights institution. It has been accredited "A-status" by the International Coordinating Committee of National Human Rights Institutions (ICC), first in 1999 and again in 2006 and 2011.

The Commission was established by Parliament through the *Canadian Human Rights Act* (CHRA) in 1977. It has a broad mandate to promote and protect human rights. The purpose of the CHRA is to extend the laws of Canada to give effect to the principle that all individuals should have an opportunity equal with others to make for themselves the lives that they are able and wish to have, without being hindered or prevented from doing so by discriminatory practices which are based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted.[1]

The Commission promotes the core principle of equal opportunity and works to prevent discrimination in Canada by:

- promoting the development of human rights cultures;
- understanding human rights through research and policy development;
- protecting human rights through effective case and complaint management; and
- representing the public interest to advance human rights for all Canadians. [2]

The Constitution of Canada divides jurisdiction for human rights matters between the federal and provincial or territorial governments. The federal government regulates employers and service providers in areas such as banking and cross border transportation, as well as "Indians and lands reserved for Indians". Provinces and territories regulate other sectors such as education and housing (excluding those on Indian reservations) and have their own human rights laws.

The Commission is proud of the leadership role that Canada played in the drafting of the *Convention on the Rights of the Child* (hereinafter referred to as the "*Convention*"), which was ratified in 1991.[3] It fully supports the broad civil, cultural, economic, political and social rights enshrined in the *Convention.* The Commission recognizes the particular vulnerability of children and has considered a number of children's human rights issues where the issues are linked to grounds of discrimination, such as race and religion. It has taken action by investigating complaints, issuing public statements, meeting with

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[1] *Canadian Human Rights Act*, RSC 1985, c. H-6, s. 2., available online at: < http://laws-lois.justice.gc.ca/eng/acts/h-6/>.

[2] See Canadian Human Rights Commission 2010 Annual Report, available online at: < http://www.chrc-ccdp.gc.ca/publications/ar_2010_ra/toc_10_tdm-eng.aspx>.

[3] *United Nations* Convention *on the Rights of the Child*, Can. T.S. 1992 No. 3, entry into force 2 September 1990, ratified by Canada on 13 December 1991., available online at: <http://www2.ohchr.org/english/law/crc.htm>.

interested stakeholders, and intervening in the public interest in court cases, including cases before the Supreme Court of Canada.

The Commission is committed to working with the Government to ensure continued progress in the protection of children's human rights in Canada. It is in the spirit of constructive engagement that the Commission submits these comments to the Committee on the Rights of the Child.

The Commission acknowledges the special care and protection needed by all Canadian children, including vulnerable groups such as children belonging to racial, ethnic or religious minorities, children with disabilities and children who are in conflict with the law. That said, this report focuses mainly on Aboriginal children in light of the Commission's jurisdiction in federal matters and the serious social and economic disadvantages faced by this group.

Part I of this submission outlines the Commission's concerns regarding Aboriginal children. Part II raises other issues of concern.

2 ABORIGINAL CHILDREN

2.1 Access to Human Rights Protection (Article 2)

Article 2 of the Convention provides a broad protection against discrimination. It says that:

> "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*"

In Canada, the *Indian Act*[4] regulates and affects many aspects of the daily lives of First Nations children. This includes the criteria for having "Indian status"[5] and band

[4] The *Indian Act* is a piece of federal legislation that dates back to1876. Although amended several times, it has remained relatively unchanged. There are over 600 First Nations operating under the broad scope of the *Indian Act*, which sets out the federal government's obligations and regulates the management of "Indians and lands reserved for Indians". The Act is outdated and is often criticized for being discriminatory and paternalistic. A more modern approach to governance that recognizes First Nations' inherent right to self-government is long overdue. Creating this approach will take time and can only be accomplished in consultation and collaboration with First Nations peoples. See *Now A Matter of Rights*, a Special Report of the Canadian Human Rights Commission, June 2011, available at: http://www.chrc-ccdp.ca/proactive_initiatives/nmr_eqd/toc_tdm-eng.aspx.>

[5]The *Indian Act* sets out the requirements for determining who is an "Indian" for the purposes of the *Indian Act*. *Indian Act*, R.S.C., 1985, c. I-5., available online at: < http://laws-lois.justice.gc.ca/eng/acts/I-5/>.

membership as well as the entitlements that flow from this status, such as housing on reserves, how property is acquired and disposed of and the guardianship of children.

For more than 30 years, section 67 of the CHRA prevented people from filing complaints of discrimination resulting from the application of the *Indian Act*.[6] The Commission called for the repeal of section 67 in two reports to Parliament; one in 2005 and the other in 2008, arguing that the exclusion of people governed by the *Indian Act* from human rights law was discriminatory and contrary to democratic principles.[7] Section 67 was finally repealed in 2008 and human rights complaints can now be filed against both the federal government and First Nations community governments in their capacity as employers and service providers operating under the *Indian Act*.

The Commission supports the federal government for taking the necessary step to correct this historic injustice. However, a number of issues could hinder this newly gained access to human rights protection for Aboriginal children. Two key ones are: 1) a possible narrowing of the application of the CHRA and 2) the lack of resources for First Nations to comply with the CHRA.

2.2 Narrowing the Application of the *Canadian Human Rights Act* (Article 2)

As mentioned previously, Article 2 provides for broad protection against discrimination.

Section 5 of the CHRA gives the Commission the mandate to address allegations of discrimination based on race and sex in the provision of services, including services provided by the Government. The historic disadvantage suffered by First Nations communities has created an important reliance on essential services funded by the federal government. These include access to potable water, education, housing, and child welfare services.

Human rights complaints have been filed against the Government of Canada alleging discrimination in the provision of services to Aboriginal communities. In response, the Government is arguing to narrow the application of the CHRA by taking the position that the provision of funding is not a 'service' under section 5 of the CHRA. This issue is

[6] s.67 of the *Canadian Human Rights Act* stated: "*Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to the Act*". For more information, see: <http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?ls=c21&Parl=39&Ses=2>.

[7] *A Matter of Rights*, Special Report of the Canadian Human Rights Commission on the Repeal of section 67, October 2005, available online at: <http://www.chrc-ccdp.ca/proactive_initiatives/section_67/toc_tdm-eng.aspx>. See also *Still a Matter of Rights*, A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*, January 2008, available online at: < http://www.chrc-ccdp.ca/proactive_initiatives/smr_tqd/toc_tdm-eng.aspx>.

currently being argued before the courts in Canada, with the Canadian Human Rights Commission representing the public interest.[8]

It was hoped that the repeal of section 67 would be a catalyst for positive change for Aboriginal children, many of whom are living in conditions described as "unacceptable" in a country as rich as Canada.[9] However, the positive effects of the repeal could be nullified if the Government is successful in narrowing the application of the CHRA. If that were to happen, Aboriginal children would not have recourse if services had a discriminatory impact on them.

The Commission is concerned that they would once again be denied full human rights protection, thereby defeating Parliament's intent when it repealed section 67 of the CHRA.

2.3 Resources for First Nations to Comply with the *Canadian Human Rights Act (CHRA)* (Article 4)

Under Article 4 of the Convention:

> " *States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*"

The repeal of section 67 of the CHRA brings new human rights obligations for First Nations governments operating under the *Indian Act.* As of June 2011, First Nations governments can have human rights complaints filed against them based on decisions made in their provision of services to children living on reserve.

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[8] *First Nations Child and Welfare Caring Society of Canada and Assembly of First Nations and Chiefs of Ontario and Amnesty International v. Attorney General*, (2011) 4 CHRT. Available online at: http://chrt-tcdp.gc.ca/search/files/2011%20chrt%204.pdf .

[9] Canada, Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations and Family Services Program-Indian and Northern Affairs, May 2008, (Ottawa: Minister of Public Works and Government Services Canada), Chapter 4., available online at: < http://www.oag-bvg.gc.ca/internet/English/parl_oag_200805_e_30714.html >. See also, 2011 report of the Auditor General, Chapter 4, available online at: < http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_e_35354.html >.

The human and financial resources needed by many First Nations to fully comply with the *Canadian Human Rights Act* are substantial. This involves raising awareness of rights and responsibilities, enhancing capacity to investigate and resolve human rights complaints and modifying policies and infrastructure, for example, making public buildings and schools accessible to children with disabilities. The ability of First Nations to respond will be limited by the amount of funding received from the Government.

The Commission considers it imperative that First Nations governments have adequate resources to protect human rights in their communities.

2.4 Cultural Identity and the *Indian Act* (Articles 2, 3, 8, 30)

Under Article 3(1) of the Convention:

"*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

In General Comment No.11 on Indigenous Children and their rights under the Convention, the Committee draws attention to Article 8(2) which affirms that:

"*States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference*."[10]

The Committee also reminds States Parties to "*undertake to respect the right of the child to preserve his or her identity, including their "ethnic identity*".[11] Article 30 provides:

> "*…a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language*."

The *Indian Act* historically discriminated against women and children by granting male Indians and those of patrilineal descent preference in the granting of Indian status. This had the effect of denying Indian status to the grandchildren of Aboriginal women, while granting status to the grandchildren of Aboriginal men.[12] As a result of a court decision in a case where these discriminatory provisions were challenged, the Government took measures to amend the *Indian Act*. This resulted in approximately 45,000 persons

[10] United Nations Committee on the Rights of the Child, *General Comment No. 11 (2009) on the Role of National Human Rights Institutions on Indigenous Children and their Rights under the Convention*, available online http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf
[11] *Ibid.*
[12] For example, see: *McIvor v. Canada*, 2009 BCCA 153 (CanLII), available online: http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca153/2009bcca153.html.

becoming entitled to 'Indian status' as of January 2011.[13] However, residual discrimination relating to status and band membership continues to exist. For example, the third generation of Aboriginal children is cut off from registration. This issue is being raised domestically by national Aboriginal groups. Sex-based residual discrimination is also being raised at the international level in the *Sharon McIvor and Jacob Grismer v. Canada* case filed with the United Nations Human Rights Committee in November 2010.[14]

The Commission is concerned about the systemic impact of *Indian Act* provisions that determine eligibility for "Indian" registration and, in particular, how denying 'Indian status' impacts Aboriginal children, their cultural identity, and their entitlement to programs and services.

2.5 First Nations Children in Care: Overrepresentation and Insufficient Funding (Articles 2, 3 and 20(1))

The Committee has emphasized that under Article 2 of the *Convention* "*the application of the non-discrimination principle of equal access to rights does not mean identical treatment.*"[15] Furthermore, Article 3 requires that the best interests of the child be a primary consideration when States parties are making decisions affecting the child's well being. Article 20(1) provides "A *child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*"

There are two issues of concern in regards to First Nations children in care: 1) overrepresentation and 2) insufficient funding provided to First Nations child welfare organizations.

Overrepresentation

Some of the most vulnerable children in Canada are First Nations children, in particular those in government care. A report of the Auditor General in 2008 revealed that the number of on-reserve First Nations children in care has grown considerably over the last ten years. At the end of March 2007, there were approximately 8,300 First Nations children on-reserve living in government care. This represents about eight times the number of children living in care in the general population.[16]

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[13] On December 15th, 2010, Bill C-3: Gender Equity in the Indian Registration Act received Royal Assent. For more information, online: http://www.ainc-inac.gc.ca/br/is/bll/index-eng.asp.

[14] Ms. McIver was denied leave at the Supreme Court of Canada. She has now filed a complaint with the United Nations Human Rights Committee, available online at: http://www.fafia-afai.org/files/MCIVORPETITIONSIGNEDGENEVAforSenateprep_2.pdf.

[15] United Nations Committee on the Rights of the Child, *General Comment No.5 (2003) on General Measures of Implementation of the Convention on the Rights of the Child*, para.12, available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/455/14/PDF/G0345514.pdf?OpenElement

[16] *Supra* note 10 at 2.

Insufficient Funding to First Nations Child Welfare Organizations

The Government of Canada is often involved in the design, funding and delivery of services on-reserve that are normally provincial services for other Canadians. The First Nations Child and Family Caring Society of Canada (FNCFCS) and the Assembly of First Nations (AFN) filed a complaint under the CHRA against the Government. They allege that underfunding for child welfare service organizations on-reserves[17] constitutes discriminatory treatment on the basis of race and that they are underfunded compared to organizations serving non-First Nations children. As a result, First Nations child welfare organizations cannot provide the programs needed to assist First Nations families in crisis. This often translates into higher rates of foster care and lower prospects of surviving a troubled childhood.[18]

The AFN, the FNCFCS, and the Commission have requested that the Federal Court of Canada review a Canadian Human Rights Tribunal decision on this issue. A hearing is expected to take place in 2012.

The Commission is concerned about the impact of overrepresentation and underfunding on Aboriginal children themselves, their families and communities, and Canadian society as a whole.

2.6 Aboriginal Youth in the Juvenile Justice System: Overrepresentation; and Programming (Articles 2, 3, 40, 37)

In addition to Article 2 (non-discrimination) and Article 3 (best interests of the child), Article 37 states that:

> *"… the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."*

[17] A reserve is a tract of land, the legal title to which is held by the Crown, set apart for the use and benefit of an Indian band.

[18] For more information see: Trocmé, N., MacLaurin, B.,Fallon, B., Knoke, D., Pitman, L., & McCormack, M. (2006). *Mesnmimk Wasatek – Catching a drop of light: Understanding the overrepresentation of First Nations children in Canada's child welfare system: An analysis of the Canadian incidence study of reported child abuse and neglect (CIS-2003).* Toronto: Centre of Excellence for Child Welfare. See also: *A Comparison of First Nations and non-Aboriginal Children Investigated for Maltreatment in Canada at:* http://www.fncfcs.com/sites/default/files/docs/First-Nations-Fact-Sheet-Revised-Jan2011.pdf.

Article 40 provides that:

> "*…. every child involved in the criminal system has a right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth…and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*."

The Committee has reminded States Parties that they are required to consider alternatives to judicial proceedings when appropriate.

The Office of the Correctional Investigator (OCI) has raised two issues of concern in regards to Aboriginal youth in the federal correctional system: 1) overrepresentation; and 2) access to programming.

Overrepresentation

The OCI's 2005-2006 Annual report states:

> *"Available data also indicate that Aboriginal offenders are significantly over-represented among younger offenders. For example, on May 9, 2006, there were 343 incarcerated offenders aged 20 and younger - 96 or 28 per cent of them were Aboriginal. The situation in the Prairies Region was most problematic as 58 per cent (72 out of 125) of offenders aged 20 and younger were Aboriginal."*[19]

Access to Programming

The report further states:

> "*This Office has often pointed out that the Correctional Service does not meet the special service and program needs of inmates aged 20 and younger. These younger offenders, numbering up to 400 at any given time, very often find themselves in disadvantaged situations - segregation, abuse by other inmates, limited access to and success in programming, gang affiliations, and delayed conditional release*."[20]

It is well documented that Aboriginal youth are the fastest growing population in Canada. The Commission is concerned that if issues of programming and overrepresentation in a correctional setting are not addressed, the situation will worsen as the population increases. It is the view of many children and justice experts[21] that federal sentencing reforms currently before Parliament (Bill C-10 *Safe Street and Communities Act*), such as

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[19] Office of the Correctional Investigator, 2005-2006 Annual Report available online at: http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20052006-eng.aspx#IIIB.

[20] *Ibid*.

[21] For more information see: Canadian Bar Association, submission on the proposed Youth Criminal Justice Act amendments, June 2010, available online at: http://www.cba.org/CBA/submissions/pdf/10-41-eng.pdf. See also: Canadian Coalition on the Rights of the Child, submission on Bill C-4, http://rightsofchildren.ca/wp-content/uploads/CCRC_submission_on_Bill_C-4_final.pdf.

mandatory minimum sentences, will exacerbate an already troubling human rights situation for Aboriginal youth.[22]

2.7 Aboriginal Children and Poverty (Article 27)

Under Article 27 (1) of the Convention, "*States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development*."

The latest data from Statistics Canada indicate that 610,000 children live below the poverty line, for a national poverty rate of 9.1%. However, Aboriginal children are "*at a higher risk of low income*". Recent data indicates that 27.5% of Aboriginal children under 15 years of age live in low-income households, whereas the rate among non-Aboriginal children is 12.9%.[23] The Government of Canada's 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child also recognized that " *High rates of poverty, single- family households, health issues, as well as a lack of social supports, create a gap in life chances between Aboriginal and non-Aboriginal children.*" [24] A third of Aboriginal children live in low-income families where food security is a concern.[25] The Auditor General has stated that "*social problems on reserves, such as alcohol and drug abuse, family violence, and suicide, are also linked to poor housing conditions."*[26]

The Government stated in its 3rd and 4th Periodic Report to the Committee that "*Aboriginal housing remains a priority for the Government of Canada…"*[27]. However, the issue of poor

[22] On the 20 September 2011, the Minister of Justice introduced Bill C-10, *Safe Street and Communities Act.* Part 4 amends the Youth Criminal Justice Act (YCJA) in a number of ways, including emphasizing the importance of protecting society and facilitating the detention of youth persons involved in serious and repeat crimes. The amendments are also meant to: Hold violent young offenders and those that might be violent accountable for their actions; Ensure the protection of society is considered at sentencing by making protection of society a primary goal of the *Act*; Simplify pre-trial detention rules to ensure that, when necessary, violent and repeat young offenders are kept off the streets while awaiting trial; Ensure adult sentences are considered for youth 14 and older who commit serious violent offences (murder, attempted murder, manslaughter and aggravated sexual assault); Require the courts to consider lifting the publication ban on the names of young offenders convicted of "violent offences," when youth sentences are given; Require police to keep records when informal measures are used in order to make it easier to identify patterns of re-offending; Ensure that all youth under 18 who are given a custodial sentence will serve it in a youth facility. For more information see: http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Mode=1&billId=5120829&Language=E

[23] A Statistical Profile of Poverty in Canada, Parliament of Canada, September 2009, available online at: http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0917-e.htm#a10.

[24] Third and Fourth Reports of Canada, Convention on the Rights of the Child, available online at: http://www.pch.gc.ca/ddp-hrd/docs/pdf/canada3-4-crc-reports-nov2009-eng.pdf

[25]For more information see *the Indigenous Children's Health Report: Health Assessment in Action,* available online at: http://www.stmichaelshospital.com/pdf/crich/ichr_report.pdf.

[26] Canada, Report of the Auditor General of Canada to the House of Commons, April 2003, (Ottawa: Minister of Public Works and Government Services Canada), available online at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_200304_06_e_12912.html, para 6.15.

[27] The government's 3rd and 4th report to the Committee covers the period of January 1998-December 2007. The report states that "*An estimated $272 million a year is provided to address housing needs on-reserve. This funding supports housing construction of approximately 2,300 new homes and renovation of 3,300 existing houses, as well as ongoing subsidies for 27,000 rental units. Budget 2005 committed $295*

housing and poverty has been raised at the international level by the UN Special Rapporteur on Adequate Housing. In his general observations following an October 2007 visit to Canada, the former Special Rapporteur identified breaches of Aboriginal peoples' right to housing as well as a general federal government failure to provide a properly funded national poverty reduction strategy as a cause of the crisis of homelessness.[28]

While there is a significant investment of federal dollars spent each year on federal grants, contributions and subsidies to First Nations and Aboriginal peoples, conditions remain significantly below the national average.[29] Poverty poses barriers for Aboriginal children and youth to obtain key lessons in healthy living and self-care on an equal footing to other Canadian children and youth.

2.8 Systemic Violence against Aboriginal Girls (Articles 2, 19)

Under Article 19(1) of the Convention:

> *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*[30]

In a recent report, the Native Women's Association of Canada (NWAC) provided statistical data showing that Aboriginal girls experience sexualized and racialized violence at a higher frequency and with greater severity than non-Aboriginal girls. NWAC reveals the documented stories of 582 Aboriginal women and girls who are missing or have been murdered in the last 30 years.[31] Of them, 17% were 18 years of age and under.[32] Amnesty International has also voiced its grave concerns about discrimination and violence against young Aboriginal women and girls stating that the

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million over five years to help address the backlog in housing on reserve." The report is available online at: http://www.pch.gc.ca/ddp-hrd/docs/pdf/canada3-4-crc-reports-nov2009-eng.pdf

[28] Canada ratified the International Covenant on Social and Economic Rights on May 19, 1976. Article 11(1) of the Covenant states: 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[29] The Department of Finance states that in 2009-2010 the government spent "*8 billion dollars in transfers for First Nations and Aboriginal peoples*", online at: http://www.fin.gc.ca/tax-impot/2010/html-eng.asp.

[30] Under Article 19(2) "*Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*"

[31] *What Their Stories Tell Us*, Research Findings from the Sisters in Spirit Initiative, Native Women's Association of Canada, 2010, Ottawa, Executive Summary, online: http://www.uregina.ca/resolve/PDFs/NWAC%20Report.pdf .

[32] *Ibid*.at 43.

"scale of violence experienced by "Indigenous" women requires a comprehensive and coordinated response from the government of Canada".[33]

In 2010, the Canadian government announced $10 million in federal funding dedicated to addressing the issue of missing and murdered Aboriginal women and girls. It remains to be seen if this funding will have an impact in addressing the systemic, deep rooted and complex situation of violence against Aboriginal women and girls.

2.9 Aboriginal Children and Health (Article 24)

Under Article 24(1) of the Convention:

> *"States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*"[34]

The federal government supports the publicly funded health care system through transfer payments to provinces and territories. In the case of First Nations on reserves, the Government is directly responsible for the funding of health care and in some cases the delivery of services.[35]

In 2008, the Auditor General reported disparity in health status between First Nations and Inuit and the general Canadian population.[36] Key health indicators, such as birth weights, infant mortality[37], and teen pregnancy all suggest a gap with non- Aboriginal peers for these children and youth. Many Aboriginal children and youth also face the challenges and limitations of living with Fetal Alcohol Spectrum Disorder (FASD). Substance abuse is a factor in many young lives. Other concerns include the high rates of diabetes and obesity. For example, First Nations people on-reserve have a rate of diabetes three to five times higher than that of other Canadians. Rates of diabetes among the Inuit are expected to rise significantly in the future given that risk factors such as obesity, physical inactivity, and unhealthy eating patterns are high.[38]

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[33] Canada : Stolen Sisters, A Human Rights Response to Violence Against Indigenous Women, Amnesty International, 2009, online: http://www.amnesty.ca/stolensisters/amr2000304.pdf

[34] Under Article 24(2) *" States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;"*Convention on the Rights of the Child.

[35] For more information see: Health Canada, mandate and priorities, First Nations and Inuit Health Branch, available online at: http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fnihb-dgspni/mandat-eng.php

[36] http://www.oag-bvg.gc.ca/internet/English/parl_oag_200812_08_e_31832.html#ex5, Exhibit 8.5

[37] For example, infant mortality rates were approximately four times higher for Inuit than for the Canadian population in 2003.

[38] For more information, see Health Canada website: http://www.hc-sc.gc.ca/fniah-spnia/diseases-maladies/diabete/index-eng.php.

The government indicated in its 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child that it has "*provided $1.3 billion over five years to be dedicated to First Nations and Inuit health programs, including new investments for nursing and human capital development on reserve* ".[39]

The significant disparities outlined above indicate urgent health needs. The Commission remains concerned about the disparity in health status between Aboriginal children and non-Aboriginal children.

2.10 Aboriginal Children and Education (Article 28, 29)

Under Article 28 of the Convention:

> "*States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity..*" Furthermore, Article 29 of the Convention provides that "*education of the child shall be directed to the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin*".

There are two issues of concern in regards to Aboriginal children and education: 1) insufficient funding; and 2) educational achievement rates.

Insufficient Funding

Although education falls within provincial jurisdiction, the federal government has responsibility in areas where transfer agreements are not in place with provinces.[40] The federal government funds band councils and other First Nations education authorities to pay for education from kindergarten through to adult learners for residents on reserves.[41] The disparities in funding for education have been documented in a number of reports. An Indian and Northern Affairs Internal Audit report concluded that :

> "*INAC's figures show a level of funding for instructional services per student that ranges between $5,500 and $7,500. The Pan-Canadian Education Indicators Project (PCEIP 2003) shows a range of per student expenditures from $6,800 to $8,400 across Canada*"[42]

In June 2011 the Auditor General also reported that:

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[39] Third and Fourth Reports of Canada to the Committee on the Rights of the Child, available online at : http://www.pch.gc.ca/ddp-hrd/docs/pdf/canada3-4-crc-reports-nov2009-eng.pdf see para.67.
[40] *Ibid.*
[41] For more information see: Caledon Institute of Social Policy, Improving Education on Reserves: A First Nations Education Authority Act, Michael Mendelson, July 2008, p. 4., available online at: http://www.caledoninst.org/Publications/PDF/684ENG.pdf
[42] *Ibid* at 6.

> *"Although the Department [now Aboriginal Affairs and Northern Development Canada) has studied various delivery options for post-secondary programs, we found that it has not specifically reviewed post-secondary funding mechanisms. As in 2004, (the department) still allocates funds by First Nations community without regard to the number of eligible students; moreover, band governments have the flexibility to allocate the funds outside the program. Again, as in 2004, we found that the current funding mechanism and delivery model used to fund post-secondary education does not ensure that eligible students have equitable access to post-secondary education funding"*[43]

The Government states in its 3rd and 4th Periodic Report to the Committee on the Rights of the Child that it "*continues to support culturally relevant elementary, secondary and post-secondary education for First Nations and Inuit students, with overall expenditures increasing from $1.4 billion in 2003-2044 to 1.7 billion in 2007-2008*". While there has been a move towards First Nations control over education in the past few years and an increase in funding, it appears that adequate funding is still a critical issue.

Education Achievement Rates

In Canada, many First Nations children do not have the opportunity to access education in conditions of true equality. Educational achievement rates show that Aboriginal children dramatically lag behind other Canadian children.[44]

> *" In 2006, the proportion of the Aboriginal population aged 25 to 64 years without a high school diploma (34%) was 19 percentage points higher than the proportion of the non-Aboriginal population of the same age group (15%). There is no disparity between Aboriginal and non-Aboriginal groups for college and trade certification; certification was obtained by 33% of both populations. Whereas 23% of the non-Aboriginal population had successfully completed a university degree, only 8% of the Aboriginal population reported completing a university education".*[45]

It is also important to note that "*the majority of Aboriginal children and youth live in urban centres and attend non-Aboriginal schools where they continue to lag behind their peers*". [46] Educational achievement is crucial to closing the gaps in income and other social indices between Aboriginal and non-Aboriginal people. However, there is no

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[43] Canada, Report of the Auditor General of Canada to the House of Commons, June 2011, (Ottawa: Minister of Public Works and Government Services Canada). Available online at: http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html#hd5e , see para. 4.21.

[44] Human Resources and Skills Development Canada, Indicators of Well-being in Canada, Learning-Educational Attainment, information available at: http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=29#M_4.

[45] *Ibid.*

[46] Canadian Council of Provincial Child and Youth Advocates, *Aboriginal Children and Youth in Canada: Canada must do Better*, at p.9-10. Available online at: http://www.rcybc.ca/Images/PDFs/Reports/Position%20Paper%20June%2016%20FINAL.pdf

national strategy to redress educational inequality for Aboriginal children across the country.

3 OTHER ISSUES OF CONCERN

3.1 Suicide among Children and Youth (Article 27)

Under Article 27 of the Convention, States Parties:

> *"….shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."*

According to Statistics Canada, the rate of suicide has remained relatively stable in Canada over the past few years. A recent Statistics Canada report reveals that 28 children ages 10-14 committed suicide in 2004 and 25 committed suicide in 2009. In the 15-19 age group, 210 committed suicide in 2004 and 208 in 2008.[47] However, a number of studies point to higher rates among vulnerable groups including recent immigrants, inmates in correctional facilities, youth suffering from mental illness and Aboriginal youth. [48] The Mental Health Commission of Canada has reported that the rate of suicide among Aboriginal youth compared to non-Aboriginal youth is five to six times higher.[49]

The Canadian Mental Health Association reported that::

> "*In Canada, suicide accounts for 24 percent of all deaths among 15-24 year olds and 16 per cent among 16-44 year olds. Seventy –three percent of hospital admissions for attempted suicide are for people between the ages of 15 and 44.''*[50]

Research studies show that suicide is the number one cause of death for sexual minority youth. Sexual minority youth are up to 7 times more likely to attempt suicide than their heterosexual peers.[51] They also face unique risk factors that include "*lack of family*

[47] For more information, see: Statistics Canada report, available online at: http://www40.statcan.gc.ca/l01/cst01/hlth66a-eng.htm

[48] For more information see the Canadian Mental Health Association, fact sheet available online at: http://www.ontario.cmha.ca/fact_sheets.asp?cID=3965. See also, World Health Organization (October 2002). World Report on Violence and Health. Geneva. www.who.int.

[49] For more information see the fact sheet: Our Journey our Beginning, Mental Health Commission of Canada, available online at : http://www.mentalhealthcommission.ca/SiteCollectionDocuments/brochures/References%20for%20On%20Our%20Way%20map.pdf .

[50] For more information see: Canadian Mental Health Association , http://www.ontario.cmha.ca/fact_sheets.asp?cID=3965

[51] Public Health Agency of Canada, *Questions and Answers: Sexual Orientation in Schools*, available online at: http://www.phac-aspc.gc.ca/publicat/qasos-qose/qasos-qose-eng.php#footnote20.

acceptance, and more frequent interpersonal conflict (such as bullying) regarding their sexuality". [52]

In its 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child, Canada stated that:

> *"The Federal Budget 2005 provided $65 million over five years to implement the National Aboriginal Youth Suicide Prevention Strategy. The Strategy provides direct support to First Nations and Inuit to improve the mental health of youth and to design and deliver community-based suicide prevention plans.*"[53]

The Federal 2010 Budget indicates funding has been allocated for another two years. The Commission supports the renewal decision. However, stable ongoing funding is required given the devastating impacts of suicide on Aboriginal families and communities. [54]

Suicide has been described as "*a major, sometimes hidden, public health concern*".[55] The House of Commons has recognized this and recently passed a motion to support a national suicide prevention strategy for all Canadian children and youth. [56]

The Commission supports the immediate development and implementation of such a strategy with appropriate funding to support the initiative.

3.2 Monitoring the Implementation of the Convention (Articles 2,7,23, 24)

Under Article 2 of the Convention, disability is explicitly mentioned as a prohibited ground of discrimination. Under Article 23(1):

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[52] Public Health Agency of Canada, *Questions and Answers: Sexual Orientation in Schools, "One Canadian study found that lesbian, gay, and bisexual youth, when compared to their heterosexual peers, were more likely to: have had suicidal thoughts and a history of suicide attempts; experience greater physical and sexual abuse; have higher rates of harassment in school and discrimination in the community; have run away from home once or more in the past year; be sexually experienced and have either been pregnant or to have gotten someone pregnant; be current smokers, tried alcohol, or used other drugs; report higher rates of emotional distress; participate less frequently in sports and physical activity; report higher levels of computer usage/time; and, feel less cared about by parents/caregivers and less connected to their families."* For more information see: http://www.phac-aspc.gc.ca/publicat/qasos-qose/qasos-qose-eng.php#footnote20.

[53] Third and Fourth Reports of Canada, Convention on the Rights of the Child, available online at: http://www.pch.gc.ca/pgm/pdp-hrp/docs/crc-rpt3-4/index-eng.cfm, para 71.

[54] Budget 2010: Leading the Way on Jobs and Growth, available online at: http://www.budget.gc.ca/2010/plan/toc-tdm-eng.html, p. 119.

[55] For more information see: the Mental Health Commission of Canada website at: http://www.suicideprevention.ca/.

[56] The motion to support the establishment of a National Suicide Prevention Strategy carried with 272 votes in favour and 3 against. http://joycemurray.liberal.ca/uncategorized/statement-in-the-house-liberal-motion-for-a-national-suicide-prevention-strategy/

> *" States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*

Under Article (2):

> *"States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child."*

Under Article 24, States Parties:

> *"…shall strive to ensure that no child is deprived of his or her right of access to such health care services."*

Canada ratified the *Convention on the Rights of Persons with Disabilities* (CRPD) in 2010. Article 7 of the CRPD[57] provides that States parties are required to "*take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*

States are responsible for ensuring the implementation of international human rights obligations. Monitoring is an essential part of this implementation. In addition to Article 4 of the Convention on the Rights of the Child, Article 33 (2) of the CRPD requires that State parties:

> *".. maintain, strengthen, designate or establish ... one or more independent mechanisms ... to promote, protect and monitor implementation ... (and) shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."*[58]

At present, the Government of Canada has not designated an independent monitoring mechanism under article 33. The Commission, as an "A"status national human rights institution, has indicated its willingness to take on this responsibility.

3.3 Establishing a Focal Point for Responsibility (Article 4)

Article 4 of the Convention provides that:

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[57] *Convention on the Rights of Persons with Disabilities*, adopted by the United Nations General Assembly on 10 of December 2006, entered into force on 3 May 2008. Canada ratified the Convention in March of 2010. Available online at: http://www.un.org/disabilities/convention/conventionfull.shtml.

[58] *Ibid* at article 33.

> *" States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation*."

In its 3rd and 4th Periodic Report to the UN Committee on the Rights of the Child, the Government stated that:

> "*Canada endeavours to strengthen coordination and monitoring of children's rights through interdepartmental and intergovernmental initiatives. An Interdepartmental Working Group on Children's Rights was created in 2007 to promote a whole-of-government approach to children's rights and to encourage collaboration among federal departments*."[59]

The absence of a federal monitoring body to ensure the effective implementation of the *Convention* and the protection of children's rights in Canada has been highlighted by a number of national and international organizations, including the Committee on the Rights of the Child,[60] the Senate Standing Committee on Human Rights,[61] and civil society. All of these emphasize that although specialized bodies are operating in nine provinces, there is no independent body at the federal level with the mandate to conduct activities to implement the Convention. These activities would include ensuring uniform human rights standards for children across the country, reviewing legislation, raising awareness, and providing expert advice on children's rights to the courts.

3.4 Incorporating the Convention into Canada's Domestic Law (Article 4)

As mentioned previously, Article 4 of the *Convention* provides that States Parties must take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention.

In General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, the Committee noted that:

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[59] *Supra* note 55 at 34.

[60] Concluding Observations of the Committee on the Rights of the Child, "*The Committee recommends that the State party establish at the federal level an ombudsman's office responsible for children's rights and ensure appropriate funding for its effective functioning*." para 15. Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/446/48/PDF/G0344648.pdf?OpenElement.

[61] *Children: the Silenced Citizens*, *supra* note 19, pp. 207-210. http://www.parl.gc.ca/Content/SEN/Committee/391/huma/rep/rep10apr07-e.pdf.

> "*Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental*."[62]

Although Canada has ratified the Convention, it has never introduced legislation incorporating it into its laws. Over the years, the Senate Standing Committee on Human Rights has issued reports highlighting concerns about the effective implementation of Canada's international obligations with respect to the rights of the child. It has urged the Government of Canada to take steps to ensure incorporation of the *Convention* and has elaborated a way forward.[63]

In order for the Convention to have full legal effect in domestic law, Canada must, as a "dualist" state, directly incorporate the Convention by introducing enabling legislation; otherwise the Convention on the Rights of the Child has no legal effect in Canada. [64]

4 CONCLUSION

The Commission has focused this report on the inequities and discrimination faced by Aboriginal children in Canada, in particular the systemic barriers caused by *Indian Act* provisions, the overrepresentation in government care, the insufficient level of health care services, unequal educational opportunities, Aboriginal youth in the criminal justice system, and violence against Aboriginal girls. Report after report has documented the same concerns showing that a disproportionate number of Aboriginal people still do not benefit from the most basic services that other Canadians take for granted. Despite the numerous calls for action both within Canada and abroad, the situation for many Aboriginal children remains unsatisfactory.

The Commission also wishes to acknowledge the special care and protection needed by all Canadian children, including other vulnerable groups such as children belonging to racial, ethnic or religious minorities, children with disabilities and children who are in conflict with the law.

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[62] *General Comment No. 5 on General Measures of Implementation on the Convention on the Rights of the Child*, available online at: http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2003/5 at 1.
[63] *Supra* note 3. See also: Canada, Parliament, Senate, *Promises to keep, Implementing Canada's Human Rights Obligations*, available online at: http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm.
[64] Ibid, *Promises to Keep, Implementing Canada's Human Rights Obligations*, at b)i).

STANDARD OPERATING PROCEDURES

JORDAN'S PRINCIPLE

INDIGENOUS SERVICES CANADA

ISC Contact:	**Bonnie Beach (613) 960-4480**
Implementation Date:	
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CONTACT INFORMATION

Senior Director	Bonnie Beach	(613) 960-4480	bonnie.beach@canada.ca
National Coordinating Team Inbox email address	JPCASEMGT-GESTCASPJ@hc-sc.gc.ca		
National Call Centre	English: 1-855-JP-CHILD (1-855-572-4453) French: 1-833-PJ-ENFAN (1-833-753-6326) Teletypewriter: 1-866-553-0554		

CHAPTER 1 : PURPOSE

This document summarizes Indigenous Services Canada (ISC) standard operating procedures (SOP) and associated steps to process requests for products and services for First Nations children with unmet needs submitted for consideration under Jordan's Principle.

All ISC employees responsible for Jordan's Principle must report deviations from this SOP to the Senior Director, Jordan's Principle, First Nations and Inuit Health Branch (FNIHB).

Please Note: As the SOP is still under development, please direct any questions related to the implementation of Jordan's Principle to the Jordan's Principle National Team.

CHAPTER 2 : GOVERNANCE

2.1 AUTHORITIES

The Canadian Human Rights Tribunal (CHRT) decisions provide that Jordan's Principle is a child-first principle to ensure that First Nations children receive government-funded services they need when they need them. The CHRT has ordered that:

- Jordan's Principle applies to ALL First Nations children living on or off reserve and ALL government-funded services;
- When a government-funded service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided:
    - to ensure **substantive equality** in the provision of services to the child;
    - to ensure **culturally appropriate services** to the child; and/or
    - to safeguard the **best interests of the child**;
- Applying substantive equality means that decisions on the provision of services/products pursuant to Jordan's Principle must reflect the historical and contemporary disadvantage of First Nations children; and
- The government department is required to make an immediate determination of cases where there is a potential for irremediable harm. For other requests, ISC must determine a case within 48 hours for individual cases, and up to 7 calendar days for community/group requests.

The CHRT retained jurisdiction to monitor Canada's implementation of the Orders on Jordan's Principle and on February 1, 2018 the CHRT ordered the Canada to enter into a consultation protocol with the Parties (First Nations Child and Family Caring Society and the Assembly of First Nations), the Canadian Human Rights Commission, and the Interested Parties (Chiefs of Ontario and the Nishnawbe Aski Nation).

ISC employees working on Jordan's Principle are required to read all of the CHRT Orders and the protocol agreement. The protocol agreement has been filed with the CHRT and is now in effect. To review the protocol agreement, please email a request to the National Coordinating Team.

To implement Jordan's Principle, the Child-First Initiative was established in July 2016 in order to provide interim funding of up to $382.5M to FNIHB, Health Canada and INAC (now ISC) to meet the service and support needs of First Nations children. The funding provided enables:

- an enhanced service coordination model of care to proactively assist in identifying and addressing needs;
- a Service Access Resolution Fund (SARF) to address an identified unmet need(s);
- data collection, analysis and reporting activities to enhance information and accountability on the implementation of Jordan's Principle and longer-term policy and program reforms;
- capacity building to ensure adequate human resources to implement components of the interim approach; and
- engagement and consultation processes to support policy development for post 2019.

In July 2016, the eligibility of services was initially restricted to health and social and children with disabilities and short term critical illnesses. It also only applied on reserve. It has since been expanded to reflect the CHRT Decisions in 2016 and the latest Decision of May 26, 2017 as amended on November 2, 2017 to apply equally to all First Nations children, whether resident on or off reserve. It is not limited to children with disabilities, or children with discrete short-term issues creating critical needs for health and social supports, or affecting their activities of daily living.

It is critical to understand that Jordan's Principle is a legal requirement and is not a policy or program. The Child First Initiative is Canada's interim policy approach to implement Jordan's Principle but the legal Orders take precedent and will continue to have effect in the event that the current approach evolves pursuant to the co-development of a longer term approach in partnership with First Nations and additional stakeholders.

2.1.1 REFERENCE

Canadian Human Rights Tribunal Orders:

February 1, 2018 (2018 CHRT 4)

May 26, 2017 (2017 CHRT 14), as amended November 2, 2017;

September 14, 2016 (2016 CHRT 16);

April 26, 2016 (2016 CHRT 10);

January 26, 2016 (2016 CHRT 2)

2.2 RESPONSIBILITIES

ISC has established a singular set of Standard Operational Procedures and a consistent delegation instrument that is applicable to both Regional Operations as well as First Nations and Inuit Health Branch regional offices to ensure uniform application of Jordan's Principle. FNIHB Jordan's Principle headquarters is responsible for the evaluation and review of service request cases escalated to the national level and provides secretariat support for the Jordan's Principle Operations Committee.

The Jordan's Principle Operations Committee has representatives of all parties of the CHRT complaint and is chaired by the Senior Assistant Deputy Minister of FNIHB. This committee reports to the Consultation Committee on Child Welfare established through the Consultation Protocol ordered by the CHRT February 1, 2018 and co-chaired by the First Nations Child and Family Caring Society and the Assembly of First Nations.

2.3 DELEGATION

To meet the timely approval of incoming requests for a First Nations child or a group of children as ordered by the CHRT on May 26, 2017, as amended on November 2, 2017, the following delegation of authorities have been put into effect.

This delegation allows ISC Regional Executives and Director Generals and other regional officials working on Jordan's Principle direct approval, funding, and data tracking responsibilities. The roles of headquarters employees (referred to as National Coordinating Team) are to provide support to regions, review proposed denials or complex cases, provide secretariat support for the Jordan's Principle Operations Committee, respond to Parties' requests for information and media or public inquiries, respond to CHRT compliance reporting with the Department of Justice, and support national data management and reporting.

In addition, delegation allows for provision of products, services and supports under Jordan's Principle to reflect the on-the-ground realities of communities and circumstances. It will enable requests to be considered within the context of existing disparities in service availability and provision within the province or territory. It also provides immediate support for the direct communication and working partnerships between and among federal programs delivered by ISC.

2.4 CHRT ORDERS & TIMELINES

CHRT Orders

All ISC employees are required to read **all** of the full CHRT decisions that have shaped Jordan's Principle, which include the definition of Jordan's Principle.

All Focal Points are expected to make decisions on the basis of the CHRT's definition of Jordan's Principle including the aspects of substantive equality, cultural needs and best interests of the child, which are cited in the CHRT orders and are important starting points when determining Jordan's Principle requests. While it is understandable that approving funding commitments in a short timeframe can raise administrative risks, risks to the child/children are most critical and need to be prioritized in determining requests.

CHRT Timelines

All requests coming in must be time-stamped if received by fax or by phone. The CHRT timeframes apply regardless of whether it is a business day or not and the Initiative must have backfills and stand-by arrangements after-hours. The timeframes are calculated on the basis of the 24 hour clock and not limited by "business hours." If a request is received after hours by the 24/7 National Call Centre or by an ISC Focal Point and immediate additional assistance is required, please contact the National Coordinating Team or the identified designated on-call personnel.

Focal Points are expected to make decisions within the timeframes outlined in the CHRT Orders. Please see Reference Document of Amended Orders for more information:

- **Immediately** in cases where the denial/delay of a service could reasonably result in significant and/or irremediable harm to a child(ren). This applies to individual and group service requests.
- **Within 48 hours**
  Individual requests:
  - Response within 12 hours upon receipt of the necessary information* for urgent requests (child is foreseeably facing a health or safety risk or requires immediate medical assistance); or
  - Response within 48 hours upon receipt of the necessary information* for non-urgent requests.
- **48 hours for urgent requests/ 7 days for non-urgent**
  Community/Group requests:
  - Response within 48 hours upon receipt of the necessary information* for urgent requests (children are foreseeably facing a health or safety risk or require immediate medical assistance); or
  - Response within one week (7 calendar days) upon receipt of the necessary information* for non-urgent requests.

***necessary information is that which is reasonably required to make a determination of a request (refer to Figure 1. Jordan's Principle Request Intake/Escalation Checklist).**

2.5 DELEGATIONS

DELEGATION OF FUNDING AND APPROVAL OF REQUESTS

Respecting the CHRT timelines outlined above, individual and group Jordan's Principle request are to be processed in the following manner:

Dental, drug, MS&E

All requests for orthodontics or dental services; drug/pharmaceuticals; medical equipment and supplies can be sent to NIHB for review. NIHB will work directly with the Focal Points within the CHRT timeframes to determine if the item is eligible under the NIHB program. NIHB will communicate approvals directly to the requester with a copy to the Focal Point. If the request cannot be approved under NIHB because it is not considered medically necessary under the existing policy frameworks, or if the child is not eligible under the NIHB program, the Focal Point will determine the request on the basis of substantive equality, cultural needs and best interests of the child.

Substantive equality

Not all Jordan's Principle requests require a substantive equality assessment. A substantive equality assessment does not need to be applied when: i) it is clear and obvious on the facts that substantive equality applies (i.e.: a former child in care struggling with mental health issues) or ii) there is a clear service need (i.e.: child needing medical equipment to breathe). However, when this is required, ONLY minimal information should be requested so as not to create a burden on the child, family or community. As well, substantive equality assessment should not result in lengthy delays in approving requests especially when the request can be easily deemed as being in the best interests of the child.

Escalating requests – complete case file

If a Focal Point escalates a request to the National Coordinating Team, it must include **complete** documentation, including information related to **substantive equality**, **cultural needs** and **best interest of the child** BEFORE escalation (see Section 3.2.2 Gathering Supporting Documentation). Examples of questions to ask to assist in making a determination on the best interests of the child include:

- How do you feel the service or product being requested will affect the child?
- What would happen if the service/product is not provided for the child?
- Overall, do you think it is in the child's best interest to receive the service? If so, why?

Only when a Focal Point has made three attempts to obtain this information from the requester over a one month period should an incomplete case file be escalated to the National Coordinating Team. This does not apply to urgent requests where a foreseeable health or safety risks or an immediate medical need exists for the child (or children). These requests should be determined pending receipt of documentation.

Denials

Only the Assistant Deputy Minister of FNIHB Regional Operations (RO), ISC has the authority to deny a request (this includes a denial related to the child's Indigenous status).

If any request is recommended for denial by the region, the completed case file must be sent immediately to the National Coordinating Team: JPCASEMGT-GESTCASPJ@hc-sc.gc.ca for review.

The region will be informed of the ADM decision and the Focal Point will notify the requestor of the decision via email within the CHRT timeframes. A written decision will be provided by the National Coordinating office for denied requests. For more information, see Delegation for Communicating Decisions to Requestors.

DELEGATION OF REGIONAL INTERDEPARTMENTAL REQUESTS

Requests received by existing programs

All regions must put into place a process to expeditiously refer all requests for First Nations children received *by* existing ISC programs or services to the Jordan's Principle Focal Point **should the request not be covered by the existing program**.

Focal Points receiving these requests are responsible for their evaluation and determination regardless of what type of product, service or support is being requested. As in all cases, they may consult with experts within ISC ONLY as needed, but must still meet the CHRT ordered timeframes for case determination. **All Jordan's Principle requests need to be processed within the CHRT timeframes specified for the type of request.**

Requests received by Jordan's Principle

If a request is submitted to Jordan's Principle but is believed by the Focal Point to be eligible under an existing ISC program such as Non-Insured Health Benefits, it is the Jordan's Principle Focal Point's responsibility to seek coverage for the child and not to refer the requester to these programs. The burden should not be placed on the requester to navigate through existing programs. However, the CHRT Ordered Timeframes need to be followed. If referring to another ISC program makes meeting the timelines impossible, then the Focal Point should determine the case and resolve the funding source later. **In other words, it is not permissible to refer a request to an existing program if doing so will breach the time frames for determination in the CHRT Orders.**

If a request is submitted and is covered by an existing ISC program, have the request tracked as a Jordan's Principle request which will be funded under existing programs.

DELEGATION FOR PAYMENTS

All payments, including Gs&Cs and O&M payments, may be approved by individuals with Section 32 delegation. Section 32 must be signed as soon as a request is approved – regions cannot wait until all documentation is received to process the payment before signing Section 32. Section 32 applies as soon as a funding commitment is made.

DELEGATION FOR CLINICAL CASE CONFERENCING

If the Focal Point requires information to determine the child's clinical need before a determination of the case can be made, please ensure that ONLY staff or Focal Points who are designated to conduct clinical case conferencing contact the professional(s) with relevant competency and training who are already involved in the child's case. This applies to cases in all areas of need, whether health, social, education or other.

If the professional(s) does(do) not have the competency and training to provide an assessment for the request, contact the requestor if an assessment is needed from another professional with relevant competency and training. The child's family/guardian, First Nation community/service providers or departmental experts (NIHB orthodontics, etc.) can also be contacted.

In cases where the child is foreseeably facing a health or safety risk, requests SHOULD be determined immediately even if an assessment is not available; an assessment can be pending and submitted later. The Focal Point should log the need for a check-in with the requestor to obtain the assessment at a future date and always, Focal Points should offer assistance to fund or refer a requestor to a service coordinator to obtain an assessment.

DELEGATION FOR COMMUNICATING DECISIONS TO REQUESTERS

All decisions must be provided to the requestor in writing (email or letter) immediately upon reaching a decision. All approval decisions are communicated by the regional Focal Point directly to the requester.

Only the Assistant Deputy Minister, FNHIB-RO, ISC has the authority to deny a request. The region will be informed of the ADM decision after which the Focal Point will notify the requestor of the decision via email. A formal written decision will be provided by the National Coordinating Team for denied requests.

Decision letters will be prepared, signed and communicated by the National Coordinating Team to the requester directly with a copy to the regional Focal Point. Decision letters will include not only a general explanation of whether the request met normative standards or whether it did not include information with respect to substantive equality or to inform a decision on the best interest of the child, but it must also include specific information on the basis for the decision.

Any request that is denied must indicate:

- the denial decision;
- an explanation as to why the request was denied specific to the request and must consider not just normative standards but also substantive equality;
- the requester's right to appeal the decision, and the process, criteria for appeal and the timeline for making an appeal, which is within one year from the date the requester receives the written denial.

Requesters who have requests denied on appeal have the right to file to have the decision judicially reviewed by the Federal Court within 30 days of receiving the decision of the Appeals Committee.

DELEGATION OF DATA COLLECTION AND TRACKING

The collection of data, its maintenance and analysis are conducted under the following conditions:

- privacy and confidentiality are protected and maintained;
- information collected is limited to what is required to meet the CHRT Orders or as requested by the Parties at the Jordan's Principle Operations Committee or the Consultation Committee on Child Welfare;
- respects the First Nations principles of OCAP® (Ownership, Control, Access and Possession); and,
- to assess the performance of the Initiative and the scope and nature of needs to inform the development of a longer-term approach to Jordan's Principle.

With respect to the meeting the CHRT Orders, the amount of data collected and provided will depend on the type of request:

- For requests to support individual children that come directly to the Focal Points for assessment, information about the needs, types of services and individual circumstances of the child is required in order to assess - each request for determination. Personal information about identified children can only be collected with the consent of a parent, legal guardian or capable child. Unique child identifiers must be created by either the region or the community to aid in the ability to track requests at a child level - while maintaining a level of anonymity.
- For service requests involving groups of children, the level of client-specific information reported for each host organization is less detailed because these arrangements will be managed by First Nations communities or other First Nation or third-party service provider. Funding recipients will be asked to collect and maintain detailed records for each child served but will only need to report to ISC at an aggregate level in the data collection instrument about the group of clients, their needs, the level of services provided, and the cost of these services. These organizations may also be asked to assist in evaluating the impact of the services provided to children during the Initiative's evaluation starting in 2018/19.

2.6 REPORTING PROCESS AND PROCEDURES

Delegation for data collection and tracking has been provided to ISC regional offices. This allows for the timely reporting of key indicators required by the CHRT (e.g. result of application request and timelines of service delivery).

The Jordan's Principle Intake Form (See Section 3.5 - Reference) will continue to be used and populated by the Focal Point and/or the Service Coordinator (last revised July 2017). This Intake Form collects the following limited information in accordance with the measures set out in the Treasury Board submission, and reporting requirements to the CHRT:

- Unique case number, sex and date of birth (to replace information on the child's name; for group requests, aggregates will only be collected);
- Eligibility status (registration or residency); and
- Current request for services.

Regional staff will complete Intake forms for every request and save these in RDIMS/CDIMS for analysis by

the national office. Regional staff will track these requests as per the Regional tracking form and submit this tracking on a weekly basis for program reporting.

2.7 REFERENCE

Delegation of Authority document	
Reference Document for Amended Orders	Reference Document for Amended Orders

CHAPTER 3 : PROCESSING INDIVIDUAL & GROUP REQUESTS

The overall objective of the procedure is to outline the steps that ISC employees should follow to comply with CHRT Orders provided to the Government of Canada to ensure the full implementation of Jordan's Principle.

Requests can be brought forward to ISC via multiple avenues, including: Service Coordinators; existing federal programs (e.g. Non-Insured Health Benefits Program, Education Program); provincial/territorial programs (e.g. Alberta Aids to Daily Living); or First Nations families, guardians or from children/youth directly.

Products, services and supports may be requested for:

- an individual child or individual children under the same family or guardianship; or
- a group of children from multiple families/guardians (where product/service/support access issues are common to a group of children or communities).

This Chapter offers supplementary (more detailed) information to what was provided in the Delegation Section 2.3.

3.1 ELIGIBILITY

Jordan's Principle responds to the unmet needs of First Nations children no matter where they live in Canada.

Jordan's Principle is available to:

- Registered First Nations children living on or off reserve;
- First Nations children entitled to be registered, under the *Indian Act* - including those who became entitled to register under the December 22, 2017 amended provisions of the *Indian Act*, under Bill S-3; and
- Non-status Indigenous children who are ordinarily resident on reserve.

Cases that were denied on the basis of eligibility dating back to July 2016 are open to re-review.

Ordinarily resident on reserve can be defined to mean:

- the child had always lived on reserve;
- the child would normally live on reserve but they or one of the members of their household (i.e. sibling, parent, extended family living with child) may have been required to spend some time away temporarily from the community to access services such as health care or education where there are no other comparable services available in the community;
- the child would have lived on reserve immediately prior to accessing these services;
- the child is dependent of a family that maintains a primary residence on-reserve;
- the child returns to live on reserve with parents, guardians, caregivers or maintainers during the year, even if they live elsewhere while attending school or to receive medical care or other services;
- the residence of a child who comes into care of a mandated child and family services authority is determined from the residency of the child's parent or guardian at the time the child is taken into care; or
- the child meets student eligibility requirements in the reference province or Yukon Territory.

In this context, reserves are deemed to include all land set aside by the federal government for the use and occupancy of an Indian band, along with all other Crown lands which are recognized by ISC as settlement lands of the Indian band of which the student is a resident.

In the case of a child in the care of a Child and Family Services Agency, or in the care of the province, the residency of the child is determined by the residency of the guardian with whom the child is placed. A guardian is a person who assumes authority for the child through a legal guardianship agreement.

Supporting documentation may include:

- Confirmation that the child is included in the nominal role (the registry of all eligible elementary and secondary students funded by ISC to attend a Band-operated, federal, provincial, or private/independent school);
- A copy of recent bill or notice, showing the child's parent/guardian's name and address, such as a telephone, electricity cable bill, or tax notice; or
- Signed email or letter from a Band Council member or community nurse that the child is ordinarily resident on reserve (template in Section 3.5 - Reference).

3.1.1 CHILD

All First Nations **children** can make a request under Jordan's Principle. For the purposes of Jordan's Principle, a "child" is defined as an individual who is under the Age of Majority within their province or territory. As such, eligibility for Jordan's Principle ceases when Age of Majority is attained.

The Age of Majority is defined as the age at which a person is granted the rights and responsibilities of an adult in accordance with provincial or territorial legislation. See corresponding table below.

All requests for children at or above the age of majority are to be escalated. If there is an equivalent provincial program that considers them a child, this information is to be included with the escalation.

Province	Age of Majority	Cut off for regional approval
Alberta	18 years	Day child turns 18 years
British Columbia	19 years	Day child turns 19 years
Manitoba	18 years	Day child turns 18 years
New Brunswick	19 years	Day child turns 19 years
Newfoundland and Labrador	19 years	Day child turns 19 years
Northwest Territories	19 years	Day child turns 19 years
Nova Scotia	19 years	Day child turns 19 years
Nunavut	19 years	Day child turns 19 years
Ontario	18 years	Day child turns 18 years
Prince Edward Island	18 years	Day child turns 18 years
Quebec	18 years	Day child turns 18 years
Saskatchewan	18 years	Day child turns 18 years
Yukon Territory	19 years	Day child turns 19 years

3.2 INDIVIDUAL REQUESTS

3.2.1 TIMELINES

The following timelines apply to individual service requests:

- **Immediate crisis intervention supports for situations where irremediable harm is reasonably foreseeable**
- **Response within 12 hours upon receipt of the necessary information (**see Section 3.2.2 - Gathering Supporting Documentation**) for urgent requests (where child is foreseeably facing a health or safety risk or requires immediate medical assistance)**
- **Response within 48 hours upon receipt of the necessary information (**see Section 3.2.2 - Gathering Supporting Documentation**) for non-urgent requests**

These timelines are effective upon receipt of all required information for each request. See the Reference Document for CHRT Amended Orders on individual and group timelines (Section 2.7) for more information.

3.2.2 RECEIPT OF INDIVIDUAL SERVICE REQUESTS

Once a request is submitted for an individual child, the following process is initiated:

- **Intake**
- **Review and Evaluate**
- **Determination**

INTAKE

Intake is the process of documenting information in an Intake Form to support a review of a request for products, services and supports. A request may be made by phone, email or through a Request Form (see Section 3.5 - Reference) to the Jordan's Principle Call Centre or regional Focal Point.

A request can be made for products, services and supports by:

- a parent/guardian of a First Nations child;
- a First Nations child at the age of consent[1] in their province or territory of residence; or
- an authorized representative[2] of the child/parent/guardian.

In order for a representative to make a request on behalf of the parent/guardian, please ensure the parent/guardian signs the Request Form and prepares an authorization in writing or by calling the Focal Point.

Focal Points need to carefully read all material submitted to them and only ask for additional information if it is **required** to determine the case. Request for information from Focal Points should be made at one time and not staggered so as to avoid time delays. Burden of documentation needs to be considered when communicating with families, communities, service coordinators or providers. More specifically, with respecting to case conferencing Canada must comply with 2017 CHRT 35 (as amended):

> [135](1)(B)(iii) "… Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified.

Intake involves three key steps:

- **Assess urgency**
- **Complete intake form**
- **Gather supporting documentation**

[1] A child at the age of consent can make decisions on their own about the care they need.

[2] An authorized representative is a person (individual or business) that the requester has given written permission (authorized) to act on their behalf (represent) with respect to the Jordan's Principle request.

ASSESSING URGENCY

The Focal Point must perform an initial assessment to ensure that the child is not facing an immediate or foreseeable health or safety risk.

- **If the child(ren) is in immediate risk of harm or requires urgent attention, the Focal Point must either direct the requester to call 911 or the nearest health facility, or in other situations, make all reasonable efforts to ensure immediate crisis intervention supports are provided until an extended response can be developed and implemented.** The Focal Point must immediately refer the issue to a competent authority, such as the police or a Child and Family Service agency. A specific procedure must be in place in all regions to properly guide the requester in such circumstances.
- If a request is submitted for a service, product or support that is needed to prevent an immediate foreseeable health or safety risk to the child, the Focal Point or Call Centre responder must determine the case within 12 hours even if not all of the documentation is available. The request can be approved and a check-in made to receive the documentation required afterwards with the requester.
- If a request is made after hours and immediate assistance is needed, the Call Centre responder or the ISC Focal Point is to contact the identified on-call individual for assistance. In no circumstances, should this assistance lead to unnecessary delays.

The best interests of the child must be the fundamental decision-making point for requests where a child or children are exposed to foreseeable health or safety risks.

COMPLETING INTAKE FORM

The intake includes "required" information and "optional" information (See Figure 1. Jordan's Principle Request Intake Checklist: Required and optional information). Only the required information is needed to process the request. The optional information can be collected after the determination of the request is made. Please ensure that the required information is acquired BEFORE escalating a request to the National Coordinating Team, unless at least three requests have been made to the requester without a response.

Upon receipt of a request from a child, the Jordan's Principle Call Centre or Focal Point will:

- complete an Intake Form for every request received based on required information obtained from the child, parent/guardian of the child or authorized representative;
- record the date and time of receipt of the request; and
- record the contact information for the person making the referral and/or for the parent/guardian of the child.

When receiving calls, please note that ALL requests should entered into an Intake Form.

All requests coming in must be time-stamped if received by fax or by phone. This timeframe applies regardless of whether it is a business day or not and Focal Points must have backfills and stand-by arrangements after-hours. The timeframes are also calculated on the basis of the 24 hour clock and not limited by "business hours". Note that unavailability of ISC staff is not an acceptable reason to delay information collection or case determination.

Jordan's Principle Escalation to Director/ADM Checklist
Required & Optional Information from Requesters, Focal Points and National Coordinator

How to escalate a request:

- Please send an email to JPCaseMgt-GestCasPJ@hc-sc.gc.ca with all the information in the checklist below
- Each email should contain one request (individual or group) and the subject should be the Case number as well as the text URGENT or TIME-SENSTIVE for requests requiring immediate attention (e.g. HC-AB-0500; URGENT)

Reminder: The following requests must be escalated:

- Cases where the region requires advice/support and no resolution has come from a consultation with the National Coordinating Team
- ALL requests recommended for denial by the region
- Requests for Métis or First Nations children with no status number, who are not eligible to be registered, and are not ordinarily resident on reserve; requests for adults

Required Information from Requester	Optional Information from Requester	Information required from Focal Point
☐ **Intake form:** ☐ Name and contact information (phone number, email) ☐ Date of Birth ☐ Community of Residence (if they live on reserve) and address (note for First Nations communities without street addresses please get as much information as you can about how to locate the family home) ☐ Status number. If non-status, indicate if the child is: ☐ Non-status and Ordinarily Resident on Reserve ☐ Non-status and eligible under current legislation. Provide parent's registration number ☐ Non-status and likely not eligible for status. Provide details ☐ Métis ☐ Reason for Request ☐ Product(s)/Service(s)/Support(s) requested ☐ Frequency of Service(s) (if applicable) ☐ Estimated Cost (only if the requester has it readily available) ☐ **Supporting Documentation:** An assessment/prescription/referral/letter from a health/social/educational professional directly involved in the child's life that indicates diagnosis/es and directly recommends the requested product/support/service. The provider must not be someone who is/will benefit from the approval of the request (e.g. providing the service requested). **Exceptions:** ☐ Urgent or time-sensitive cases – supporting documentation can be provided after the case has been decided and need has been met.	☐ **Substantive equality information** ☐ ONLY minimal information should be requested so as not to create a burden on the child, family or community. A substantive equality assessment should not result in lengthy delays in responding to requests especially when the request can be easily deemed as being in the best interests of the child. ☐ A letter of support or documentation can be provided (but not necessary) from a health/social/educational professional directly involved in the child's life that corroborates substantive equality information provided by parent. The provider must not be someone who is/will benefit from the approval of the request (e.g. providing the service requested). ☐ Details of the child's/family or social context that may be relevant to the request ☐ Any additional information not previously provided ☐ For more information, please refer to Chapter 5 of the Standard Operating Procedures.	☐ **Intake form:** ☐ Case number (1 child per case number unless a group request) ☐ Was the request received from NIHB? ☐ Is this product/service/support covered by a current ISC program, including NIHB? Please indicate which program and if denied by that program. ☐ Was the child previously approved for a request(s) under Jordan's Principle? ☐ Does this product/service/support meet normative standards? ☐ Estimated Cost (if not provided by requester) by requester) **Information required from National Coordinating Team to ADM** ☐ Summary of Case Reviews ☐ ADM Summary Review Template ☐ Substantive equality questions (as found on webpage)

Figure 1. Jordan's Principle Request Intake/Escalation Checklist: Required and optional information

GATHERING SUPPORTING DOCUMENTATION

Required for ALL INDIVIDUAL and GROUP REQUESTS: supporting documentation from a health/social/educational professional that clearly indicates diagnosis and directly recommends the requested product/support/service. Recommendation must be within the professional's area of expertise (i.e. medical equipment must be recommended by a health professional, and cannot be recommended by a Social Worker or Child Protection Worker). Supporting documentation could include ONE of the following:

- Health/educational/social assessment
- Referral
- Prescription (requires annual evaluation & assessment from prescribing professional)
- Letter from health/social/educational professional involved in the child's/children's life that indicates diagnosis/es and directly recommends the requested product/support/service. **For group requests, one letter for all the children in the group is acceptable**

IMPORTANT NOTES:

- **ALL URGENT and Time Sensitive individual and group requests and/or CASES WHERE THERE IS A RISK OF HARM TO SELF OR OTHERS OR AN IMMEDIATE MEDICAL NEED are EXEMPT from having to produce SUPPORTING DOCUMENTATION. S**upporting documentation can be provided after the case has been decided and need has been met.

- If the region is unsure about which supporting documentation is required or needs input on a request, the regional Focal Point is requested to consult with the National Coordinating Team via the Jordan's Principle Case Management Inbox. Requests that are unable to be resolved with an initial consultation must be escalated.
- If there are questions related to the type of assessment required for the request, use the phrase below in your response.

  A [health/social/educational] professional, who is directly involved in the child's care/life, may recommend, in their professional opinion as the child's [doctor/social worker/teacher etc.], that the child's [health/mental health/education etc.] would benefit from the recommended [product/service/support]. The recommendation must be linked to the professional's area of expertise.

Documentation to support substantive equality

A statement from a family member will be considered under substantive equality, documentation from a health/education/social professional supporting the information provided by the parent is also recommended, but not necessary.

Professional treatment plans

ISC should not be overriding treatment plans for the child/children. If the Focal Point has a question or concern relating to a professional assessment received, only in exceptional cases would he/she consult with ISC professionals with the required credentials. This practice should only occur when the best interests of the child are at the forefront of the determination of the request. If denial of the request is to be recommended to the ADM-RO FNIHB, ISC, on the basis of a question or concern regarding a professional assessment accompanying the request, specific reasons outlined by the ISC professional with the required credentials need to accompany the Intake Form to be escalated to the National Coordinating Team and the ADM-RO FNIHB, ISC. If denial is upheld, an alternative service/product/support should be proposed in the letter to the requester.

REVIEW AND EVALUATE

Upon completion of intake form and after supporting documentation is collected, the Focal Point will:

- **Acknowledge Receipt**
- **Escalate To The National Coordinator (Only As Necessary)**

ACKNOWLEDGE RECEIPT

Upon completion/receipt of the Intake Form and supporting documentation, the Focal Point will:

- advise the requester that a determination is underway; and
- document the date and time of the commencement of the review on the Intake Form.

If the request has come through the National Call Centre, contact the requester (by phone and/or by email) within one business day to acknowledge receipt of the request, gather supporting documentation, and upon receipt of supporting documentation, indicate that determination is underway.

Important Note: The CHRT timelines are effective upon receipt of all required information for each request (see Section 3.2.2 -Gathering Supporting Documentation for a list of required information). However, Focal Points must proceed as quickly as possible and at most, within 1 business day, to request the required information from the requester in order to determine a request. If the determination of urgency is made (i.e. foreseeable health and safety risk to the child Section 3.2.1 - Timelines) you may approve the request pending additional documentation. Your judgement on this will be case-specific.

THE NATIONAL COORDINATING TEAM

Advice

If the Focal Point requires advice or support they may contact the National Coordinating Team. In no circumstances, should this assistance lead to unnecessary delays.

Escalation

All requests are to be first reviewed at the regional level. Only requests **recommended for denial** by the region are to be sent to the National Coordinating Team to prepare for decision by the ADM-RO FNIHB, ISC. This includes requests for individuals determined not to be eligible or those with incomplete information, as described in Section 2.5 – Escalating Requests.

MAKE A DETERMINATION

Within 12-48 Hours of receiving the request, the Focal Point will:

- **Conduct review and make determination**
- **Communicate decision to the requester unless recommended for denial**
- **Document decision, track and report**

CONDUCT REVIEW AND MAKE DETERMINATION

Upon receipt of a request, Focal Points will conduct a review of the request, based on the completed Intake Form and supporting documentation and consider the following factors:

- Does the supporting documentation substantiate the request?
    - Has an assessment/prescription/referral/letter by a health, social and educational professional been completed?
    - What is the level of product/service/support required as per the assessment/prescription/referral/letter?
        - e.g. frequency, duration, cost
    - If a professional assessment is not available, is the requester agreeable to (interested in) ISC funding this the required assessment?
    - Can the request be determined pending receipt of the assessment/prescription/referral/letter?
    - Is obtaining an assessment/prescription/referral/letter potentially going to delay determination of a request that could result in health or safety risks to the child or counter to a child's best interests?

- PLEASE NOTE THAT COMMUNITY HEALTH, SOCIAL AND EDUCATION PROVIDERS SHOULD BE CONSIDERED AS QUALIFIED IN MOST CASES TO PROVIDE AN INITIAL ASSESSMENT OF UNMET NEED OF THE CHILD (OR CHILDREN). This is especially important to consider in cases where communities/families do not have timely access to higher degrees of professional expertise (e.g. NNADAP worker can provide an assessment in the absence of a physician or psychologist).

- Is the requested product/service/support **within normative standard** of what is provided or funded by the government to other children residing in that province or territory?
- Does the requested product/service/support address substantive equality, cultural needs and/or best interests of the child?
  - Focal Points are to evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services of the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child.

COMMUNICATE DECISION

All decisions to the requester must be provided in writing (email or letter) immediately upon reaching a decision.

- All **approval decisions** are communicated by the regional Focal Point directly to the requester.
- All **decisions recommended for denial** must be escalated to the ADM-RO FNIHB, ISC.

Please note that these steps must be taken in a timely manner to ensure the timeframes outlined in the CHRT Orders are met. **The timeframes begin as soon as the Focal Point has all the necessary information to make the initial evaluation and determination. This may be later than the time the initial request was received but should not be placing an undue burden on the requester. The best interests of the child are a key factor to consider in the determination of a request.**

DOCUMENTING DECISION, TRACKING AND REPORTING

See Delegation Of Data Collection And Tracking for more detail.

Regional staff will complete Intake forms for every request and save these in RDIMS/CDIMS for analysis by the national office. Regional staff will track these requests as per the Regional tracking form and submit this tracking on a weekly basis for program reporting.

3.3 COMMUNITY-MANAGED GROUP REQUESTS

Only information that is different from how to manage individual requests is included below.

3.3.1 TIMELINES

The following timelines apply to Community or Group service requests:

- **Immediate crisis intervention supports for situations where irremediable harm is reasonably foreseeable**
- **Response within 48 hours upon receipt of the necessary information for urgent requests (where children are foreseeably facing a health or safety risk or require immediate medical assistance)**
- **Response within one week (7 calendar days) upon receipt of the necessary information for non-urgent requests**

These timelines are effective upon receipt of all required information for each request. For immediate or urgent requests, approval can be granted pending the receipt of further documentation in the best interests of the child. See the Reference Document for CHRT Amended Orders on individual and group timelines for more information.

3.3.2 RECEIPT OF GROUP SERVICE REQUESTS

A group request can be made for products/services on behalf of First Nations children by a:

- parent/guardian of First Nations children; or
- Community; or
- Community organization.

Assessment

It is ISC's responsibility:

- to review the request within CHRT timelines;
- to consider the context of the community's profile; and
- to consider the suite of existing government programs and services.

Group requests should be determined on the basis of unmet needs presented by a group of children with consideration given up-front to substantive equality, cultural needs and best interests of the child. Unmet needs can be assessed by a health/social/education professional or community service provider in cases where professional expertise is not available in a timely manner. ISC should offer the requester funding to support professional assessment of the children but this should not affect timeliness of determination of requests.

Focal Points should not be contacting other government departments before determining a request as this is considered non-clinical case conferencing.

Supporting Documentation

Proposals are NOT required to support a group request. As in individual requests, an unnecessary burden of information should not be placed on the requester.

For the purpose of documentation, any approval of a group request above $100,000 should be provided through a briefing note to the Regional Director General or Regional Executive. CHRT timelines apply and

must be met. Any recommended denials must be escalated to the ADM-RO FNIHB, ISC.

Group Request Process

As per individual requests, once a request is submitted for a group of children, the following process is initiated:

Intake

- Assess urgency
- Complete intake form
- Gather supporting documentation

Review and Evaluate

- Acknowledge Receipt
- Escalate To The National Coordinator (Only As Necessary)

Make a Determination

- Conduct review and make determination
- Communicate decision to the requester unless recommended for denial
- Document decision, track and report

3.4 PRIVACY

Collection

The personal information provided in making a Jordan's Principle request is protected in accordance with the *Privacy Act* and collected under the authority of the Privy Council Order-in-Council PC Number 2017-1464. Intake Forms, Request Forms, and most supporting documentation used in completing Jordan's Principle requests contain sensitive, personal information. It is the responsibility of every Federal Government employee and Jordan's Principle staff member to diligently protect this information and safe guard the process in which it is handled.

Use

ISC requires this information to determine eligibility and process requests for health, social and educational assistance under the Jordan's Principle Initiative. Personal information is used within ISC for the alignment of health, social and educational benefits and for audit purposes.

Disclosure

With consent, personal information may be disclosed to health, social and educational services professionals, and service coordinators for processing requests.

Personal information may be disclosed without consent, but only in accordance with Subsection 8(2) of the *Privacy Act*. This information collection is described in Info Source, available online at infosource.gc.ca.

Access

Jordan's Principle requesters have rights under the *Privacy Act*: the right of access to, correction and protection of their personal information. They also have the right to file a complaint with the Privacy Commissioner of Canada if they think their personal information has been handled improperly.

Employees are required to follow the various information management policies, standards and guidelines in place by the department. These include responsibilities regarding the legal and policy requirement for the protection of personal information. Please refer to the following documentation regarding privacy.

3.5 REFERENCE

Request Form	Jordan's Principle Request Form
Intake Form	JP Intake Form.pdf
Regional Tracking Sheet	Regional_tracking_template_Sept_26_201
Confirmation of Residency template (Ordinarily Resident on Reserve)	ConfirmationORORR.docx
Processing of Individual and Group Requests Review Approval Letter Template (Please note that the template has been provided as a guide to assist in response preparation. **Please modify based on the specifics of the request and context**.)	
Privacy	
Legislation	Privacy Act
TBS policies and publications	• Policy on Privacy Protection • Directive on Privacy Practices • Directive on Privacy Impact Assessment • Directive on Social Insurance Number • Guidelines for Privacy Breaches • Privacy Breach Management Toolkit • Guidance Document: Taking Privacy into Account Before Making Contracting Decisions • Guidance on Preparing Information Sharing Agreements Involving Personal Information
HC/PHAC guidelines	• Privacy Impact Assessment Toolkit • Privacy Notice Guidelines • Personal Information Disclosure Guide • Info Source Handbook

Commented [TN1]: Insert links

3.5.1 PROCESSING INDIVIDUAL & GROUP REQUESTS

Responsible Party	Action Step
Requester	1. Sends in a request via email, phone or Request Form to the Call Centre, Service Coordinator or Focal Point.
Service Coordinator	1. Provides information on Jordan's Principle and discusses service. delivery arrangements/models as appropriate to support the family, community or region. 2. Receives a request for Jordan's Principle via email, phone or Request Form and sends it to the Focal Point.
Jordan's Principle Call Centre	1. Provides information on Jordan's Principle. 2. Receives a request via phone. 3. Assesses immediate or foreseeable health and safety risks to the child(ren). 4. Completes an Intake Form and sends it to the Focal Point OR to the National Coordinator in urgent cases to be determined within 12 hours.
Regional Jordan's Principle Focal Point	1. Provides information on Jordan's Principle. 2. Receives a request for an individual child via phone, email or Request Form, Jordan's Principle Call Centre or Service Coordinator and completes an Intake Form. 3. Receives a request for group of children via phone or email. 4. Assesses immediate or foreseeable health and safety risks to the child(ren). 5. Acknowledges receipt of request. 6. Sends requests for an existing ISC Program, including NIHB, to the program and tracks it to ensure compliance with CHRT ordered timeframes. If timeframes cannot be met, Focal Point proceeds with determining the request without program input. 7. Conducts Initial Review: eligibility, urgency, completeness of information received. 8. Clinical Case Conferences (only as necessary). 9. Evaluates request and make a determination. Sign Section 32. 10. If approved, communicates the decision with an approval letter. 11. If recommended to deny, escalates to National Coordinator by sending the request to the Jordan's Principle inbox JPCASEMGT-GESTCASPJ@hc-sc.gc.ca and include all relevant information (See Figure 1) about the request. 12. Tracks the decision in the weekly tracking sheet. 13. Initiates financial claim process or funding agreement process.

3.5.2 APPROVAL LETTER TEMPLATE

[CHILD/PARENT/GUARDIAN]
[TITLE (if applicable)]
[ADDRESS]
[CITY. P/T POSTAL CODE]

[DATE]

Dear [PARENT/GUARDIAN/ADVOCATE]

Re: [FILE #]

On [DATE], your request for [CHILD'S NAME] [REQUEST DESCRIPTION] under Jordan's Principle was received. Thank you for bringing [CHILD NAME]'s request to our attention.

I am pleased to inform you that your request for [REQUEST DESCRIPTION] has been approved under Jordan's Principle.

If you have not already been contacted to discuss service arrangement and delivery by the time you receive this letter, please contact me immediately.

Jordan's Principle is about helping to ensure all First Nations children have access to government-funded services, supports and products, no matter where they live. For more information, please visit www.canada.ca/jordans-principle, or please feel free to contact me should you have any further question.

Sincerely,

[Name]
Regional Jordan's Principle Focal Point
First Nations and Inuit Health Branch
Indigenous Services Canada

[Insert phone and email address]

Cc: [Insert name and phone/email of responsible Service Coordinator; name of Service Coordination Organization]

CHAPTER 4 ADM REVIEW – ESCALATED REQUESTS

4.1 ADM REVIEW PROCESS

An ADM Review is required for requests:

- recommended for denial by the region.

Authority for issuing a denial resides with:

- the Assistant Deputy Minister of Regional Operations, FNIHB, ISC
- In their absence, an alternate may be designated by the ADM-RO FNIHB, ISC.

Under no circumstance may the individual who made the initial decision render a determination on the same request at the ADM Review and Appeals level.

4.2 DETERMINATION ON REVIEW

In making their determination, the ADM-RO FNIHB, ISC will:

- Review the evaluation conducted at the regional level to determine whether all components of the Jordan's Principle definition and CHRT Orders have been considered;
- Consider the review conducted by other programs that have reviewed the request, if applicable; and
- Consider if other programs/services could assist the family or the child.

The ADM-RO FNIHB, ISC will confirm his/her final decision to the Jordan's Principle National Coordinating Team, who will communicate the decision to the regional Focal Point. If a denial is made, the requester will be advised of their right to appeal, and be provided with the information needed for them to file such an appeal.

If the request is denied by the ADM-RO FNIHB, ISC:

- the regional Focal Point will communicate the decision to the requester verbally or by email within CHRT timelines.
- Decision letters will be prepared, signed and communicated by the National Coordinating Team to the requester directly with a copy to the regional Focal Point.
- Any request that is denied must indicate the denial decision, an explanation as to why the specific request was denied (direct link to the specific case and not generic), the requester's right to appeal the decision and the process, criteria for appeal and the timeline for making an appeal, which is within one year from the date the requester receives the written denial.

4.3 REFERENCE

ADM Review Process

ADM Review Process Checklist

ADM Review Template

ADM Review- Denial Letter Template

ADM REVIEW PROCESS

Responsible Party	Action Step
Regional Jordan's Principle Focal Point	1. Immediately sends a request for escalation to the Jordan's Principle inbox JPCASEMGT-GESTCASPJ@hc-sc.gc.ca and includes all relevant information about the request.
Jordan's Principle National Coordinating Team, FNIHB/ Senior Director's Office	2. Reviews the requests. 3. Approves requests and communicates decision to the Regional Focal point. 4. Recommends denial and arranges an ADM Review meeting to discuss requests. 5. Supports ADM Review by preparing ADM Review Template, which outlines all salient details of the request and rationale for the initial denial recommendation.
ADM-RO FNIHB, ISC Review	6. Following a discussion of the case, renders a decision; the decision and a rationale for the decision is recorded on the ADM Review Template which is then signed by the ADM-RO FNIHB, ISC (see ADM Summary Review Template) 7. Communicates decision to the Jordan's Principle National Coordinating Team for tracking and communicating to the Regional Focal Point.
Jordan's Principle National Coordinating Team	8. Tracks, communicates the ADM-RO FNIHB, ISC Review decision to the Regional Focal Point and sends out denial letter to requester.
Regional Jordan's Principle Focal Point	9. Communicates the decision to the requester within the timeframe required by the CHRT Orders, taking into account the initial date and time that the request was received.

ADM REVIEW PROCESS CHECKLIST

Jordan's Principle Escalation to Director/ADM Checklist
Required & Optional Information from Requesters, Focal Points and National Coordinator

How to escalate a request:

- Please send an email to JPCaseMgt-GestCasPJ@hc-sc.gc.ca with all the information in the checklist below
- Each email should contain one request (individual or group) and the subject should be the Case number as well as the text URGENT or TIME-SENSTIVE for requests requiring immediate attention (e.g. HC-AB-0500; URGENT)

Reminder: The following requests must be escalated:

- Cases where the region requires advice/support and no resolution has come from a consultation with the National Coordinating Team
- ALL requests recommended for denial by the region
- Requests for Métis or First Nations children with no status number, who are not eligible to be registered, and are not ordinarily resident on reserve; requests for adults

Required Information from Requester	Optional Information from Requester	Information required from Focal Point
☐ **Intake form:** ☐ Name and contact information (phone number, email) ☐ Date of Birth ☐ Community of Residence (if they live on reserve) and address (note for First Nations communities without street addresses please get as much information as you can about how to locate the family home) ☐ Status number. If non-status, indicate if the child is: ☐ Non-status and Ordinarily Resident on Reserve ☐ Non-status and eligible under current legislation. Provide parent's registration number ☐ Non-status and likely not eligible for status. Provide details ☐ Métis ☐ Reason for Request ☐ Product(s)/Service(s)/Support(s) requested ☐ Frequency of Service(s) (if applicable) ☐ Estimated Cost (only if the requester has it readily available) ☐ **Supporting Documentation:** An assessment/prescription/referral/letter from a health/social/educational professional directly involved in the child's life that indicates diagnosis/es and directly recommends the requested product/support/service. The provider must not be someone who is/will benefit from the approval of the request (e.g. providing the service requested). **Exceptions:** ☐ Urgent or time-sensitive cases – supporting documentation can be provided after the case has been decided and need has been met.	☐ **Substantive equality information** ☐ ONLY minimal information should be requested so as not to create a burden on the child, family or community. A substantive equality assessment should not result in lengthy delays in responding to requests especially when the request can be easily deemed as being in the best interests of the child. ☐ A letter of support or documentation can be provided (but not necessary) from a health/social/educational professional directly involved in the child's life that corroborates substantive equality information provided by parent. The provider must not be someone who is/will benefit from the approval of the request (e.g. providing the service requested). ☐ Details of the child's/family or social context that may be relevant to the request ☐ Any additional information not previously provided ☐ For more information, please refer to Chapter 5 of the Standard Operating Procedures.	☐ **Intake form:** ☐ Case number (1 child per case number unless a group request) ☐ Was the request received from NIHB? ☐ Is this product/service/support covered by a current ISC program, including NIHB? Please indicate which program and if denied by that program. ☐ Was the child previously approved for a request(s) under Jordan's Principle? ☐ Does this product/service/support meet normative standards? ☐ Estimated Cost (if not provided by requester) by requester) **Information required from National Coordinating Team to ADM** ☐ Summary of Case Reviews ☐ ADM Summary Review Template ☐ Substantive equality questions (as found on webpage)

ADM SUMMARY REVIEW TEMPLATE

PROTECTED B

ADM Summary Review

Background Information on File (Note: all dates are YYYY/MM/DD)	
Date/Time Escalated:	
Group Request (Y/N):	
Child's Name:	
Child's Date of Birth:	
Address/Community:	
Parent/Requester Name:	
Presentation to ADM (filled in electronically)	
Case Number:	
Age:	
Child's Status:	
Professional diagnosis:	
Challenges/Needs identified:	
Product or service requested:	
Costs associated with each item:	
Within Normative Standards?	
Other relevant information:	
Request History:	
Supporting documents:	
Date of ADM Review:	
Decision:	
Rationale:	
Follow-up Action:	

Substantive Equality Consideration (Completed on hard copy of document)	
SE	o Information was requested and no response received; or Information was provided in relation to the following: o 1- Child has heightened needs as a result of historical disadvantage o 2- Failure to provide service perpetuates disadvantage as a result of race, nationality or ethnicity o 3- Failure to provide service results in child needing to leave home/community for extended period o 4- Failure to provide service results in child being placed at significant disadvantage in terms of ability to participate in healthy development activities o 5- Support ensures access to culturally appropriate services o 6- Support is necessary to avoid significant disruption in child's care o 7- Support is necessary in maintaining family stability re: risk of child being placed in care and caregivers being unable to assume caregiving responsibilities o 8- Individual circumstances of child's health condition, family, or community context lead to a different/greater need for services compared to other children o 9- Supports ability to serve, protect and nurture its children in a manner that strengthens resilience, healing and self-determination of family/community o Other:

ADM Decision and Signature (Completed on hard copy of document)	
Decision and Rationale: **Approved**	o Gap in government funded services o Clear supportive substantive equality information o Medical basis for request o Other:
Decision and Rationale: **Denied**	o No gap in government funded services o Lack of clear supportive substantive equality information o No medical basis for request o Other:
ADM Signature:	_____

ADM REVIEW - DENIAL DECISION LETTER TEMPLATE

[CHILD/PARENT/ AUTH REP]
[TITLE (if applicable)]
[ADDRESS]
[CITY. P/T POSTAL CODE]

[DATE]

Dear [CHILD/PARENT/ AUTH REP]

Re: [Case Number]

*****choose appropriate scenario*****

Scenario 1: Decision letter communicated within service standards (5 business days)

On [DATE], your request for [CHILD'S NAME]'s [REQUEST DESCRIPTION] under Jordan's Principle was reviewed by the Assistant Deputy Minister, Indigenous Services Canada.

Upon review of each of the items submitted for [CHILD'S FIRST NAME], we are writing to formally notify you that the following items were denied [LIST THE ITEMS]. In making the decision, it was noted that [PRODUCT/SERVICE/SUPPORT] is [not available to all other children/ or is beyond the normative standard of care].

OR

Scenario 2: Decision letter delay and decision was communicated by Focal Point already:

On [DATE], your request for [CHILD'S NAME]'s [REQUEST DESCRIPTION] under Jordan's Principle was reviewed by the Assistant Deputy Minister, Indigenous Services Canada. We apologize for the delay in formally communicating the decision rendered on your request.

Further to this decision communicated to you by your regional Focal Point on [DATE], we are writing to formally notify you that the following items were denied [LIST THE ITEMS].
[PRODUCT/SERVICE/SUPPORT] is [not available to all other children/ or is beyond the normative standard of care].

*****continue below for all scenarios*****

Furthermore, in evaluating the request, an evaluation of [CHILD'S NAME] individual needs was undertaken, and consideration was given to whether the request should be provided to [ensure substantive equality in the provision of services to (CHILD'S NAME])/, to ensure culturally appropriate services to (CHILD'S NAME) / and/or to safeguard the best interest of (CHILD'S NAME)] . Unfortunately, it was determined that ADD DETAILS and your request of [DATE] is denied.

For more information on substantive equality, please see the attached document, which can also be found on our website.

Should you wish to appeal this decision, please submit a request in writing to your regional Jordan's Principle Focal Point contact within one (1) year of this written decision, who will work with you throughout the appeal process. Please include any new or additional information in your submission, however please note that new information is not required to request an appeal. Your regional Focal Point contact for the Department of Indigenous Services Canada, [XXXXX] Region is:

[NAME]
[POSITION]
Department of Indigenous Services Canada, [XXXX] Region
[(xxx) xxx-xxxx]
[Email]@canada.ca

Jordan's Principle is about helping to ensure all First Nations children have access to the same government-funded supports and services as other children, no matter where they live. For more information, please visit www.canada.ca/jordans-principle, contact your regional Focal Point, or call 1-855-JPCHILD (1-855-572-4453).

Sincerely,

CHAPTER 5 APPEALS

An appeals process may be initiated when a request has been denied for either individual and/or community/group requests.

Commented [VG2]: It is understood that this process will be replaced with a CCCW approved process in coming months.

5.1 APPEALS PROCESS

If a request is denied, the requester may appeal the decision by sending in a written request to the ISC Focal Point in their region within one year of the date of denial.

- At a minimum, the request for appeal should contain:
  - child's name and date of birth;
  - the product/service/support requested;
  - the date of denial and a copy of the denial letter; and
  - additional information (optional) may include assessments or information to assess **substantive equality**. *Note*: *new or additional information is not needed in order to initiate an appeal.*

When a decision is appealed, the request is reviewed by an appeals committee which does not include the person who reviewed the denial. The appeal decision will be provided to the requester in writing within 30 days of the request for appeal.

Requesters who have requests denied on appeal have the right to file to have the decision judicially reviewed by the Federal Court within 30 days of receiving the decision of the Appeals Committee.

5.2 WHO CAN SUBMIT AN APPEAL

An individual can appeal a decision on behalf on First Nations child, if they are:

- a parent/guardian of a First Nations child;
- a First Nations child at the age of consent[3] in their province or territory of residence; or
- an authorized representative[4] of the child /parent/or guardian.

[3] A child at the age of consent can make decisions on their own about the care necessary for their health.

[4] An authorized representative is a person (individual or business) that the requester has given written permission (authorized) to act on their behalf (represent) with respect to the Jordan's Principle request.

The National Coordinator arranges a meeting of the Appeals Committee within 30 days of receipt of the appeal.

5.3 APPEALS COMMITTEE

Appeals are considered by the Appeals Committee, which comprises:

- the Senior Assistant Deputy Minister of the FNIHB Sector, ISC; and
- the Assistant Deputy Minister of the ESDPP Sector, ISC.

In their absence, an alternate may be designated by the Committee member.

Under no circumstance may the individual who made the initial decision render a determination on the same request at the ADM Review and Appeals level.

5.4 AUTHORITY

Decisions of the Appeals Committee will replace the decision rendered at the ADM Review.

5.5 DECISIONS

Decisions of the Appeals Committee are rendered by the majority of the members. Decisions must be communicated to the requester in writing within 30 days of receipt of the requested appeal.

5.6 CONSIDERATIONS

In rendering its determination on appeal, the following factors will be considered by the Appeals Committee:

- whether the product/service/support is provided or funded by the government for any child in the relevant province;
- whether there is a gap in services between levels of government; and
- whether there is any information to support the provision of service to the child to ensure **substantive equality**.

5.7 RECORDING AND COMMUNICATING DECISIONS OF THE COMMITTEE

The Appeals Committee signs a record of its decision on the Review Template, outlining the rationale for its decision.

The National Coordinator communicates the appeal decision in writing to the requester within 30 days of the request for appeal.

5.8 REFERENCE

Appeals Process
Appeals Checklist
Appeals Committee Template
Appeals Decision Letter Template

APPEALS PROCESS

Responsible Party	Action Step
Regional Jordan's Principle Focal Point	1. Assesses the Appeal to ensure that it is received within one year of the date of the denial letter. 2. Notice of appeal is submitted to the National Coordinator by the Regional Focal Point, either in writing or phone. 3. Sends additional information to be considered by the Appeals Committee to the Jordan's Principle National Coordinating Team. Note: New or additional information is not needed in order to initiate an appeal.
Jordan's Principle National Coordinator	4. Arranges an Appeal Committee meeting within **30 days** upon receipt of the notice to appeal.
Jordan's Principle National Coordinating Team	5. Completes an Appeals Committee Template *to* support the Committee's deliberations, which outlines all salient details of the request and rationale for the initial denial, with denial letter attached.
Appeals Committee	6. Following a discussion of the case, a decision is rendered; the decision and a rationale for the decision is recorded on the Appeals Committee Template which is then signed by all members.
Jordan's Principle National Coordinating Team	7. The decision is communicated to the Regional Focal Point within 12 hours. 8. The appeal decision is communicated in writing to the requester within 30 days of the request for appeal.

APPEALS CHECKLIST

Jordan's Principle Appeals Checklist
Required Information from Requesters, Focal Points and National Coordinator

How to send an appeal to the Appeals Committee:

- Please send an email to JPCaseMgt-GestCasPJ@hc-sc.gc.ca with all the information in the checklist below
- Each email should contain one request (individual or group) and the subject should be the Case number as well as the text APPEAL (e.g. HC-AB-0500 APPEAL)

Information required from Requester	Information required from Focal Point	Information required from National Coordinating Team
☐ **Intake form:** ☐ Name of child ☐ Product(s)/Service(s)/Support(s) requested ☐ Date of denial ☐ Denial letter ☐ **Additional information included (note: this is optional)** ☐ Substantive equality information as provided by the requester ☐ Supporting documentation ☐ Any additional information not previously provided	☐ **Case number OR past Intake Form and attached documents**	☐ **Appeals Committee Template** ☐ **Substantive equality questions (as found on webpage)**

APPEALS COMMITTEE TEMPLATE

PROTECTED B

Appeal

Background Information on File (Note: all dates are YYYY/MM/DD)	
Date of Denial:	
Date of Appeal Request:	
Group Request (Y/N):	
Child's Name:	
Child's Date of Birth:	
Address/Community:	
Parent/Requester Name:	
Presentation to Appeal Committee (filled in electronically)	
Case Number:	**XX-XXX-XXXX-APPEAL**
Age:	
Child's Status:	
Medical diagnosis:	
Challenges/Needs identified:	
Product or service requested:	• **1)** • **2)**
Costs associated with each item:	• **1)** • **2)** **Total: $**
Within Normative Standards?	• 1) • 2)
Other relevant information:	
Request History:	
Supporting documents:	
Date of Appeal:	**2018-**
Decision:	
Rationale:	
Follow-up Action:	
Substantive Equality Consideration (Completed on hard copy of document)	
SE	o Information was requested and no response received; or Information was provided in relation to the following: o 1- Child has heightened needs as a result of historical disadvantage o 2- Failure to provide service perpetuates disadvantage as a result of race, nationality or ethnicity o 3- Failure to provide service results in child needing to leave home/community for extended period o 4- Failure to provide service results in child being placed at significant disadvantage in terms of ability to participate in educational activities o 5- Support ensures access to culturally appropriate services o 6- Support is necessary to avoid significant disruption in child's care o 7- Support is necessary in maintaining family stability re: risk of child being placed in care and caregivers being unable to assume caregiving responsibilities o 8- Individual circumstances of child's health condition, family, or community context lead to a different/greater need for services compared to other children o 9- Supports ability to serve, protect and nurture its children in a manner that strengthens resilience, healing and self-determination of family/community o Other:
Appeal Committee Decision and Signature (Completed on hard copy of document)	
Decision and Rationale: **Approved**	o Gap in government funded services o Strong supportive substantive equality information o Medical basis for request o Other:
Decision and Rationale: **Denied**	o No gap in government funded services o Lack of strong supportive substantive equality information o No medical basis for request o Other:
Appeal CommitteeHC-MB-0211 Signature:	_____

APPEALS DECISION LETTER TEMPLATE

[CHILD/PARENT/GUARDIAN]
[TITLE (if applicable)]
[ADDRESS]
[CITY, P/T POSTAL CODE]

[DATE]

Dear [PARENT/GUARDIAN/ADVOCATE]

Re: [Case Number]

On [DATE], you made a request to appeal the denial of [REQUEST DESCRIPTION] for your child, [CHILD'S NAME]. Your request, along with all submitted documentation, was reviewed by the Appeals Committee on [Date]. [IF DELAYED: We apologize for the delay in communicating the decision rendered on your request.]

The Appeals Committee for Jordan's Principle is comprised of the Senior Assistant Deputy Minister of the First Nations Inuit Health Branch, and the Assistant Deputy Minister of the Education and Social Development Programs and Partnerships Sector, of Indigenous Services Canada.

Following its review, we **[regret/would like]** to inform you that the Appeals Committee determined that your request **[cannot be/is]** approved under Jordan's Principle. In making its decision, the Committee noted that [PRODUCT/SERVICE/SUPPORT] **is (not)** available to all other children/ or is (not) beyond the normative standard of care].

Furthermore, evaluating the request, an evaluation of [CHILD'S NAME] individual needs was undertaken, and consideration was given to whether the request should be provided to [ensure substantive equality in the provision of services to (CHILD'S NAME])/, to ensure culturally appropriate services to (CHILD'S NAME) / and/or to safeguard the best interest of (CHILD'S NAME)]. **(Unfortunately),** it was determined that ADD SPECIFIC DETAILS . Therefore the denial of [DATE] is **[upheld/overturned].** For more information on substantive equality, please see the attached document, which can also be found on our website.

Jordan's Principle is about helping to ensure all First Nations children have access to the same government-funded supports and services as other children, no matter where they live. We encourage you to submit requests for products, services and supports for First Nations children in need who are experiencing gaps in government services.

For more information on Jordan's Principle, please visit www.canada.ca/jordans-principle, contact your regional Focal Point, or call the Jordan's Principle National Call Centre at 1-855-JPCHILD (1-855-572-4453).

Sincerely,

CHAPTER 6 : PAYMENTS FOR SERVICE REQUESTS

6.1 FINANCIAL CLAIM PROCESS

The financial claims process for Jordan's Principle has been created to expedite payments and to ensure that financial controls are in accordance with the Financial Administration Act. Key documents for Focal Points include:

- a process map outlining the step-by-step process and the roles and responsibilities of various actors in processing financial claims;
- the Financial Case Overview Form which reconciles the approval of requests, with the required financial approvals; and
- the GC 80-1 form which is required for the requisition of payment by the Accounting Operations pay hubs.

This process supported by the completion of the listed forms, must be followed for Jordan's Principle payments to be made.

6.2 ADVANCE PAYMENT PROCESS

An advance payment is defined as: a payment made by or on behalf of Her Majesty before the work, delivery of the goods, or rendering of the service has been completed.

When is a payment an "advance payment"?

A payment is considered to be an advance payment only when it is issued before any goods have been received or before any services have been rendered. A payment made after partial completion of the work or when a specific milestone is met is considered a progress payment, not an advance payment.

Advance payments and Jordan's Principle

When it is not possible to arrange the provision of goods or services with the supplier, or when the payment cannot be made by the recipient, an advance payment may be considered in **exceptional circumstances** AND when all the following factors exist:

- the payment is considered essential to attaining program objectives to comply with the CHRT orders;
- no other reasonable alternative exists to comply with the orders of the Canadian Human Rights Tribunal issued on May 26, 2017 (2017 CHRT 14) as amended on November 2, 2017 (2017 CHRT 35); and
- the payment is in accordance with a contract, agreement or legislation.
    - For Jordan's Principle, an agreement between the claimant or third party and the department attesting to the validity of provision of products/services which require advance payment is acceptable.

Where advance payments are warranted, the amount of any such advance made in any particular fiscal year shall not exceed the value of the goods or services received in that fiscal year.

A detailed guide has been created to guide this process for Regions and can be found in Section 6.5 - Reference . Listed below are the steps that Focal Points should follow to have an advance payment issued:

1) Enter into a signed written agreement between the claimant / third party and ISC attesting to the validity of provision of products/services. Only someone with the appropriate delegated FAA authority can sign on behalf of ISC. Please refer to the Health Canada Delegation of Financial Signing Authorities Matrix for guidance.
2) Ensure appropriate receipts for the incurred expenses are included.
3) Submit the agreement and financial information to the HUB to make the payment.
4) Print a copy of all documentation, including the written agreement and receipts, and save to hard and electronic file.

This process follows the Treasury Board Directive on Payments (refer to Section 4.1.1 after accessing hyperlink).

6.3 PAYMENTS FOR REQUESTS BEYOND MARCH 31, 2019

Jordan's Principle is a legal requirement that Canada will continue to implement. In order to ensure this is done, Canada will implement a payment process in order to address any existing requests for services whose term extends beyond March 2019.

6.4 CONTRIBUTION AGREEMENTS

6.4.1 FUNDING AGREEMENT PROCESS

Jordan's Principle –Child First Initiative Service Coordination Objectives and Activities

Context:

On January 26, 2016 the Canadian Human Rights Tribunal (CHRT) found that Canada's failure to ensure First Nations children can access government services on the same terms as other children via a mechanism known as Jordan's Principle was discriminatory and contrary to the law (http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/127700/1/document.do).

2017 CHRT 14 On May 26, 2017 the Tribunal issues the third compliance orders http://decisions.chrt-tcdp.gc.ca/chrt-tcdp/decisions/en/item/232587/index.do

- Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in previous decisions;
- Canada's definition and application of Jordan's Principle shall be based on the following principles:

i. Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete short-term issues creating critical needs for health and social supports or affecting their activities of daily living.

ii. Jordan's Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy.

iii. When a government service is available to all other children, the government department of first contact will pay for the service to a First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is

provided, the government department of first contact can seek reimbursement from another department/government;

iv. When a government service is not necessarily available to all other children or is beyond the normative standard of care, the government department of first contact will still evaluate the individual needs of the child to determine if the requested service should be provided to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services to the child and/or to safeguard the best interests of the child. Where such services are to be provided, the government department of first contact will pay for the provision of the services to the First Nations child, without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided. Once the service is provided, the government department of first contact can seek reimbursement from another department/government.

v. While Jordan's Principle can apply to jurisdictional disputes between governments (i.e., between federal, provincial or territorial governments) and to jurisdictional disputes between departments within the same government, a dispute amongst government departments or between governments is not a necessary requirement for the application of Jordan's Principle.

Goals:

1. To implement service coordination functions for First Nation children and their families by providing families of First Nations children with a knowledgeable resource to help them access health, education and social supports through Jordan's Principle; to contact Indigenous Services Canada on behalf of such children and their families, and to navigate existing federal and provincial/territorial health, social, and educational programs and services to address a child's needs.

Objectives:

2. In order to support Jordan's Principle – A Child First Initiative under the terms and conditions of the Agreement, the Recipient shall carry out the activities set out in Section 4 of this Schedule to achieve the following objectives:

i. Promote Jordan's Principle to families, communities and service providers and encourage children with unmet needs and their families to secure access to needed services and supports and to submit requests to ISC Focal Points on behalf of such children and their families.

ii. Nurture relationships across community-based programs and services; service providers; and First Nations, federal, provincial and territorial programs and services and identify/develop possible models of service delivery that will improve timely access to services for First Nations children living in or outside their communities;

iii. Where families may require assistance, assist them in identifying service providers to support children's access to quality and culturally appropriate health, social and educational services and supports across all stages and levels of care;

iv. Support data collection and analytical activities to better understand the scope of children's needs and nature of service gaps, such as by distributing annual client surveys provided by Indigenous Services Canada.

Provider Qualifications:

3. Where the Recipient engages the services of:

   (1) A health, social or educational (if applicable) service provider, for the purposes of fulfilling any of the terms and conditions of this Schedule, the Recipient shall ensure that the provider is a registered member in good standing of the college or professional association applicable to the provider's profession, and that the provider is entitled to practice his or her profession in accordance with the laws of the province where the care is to be provided.

   (2) A community-based worker or cultural practitioner for the purposes of fulfilling any of the terms and conditions of this Schedule, the Recipient shall ensure the provider is qualified to carry out the activities within their area of practice.

Activities:

4. In order to carry out the Objectives, the Recipient shall undertake the following activities:

1) Visit First Nation communities and meet with service providers and organizations to promote awareness of and access to Jordan's Principle;
2) Encourage and support families to bring forward their cases to ISC Jordan's Principle focal points to seek Service Access Resolution funding from Indigenous Services Canada by way of:
   a. Encouraging children and families to authorize the Recipient to submit their cases on their behalf; or
   b. Encouraging and assisting families to apply themselves if they prefer to do so and to offer to assist them in such cases;

   In both cases, Jordan's Principle claims may be submitted to regional ISC Jordan's Principle focal points via using the toll-free 24/7 line: 1-855-JP-CHILD (1-855-572-4453); TTY 1-866-553-0554; or by visiting: www.canada.ca/jordans-principle;

3) Where families are experiencing difficulties accessing service providers, collaborate with and identify opportunities to build relationships across all aspects of the health, social and education services systems, including First Nations, federal, provincial and territorial services and programs; service providers, and communities to facilitate access to needed services and supports;

4) Work with First Nation communities to proactively identify children with unmet needs to facilitate early intervention and timely access to services and supports;

5) Undertake follow-up with clients/families and key contacts to ensure the child is receiving and maintaining the services required;

6) Identify and work collaboratively with federal, provincial, territorial, regional and community partners to implement promising practices and evidence-based models, service arrangements and supports, where possible;

7) Promote service access where culture is reflected in care where First Nations people are treated with respect, compassion, and cultural understanding, and assist to build cultural competency within the region and broader health, social, education and other systems;

8) Collect information and support case coordination with Jordan's Principle focal points to ensure seamless transition of cases, and assist Indigenous Services Canada in distribution of annual client surveys and the conduct of Jordan's Principle evaluations.

Program Delivery Requirements:

5.

(1) Communications coordination: In accordance with the communications clause of the main body of this Agreement, the Recipient shall ensure that it first discusses with Canada any significant public communication materials that it intends to issue regarding Jordan's Principle or the Jordan's principle – Child First Initiative program, in order to provide Canada with an opportunity to comment or participate in the development of those materials. The Recipient shall also ensure that such materials are consistent with the orders of the Canadian Human Rights Tribunal and the full definition of Jordan's Principle currently found at https://www.canada.ca/en/indigenous-services-canada/services/jordans-principle/definition-jordans-principle-canadian-human-rights-tribunal.html.

(2) Employee Training: The Recipient shall ensure that its employees working on the activities set out in this Schedule understand Jordan's Principle, including the rulings of the Canadian Human Rights Tribunal, and will provide training to its employees for this purpose.

(3) Immediate Referral to ISC: The Recipient shall ensure that its service coordination functions do not delay the submission of requests from families/children/service providers for access to Jordan's Principle. Requests should not be triaged, unnecessarily case managed or deemed ineligible by the Recipient. Subject to Subsection (4), all requests should be submitted immediately directly to Indigenous Services Canada.

(4) Consent: The Recipient shall ensure that it has oral or written consent of families or guardians of children (or children themselves if they have capacity to consent) before submitting personal information of children to ISC Focal Points on their behalf.

Program Requirements:

5. The Recipient shall submit reports to the regional office of Indigenous Services Canada (First Nations and Inuit Health Branch) as follows:

(1) Within 45 days following the last day of September an interim report that includes:

Quantitative data:

(a) Total number of First Nation communities served;

(b) Total number of requests referred by the Recipient on behalf of First Nation children and their families to regional Jordan's Principle focal point for Service Access Resolution funding;

(c) Total number of requests referred by the children or their families with the assistance of the Recipient to regional Jordan's Principle focal point for Service Access Resolution funding;

(d) Number of children living on and off-reserve by type of services/supports received through service coordination.

(2) Within 120 days after March 31st, or after the end of the activity (ies) whichever occurs first, an annual report that includes:

Quantitative data:

(a) See above indicators

Qualitative data:

(b) Description of activities undertaken to reach out and identify potential service coordination clients to improve the situation for families;
(c) Examples of how the relationships built across health and social systems and levels of government facilitated better access for clients and how the knowledge gained from this function will help improve service access for future clients;
(d) Description of opportunities used to build cultural competency within the broader health, social, education and other systems or provide culturally appropriate and safe care for clients;
(e) Qualitative information on achievement of objectives and activities, including as appropriate, successes, barriers, challenges, future needs, etc. including any success stories of families served.

Record Keeping Requirements:

6. The Recipient shall maintain the following information on file and make it available upon request for review and audit where children and their families consented to such disclosure to Canada:

(1) Client information (name; date of birth; name of community; place of residence (on reserve or ordinarily resident on reserve); Indian Registration Number (if available); province/territory; contact information;

(2) Services/supports provided (by child; date of services; type of service/support);
(a) Referrals to regional Jordan's Principle focal point for Service Access Resolution funding (by child); and
(b) Cases where the Recipient assisted children and their families to make their own referrals.

6.5 REFERENCE

Process Map	Annex A -Jordan's Principle Financial Clai Annex A -Jordan's Principle Financial Clai
Financial Case Overview Form	Annex B -Case overview (E) -ED app Annex B -Case overview (F) -ED app
GC-80-1 Form	GC80 Jordan's Principle with Attestat GC80 Jordan's Principle with Attestat GC80 Jordan's Principle with Attestat GC80 Jordan's Principle with Attestat
Advanced Payment Process Guide	Guide on Advanced Payments.docx
Advanced Payment Process Tools	direct_deposit_enrollment_form_vendors. Jordan's Principle Claim Declaration For JP INVOICE Template.docx

Commented [MS3]: Sent to BSFO for review. Awaiting feedback.

Commented [MS4]: Sent to BSFO for review. Awaiting feedback.

CHAPTER 7 : LEGAL PRINCIPLES/FRAMEWORKS

7.1 SUBSTANTIVE EQUALITY

Jordan's Principle – Substantive Equality Principles

This document was developed as a tool to help build understanding, and provide practical guidance, to assist in the operationalization of substantive equality across the country in the context of ensuring Canada's full implementation of Jordan's Principle. This document remains evergreen and will be periodically updated to ensure that it remains relevant and is aligned with Government of Canada priorities.

7.1.1 WHAT IS SUBSTANTIVE EQUALITY?

Substantive equality is a legal principle that refers to the achievement of true equality in outcomes. It is achieved through equal access, equal opportunity, and, most importantly, the provision of services and benefits in a manner and according to standards that meet any unique needs and circumstances, such as cultural, social, economic and historical disadvantage.

Substantive equality is both a process and an end goal relating to outcomes that seeks to acknowledge and overcome the barriers that have led to the inequality in the first place.

When substantive equality in outcomes does not exist, inequality remains.

Achieving substantive equality for members of a specific group requires the implementation of measures that consider and are tailored to respond to the unique causes of their historical disadvantage as well as their historical, geographical and cultural needs and circumstances. First Nations children have experienced historical disadvantage due to Canada's repeated failure to take into account their best interest as well as their historical, geographical and cultural needs and circumstances. For this reason, substantive equality for First Nations children will require that government policies, practices and procedures impacting them take account of their historical, geographical and cultural needs and circumstances and aim to safeguard the best interest of the child as articulated in the United Nations Committee on the Rights of the Child General Comment 11.

7.1.2 WHAT IS CANADA'S OBLIGATION UNDER JORDAN'S PRINCIPLE WITH RESPECT TO SUBSTANTIVE EQUALITY?

Pursuant to the CHRT May 26, 2017 decision as amended, the Government of Canada is to ensure substantive equality in the provision of services to the child, to ensure culturally appropriate services and to safeguard the best interests of the child.

This requires Canada to provide all First Nations children, on and off reserve, with publicly funded benefits, supports, programs, goods and services in a manner and according to a standard that meets their particular needs and circumstances.

7.1.3 HOW DOES SUBSTANTIVE EQUALITY APPLY TO JORDAN'S PRINCIPLE?

Substantive equality is an overarching legal obligation that must guide the interpretation and implementation of Jordan's Principle. The key values identified in the Touchstones of Hope, as outlined below, are to be respected to achieve substantive equality in the provision of services, products and supports, under Jordan's Principle:

Self-Determination

First Nations Peoples are in the best position to make decisions that affect First Nations children, youth, families and communities. First Nations Peoples must meaningfully participate in the development and implementation of Jordan's Principle on a regular and ongoing basis.

Culture and Language

Culture and language are the foundations of health and well-being for First Nations Peoples. Jordan's Principle recognizes this and requires that approved products, services and supports are culturally appropriate.

Holistic approach

The holistic needs of a child must be met. These needs will be informed by historical and cultural factors, such as residential schools, intergenerational trauma, colonization, racism and intersectional discrimination. Products, services, and supports must meet the needs of the child in the context of his/her family and community and be child-centred, focused on promoting the health and well-being of the child's mind, body, spirit and emotions.

Structural interventions

Jordan's Principle requires the eliminating of systemic barriers that have resulted from racism and colonialism by challenging the existing systems to fully meet the needs of First Nations children.

Non-discrimination

Non-discrimination underlies Jordan's Principle by ensuring that First Nations children receive the products, services and supports they need regardless of where they live. It challenges historical practices and structural barriers and strives for equal access to health, social and educational systems in order to achieve equal outcomes.

7.1.4 UNDERSTANDING SUBSTANTIVE EQUALITY

Substantive equality is the recognition that not all people start off from the same position, and that these unequal opportunities make it more difficult for some to be successful.

Treating everyone the same is only fair if they are starting from the same position.

Substantive equality seeks to address the inequalities that stem from an individual's particular circumstances, to help put them at the same position as others.

7.1.5 APPLYING SUBSTANTIVE EQUALITY

In an effort to offer some clarity, the following examples are being provided to demonstrate how substantive equality should be considered upon further review of a request:

Request for clothing and footwear

A request was submitted for clothing and footwear for a school-age child with a specific diagnosis. This condition resulted in damage to the child's clothing and footwear on a much more frequent basis beyond the typical wear and tear expected. Upon review of the request, it was determined that the frequency of the clothing and footwear replacements due to the child's condition resulted in financial hardship to the family. In their efforts to meet the child's needs, the family incurred unexpected and elevated clothing costs. Due to substantive equality, the clothing and footwear costs were covered by Jordan's Principle.

Request for air transportation

A request was submitted by a family to attend a series of workshops for parents with children with special needs and transportation to and from the workshops. The requests for the workshops and transportation costs by car were approved. Following the approval, the family requested funding to cover the cost of air travel to attend the workshops since the family lived several hundred miles from where the workshops were being held. Upon review of the request for air travel, it was determined that the distance was too far for the family to travel by car. To ensure substantive equality in the provision of services to the child, Jordan's Principle provided funding to the family to cover air transportation to attend the workshops.

7.1.6 ASSESSING REQUESTS VIS-A-VIS SUBSTANTIVE EQUALITY

Service needs will continue to be assessed first against normative standards. However, in assessing whether a service should be provided, the following questions serve as guidance to help achieve substantive equality.

When considering requests, please take into account the specific needs of the child such as:

1. Does the child have heightened needs for the service in question as a result of an historical disadvantage?
2. Would the failure to provide the service perpetuate the disadvantage experienced by the child as a result of his or her race, nationality or ethnicity?
3. Would the failure to provide the service result in the child needing to leave the home or community for an extended period?
4. Would the failure to provide the service result in the child being placed at a significant disadvantage in terms of ability to participate in educational activities?
5. Is the provision of support necessary to ensure access to culturally appropriate services?
6. Is the provision of support necessary to avoid a significant interruption in the child's care?

"It is about the Aboriginal perspective; picture yourself in the community, and see it [the request] from that perspective"

October 30, 2017 interview with Justice Mandamin

7. Is the provision of support necessary in maintaining family stability, as indicated by:
    - the risk of children being placed in care; and/or
    - caregivers being unable to assume caregiving responsibilities?

8. Does the individual circumstance of the child's health condition, family, or community context (geographic, historical or cultural) lead to a different or greater need for services as compared to the circumstances of other children (e.g., extraordinary costs associated with daily living due to a remote location)?

9. Would the requested service support the community/family's ability to serve, protect and nurture its children in a manner that strengthens the community/family's resilience, healing and self-determination?

7.2 MANAGEMENT CONTROL FRAMEWORK[5]

Through Jordan's Principle Canada aims to address the circumstances underpinning the rulings of the CHRT and fundamentally to advance the interests of First Nations Children and in this way, facilitate positive systemic change in how health services are delivered to First Nations children.

While protecting and advancing the interests of First Nation's children, Canada also has a responsibility to manage in a way that respects its stewardship responsibilities and compliance with legislative and policy requirements.

Accordingly, processes and controls must be in place to ensure that Canada is able to meet its legislative and policy obligations, while complying with the CHRT orders to address the unmet needs of First Nations children.

To address these obligations, a Management Control Framework was developed, identifying a series of objectives, and associated actions.

7.2.1 RECONCILIATION & RELATIONSHIP BUILDNG

Reconciliation and Relationship Building is the initiative's basic mission and vision and is tied to the government of Canada's priorities related to enabling and reconciling with Indigenous peoples. This includes building reciprocity and trust by working with First Nations, provinces, territories, federal departments and other partners

Expectations:

- **First Nations Capacity-building and Support:** The organization has in place mechanisms to support First Nations in building their capacity for service delivery related to Jordan's Principle activities.
- **Reflection & Integration Mechanisms:** The department has formal mechanisms to reflect on and integrate the service experience and the solutions of First Nations into the design and delivery of services.
- **Engagement:** Formally established mechanisms are in place to collaborate with and gain meaningful input from the users of Jordan's Principle-related services on their service experience.

7.2.2 OPERATIONAL OBJECTIVES

Operational objectives relate to the achievement of service delivery, stewardship, accountability and the effective management of resource goals.

[5] *Jordan's Principle- A Child First Initiative Management Framework*, August 2018, by Murray Management Consulting & Wind Reach Consulting Services Inc.

This requires the implementation of internal controls to provide reasonable assurance that the initiative's operations will be carried out as intended and that program assets (including financial, human, informational and reputational assets) are safeguarded, in support of sustainable, value-added service to children.

Expectations:

- **Financial Management Policies** - Financial management policies are documented and communicated
- **Guidance** - Staff have the necessary guidance to support them in executing their financial management roles and responsibilities
- **Roles, responsibilities and accountabilities -** Roles, responsibilities and accountabilities for the financial management of Jordan's Principle-CFI are clear and well understood.
- **Payments processing -** processing of Jordan's Principle -CFI payments is timely and consistent with the established process
- **Direct Funding Requests** -Individual requests for products/services to be funded under JORDAN'S PRINCIPLE-CFI by the department directly, are consistently reviewed, assessed and decided up within prescribed timelines
- **Business continuity-** business continuity planning processes support the uninterrupted delivery of Jordan's Principle-CFI
- **Contribution Agreements**- Group Requests and service coordination funded Contribution Agreement are reviewed, assessed and decided up on a timely basis
- **Performance Assessment**: The organization has in place a system for the performance evaluation of employees.
- **Departmental Capacity:** Sufficient (human) resource capacity exists to ensure operational continuity and employee well-being.
- **Competency Management:** The organization has identified its required competencies for key roles and has mechanisms in place to ensure the full set of competencies are established and maintained.
- **Governance Bodies**: Effective and informed governance bodies exist to allow for the discussion, setting and monitoring of directions (policy, priorities or plans), decisions and results.
- **Communications**: Open, defined and effective channels exist for internal and external communications, in support of decision-making, coordination, feedback and oversight, awareness, coordination and reporting.

7.2.3 REPORTING OBJECTIVES

Reporting objectives pertain to the preparation of reports for use by organizations and program stakeholders, including both internal and external financial and non-financial reports.

Expectations:

- **Financial forecasting -** Financial forecasts for Jordan's Principle-CFI are closely monitored throughout the year and resources reallocated/re-profiled as required
- **Financial Reporting and Monitoring -** Financial reporting is timely, complete and accurate (internal reporting in support of monitoring/decision making and external reporting in support of accountability)
- **Internal and External Reports:** Appropriate, reliable and timely financial and non-financial reporting is developed and communicated internally and externally.
- **Financial and Operational Monitoring:** Jordan's Principle - CFI has efficient and meaningful mechanisms to monitor its financial and operational performance at the regional and national levels.
- **Recipient Reporting -** Process in place to follow-up on Jordan's Principle-CFI recipient reporting not received on a timely basis
- **Financial forecasting -** Financial forecasts for Jordan's Principle-CFI are closely monitored throughout the year and resources reallocated/reprofiled as required

- **Budgetary Management -** Budgets are established and managed in accordance with departmental frameworks and policies
- **Information systems** - Information systems and electronic tools are in place and consistently operationalized to meet information and reporting needs.
- **Data collection** - Data and information is collected to support the management of the Jordan's Principle-CFI and accountability reporting.

7.2.4 COMPLIANCE OBJECTIVES

Jordan's Principle must operate in accordance with a range of legal, regulatory, policy and other compliance requirements, including the orders of the Canadian Human Rights Tribunal, the *Financial Administration Act*, the *Access to Information and Privacy Acts*, and Treasury Board directives and policies . The suite of compliance requirements establish the minimum requirements of conduct and as such, management has put in place internal controls that help to enable compliance.

Expectations:

- **Monitoring of Compliance:** Mechanisms exist to monitor conformity with key compliance requirements, including policies, legislative requirements and the orders of the CHRT
- **Privacy -** Mechanisms are in place to support the privacy and confidentiality of First Nations children
- **Independent review and advice**: Mechanisms are in place to independently review the management practices and long-term results.
- **Fraud detection -** Mechanisms are in place to support the detection of fraud within Jordan's Principle-CFI
- Mechanisms are in place to enable corrective action when material variances are noted.
- **Monitoring of End Results:** Mechanisms exist to follow up and confirm that products and services are delivered as intended, with the intended results.
- **Post-Payment verification:** Direct payments under Jordan's Principle-CFI are reviewed and verified to ensure compliance with established processes, policies and legislative requirements**.**
- **Data retention and disposition-:** Jordan's Principle **-** CFI manages its data in manner that is compliant with departmental and OCAP requirements
- **Delegations of Authority:** Delegations of authority are established for Jordan's Principle -CFI consistent with legislative and policy requirements

7.2.2. REFERENCE

Management Control Framework Briefing	Management Framework - FINAL D Management Framework (F) - Draf
Management Control Framework Action Plan	To follow in coming weeks.

From: Cindy Blackstock <cblackst@fncaringsociety.com>
Sent: Tuesday, August 21, 2018 12:12 PM
To: valerie.gideon@canada.ca; bonnie.beach@canada.ca; Jonathan Thompson; keith.conn@canada.ca; David Taylor; Sarah Clarke; paula.isaak@canada.ca
Subject: Concerns with Canada's Compliance with CHRT Orders on Jordan's Principle.pdf
Attachments: Concerns with Canada's Compliance with CHRT Orders on Jordan's Principle.pdf; ATT00001.c

Hello

Please find attached a final version of the Caring Society's observations regarding Jordan's Principle cases that are coming to our attention.

The remedies are not exhaustive and are made in the spirit of proactive problem solving. The matters regarding improper use of "gaps" for denials, lack of proper identification, backlog at HQ and processing of urgent cases and the issues with group requests are particularly problematic.

I am requesting that DISC respond to the issues raised in this document as they are all linked to CHRT decisions.

Thanks
Cindy

Concerns with Canada's Compliance with CHRT Orders on Jordan's Principle

August 20 2018

First Nations Child & Family Caring Society of Canada

www.fncaringsociety.com

1. Substantive Equality

a. Canada is requiring a substantive equality report to be completed for every case regardless of the child's circumstances. These reports are not necessary in some cases and the reports take a significant amount of time to complete and can delay service provision.

b. More specifically, a substantive equity analysis does not need to be applied when: i) it is clear and obvious on the facts that substantive equality applies (i.e.: a former child in care struggling with mental health issues) or ii) there is a clear service need (i.e.: child needing medical equipment to breathe).

c. Canada's practice of requiring substantive equality reports in every case can be highly problematic. For example, a service coordinator submitted a case in the summer of 2018 requesting equipment to assist a child who had difficulty breathing in humid conditions; Canada insisted on having a substantive equality report before making a decision on the case. The initial request had a doctor's note detailing the child's condition and the equipment that would remedy his breathing problems. Canada's requirement for additional information, as well as submitting a substantive equality report, involved time delays over which time the child went into increased medical distress. The service coordinator kept pressing Canada to provide the equipment, emphasizing the deterioration of the child's condition given the hot and humid summer. It took over four weeks before Canada approved what should have been immediately classified as an urgent case.

d. Requests are being denied on the grounds that family or navigators have failed to demonstrate how substantive equality applies. Focal Points appear to be operating on the assumption that it is the job of families/navigators to demonstrate substantive equality, when in fact this responsibility lies with Canada.

Possible Remedies:

e. Focal Points should begin with the assumption that substantive equality will apply in cases, so that the burden is on Canada to demonstrate why substantive equality does not apply.

f. Focal Points should be given clearer guidance on when it is unnecessary to collect information on substantive equality and to apply the substantive equality analysis.

g. It should also be clear that the burden to prove "substantive equality does not apply" rests with Canada. It is not up to children, families or the service coordinators to prove that "substantive equality does apply." Requests cannot be returned on the grounds that the family/navigator has failed to demonstrate substantive equality. Rather, it is the responsibility of the Focal Point (or Headquarters) to demonstrate, clearly, why substantive equality does not apply.

h. In cases where the request is denied on other grounds (i.e. not medically necessary), the Focal Point can then undertake a substantive equality report to determine whether the service should be provided on this basis – keeping in mind that the burden rests on Canada.

2. Best Interests

a. While Focal Points concentrate on getting information from service coordinators on substantive equality, there is no evidence that they are considering the child's best interests in decision making or in the process applied to requests.

Possible Remedies:

b. Canada needs to develop and train Focal Points on the best interests of the child and ensure that all decisions and processes used for Jordan's Principle cases meet the best interests test.

3. Focal Point Information Requests

a. Focal Points are often asking service navigators questions on cases that are already answered in the original submission. It appears to the navigators that Focal Points are not always carefully reading the submissions and thus, delaying the processing of cases.

b. It appears that requests for information are sometimes linked to changes or turnover in Focal Points. The Caring Society is concerned that information provided by families or navigators to one Focal Point may not be passed on to subsequent workers when staff changes occur.

c. Focal Points do not have a practice of asking for all relevant information at one time. Instead, it is not unusual for a Focal Point to ask for one piece of information and days later ask another question that could have been easily posed in the first contact. The lack of complete information requests and delays between information requests mean that the child's case is not being responded to within the CHRT timeframes.

Possible Remedies:

d. Focal Points need to carefully read all material submitted to them and only ask for additional information if it is REQUIRED to determine the case.

e. Requests for information from Focal Points should be made at one time and not staggered so as to avoid time delays.

f. Canada needs to take measures to ensure its information gathering is absolutely necessary to make a determination of the "requestors needs" and does not amount to an administrative procedure that delays services to children. More specifically, Canada must comply with 2017 CHRT 35 (amended orders):

   i. [3]b.ii. ii. Where clinical case conferencing is reasonably necessary to understand a First Nation's child's clinical needs, and where professionals with relevant expertise are already involved in the First Nations child's case, those are the professionals that must be consulted (p. 2)

   ii. [135]B.iii. "… Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified (p. 5-6)

4. Routine Referrals to Headquarters

a. Focal Points are routinely referring the vast majority of cases to Headquarters (HQ) and this results in determination delays that exceed the CHRT ruling. The reason for the referrals are not well understood and there appears to be no official criteria for screening cases at the region.

b. We were recently advised that all medication requests are to be sent to HQ.

c. Focal Points seem to have little control in ensuring timely resolution of cases once requests have been sent to HQ.

Possible Remedies:

d. There must be criteria that clearly state that referrals to HQ are made only when a determination cannot reasonably be made at the regional level and there should be documentation of the reasons.

e. The systematic tracking of reasons why the decision cannot be made at the region should be reviewed regularly to identify and address any systemic barriers to CHRT compliance.

f. Referrals to HQ do not absolve Canada of its CHRT time requirements. HQ needs to develop a method to determine cases within the CHRT guidelines.

5. Privacy Concerns

a. The Caring Society has raised concerns about the apparent lack of protections for the Privacy of Information in Canada's Jordan's Principle process. We have been advised that in one case, a Focal Point in Ontario "lost" a client's file and in Atlantic Region, cases (with identifying information) are being shared with GOC personnel who do not have a direct role in determining Jordan's Principle cases. Canada has previously shared that it is following the Privacy Act and other internal guidelines, but processes appear to vary by region and the actual implementation of the Act and guidelines remains unclear.

Possible Remedies:

b. Canada must publicly share its procedures for protecting the privacy rights of children and families in Jordan's Principle cases including ensuring that identifying information is not shared with GOC personnel who are not directly charged with the determination of Jordan's Principle cases. These same procedures should be shared with the CCCW committee.

c. All Focal Points and other GOC staff charged with receiving and determining Jordan's Principle cases must be trained on, and held accountable for, ensuring privacy rights are respected.

6. Lack of a Procedure for Identifying and Responding to Urgent Cases

a. As raised at the JPOC meetings, the Caring Society noted its concern at the low rate of "urgent" cases identified by personnel at the 24 hour line (one case since the line was implemented). We suspected this was a significant under-representation of urgent cases (per the CHRT order). From August 13-17, 2018, at least two urgent cases that were not treated as urgent by Canada were referred to us. The first is the case discussed in section (1), where it should have been clear and obvious to the Focal Point that a child who is having difficulty breathing should be classified as an urgent request. The second case involved a child with autism who focuses on rotating circles (i.e.: motor vehicle wheels) and thus, the family requested a fence to keep the child safely in the yard to stop him from running into traffic. In the original referral made in October of 2017, the service coordinator included a physician's note confirming the autism diagnosis and the grandparent/parent reports of the child going into traffic or under cars was relayed to the Focal Point. The Focal Point, however, insisted on an assessment linking the request for a yard fence with the autism however, it was relayed to the Focal Point that such assessments are not easily accessed in the community. The Focal Point continued to make information requests instead of responding to the immediate safety need of the child. On August 16, 2018 the child's grandfather wrote an email reporting that the child had dashed toward the tires of a large vehicle but was thankfully caught in time.

Cindy Blackstock brought this case immediately to HQ official's attention stressing that she viewed this as an urgent case per the CHRT and HQ, in turn asking the region to take action. In response, the region sent a request to the service coordinator for five pieces of information and made no provisions for the child's immediate safety. The Focal Point's email was forwarded to Dr. Blackstock and she, in turn, forwarded it to an HQ official who then said the region would follow up in the morning to see what interim safety arrangements could be made.

Dr. Blackstock then had to stress this was unacceptable and not in compliance for an urgent case where a child's safety is clearly at risk. She made clear that the Caring Society's expectation is that Canada immediately approves the fence and any remedial measures, and that the fence construction not be forestalled due to the Focal Point's information needs expressed earlier that day. HQ agreed. The service coordinator informed the family that night so the family could go to the hardware store to see if any interim measures could be employed.

These cases clearly demonstrates that there is either: 1) no process for identifying or managing urgent cases; 2) the processes that exist are inadequate and in both cases, could have resulted in a tragic outcome; and/or 3) there is no effective monitoring system to ensure that cases are classified as urgent or non-urgent properly.

Possible Remedies:

b. Canada to immediately issue direction to Focal Points to screen all cases to determine and record whether they meet the criteria for urgent cases (i.e.: any reasonable belief that irrevocable harm may come to a child). This must include reminding all Focal Points and persons staffing the 24 hour line of the CHRT provisions regarding urgent cases (and a reminder this applies to all First Nations children, not just those that Canada interpreted as eligible, per Canada's commitment to the Tribunal). This should be immediately signed by a supervisor and if classified as non-urgent, reasons should be appended.

c. Where there is doubt, focal points and 24 hour line staffers should default to the urgent classification.

d. Canada to review all existing cases to identify any cases that should be classified as urgent but have not been.

e. A tracking system for urgent cases needs to be developed and there needs to be a process for continuing to work on urgent cases after business hours.

7. Over-riding Professional Treatment Plans

a. There are situations where licensed professionals deem a service necessary as a part of a child's safety or treatment plan that are over-ruled by Canada even on appeal. For example, a team of nine professionals noted that a high risk youth's participation in hockey (cost $1800) was a key part of the youth's health and safety plan. Canada rejected the application because it was not a "gap" in service. The case was also denied because Canada stated the youth already had hockey equipment; the youth's equipment included a helmet held together with duct tape and skates with no blades. This information was repeated to Canada but there is no evidence that the dire condition of his equipment was ever taken into consideration. There is also no evidence that the Focal Point or the person reviewing appeals had the credentials or training to challenge or ignore the treatment plan proposed by the professional team treating the child. The GOC proposed no alternative to meet the youth's needs.

b. There seems to be a theme when it comes to the Focal Points delaying Jordan's Principle services for reasons of requiring additional or "better" proof of need. The Caring Society believes this could be considered case conferencing, in which case, according to 2017 CHRT 35 (amended orders):

   i. [3]b.ii. ii. Where clinical case conferencing is reasonably necessary to understand a First Nation's child's clinical needs, and where professionals with relevant expertise are already involved in the First Nations child's case, those are the professionals that must be consulted (p. 2);

ii. [135]B.iii. "… Canada may only engage in clinical case conferencing with professionals with relevant competence and training before the recommended service is approved and funding is provided to the extent that such consultations are reasonably necessary to determine the requestor's clinical needs. Where professionals with relevant competence and training are already involved in a First Nations child's case, Canada will consult those professionals and will only involve other professionals to the extent that those professionals already involved cannot provide the necessary clinical information. Canada may also consult with the family, First Nation community or service providers to fund services within the timeframes specified (p.5-6).

c. A related concern is Canada's use of government officials or government retained experts to review the funding eligibility for the treatment plans of attending professionals. It is unclear to us that when Canada invokes this practice, on what grounds they do so, and if the qualifications of the "reviewer" are relevant to the child's needs and proposed treatment plan. Moreover when Canada, or its advisors, reject a treatment plan, they do not provide a viable alternative, leaving the child with unmet needs.

Possible Remedies:

d. Canada must not over-rule professional treatment plans unless it has a qualified professional(s) credentialed in the same area who are prepared to provide a second opinion and identify that such action is in the best interests of the child. Ignoring professional assessments of children's needs in favour of bureaucratic considerations (ie: a service gap) is not acceptable practice particularly as the CHRT does not allow refusal of Jordan's Principle claims based on service "gaps."

e. Canada must ensure that any "reviewers" of treatment plans submitted by attending professionals are credentialed in the area and follow a standard of review accepted by the profession. Moreover, Canada's decision to review cases must be clearly articulated and made in a manner consistent with the CHRT decisions.

f. Confirm that Canada should be very reluctant to over-ride the professional recommendations for service needs and if it does so, it needs to provide a reason (related to the children's best interest) for the over-ride and provide realistic alternatives for the need to be met. This must be communicated to the requester in writing within the CHRT timeframes.

8. Service "Gap" Rationale for Refusal

a. In multiple cases across the country, GOC is denying cases as there is no "gap" in service. This is inconsistent with the CHRT rulings requiring Canada to determine cases on the basis of the "needs" of children with their best interests in mind and in keeping with substantive equality.

Possible Remedies:

b. Canada must immediately communicate to Focal Points and all other relevant staff that a "gap" in services is not a CHRT compliant reason for denial.

c. Canada must immediately communicate to all Focal Points and all other relevant staff the CHRT compliant requirements for assessing cases.

d. Canada must review all cases, including those denied on appeal, where the "gap" reason has been given and reassess those claims based on CHRT requirements.

9. Exclusion on the Basis of First Nations Eligibility Criteria

a. First Nations children without status residing off-reserve continue to be denied access to Jordan's Principle which is problematic and, in the view of the Caring Society, non-compliant. However, there are additional issues relating to Canada's approach to the "All First Nations" children requirement in the CHRT. For example, Focal Points seem to have an uneven understanding that non-status children on reserve are now eligible and it is not clear how retroactive cases are being addressed.

b. The Caring Society also received a report that a group request for a cultural drumming group was declined as the First Nation refused to guarantee that no non-First Nations children would participate. Not only was this morally untenable for the First Nation from a reconciliation and proper treatment of children point of view, but it would have also required that the First Nation discriminate against children on the basis of race.

c. Another challenge may involve Canada's approach to pre-natal care programs. While Canada's reasons are still unclear, it appears Canada refused a First Nation's request for a culturally appropriate mid-wifery program because it felt that either: 1) the children were not First Nation (and provided no evidence that this was the case); and/or 2) that Canada was taking the position that because pre-natal children involve children who are not yet born, they were rejecting the case. Both are problematic from ethical viewpoints and fail to respond to the scientific evidence that good prenatal care contributes to healthier babies.

10. Group Requests

a. The process for the assessment of group requests seems very uneven across Canada and the use of the "gaps" reason for denial is prevalent. There are perceptions from some First Nations and First Nations service providers that the group requests are being handled like "proposals" which would have been with little, or no, attention to the CHRT requirements (particularly regarding assessment criteria and time frames for determination). Moreover, from a service coordinator point of view, Canada is counting these as "one case" to manage rather than taking into account the need for service coordinators to attend to the unique needs and circumstances of all children who may be serviced in the group.

b. There have been cases where Focal Points have dissuaded communities from putting in applications for group requests. From the Caring Society's perspective, this amounts to a denial.

c. Concerns regarding Focal Point information requests (see #3) and coordination with other government departments (see #14) are of particular concern with regard to group requests. It appears in many group requests Focal Points are continuously asking for information from the requestors and consulting with other government departments, resulting in delays to the requests.

Possible Remedies:

d. Canada to clearly communicate with Focal Points and others involved in Jordan's Principle cases the CHRT assessment criteria and the time frames. Canada needs to develop accountability measures to ensure these are being followed.

e. There needs to be more transparency on the process for appeals of group requests.

f. Ensure service coordinators have the resources necessary to respond to the unique needs and circumstances of each child receiving services in the group.

g. There is a need for capital costs to allow for the provision of services per group requests (see also #16).

11. Service Coordination

a. Canada's existing contracts with many service coordination groups expire on March 31, 2019 and there are currently no details on if, and how, these contracts would be renewed. This means that service coordination groups can only hire staff until March 31, 2019 which makes recruitment and retention of qualified staff difficult. Moreover, service coordinators in some regions report very heavy caseloads which are complicated by multiple information requests from Canada's Focal Points which do not always have an obvious connection to the CHRT orders or the child's needs or best interests (see examples noted earlier).

Possible Remedies:

b. Canada must approve additional staff where heavy workloads are reported to ensure that children and families receive timely and quality service on Jordan's Principle cases per the CHRT orders.

c. Absent any evidence, Canada must not state or imply that the service coordinators are unable to manage the heavy workload due to inefficiency on their part or the service coordination bodies part. Canada has the legal obligation to ensure children's access to Jordan's Principle is met and that includes providing adequate and sustained support for service coordination bodies.

d. Canada needs to provide written assurance to all service coordinators that Canada will continue their contract with them post March 31, 2019.

e. Canada needs to account for the need for service coordinators to respond to the individual needs of children in group requests when assessing workloads.

f. Canada needs to improve communication with service coordinators, Focal Points and all others working on Jordan's Principle to ensure all communication is up to date and CHRT compliant. This must also include notice that Jordan's Principle is a legal rule and does not expire after March 31, 2019.

12. Inconsistent Decisions and Handling of Cases

a. There are many inconsistencies across the provinces/territories in dealing with cases and delivering decisions. As the Caring Society has seen, denial or acceptance rates are often correlated to who the Focal Point in the region is. Cases that may be accepted in one province/territory may not be accepted in another province/territory. If a Focal Point changes positions, there is no guarantee that Jordan's Principle cases will be treated in the same way.

b. There have also been inconsistencies within the same province. In New Brunswick for example, several schools applied for lunch programs to serve children/youth from the local First Nation community, many of whom do not have enough to eat. Two elementary schools received funding for this program but one elementary school and one high school did not receive funding for the lunch program as there was "no identified gap."

Possible Remedies:

c. Develop a consistent standard for Jordan's Principle to ensure children access Jordan's Principle in a similar way across the country pursuant to the CHRT.

d. There must be consistency in case decisions that are similar in nature within a province/territory.

13. Gaps in FNIHB/NIHB Funding

a. Families and communities are finding that they need to go through Jordan's Principle to access services because the NIHB program remains discriminatory (does not fund the range of services and supports available through the provinces and territories). NIHB response times are also slow and therefore unable to meet the needs of children, even when the service is covered.

b. In Ontario for example, infant audiology tests are covered for off-reserve infants. FNIHB states that the tests are not OHIP billable thus are not funded however, infants off-reserve get these tests in hospitals and infant development centers so they are provided to kids off-reserve.

Possible Remedies:

c. Canada must take measures to ensure that FNIHB/NIHB funding covers services that are available to children off-reserve. Reform is also needed to improve response times.

14. Coordination with Other Government Departments

a. It would appear that Focal Points in at least some regions work closely with the regional FNIHB/NIHB office to prevent duplication of services in the funding of Jordan's Principle cases (the implication being that requests or proposals for "duplicate services" will be denied). It would also appear that FNIHB/NIHB guidelines and understandings (i.e. that certain services are provincial responsibilities and should not be funded by Canada) are sometimes applied to Jordan's Principle cases. FNIHB staff are not trained on the CHRT orders and their guidance/recommendations to Focal Points may not align with the principles of substantive equality and the best interests of the child.

Possible Remedies:

b. HQ to provide Focal Points with direction on when it is appropriate to liaise with FNIHB and to remind staff that FNIHB processes and standards are separate from Jordan's Principle and must not be used to determine service requests.

c. Reiterate to Focal Points that administrative conferencing, such as meetings with government departments, must not delay the timely resolution of cases as per CHRT timelines.

15. Cultural Shifts

a. Many of the above concerns, requests for further information, referral to HQ, consultation with other departments, etc., appear tied to a culture of restraint and, perhaps, the fear of "mistakenly" approving a case. In some offices, the culture of restraint seems to outweigh the principle of substantive equality or the best interests of the child.

Possible Remedies:

b. HQ to send a message to all staff stating that the GOC is committed to the best interests of the child and substantive equality and that staff should err on the side of approving cases; that Canada would prefer staff to "erroneously" approve cases, rather than erroneously deny them. HQ to reiterate that staff will not be penalized for erring on the side of substantive equality and the best interests of the child.

16. Capital Costs

a. There is a need for major capital costs to ensure adequate space for the provision of services for group requests. Even if a group is granted funding to provide a service through Jordan's Principle, there is often no building or place from which to provide the service.

Possible Remedies:

b. Canada must make provisions to allow for major capital costs to be covered under Jordan's Principle.

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Consideration of reports submitted by States parties under article 44 of the Convention

Concluding observations: Canada

1. The Committee considered the consolidated third and fourth periodic report of Canada (CRC/C/CAN/3-4) at its 1742nd and 1743rd meetings held on 26 and 27 September 2012, and adopted, at its 1754th meeting, held on 5 October 2012, the following concluding observations.

I. Introduction

2. The Committee welcomes the submission of the consolidated third and fourth periodic report of the State party (CRC/C/CAN/3-4) and the written reply to its list of issues (CRC/C/XCAN/Q/3-4/Add.1), which allowed for a better understanding of the situation in the State party. The Committee expresses appreciation for the constructive dialogue held with the multi-sectorial delegation of the State party.

3. The Committee reminds the State party that the present concluding observations should be read in conjunction with its concluding observations adopted on the State party's initial report under the Optional Protocol on the involvement of children in armed conflict (CRC/C/OPAC/CAN/CO/1, 2006) and under the Optional Protocol on sale of children, child prostitution and child pornography (CRC/CO/OPSC/CAN/CO/1, 2012). The Committee regrets that the reporting guidelines were not followed in the preparation of the State party's report.

II. Follow-up measures undertaken and progress achieved by the State party

4. The Committee welcomes the adoption of the following legislative, measures:

(a) The law amending the Citizenship Act which came into effect on 17 April 2009; and

(b) Bill C-49 in 2005, an Act to amend the Criminal Code (trafficking in persons) (25 November 2005), which creates indictable offences which specifically address trafficking in persons.

5. The Committee also welcomes the ratification of the Convention on the Rights of Persons with Disabilities, in March 2010.

6. The Committee notes as positive the following institutional and policy measures:

(a) National Action Plan to Combat Human Trafficking in June 2012;

(b) Homelessness Partnering Strategy (HPS) in April 2007;

(c) National Plan of Action for children, A Canada Fit for Children, launched in April 2004; and

(d) National Strategy to Protect Children from Sexual Exploitation on the Internet, launched in May 2004.

III. Main areas of concerns and recommendations

A. General measures of implementation (arts. 4, 42 and 44, para. 6 of the Convention)

The Committee's previous recommendations

7. While welcoming the State party's efforts to implement the Committee's concluding observations of 2003 on the State party's initial report (CRC/C/15/Add.215, 2003), the Committee notes with regret that some of the recommendations contained therein have not been fully addressed.

8. The Committee urges the State party to take all necessary measures to address those recommendations from the concluding observations of the second periodic report under the Convention that have not been implemented or sufficiently implemented, particularly those related to reservations, legislation, coordination, data collection, independent monitoring, non-discrimination, corporal punishment, family environment, adoption, economic exploitation, and administration of juvenile justice.

Reservations

9. While the Committee positively acknowledges the State party's efforts towards removing its reservations to article 37(c) of the Convention, the Committee strongly reiterates its previous recommendation (CRC/C/15/Add.215, para.7, 2003), for the prompt withdrawal of its reservation to article 37(c).

Legislation

10. While welcoming numerous legislative actions related to the implementation of the Convention, the Committee remains concerned at the absence of legislation that comprehensively covers the full scope of the Convention in national law. In this context, the Committee further notes that given the State party's federal system and dualist legal system, the absence of such overall national legislation has resulted in fragmentation and inconsistencies in the implementation of child rights across the State party, with children in similar situations being subject to disparities in the fulfilment of their rights depending on the province or territory which they reside in.

11. The Committee recommends that the State Party finds the appropriate constitutional path that will allow it to have in the whole territory of the State Party, including its provinces and territories, a comprehensive legal framework which fully incorporates the provisions of the Convention and its Optional Protocols and provides clear guidelines for their consistent application.

Comprehensive policy and strategies

12. The Committee notes the adoption of the National Plan of Action for Children, A Canada Fit for Children, in 2004, but is concerned that beyond its broad objectives the Plan lacks clear division of responsibilities, clear priorities, targets and timetables, resource allocation and systematic monitoring as recommended in the Committee's previous concluding observations (CRC/C/15/Add.215, par. 13, 2003) and that it has not been evaluated in order to assess its impact and to guide the next steps.

13. The Committee strongly recommends that the State party adopt a national strategy that provides a comprehensive implementation framework for the federal, provincial and territorial levels of government spelling out as is appropriate the priorities, targets and respective responsibilities for the overall realization of the Convention and that will enable the provinces and territories to adopt accordingly their own specific plans and strategies. The Committee further recommends that the State party allocate adequate human, technical and financial resources for the implementation, monitoring and evaluation of this comprehensive strategy and related provincial and territorial plans. In this context, the Committee encourages the State party to establish a coordinated monitoring mechanism that would enable the submission and review of progress reports by all provinces and territories. It also recommends that children and civil society are consulted.

Coordination

14. While noting as positive the work of the Council of Ministers of Education and the Joint Consortium for School Health, both with representation from all levels of government, as well as other sectorial coordination bodies, the Committee remains concerned that overall coordination of the implementation of the Convention assigned to the Interdepartmental Working Group on Children's Rights (2007) has not been effective in practice. Furthermore, the Committee notes the challenges presented by the federal system of the State party and is concerned that the absence of overall coordination results in significant disparities in the implementation of the Convention across the State party´s provinces and territories.

15. The Committee strongly reiterates its recommendation for the State party to establish a coordinating body for the implementation of the Convention and the national strategy (recommended in paragraph 13 above) with the stature and authority as well as the human, technical and financial resources to effectively coordinate actions for children"s rights across sectors and among all provinces and territories. Furthermore, the Committee encourages the State party to consider strengthening the Interdepartmental Working Group on Children´s Rights accordingly thus ensuring coordination, consistency and equitability in overall implementation of the Convention. The Committee also recommends that civil society, including all minority groups, and children be invited to form part of the coordination body.

Allocation of resources

16. Bearing in mind that the State party is one of the most affluent economies of the world and that it invests sizeable amounts of resources in child-related programmes, the

Committee notes that the State party does not use a child-specific approach for budget planning and allocation in the national and provinces/territories level budgets, thus making it practically impossible to identify, monitor, report and evaluate the impact of investments in children and the overall application of the Convention in budgetary terms. Furthermore, the Committee also notes that while the State party report contained information about various programs and their overall budget the Committee regrets that the report lacked information on the impact of such investments.

17. In light of the Committee's Day of General Discussion in 2007 on "Resources for the Rights of the Child - Responsibility of States" and with emphasis on articles 2, 3, 4 and 6 of the Convention, the Committee recommends that the State party establish a budgeting process which adequately takes into account children's needs at the national, provincial and territorial levels, with clear allocations to children in the relevant sectors and agencies, specific indicators and a tracking system. In addition, the Committee recommends that the State party establish mechanisms to monitor and evaluate the efficacy, adequacy and equitability of the distribution of resources allocated to the implementation of the Convention. Furthermore, the Committee recommends that the State party define strategic budgetary lines for children in disadvantaged or vulnerable situations that may require affirmative social measures (for example, children of Aboriginal, African Canadian, or other minorities and children with disabilities) and make sure that those budgetary lines are protected even in situations of economic crisis, natural disasters or other emergencies.

International Cooperation

18. The Committee welcomes the international cooperation carried out through the Canada International Development Assistance (CIDA) program and particularly appreciates that approximately 30% of the State party's aid goes to health, education, and population. However, the Committee notes with concern that ODA for 2010-2011 is 0.33% of GNI and is projected to decline, which would bring it even further below the OECD/DAC average and below the percentage recommended in the Monterrey Consensus.

19. The Committee encourages the State Party to focus on children in its assistance programs and to increase its level of funding in order to meet the recommended aid target of 0.7% of GNI.

Data collection

20. The Committee notes with concern the limited progress made to establish a national, comprehensive data collection system covering all areas of the Convention. The Committee notes that the complex data collection systems utilize different definitions, concepts, approaches, and structures across provinces and territories which therefore makes it difficult to assess progress to strengthen the implementation of the Convention. In particular, the Committee notes that the State party report lacked data on the number of children aged 14 to 18 years old placed into alternative care facilities.

21. The Committee reiterates its recommendation for the State party to set up a national and comprehensive data collection system and to analyse the data collected as a basis for consistently assessing progress achieved in the realization of child rights and to help design policies and programmes to strengthen the implementation of the Convention. Data should be disaggregated by age, sex, geographic location, ethnicity and socio-economic background to facilitate analysis on the situation of all children. More specifically, the Committee recommends that appropriate data on children in special situations of vulnerability be collected and analysed to inform policy decisions and programs at different levels.

Independent monitoring

22. While noting that most Canadian provinces have an Ombudsman for Children, the Committee reiterates its concern (CRC/C/15/Add.215, para. 14, 2003) about the absence of an independent Ombudsman for Children at the federal level. Furthermore, the Committee is concerned that their mandates are limited and that not all children may be aware of the complaints procedure. While noting that the Canadian Human Rights Commission operates at the federal level and has the mandate to receive complaints, the Committee regrets that the Commission only hears complaints based on discrimination and therefore does not afford all children the possibility to pursue meaningful remedies for breaches of all rights under the Convention.

23. The Committee recommends that the State party take the necessary measures to establish a federal Children"s Ombudsman in full accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles), to ensure comprehensive and systematic monitoring of all children"s rights at the federal level. Furthermore, the Committee encourages the State party to raise awareness among children concerning the existing children"s Ombudsman in their respective provinces and territories. Drawing attention to its General Comment No. 2 (CRC/GC/2, 2002), the Committee also calls upon the State party to ensure that this national mechanism be provided with the necessary human, technical and financial resources in order to secure its independence and efficacy.

Dissemination and awareness-raising

24. The Committee appreciates the State party's efforts to promote awareness and understanding of the Convention, particularly by supporting non-governmental organizations' efforts. Nevertheless, the Committee is concerned that awareness and knowledge of the Convention remains limited amongst children, professionals working with children, parents, and the general public. The Committee is especially concerned that there has been little effort to systematically disseminate information on the Convention and integrate child rights education into the school system.

25. The Committee urges the State party to take more active measures to systematically disseminate and promote the Convention, raising awareness in the public at large, among professionals working with or for children, and among children. In particular, the Committee urges the State party to expand the development and use of curriculum resources on children"s rights, especially through the State party"s extensive availability of free Internet and web access providers, as well as education initiatives that integrate knowledge and exercise of children"s rights into curricula, policies, and practices in schools.

Training

26. Despite information on some training provided for professionals, such as immigration officers and government lawyers on the Convention, the Committee is concerned that there is no systematic training on children's rights and the Convention for all professional groups working for or with children. In particular, the Committee is concerned that personnel involved in juvenile justice, such as law enforcement officers, prosecutors, judges, and lawyers, lack understanding and training on the Convention.

27. The Committee urges the State party to develop an integrated strategy for training on children"s rights for all professionals, including, government officials, judicial authorities, and professionals who work with children in health and social services. In developing such training programs, the Committee urges the State party

to focus the training on the use of the Convention in legislation and public policy, program development, advocacy, and decision making processes and accountability.

Child rights and the business sector

28. The Committee joins the concern expressed by the Committee on the Elimination of Racial Discrimination that the State has not yet adopted measures with regard to transnational corporations registered in Canada whose activities negatively impact the rights of indigenous peoples in territories outside Canada, (CERD/C/CAN/CO/19-20, para. 14, 2012), in particular gas, oil, and mining companies. The Committee is particularly concerned that the State party lacks a regulatory framework to hold all companies and corporations from the State party accountable for human rights and environmental abuses committed abroad.

29. The Committee recommends that the State Party establish and implement regulations to ensure that the business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights, and in light of Human Rights Council resolutions 8/7 of 18 June 2008 (para. 4(d)) and resolution 17/4 of 16 June 2011 (para. 6(f)). In particular, it recommends that the State party ensure the:

(a) Establishment of a clear regulatory framework for, among others, the gas, mining, and oil companies operating in territories outside Canada ensure that their activities do not impact on human rights or endanger environment and other standards, especially those related to children"s rights;

(b) The monitoring of implementation by companies at home and abroad of international and national environmental and health and human rights standards and that appropriate sanctions and remedies are provided when violations occur with a particular focus on the impact on children;

(c) Assessments, consultations with and disclosure to the public by companies on plans to address environmental and health pollution and the human rights impact of their activities; and

(d) In doing so, take into account the UN Business and Human Rights Framework adopted unanimously in 2008 by the Human Rights Council.

B. Definition of the child (art. 1 of the Convention)

30. The Committee is concerned that not all children under the age of 18 are benefiting from the full protection under the Convention, in particular children who in some provinces and territories, can be tried as adults and children between the ages of 16 and 18 who are not appropriately protected against sexual exploitation in some provinces and territories.

31. The Committee urges the state party to ensure the full compliance of all national provisions on the definition of the child with article 1 of the Convention, in particular to ensure that all children under18 cannot be tried as adults and all children under 18 who are victims of sexual exploitation receive appropriate protection.

C. General principles (arts. 2, 3, 6 and 12 of the Convention)

Non-discrimination

32. While welcoming the State party's efforts to address discrimination and promote intercultural understanding, such as the Stop Racism national video contest, the Committee is nevertheless concerned at the continued prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin and other grounds. In particular, the Committee is concerned at:

(a) The significant overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care;

(b) The serious and widespread discrimination in terms of access to basic services faced by children in vulnerable situations, including minority children, immigrants, and children with disabilities;

(c) The lack of a gender perspective in the development and implementation of programs aimed at improving the situation for marginalized and disadvantaged communities, such as programs to combat poverty or the incidence of violence, especially in light of the fact that girls in vulnerable situations are disproportionately affected;

(d) The lack of action following the Auditor General's finding that less financial resources are provided for child welfare services to Aboriginal children than to non-Aboriginal children; and

(e) Economic discrimination directly or indirectly resulting from social transfer schemes and other social/tax benefits, such as the authorization given to provinces and territories to deduct the amount of the child benefit under the National Child Benefit Scheme from the amount of social assistance received by parents on welfare.

33. The Committee recommends that the State party include information in its next periodic report on measures and programs relevant to the Convention on the Rights of the Child undertaken by the State party in follow-up to the Declaration and Program of Action adopted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as the outcome document adopted at the 2009 Durban Review Conference. The Committee also recommends that the State party:

(a) Take urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care;

(b) Address disparities in access to services by all children facing situations of vulnerability, including ethnic minorities, children with disabilities, immigrants and others;

(c) Ensure the incorporation of a gender perspective in the development and implementation of any programme or stimulus package, especially programs related to combatting violence,poverty, and redressing other vulnerabilities;

(d) Take immediate steps to ensure that in law and practice, Aboriginal children have full access to all government services and receive resources without discrimination; and

(e) Undertake a detailed assessment of the direct or indirect impact of the reduction of social transfer schemes and other social/tax benefit schemes on the standard of living of people depending on social welfare, including the reduction of social welfare benefits linked to the National Child Benefit Scheme, with particular

attention to women, children, older persons, persons with disabilities, Aboriginal people, African Canadians and members of other minorities.

Best interests of the child

34. The Committee is concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programs and projects relevant to and with an impact on children. In particular, the Committee is concerned that the best interest of the child is not appropriately applied in asylum-seeking, refugee and/or immigration detention situations.

35. The Committee urges the State party to strengthen its efforts to ensure that the principle of the best interests of the child is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as in all policies, programs and projects relevant to and with an impact on children. In this regard, the State party is encouraged to develop procedures and criteria to provide guidance for determining the best interests of the child in every area, and to disseminate them to the public or private social welfare institutions, courts of law, administrative authorities and legislative bodies. The legal reasoning of all judicial and administrative judgements and decisions should also be based on this principle, specifying the criteria used in the individual assessment of the best interests of the child.

Respect for the views of the child

36. The Committee welcomes the State Party's Yukon Supreme Court decision in 2010 which ruled that all children have the right to be heard in custody cases. Nevertheless, the Committee is concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative processes that impact children.

37. The Committee draws the State party"s attention to its general comment No. 12 General Comment No. 12 (CRC/C/GC/12, 2009), and recommends that it continue to ensure the implementation of the right of the child to be heard in accordance with article 12 of the Convention. In doing so, it recommends that the State party promote the meaningful and empowered participation of all children, within the family, community, and schools, and develop and share good practices. Specifically, the Committee recommends that the views of the child be a requirement for all official decision-making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment. The Committee also urges the State party to ensure that children have the possibility to voice their complaints if the their right to be heard is violated with regard to judicial and administrative proceedings and that children have access to an appeals procedures.

D. Civil rights and freedoms (arts. 7, 8, 13-17, 19 and 37 (a) of the Convention) Birth registration

38. While the Committee notes as positive that birth registration is almost universal in the State party, it is seriously concerned that some children have been deprived of their identity due to the illegal removal of the father's name on original birth certificates by governmental authorities, especially in cases of unwed parents.

39. The Committee recommends that the State party review legislation and practices in the provinces and territories where birth registrations have been illegally

altered or the names of parents have been removed. The Committee urges the State party to ensure that the names on such birth certificates are restored and change legislation if necessary to achieve this.

Nationality and Citizenship

40. While welcoming the positive aspects of the April 2009 amendment to the Citizenship Act, the Committee is nevertheless concerned about some provisions of the amendment which place significant limitations on acquiring Canadian citizenship for children born to Canadian parents abroad. The Committee is concerned that such restrictions, can in some circumstances, lead to statelessness. Furthermore, the Committee is concerned that children born abroad to government officials or military personnel are exempted from such limitations on acquiring Canadian citizenship.

41. The Committee recommends the State party to review the provisions of the amendment to the Citizenship Act that are not in line with the Convention with a view to removing restrictions on acquiring Canadian citizenship for children born abroad to Canadian parents. The Committee also urges the State party to consider ratifying the 1954 Convention relating to the Status of Stateless Persons.

Preservation of identity

42. The Committee is concerned that vulnerable children, including Aboriginal and African Canadian children, who are greatly over-represented in the child welfare system often lose their connections to their families, community, and culture due to lack of education on their culture and heritage. The Committee is also concerned that under federal legislation, Aboriginal men are legally entitled to pass their Aboriginal status to two generations while Aboriginal women do not have the right to pass their Aboriginal status to their grandchildren.

43. The Committee urges the State party to ensure full respect for the preservation of identity for all children, and to take effective measures so as to ensure that Aboriginal children in the child welfare system are able to preserve their identity. To this end, the Committee urges the State party to adopt legislative and administrative measures to account for the rights, such as name, culture and language, of children belonging to minority and indigenous populations and ensure that the large number of children in the child welfare system receive an education on their cultural background and do not lose their identity. The Committee also recommends that the State party revise its legislation to ensure that women and men are equally legally entitled to pass their Aboriginal status to their grandchildren.

E. Violence against children ((arts 19, 37 (a), 34 and 39 of the Convention)

Corporal punishment

44. The Committee is gravely concerned that corporal punishment is condoned by law in the State party under Section 43 of the Criminal Code. Furthermore, the Committee notes with regret that the 2004 Supreme Court decision Canadian Foundation for Children, Youth and the Law v. Canada, while stipulating that corporal punishment is only justified in cases of "minor corrective force of a transitory and trifling nature," upheld the law. Furthermore, the Committee is concerned that the legalization of corporal punishment can lead to other forms of violence.

45. The Committee urges the State party to repeal Section 43 of the Criminal Code to remove existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against all age groups of children,

however light, within the family, in schools and in other institutions where children may be placed. Additionally, the Committee recommends that the State party:

(a) Strengthen and expand awareness-raising for parents, the public, children, and professionals on alternative forms of discipline and to promote respect for children"s rights, with the involvement of children, while raising awareness about the adverse consequences of corporal punishment; and

(b) Ensure the training of all professionals working with children, including judges, law enforcement, health, social and child welfare, and education professionals to promptly identity, address and report all cases of violence against children.

Abuse and neglect

46. While the Committee notes initiatives such as *the Family Violence Prevention Program,* the Committee is concerned about the high levels of violence and maltreatment against children evidenced by the *Canadian Incidence Study of Reported Child Abuse and Neglect 2008*. The Committee is especially concerned about:

(a) The lack of a national comprehensive strategy to prevent violence against all children;

(b) That women and girls in vulnerable situations are particularly affected, including Aboriginal, African Canadian, and those with disabilities;

(c) The low number of interventions in cases of family violence, including restraining orders; and

(d) The lack of counselling for child victims and perpetrators and inadequate programs for the reintegration of child victims of domestic violence.

47. The Committee recommends that the State party take into account the Committee"s General Comment No. 13 (CRC/C/GC/13, 2011) and urges the State party to:

(a) Develop and implement a national strategy for the prevention of all forms of violence against all children, and allocate the necessary resources to this strategy and ensure that there is a monitoring mechanism;

(b) Ensure that the factors contributing to the high levels of violence among Aboriginal women and girls are well understood and addressed in national and province/territory plans;

(c) Ensure that all child victims of violence have immediate means of redress and protection, including protection or restraining orders; and

(d) Establish mechanisms for ensuring effective follow-up support for all child victims of domestic violence upon their family reintegration.

Sexual exploitation and abuse

48. The Committee notes with appreciation the launching of the National Strategy for the Protection of Children from Sexual Exploitation on the Internet in 2004 and the significant amount of resources allocated to the implementation of this program by the State party. The Committee further notes as positive that the State party has demonstrated considerable political will to coordinate law enforcement agencies to combat sexual exploitation of children on the internet. Nevertheless, the Committee is concerned that the State party has not taken sufficient action to address other forms of sexual exploitation, such as child prostitution and child sexual abuse. The Committee is also concerned about the lack of attention to prevention of child sexual exploitation and the low number of

investigations and prosecutions for sexual exploitation of children as well as inadequate sentencing for those convicted. In particular, the Committee is gravely concerned about cases of Aboriginal girls who were victims of child prostitution and have gone missing or were murdered and have not been fully investigated with the perpetrators going unpunished.

49. The Committee urges the State party to:

(a) Expand existing government strategies and programs to include all forms of sexual exploitation;

(b) Establish a plan of action to coordinate and strengthen law enforcement investigation practices on cases of child prostitution and to vigorously ensure that all cases of missing girls are investigated and prosecuted to the full extent of the law;

(c) Impose sentencing requirements for those convicted of crimes under the Optional Protocol to ensure that the punishment is commensurate with the crime; and

(d) Establish programs for those convicted of sexual exploitation abuse, including rehabilitation programs and federal monitoring systems to track former perpetrators.

Harmful Practices

50. The Committee is concerned that there is inadequate protection against forced child marriages, especially among immigrant communities and certain religious communities such as the polygamous communities in Bountiful, British Columbia.

51. The Committee recommends that the State party take all necessary measures, including legislative measures and targeted improvement of investigations and law enforcement, to protect all children from underage forced marriages and to enforce the legal prohibition against polygamy.

Freedom of the child from all forms of violence

52. Recalling the recommendations of the United Nations Study on violence against children (A/61/299), the Committee recommends that the State party prioritize the elimination of all forms of violence against children. The Committee further recommends that the State Party take into account General Comment No 13 on „The right of the child to freedom from all forms of violence" (CRC/C/GC/13, 2011), and in particular:

(a) Develop a comprehensive national strategy to prevent and address all forms of violence against children;

(b) Adopt a national coordinating framework to address all forms of violence against children;

(c) Pay particular attention to the gender dimension of violence; and

(d) Cooperate with the Special Representative of the Secretary-General on violence against children and relevant United Nations institutions.

F. Family environment and alternative care (arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention)

Family environment

53. The Committee welcomes the State party's efforts to better support families through, inter alia, legislative and institutional changes. However, the Committee is concerned that families in some disadvantaged communities lack adequate assistance in the performance of their child-rearing responsibilities, notably those families in a crisis situation due to poverty. In particular, the Committee is concerned about the number of pregnant girls and teenage mothers who drop out of school, which leads to poorer outcomes for their children.

54. The Committee recommends that the State party intensify its efforts to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities with timely responses at the local level, including services to parents who need counselling in child-rearing, and, in the case of Aboriginal and African Canadian populations, culturally appropriate services to enable them to fulfil their parental role. The Committee further encourages the State party to provide education opportunities for pregnant girls and teenage mothers so that they can complete their education.

Children deprived of a family environment

55. The Committee is deeply concerned at the high number of children in alternative care and at the frequent removal of children from their families as a first resort in cases of neglect or financial hardship or disability. The Committee is also seriously concerned about inadequacies and abuses committed within the alternative care system of the State party, including:

(a) Inappropriate placements of children because of poorly researched and ill-defined reasons for placement;

(b) Poorer outcomes for young people in care than for the general population in terms of health, education, well-being and development;

(c) Abuse and neglect of children in care;

(d) Inadequate preparation provided to children leaving care when they turn 18;

(e) Inadequate screening, training, support and assessment of care givers; and

(f) Aboriginal and African Canadian children often placed outside their communities.

56. The Committee urges the State party to take immediate preventive measures to avoid the separation of children from their family environment by providing appropriate assistance and support services to parents and legal guardians in performance of child-rearing responsibilities, including through education, counselling and community-based programmes for parents, and reduce the number of children living in institutions. Furthermore, the Committee calls upon the State party to:

(a) Ensure that the need for placement of each child in institutional care is always assessed by competent, multidisciplinary teams of professionals and that the initial decision of placement is done for the shortest period of time and subject to judicial review by a civil court, and is further reviewed in accordance with the Convention;

(b) Develop criteria for the selection, training and support of childcare workers and out-of-home carers and ensure their regular evaluation;

(c) Ensure equal access to health care and education for children in care;

(d) Establish accessible and effective child-friendly mechanisms for reporting cases of neglect and abuse and commensurate sanctions for perpetrators;

(e) Adequately prepare and support young people prior to their leaving care by providing for their early involvement in the planning of transition as well as by making assistance available to them following their departure; and

(f) Intensify cooperation with all minority community leaders and communities to find suitable solutions for children from these communities in need of alternative care, such as for example, kinship care.

Adoption

57. The Committee notes as positive the recent court decision in Ontario v. Marchland which ruled that children have the right to know the identity of both biological parents. However, the Committee is concerned that domestic adoption legislation, policy, and practice are set by each of the provinces and territories and vary considerably from jurisdiction to jurisdiction and as a result, Canada has no national adoption legislation, national standards, national database on children in care or adoption, and little known research on adoption outcomes. The Committee is also concerned that adoption disclosure legislation has not been amended to ensure that birth information is made available to adoptees as recommended in previous concluding observations (CRC/C/25/Add.215, para. 31, 2003). The Committee also regrets the lack of information provided in the State party on inter-country adoption.

58. The Committee recommends that the State party:

(a) Adopt legislation, including at the federal, provincial and territorial levels, where necessary, to ensure compliance with the Convention and the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption;

(b) Amend its legislation without delay to ensure that information about the date and place of birth of adopted children and their biological parents are preserved; and

(c) Provide detailed information and disaggregated data on domestic and international adoptions in its next periodic report.

G. Disability, basic health and welfare (arts. 6, 18 (para. 3), 23, 24, 26, 27 (paras. 1-3) of the Convention)

Children with disabilities

59. The Committee welcomes the ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2010. While recognizing that progress has been made on the inclusion of children with disabilities within the State party, the Committee is deeply concerned that:

(a) The *PALS (Participation and Activity Limitation Survey)* was last conducted by the State party in 2006 without it having been substituted to date by any other data collection effort on children with disabilities. As a result, there are no global or

disaggregated data since 2006 on which to base a policy on inclusion and equal access for children with disabilities.

(b) There is great disparity among the different provinces and territories of the State Party in access to inclusive education, with education in several provinces and territories being mostly in segregated schools;

(c) The cost of caring for children with disabilities often has a negative economic impact on household incomes and parental employment and some children do not have access to the necessary support and services; and

(d) Children with disabilities are more than twice as vulnerable to violence and abuse as other children and despite an overall drop in homicide rates among the general population, there appears to be an increase in homicide and filicide rates against people with disabilities.

60. The Committee recommends that the State party implement the provisions of the Convention on the Rights of Persons with Disabilities (CRPD) and in light of its General Comment No. 9 (CRC/C/GC/9, 2006), the Committee urges the State party to:

(a) Establish as soon as possible a system of global and disaggregated data collection on children with disabilities, which will enable the State party and all its provinces and territories to establish inclusive policies and equal opportunities for all children with disabilities;

(b) Ensure that all children with disabilities have access, in all provinces and territories, to inclusive education and are not forced to attend segregated schools only designed for children with disabilities;

(c) Ensure that children with disabilities, and their families, are provided with all necessary support and services in order to ensure that financial constraints are not an obstacle in accessing services and that household incomes and parental employment are not negatively affected; and

(d) Take all the necessary measures to protect children with disabilities from all forms of violence.

Breastfeeding

61. While welcoming programs such as *Canada's Prenatal Nutrition Program (CPNP),* the Committee is nevertheless concerned at the low rates of breastfeeding in the State party, especially among women in disadvantaged situations and the lack of corresponding programs to help encourage breastfeeding among all mothers in the State party. The Committee also regrets that despite adopting the International Code of Marketing of Breastmilk Substitutes, the State party has not integrated the various articles of the International Code into its regulatory framework and as a result, formula companies have routinely violated the Code and related World Health Assembly resolutions with impunity.

62. The Committee recommends that the State party:

(a) Establish a program to promote and enable all mothers to successfully breastfeed exclusively for the first six months of the infant"s life and sustain breastfeeding for two years or more as recommended by the Global strategy for Infant and Young Child Feeding; and

(b) Strengthen the promotion of breast-feeding and enforce the International Code of Marketing of Breast-milk Substitutes, and undertake appropriate action to investigate and sanction violations.

Health

63. The Committee notes as positive the free and widespread access to high-quality healthcare within the State party. However, the Committee notes with concern the high incidence of obesity among children in the State party and is concerned by the lack of regulations on the production and marketing of fast foods and other unhealthy foods, especially as targeted at children.

64. The Committee recommends that the State party address the incidence of obesity in children, by inter alia promoting a healthy lifestyle among children, including physical activity and ensuring greater regulatory controls over the production and advertisement of fast food and unhealthy foods, especially those targeted at children.

Mental health

65. The Committee notes with appreciation that the State party provided significant resources to implement the National Aboriginal Youth Suicide Prevention Strategy over a five year period. Despite such programs, the Committee is concerned about:

(a) The continued high rate of suicidal deaths among young people throughout the State party, particularly among youth belonging to the Aboriginal community;

(b) The increasingly high rates of children diagnosed with behavioural problems and the over-medication of children without expressly examining root causes or providing parents and children with alternative support and therapy. In this context, it is of concern to the Committee that educational resources and funding systems for practitioners are geared toward a "quick fix;" and

(c) The violation of both children's and parents' informed consent based on adequate information provided by health practitioners.

66. The Committee recommends that the State party:

(a) Strengthen and expand the quality of interventions to prevent suicide among children with particular attention to early detection, and expand access to confidential psychological and counselling services in all schools, including social work support in the home;

(b) Establish a system of expert monitoring of the excessive use of psycho stimulants to children, and take action to understand the root causes and improve the accuracy of diagnoses while improving access to behavioural and psychological interventions; and

(c) Consider the establishment of a monitoring mechanism in each province and territory, under the ministries of health, to monitor and audit the practice of informed consent by health professionals in relation to the use of psycho-tropic drugs on children.

Standard of living

67. While the Committee appreciates that the basic needs of the majority of children in the State party are met, the Committee is concerned that income inequality is widespread and growing and that no national strategy has been developed to comprehensively address child poverty despite a commitment by Parliament to end child poverty by 2000. The Committee is especially concerned about the inequitable distribution of tax benefits and social transfers for children. Furthermore, the Committee is concerned that the provision of welfare services to Aboriginal children, African Canadian and children of other minorities

is not comparable in quality and accessibility to services provided to other children in the State party and is not adequate to meet their needs.

68. The Committee recommends that the State party:

(a) Develop and implement a national, coordinated strategy to eliminate child poverty as part of the broader national poverty reduction strategy, which should include annual targets to reduce child poverty;

(b) Assess the impact of tax benefits and social transfers for and ensure that they give priority to children in the most vulnerable and disadvantaged situations; and

(c) Ensure that funding and other support, including welfare services, provided to Aboriginal, African-Canadian, and other minority children, including welfare services, is comparable in quality and accessibility to services provided to other children in the State party and is adequate to meet their needs.

H. Education, leisure and cultural activities (arts. 28, 29 and 31 of the Convention)

Education, including vocational training and guidance

69. While welcoming the State party's various initiatives to improve educational outcomes for children in vulnerable situations, the Committee is concerned about the following:

(a) The need for user fees at the compulsory education level for required materials and activities that are part of the basic public school service for children;

(b) The high dropout rate of Aboriginal and African-Canadian children;

(c) The inappropriate and excessive use of disciplinary measures applied to Aboriginal and African Canadian children in school, such as resorting to suspension and referring children to the police, as well as the overrepresentation of these groups in alternative schools;

(d) The high number of segregated schools primarily for minority and disabled children, which leads to discrimination; and

(e) The widespread incidence of bullying in schools.

70. The Committee recommends that the State party:

(a) Take measures to abolish the need for user fees at the level of compulsory education;

(b) Develop a national strategy, in partnership with Aboriginal and African Canadian communities, to address the high dropout rate of Aboriginal and African Canadian children;

(c) Take measures to prevent and avoid suspension and the referral of children to police as a disciplinary measure for Aboriginal and African Canadian children and prevent their reassignment to alternative schools while at the same time ensuring that professionals are provided with the necessary skills and knowledge to tackle the problems;

(d) Ensure integration of minority and disabled children in educational settings in order to prevent segregation and discrimination; and

(e) Enhance the measures undertaken to combat all forms of bullying and harassment, such as improving the capacity of teachers and all those working at schools and of students to accept diversity at school and in care institutions, and improve conflict resolution skills of children, parents, and professionals.

Early childhood education and care

71. The Committee is concerned that despite the State party's significant resources, there has been a lack of funding directed towards the improvement of early childhood development and affordable and accessible early childhood care and services. The Committee is also concerned by the high cost of child-care, the lack of available places for children, the absence of uniform training requirements for all child-care staff and of standards of quality care. The Committee notes that early childhood care and education continues to be inadequate for children under four years of age. Furthermore, the Committee is concerned that the majority of early childhood care and education services in the State party are provided by private, profit-driven institutions, resulting in such services being unaffordable for most families.

72. Referring to General Comment No. 7 (CRC/C/GC/7/Rev.1, 2005), the Committee recommends that the State party further improve the quality and coverage of its early childhood care and education, including by:

(a) Prioritizing the provision of such care to children between the age of 0 and 3 years, with a view to ensuring that it is provided in a holistic manner that includes overall child development and the strengthening of parental capacity;

(b) Increasing the availability of early childhood care and education for all children, by considering providing free or affordable early childhood care whether through State-run or private facilities;

(c) Establishing minimum requirements for training of child care workers and for improvement of their working conditions; and

(d) Conducting a study to provide an equity impact analysis of current expenditures on early childhood policies and programs, including all child benefits and transfers, with a focus on children with higher vulnerability in the early years.

I. Special protection measures (arts. 22, 30, 38, 39, 40, 37 (b)-(d), 32-36 of the Convention)

Asylum-seeking and refugee children

73. The Committee welcomes the State party's progressive policy on economic migration. Nevertheless, the Committee is gravely concerned at the recent passage of the law entitled, Protecting Canada's Immigration System Act, in June 2012 authorizing the detention of children from ages 16 to 18 for up to one year due to their irregular migrant status. Furthermore, the Committee regrets that notwithstanding its previous recommendation (CRC/C/15/Add.215, para. 47, 2003), the State party has not adopted a national policy on unaccompanied and asylum-seeking children and is concerned that the Immigration and Refugee Protection Act makes no distinction between accompanied and unaccompanied children and does not take into account the best interests of the child. The Committee is also deeply concerned about the frequent detention of asylum-seeking children it being done without consideration for the best interests of the child. Furthermore, while acknowledging that a representative is appointed for unaccompanied children, the Committee notes with concern that they are not provided with a guardian on a regular basis. Additionally, the Committee is concerned about the deportation of Roma and other migrant

children who previous to that decision often await, in a certain status, for prolonged periods of time, even years, such decision.

74. The Committee urges the State party to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards and reiterates its previous recommendations (CRC/C/15/Add.215, para 47, 2003). In doing so, the State party is urged to take into account the Committee's General Comment No. 6 on the "Treatment of unaccompanied and separated children outside their country of origin" (CRC/GC/2005/6, 2005). In addition, the Committee urges the State party to:

(a) Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and ensure that detention is only used in exceptional circumstances, in keeping with the best interests of the child, and subject to judicial review;

(b) Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes, that determination of the best interests is consistently conducted by professionals who have been adequately such procedures;

(c) Expeditiously establish the institution of independent guardianships for unaccompanied migrant children;

(d) Ensure that cases of asylum-seeking children progress quickly so as to prevent children from waiting long periods of time for the decisions; and

(d) Consider implementing the United Nations High Commission for Refugees Guidelines on International Protection No.8: Child Asylum Claims under articles 1(A)2 and 1(F) of the 1951 Convention. In implementing this recommendation, the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child and that immigration authorities be trained on the principle and procedures of the best interest of the child.

Children in armed conflict

75. While noting with appreciation oral responses provided by the delegation during the dialogue, the Committee seriously regrets the absence of information to the follow up on implementation of the OPAC pursuant to Article 8(2). The Committee expresses deep concern that despite the recommendation provided in its concluding observations (CRC/OPAC/CAN/C0/1, para. 9, 2006) to give priority, in the process of voluntary recruitment, to those who are oldest and to consider increasing the age of voluntary recruitment, the State party has not considered measures to this effect. The Committee additionally expresses concern that recruitment strategies may in fact actively target Aboriginal youth and are conducted at high school premises.

76. The Committee reiterates its previous recommendations provided in CRC/OPAC/CAN/C0/1 and recommends to the State party to include their implementation and follow up to OPAC in its next periodic report to the CRC. The Committee further recommends the State Party to consider raising the age of voluntary recruitment to 18, and in the meantime give priority to those who are oldest in the process of voluntary recruitment. The Committee further recommends that Aboriginal, or any other children in vulnerable situations are not actively targeted for recruitment and to reconsider conducting these programs at high school premises.

77. The Committee welcomes the recent return of Omar Kadr to the custody of the State party. However, the Committee is concerned that as a former child soldier, Omar Kadr has not been accorded the rights and appropriate treatment under the Convention. In particular, the Committee is concerned that he experienced grave violations of his human rights, which the Canadian Supreme Court recognized, including his maltreatment during his years of detention in Guantanamo, and that he has not been afforded appropriate redress and remedies for such violations.

78. The Committee urges the State party to promptly provide a rehabilitation program for Omar Kadr that is consistent with the Paris Principles for the rehabilitation of former child soldiers and ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada ruled he experienced.

Economic exploitation, including child labour

79. The Committee regrets the lack of information provided in the State party report regarding of child labour and exploitation, and notes with concern that data on child labour is not systematically collected in all provinces and territories.. The Committee is also concerned that the State party lacks federal legislation establishing the minimum age of employment within the provinces and territories. The Committee also expresses concern that in some provinces and territories, children of 16 years of age are permitted to perform certain types of hazardous and dangerous work.

80. The Committee recommends that the State party:

(a) Establish a national minimum age of 16 for employment, which is consistent with the age of compulsory education;

(b) Harmonize province and territory legislation to ensure adequate protection for all children under the age of 18 from hazardous and unsafe working environments;

(c) Take steps to establish a unified mechanism for systematic data collection on incidences of hazardous child labour and working conditions, disaggregated by age, sex, geographical location and socio-economic background as a form of public accountability for protection of the rights of children; and

(d) Consider ratifying the ILO Convention No. 138 on the minimum age for admission to employment.

Sale, trafficking and abduction

81. The Committee welcomes the passage of Bill C-268 in 2010, which requires minimum mandatory sentences for persons convicted of child trafficking. However, the Committee is concerned about the weak capacity of law enforcement organizations to identify and subsequently protect child victims of trafficking and the low number of investigations and prosecutions in this respect. The Committee is also concerned that due to the complexity of most child trafficking cases, law enforcement officials and prosecutors do not have clear guidelines for investigation and are not always aware of how to best lay charges.

82. The Committee urges the State party to provide systematic and adequate training to law enforcement officials and prosecutors with the view of protecting all child victims of trafficking and improving enforcement of existing legislation. The Committee recommends that such training include awareness-raising on the applicable sections of the Criminal Code criminalizing child trafficking, best practices for investigation procedures, and specific instructions on how to protect child victims.

Help lines

83. The Committee notes as positive the existence of a toll-free helpline for children, which seems to be used by a significant number of children within the State party who have sought psycho-social support for cases of depression, sexual exploitation, and school bullying. The Committee is however concerned that the State party has provided limited resources for the effective functioning of such a helpline.

84. The Committee urges the State party to provide financial and technical support to this helpline in order to maintain it and ensure that it provides 24 hour services throughout the State party. The Committee also urges the State party to promote awareness on how children can access the helpline.

Administration of juvenile justice

85. The Committee notes as positive that Bill C-10 (Safe Streets and Communities Act of 2012) prohibits the imprisonment of children in adult correctional facilities. Nevertheless, the Committee is deeply concerned at the fact that the 2003 Youth Criminal Justice Act, which was generally in conformity with the Convention, was in effect amended by the adoption of Bill C-10 and that the latter is excessively punitive for children and not sufficiently restorative in nature. The Committee also regrets there was no child rights assessment or mechanism to ensure that Bill C-10 complied with the provisions of the Convention. In particular, the Committee expresses concern that:

(a) No action has been undertaken by the State party to increase the minimum age of criminal responsibility (CRC/C/15/Add.215, 2003, para. 57);

(b) Children under 18 are tried as adults, in relation to the circumstances or the gravity of their offence;

(c) The increased use of detention reduced protection of privacy, and reduction in the use of extrajudicial measures, such as diversion;

(d) The excessive use of force, including the use of tasers, by law enforcement officers and personnel in detention centers against children during the arrest stage and in detention;

(e) Aboriginal and African Canadian children and youth are overrepresented in detention with statistics showing for example, that Aboriginal youth are more likely to be involved in the criminal justice system than to graduate from high school;

(f) Teenage girls are placed in mixed-gender youth prisons with cross-gender monitoring by guards, increasing the risk of exposing girls to incidents of sexual harassment and sexual assault.

86. The Committee recommends that the State party bring the juvenile justice system fully in line with the Convention, including Bill C-10 (2012 Safe Streets and Communities Act) in particular articles 37, 39 and 40, and with other relevant standards, including the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), the Vienna Guidelines for Action on Children in the Criminal Justice System; and the Committee's General Comment No. 10 (2007) (CRC/C/GC/10). In particular, the Committee urges the State party to:

(a) Increase the minimum age of criminal responsibility;

(b) Ensure that no person under 18 is tried as an adult, irrespective of the circumstances or the gravity of his/her offence;

(c) Develop alternatives to detention by increasing the use of extrajudicial measures, such as diversion and ensure the protection of privacy of children within the juvenile justice system;

(d) Develop guidelines for restraint and use of force against children in arrest and detention for use by all law enforcement officers and personnel in detention facilities, including the abolishment of use of tasers;

(e) Conduct an extensive study of systemic overrepresentation of Aboriginal and African Canadian children and youth in the criminal justice system and develop an effective action plan towards eliminating the disparity in rates of sentencing and incarceration of Aboriginal and African Canadian children and youth, including activities such as training of all legal, penitentiary and law enforcement professionals on the Convention;

(f) Ensure that girls are held separately from boys and that girls are monitored by female prison guards so as to better protect girls from the risk of sexual exploitation; and

(g) Ensure that girls are held separately from boys and that girls are monitored by female prison guards so as to better protect girls from the risk of sexual harassment and assault.

J. Ratification of international human rights instruments

87. The Committee encourages the State party, in order to further strengthen the fulfilment of children"s rights, to ratify the CRC Optional Protocol on Individual Communication. The Committee further urges the State party to ratify ILO Convention No. 138 concerning the minimum age for admission to employment and ILO Convention No. 189 on decent work for domestic workers.

K. Cooperation with regional and international bodies

88. The Committee recommends that the State party cooperate with the Organization of American States (OAS) towards the implementation of the Convention and other human rights instruments, both in the State party and in other OAS member States.

L. Follow-up and dissemination

89. The Committee recommends that the State party take all appropriate measures to ensure that the present recommendations are fully implemented by, inter alia, transmitting them to the Head of State, Parliament, relevant ministries, the Supreme Court, and to heads of provincial and territorial authorities for appropriate consideration and further action.

90. The Committee further recommends that the third and fourth periodic report and written replies by the State party and the related recommendations (concluding observations) be made widely available in the languages of the country, including (but not exclusively) through the Internet, to the public at large, civil society organizations, media, youth groups, professional groups and children, in order to generate debate and awareness of the Convention and its Optional Protocols and of their implementation and monitoring.

M. Next report

91. The Committee invites the State party to submit its next combined fifth and sixth periodic report by 11 July 2018 and to include in it information on the implementation of the present concluding observations. The Committee draws attention to its harmonized treaty-specific reporting guidelines adopted on 1 October 2010 (CRC/C/58/Rev.2 and Corr. 1) and reminds the State party that future reports should be in compliance with the guidelines and not exceed 60 pages. In the event that a report exceeding the page limitations is submitted, the State party will be asked to review and eventually resubmit the report in accordance with the above mentioned guidelines. The Committee reminds the State party that, if it is not in a position to review and resubmit the report, translation of the report for purposes of examination of the treaty body cannot be guaranteed.

92. The Committee also invites the State party to submit an updated core document in accordance with the requirements of the common core document in the harmonized guidelines on reporting, approved at by the fifth inter-committee meeting of the human rights treaty bodies in June 2006 (HRI/MC/2006/3).

BN on Jordan's Principle and Children with Complex Medical Needs

From:

Betty-Ann Scott <scottba@inac-ainc.gc.ca>

To:

Odette Johnston <johnstono@ainc-inac.gc.ca>

Cc:

Barbara D'Amico <damicob@ainc-inac.gc.ca>, Scott Amos <amoss@inac-ainc.gc.ca>, Anna Fontaine <fontainea@inac-ainc.gc.ca>, Grace Sutherland <sutherlandg@inac-ainc.gc.ca>

Date:

Fri, 07 Dec 2007 12:36:01 -0500

Attachments:

WINNIPEG-#516073-v1-GOV_-_BN_ON_JORDAN'S_PRINCIPLE_AND_CHILDREN_WITH_LIFE_LONG_COMPLEX_MEDICAL_NEEDS.DOC (50.69 kB)

Odette,

Please find the attached BN as requested. I've incorporated Anna's revisions as well as some of your suggestions. The document is located under CIDM#516073.

Thanks.
Betty Ann

JORDAN'S PRINCIPLE AND CHILDREN WITH LIFE LONG COMPLEX MEDICAL NEEDS

(Information for Parliamentary Secretary Rod Bruinooge)

DATE December 6, 2007

PURPOSE

To provide an information update on Jordan's Principle and the Children with Life Long Complex Medical Needs (CWLLCMN) Project in preparation for a meeting between Parliamentary Secretary Rod Bruinooge and Grand Chief Sydney Garrioch, Manitoba Keewatinook Ininew Okimowin (MIKO).

SUMMARY

- Ongoing discussion continues between federal and provincial leadership including First Nations at various levels on the Jordan's Principle.
- Current authorities of federal and provincial governments are limited or non-existent related to the provision of health services for First Nations with disabilities and complex medical needs that reside on reserve.
- Five children remain in the CWLLCMN project and no new case referrals will be accepted.

BACKGROUND

- The Jordan's Principle is a "child first" concept that proposes the government or party of first contact pays without a disruption or delay in service provision for a status Indian child. The payer then refers the matter to jurisdictional dispute mechanisms.
- The principle was introduced as a result of a Manitoba First Nation child from Norway House Cree Nation who died in the hospital while waiting for federal and provincial government departments trying to determine areas of responsibility for payment to accommodate his placement into a medical foster home.
- The CWLLCMN project was implemented in 1999 with a formal agreement between federal and provincial governments including First Nations to cost share until the children reach the age of majority or pass on.

CURRENT STATUS

- Discussions have taken place at a national level between senior officials of Indian and Northern Affairs Canada (INAC) and Health Canada to discuss areas of responsibility.
- Limited progress has been made in support of Jordan's Principle and issues related to First Nations with disabilities, including children. These issues often fall outside of existing authorities and policies of both

governments. Current practice results in the children being placed into care to receive services, even though the placements often do not involve child protection issues.

- In terms of Jordan's Principle, there was a final hour of debate in the House and there was unanimous support. The issue is scheduled for a vote on December 12. It has been reported that families and Jordan's parents from Norway House will be brought to the event with approximately 600 supporters including chiefs and councillors.
- Five children remain in the CWLLCMN project. The children and families receive in home care, respite, physiotherapy, occupational therapy as well as other supports and are case managed. INAC's funding contribution is $97, 217 for the 2007/08 fiscal year which represents one-third of the project's annual budget.
- The Manitoba Intergovernmental Committee on First Nation Health (ICFNH) represented by federal, provincial and First Nation representatives developed a joint briefing note with recommendations to support a service delivery model for Manitoba. The briefing note will be presented to the Manitoba Senior Officials Steering Committee of the ICFNH on December 18, 2007 for approval. INAC Regional officials will not be able to support the recommendation in its' current format.

ISSUES

- Issues related to First Nations with disabilities and complex medical needs including children are currently being addressed as "one-off" situations.
- Challenges remain in the implementation of Jordan's Principle as a fair and equitable mechanism is required to sort out payment/reimbursement of services provided.
- In order to access necessary services for their children, First Nation families are faced with the decision to relocate or in some instances voluntarily place their child in the care of Child and Family Services when child protection is not an issue.

CONSIDERATIONS

- INAC is supportive of the "child first" concept but must continue to engage with key stakeholders to realize this objective.
- This issue has received media attention particularly in the north. However it is a prevalent issue across Manitoba.
- INAC Manitoba region received two separate submissions from Manitoba Keewatinook Ininew Okimowin (MKIO) and Norway House Cree Nation requesting similar funding support related to children with disabilities and complex medical needs. It would be more cost effective to support a proposal that is comprehensive rather than these "one off" situations for northern First Nations.
- In depth analysis and research would assist in determining the present service gaps and the cost associated with the implementation of program

authorities to close those gaps. This would need to be a collaborative effort between federal and provincial governments including First Nations.

NEXT STEPS

- Federal, provincial and First Nations must continue to engage on this issue using existing best practices as a mechanism to move forward in a collaborative manner.
- Policy direction and authority on this issue is required from Headquarters who is the funding authority. In addition, clear definition of roles and responsibilities from federal and provincial perspectives is necessary.

ORIGINATOR:
Betty Ann Scott/Manitoba Region/Indian and Northern Affairs Canada/ (204) 983-0740/

Consultations: Scott Amos/Manitoba Region/Indian and Northern Affairs Canada/ (204) 984-6627
Date created: December 7, 2007

CIDM #516073

CANADIAN HUMAN RIGHTS TRIBUNAL

TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

Docket: T1340/7708

BETWEEN:

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

Complainants

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

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

Respondent

and

CHIEFS OF ONTARIO and
AMNESTY INTERNATIONAL

Interested Parties

BEFORE:

Sophie Marchildon	Panel Chairperson
Edward Lustig	Member
Réjean Bélanger	Member

2013/02/11
Ottawa, Ontario
Volume 47

APPEARANCES

Daniel Poulin Sarah Pentney	Canadian Human Rights Commission
Paul Champ	First Nations Child and Family Caring Society of Canada
Jonathan Tarlton Patricia MacPhee	Attorney General of Canada
Stuart Wuttke	Assembly of First Nations

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"But limited progress has been made in support of Jordan's Principle and issues related to First Nations with disabilities, including children. These issues often fall outside of existing authorities and policies of both governments. Current practices result in children being taken into care to receive services..."

Remember I was saying that's really what was happening in Jordan's case.

"... even though the placements often do not involve child protection issues." (As read)

That is a very, you know, concerning thing. Really, child welfare is about child maltreatment, but we find the only way that you bring children into care in order to meet their health needs, when there are healthy, happy families that could be caring for them at home if the child was in their family home.

We will see another example of that. I think Elsie Flette talks about that in the Phoenix Sinclair inquiry -- we will get to that later -- in Manitoba.

And it talks about the full-hour debate on December 12, 2007. I was there and so was Jordan River Anderson. And that:

> "There are five children that remain in this project. The children and families receive in-home care, respite, physiotherapy, occupational therapy, as well as other supports, and INAC's funding contribution is $97,217, which represents one third of the budget." (As read)

So that's not a lot of money to provide care for those kids in their family home. The average cost of a child in foster care, a study by the US government said, is around $47,000. So really this just echoes again that it's cheaper to provide care -- and better for kids to provide care for them and their family homes and off reserve.

And then we go to the issues part, so what's of concern here:

> "Issues related to children with complex disabilities, or disabilities and complex medical needs often including children, are currently being addressed in one-off situations." (As read)

So there is no systemic way, so your people are -- you know, good bureaucrats within the Department or other things are scrambling around trying to figure out how to deal with them every time, instead of there being a systematic policy.

> "Challenges remain in the implementation of Jordan's principle as a fair and equitable mechanism as required to sort out payment and reimbursement issues, and in order to access necessary services for their children, First Nations families are faced with the decision to

relocate (i.e. they move off reserve and the province will pay) or, in some instances, voluntarily place their children in care of Child and Family Services when Child protection is not an issue." (As read)

And there is another case actually very close to this in the Federal Court from a mother in Pictou Landing First Nation, where her child had a complex special needs and the Department was prepared to pay a fixed amount for his care at home when she had a stroke. That was viewed as being insufficient, and the Department actually said, well, if you were to put them in child welfare care, they would cover that cost.

But this is a loving family and just, you know -- in my view, as a social worker, I don't think foster care is the right place for these kids, but it is a place where families have to go to get the specialized care that these children need and deserve.

MS PENTNEY: And the note itself

WE HEREBY CERTIFY that this transcript is a true and accurate transcription to the best of our abilities of this proceeding before the Canadian Human Rights Tribunal.

Proceedings were recorded and provided by the Canadian Human Rights Tribunal and we accept no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

_____

Jean Desaulniers

_____

Beverley Dillabough

Summary statement regarding capital

Background facts

1. Directive 20-1 did not include any reference to capital funds to support the development of on-reserve children in care options or office space for First Nations Child and Family Services Agencies ("FNCFS Agencies").

2. The *1965 Agreement* has not provided for the cost sharing of capital expenditures since 1975.

3. In 2000, the Joint National Policy Review ("NPR") concluded as Recommendation #13 that:

   > *DIAND and First Nations need to identify capital requirements for FNCFS agencies with a goal to develop a creative approach to finance First Nation child and family facilities that will enhance holistic service delivery at the community level*.

4. The first *Wen:De* report noted that FNCFS Agencies expressed concerns and challenges related to a lack of funding for capital costs (2016 CHRT 2 at para 157).

5. The second *Wen:De* report found that FNCFS Agencies were inadequately funded in capital costs (2016 CHRT 2 at para 162) and that funding had not reflected the significant technological changes in computer hardware and software since the early 1990s (2016 CHRT 2 at para 167).

6. The third *Wen:De* report recommended that Directive 20-1 be changed to provide sufficient funding to cover capital costs (buildings, vehicles, information technology (IT) and office equipment) (2016 CHRT 2 at para 177).

7. The 2012 *AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia* ("2012 *AANDC Evaluation*") found that capital expenditures on new buildings, new vehicles and computer hardware were identified as being necessary to achieve compliance with provincial standards and to make FNCFS Agencies a more desirable place to work. However, the 2012 *AANDC Evaluation* also found that capital expenditures were not anticipated when the EPFA was implemented (2016 CHRT 2 at para 289).

Tribunal findings

8. The Tribunal concluded that the EPFA did not provide adjustments for increasing costs over time for things such as capital expenditures (2016 CHRT 2 at para 344), and that the funding structure for the FNCFS Program created funding deficiencies for items such as capital infrastructure (2016 CHRT 2 at para 389).

9. One of the main adverse impacts found by the Tribunal was that there was inadequate fixed funding for operation (including capital costs) which hindered the ability of FNCFS Agencies to

provide provincially/territorially mandated child welfare services, let alone culturally appropriate services.

Discussions among the parties at the CCCW

10. By the May 10, 2018 CCCW meeting, Canada advised the parties that it was revising the Terms and Conditions for the FNCFS Program.

11. On May 10, 2018, Ms. Isaak (ISC-ESDPP ADM) provided draft interim Terms and Conditions for the FNCFS Program until the alternate funding system ordered by the Tribunal was designed and put in place. This draft did not contain reference to major capital expenditures or to Information Technology expenditures.

12. On May 16, 2018, Dr. Blackstock provided the Caring Society's comments on the draft interim Terms and Conditions for the FNCFS Program and proposed the addition of capital costs for the purchase and maintenance of information technology equipment and systems that are tailored to child and family services delivery as an eligible expenditure under the FNCFS Program.

13. On May 28, 2018, ISC provided a revised version of the draft interim terms and conditions for the FNCFS Program, which accepted the Caring Society's recommendation to add capital costs for the purchase and maintenance of information technology equipment and systems that are tailored to child and family services delivery as an eligible expenditure under the FNCFS Program.

14. On June 8 and 19, 2018, the Caring Society noted its concern that the draft interim Terms and Conditions did not make provision to expand building capacity or to construct or acquire new facilities to accommodate the requirements of expanded prevention programming.

15. At the June 22, 2018 CCCW meeting:
    a. Dr. Blackstock (Caring Society) raised the matter of finding a solution for capital funding for the FNCFS Program and under Jordan's Principle in order to allow for space for the delivery of service and for additional staff. The Caring Society had received feedback from communities across the country that a lack of capital funds was a major stalling block to delivering new services, as additional funds for new staff and programs could only be effective if there was space for these new activities.

    b. Mr. Thompson (AFN) confirmed that the matter of capital funding had arisen a number of times during regional discussions of the Jordan's Principle Action Table.

    c. Ms. Isaak (ISC-ESDPP) advised that the FNCFS Program had authority for minor capital (projects under $1.5 million) but not for major capital (projects over $1.5 million), and that Canada was looking to find a solution to the capital issue in order to provide space for FNCFS Agencies as operations expand.

d. Dr. Blackstock proposed that a pool be established based on the best estimate of capital needs for the fiscal year, with adjustments made for following fiscal years as more accurate numbers were established, much as was done for Jordan's Principle in 2016. Ms. Isaak identified a lack of knowledge regarding community priorities for infrastructure as an obstacle to proceeding immediately. Dr. Blackstock identified a need for ISC to make a pool of funds available so that it was not a barrier to progress, with no funds being available once community priorities are established, and that some FNCFS Agencies had "shovel ready" projects (i.e. feasibility and technical studies already completed) that could begin rapidly, such that these projects should not be held back while longer-term planning was conducted for other communities.

e. Ms. Isaak indicated that capital authorities do exist within other parts of ISC, such as related to community infrastructure; however, there are insufficient funds available through these authorities to fund the FNCFS Agency needs. Including a capital authority within the FNCFS Program would require Cabinet approval and a specification of the amount of funds involved.

f. ISC committed to follow-up on the state of its current capital program and the projects it funds.

16. On August 1, 2018 ISC provided a "Discussion Paper – Addressing Capital Needs" (**Tab 1**) that outlined current policy authorities, interim authority under the revised Terms and Conditions, and future policy authorities, including a need to return to Cabinet to support major capital projects. A list of expanded minor capital expenditures was attached to the Discussion Paper.

17. At the August 2, 2018 CCCW meeting:

    a. Dr. Blackstock stated that the Discussion Paper failed to address the major issue related to the need for new space for increased staff and prevention programs, and that a firm commitment that authorities would be extended to cover major capital projects was required.

    b. Ms. Isaak advised that ISC required a full grasp of FNCFS Agency capital needs in order to build the best case for adding major capital authorities.

    c. Dr. Blackstock reiterated her concerns that ISC's requirement of a "full grasp" of FNCFS Agency capital needs would forestall projects that were already ready to proceed.

18. At the September 5, 2018 CCCW meeting:

    a. Dr. Gideon advised that while the First Nations Inuit Health Branch has authority for major capital projects on reserve, those authorities have been narrowed over the years to be specific to health centres.

b. Ms. Isaak advised that ISC was determining which FNCFS Agencies operate in owned space as opposed to leased space.

c. Ms. Isaak advised that in 2007, Treasury Board rescinded the general requirement that minor capital projects be limited to under $1.5 million and stated that each program must create their respective authority. The former INAC simply adopted the $1.5 million threshold for minor capital projects, with some programs having increased it. All parties agreed that the $1.5 million threshold was insufficient for actual needs for new space.

d. The Caring Society suggested applying an inflation adjustment to the minor capital threshold adopted following the change to the Treasury Board directive in order to restore lost purchasing power.

e. Ms. Isaak raised the possibility of setting an assessment process to ascertain which FNCFS Agencies require significant and imminent work, as well as a capital needs assessment of all FNCFS Agencies to be performed to have a better understanding and comprehensive picture of current and projected costs.

19. On October 1, 2018, the Caring Society provided feedback to ISC regarding its Capital Options Discussion Paper (**Tab 2**).

20. At the October 23, 2018 CCCW meeting:

a. Canada advised that the threshold for capital projects under the Terms and Conditions had been increased from $1.5 million to $2.5 million to account for inflation, and that the Terms and Conditions had eliminated a reference to major capital projects as opposed to minor capital projects.

b. The increase of the capital threshold from $1.5 million to $2.5 million would be accompanied by a directive on capital, so that further changes to the threshold would not require a Treasury Board process. The draft directive on capital would be provided to the CCCW for review.

c. Chiefs of Ontario identified that the August 1, 2018 Discussion Paper regarding capital options was only directed to FNCFS Agencies, which excluded communities that wanted to deliver prevention services themselves, as well as communities with band representative programs.

21. On October 30, 2018, Ms. Wilkinson (ISC ADM of ESDPP) wrote to Dr. Blackstock explaining the specific information that ISC requires in order to move forward on capital requirements (**Tab 3**)

22. At the November 19, 2018 CCCW Meeting:

    a. ISC provided a cost estimate development for Jordan's Principle Renewal table that identified $38.4 million in funds allocated to infrastructure. (**Tab 4)**

23. At the December 11, 2018 CCCW Meeting:

    a. Ms. Wilkinson advised that a communique to FNCFS Agencies regarding the update to the Terms and Conditions on the matter of capital was under development and that a draft would be circulated to the CCCW for comment.

24. On December 15, 2018, IFSD provided its final report, which concluded that:

    a. Nearly 60% of FNCFS Agencies indicated a need for capital repair and investment;

    b. FNCFS Agency Information Technology needs are funded on average at 1.6% of the FNCFS Agency's budget, which is severely underfunded when compared to the industry standard of approximately 5-6%;

    c. There is a need for a *one-time* capital investment of $116 million to $175 million for FNCFS Agency headquarters facilities, with recommended further budgeting of 2% annual recapitalization rate, for FNCFS Agency headquarters facilities; and

    d. Across the FNCFS Program, pursuant to industry standards, the annual Information Technology expenditure should be $65 million to $78 million.

25. On January 16, 2018, Ms. Wilkinson advised the parties that the FNCFS Program Terms and Conditions would not contain a cap or limit on capital funding, and that the forthcoming directive on capital would set a limit of $2.5 million for capital infrastructure projects that are outside of the projects that can be claimed through the actuals process.

26. At the January 17, 2019 CCCW Meeting:

    a. Following a presentation from Dr. Gaspard (IFSD), Dr. Blackstock requested that ISC confirm if Canada could commit to make the one-time capital investment of $116 million to $175 million for FNCFS Agency headquarters facility.

    b. Ms. Wilkinson stated that Canada could not make such a commitment and that it was considering the IFSD report.

27. On January 18, 2019, Ms. Wilkinson provided the parties with the FNCFS Program Terms and Conditions that were approved in December 2018. The Terms and Conditions list "Purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services" as an "eligible expenditure" for FNCFS Agencies.

FIRST NATIONS CHILD AND FAMILY SERVICES
DISCUSSION PAPER – ADDRESSING CAPITAL NEEDS

First Nations Children and Family Services (FNCFS) Program has received requests for minor capital expenditures (e.g. expansions), and major capital projects above $1.5M (e.g. building long-houses, community-centres, safe-houses on reserve, creating group homes for keeping children in care close to the community), which are outside of the current Program authorities. As of February 1, 2018, Indigenous Services Canada is paying building repairs based on actuals (including reimbursements of expenditures dated back to Jan. 26, 2016)

In the short-term, FNCFS is currently working to clarify and expand the list of eligible expenditures under minor capital through the interim Terms and Conditions. The program is also seeking to learn more from the data collected by the Institute of Fiscal Studies and Democracy (IFSD)'s (July 10, 2018 presentation) on agency capital needs. As the work of IFSD continues towards developing a new funding methodology, the Program is prepared to discuss what capital may be needed by agencies moving forward.

First Nations Child and Family Services (FNCFS) Authorities–Capital		
CURRENT	**INTERIM T&C'S**	**FUTURE**
Policy/Authorities: • The threshold of $1.5M for minor capital is based on departmental policy within the First Nations Community Infrastructure Program. There is currently no policy authority for supporting major capital projects for FNCFS agencies. • The Capital Facilities Maintenance Program (CFMP), which supports community infrastructure for First Nations on reserve, does not have program authorities to provide funding for the construction, renovation or maintenance of FNCFS agency buildings and/or capital assets. CFMP authorities also do not list FNCFS agencies as eligible funding recipients. **Eligible Expenses:** • Current FNCFS Program Terms and Conditions cover expenditures related to minor capital; specifically: "minor maintenance, upgrading and repairs of facilities (leasehold improvements may only be used for minor capital projects)"; and "overhead administration costs". These	**Policy/Authorities:** • Interim T&C's propose to expand existing eligible expenses which includes the definition of capital costs for upgrading/repair/ construction and purchases like vehicles and IT, previously considered outside the programs authorities. **Eligible Expenses:** • The Department is proposing to expand the list of eligible expenditures. For a preliminary list of expanded eligible expenditures see Annex A.	**Policy/Authorities:** • If future study (i.e. IFSD) demonstrates there is a need to increase the threshold of $1.5M the Department can seek approval through new Terms and Conditions. • New policy authorities from Cabinet would be required to support major capital projects. **Eligible Expenses:** • To date based on IFSD and discussions with agencies, new Terms and Conditions could include the purchase, construction or development of capital needed to support program service delivery to keep children out of care and with their families in their communities (e.g. Anishinaabe Child & Family Services new building due to the community being displaced). **Considerations:** • In the mid- to long-term, the Department could consider leveraging the First Nations Infrastructure Investment Plan (FNIIP) that address the

administration costs specifically refer to security costs, appliances, furniture, supplies, equipment (including IT equipment), rent and mortgage. **Considerations:** • The scope of capital needs as it relates to child and family services is not currently known. The IFSD's interim report has examined 70% of the agencies. More detail may be needed to support program changes. • Active support to FNCFS agencies and other service organizations may be required to ensure common understanding of the scope of eligible expenditures.		planning, construction, acquisition, operation and maintenance of community infrastructure.

Next steps:

- Seek authorities through the interim Terms and Conditions to expand the definition of minor capital; and expand the current list of eligible expenditures within the $1.5M cap.
- Work with IFSD to obtain any additional data or analysis of the data collected from agency capital needs.
- Work with Regional colleagues to obtain additional information related to capital needs.
- Develop a proposal that would support any new authorities that may be required to support capital needs.

Annex A: Eligible Expenses – Capital Costs for upgrading/repairs/construction

- Renovations/repairs to the building structure, structural foundations, etc.;
- Repair/replacement of roofing, siding etc.;
- Repairs replacement of Heating system, Cooling system, Ventilation system, Electrical system, Water system, Plumbing system, Back-up generators, etc.;
- Repairs/replacement to/of the floors;
- Repairs/repainting to/of the walls, ceiling, etc.;
- Repairs/replacement to/of windows, doors, etc.;
- Repairs/renovations to the toilets, bathrooms;
- Repairs/renovations to the kitchen (including replacement of cupboards, counters, etc.);
- Repairs/renovations to storage space;
- Repairs/renovations related to improved indoor environmental quality including:
- Air quality (e.g. vent replacement),
- Thermal comfort (e.g. replacement of thermostats),
- Acoustics (e.g. wall insolation),
- Day lighting (e.g. additional windows, replacing/installing additional light fixtures to simulate external light for centers in the north, etc.)
- Pollutant source control (e.g. water purification systems);
- Use of low-emission materials and building system controls, etc.; and,
- Fixtures and Equipment required by Fire Regulations including Fire alarms, Fire doors, Exit signs, Fire extinguishers, First aid kits, Earthquake kits, etc.
- Repairs/renovations to the parking lot;
- Repairs/renovations to external alleys, paths, etc.;
- Repairs/renovations to external structures;
- Permanent Signage;
- Outdoor play structures/space; and,
- Porch, deck, fences, etc.

From: "Isaak, Paula (AADNC/AANDC)" <paula.isaak@canada.ca>
Date: Monday, October 1, 2018 at 12:31 PM
To: Andrea Auger <aauger@fncaringsociety.com>
Cc: Cindy Blackstock <cblackst@fncaringsociety.com>, "Buist, Margaret (AADNC/AANDC)" <margaret.buist@canada.ca>, "Nafziger, Lisa (AADNC/AANDC)" <lisa.nafziger@canada.ca>, "Legault, Lisa (AADNC/AANDC)" <lisa.legault@canada.ca>
Subject: RE: Capital Options

Thanks Andrea. This is helpful. We are working on all the aspects Cindy raised and will have an update on our progress if not before the next CCCW, on that day.

Thanks
Paula

Paula Isaak
Assistant Deputy Minister/Sous-ministre adjoint Education and Social Development Programs and Partnerships Sector/Secteur des programmes et des partenariats en matière d'éducation et de développement social
10 Wellington St / 10 rue Wellington
Room 2347/ Pièce 2347
Phone: (819) 997-0020
Fax: (819) 953-4094
Paula.Isaak@canada.ca

From: Andrea Auger [mailto:aauger@fncaringsociety.com]
Sent: Monday, October 01, 2018 12:24 PM
To: Isaak, Paula (AADNC/AANDC)
Cc: Cindy Blackstock
Subject: Capital Options

Dear Paula,

The "Timeline of FNCFS Program Documents sent by ISC and Feedback from Parties – July 2018 to Present" lists the "Capital Options" document of August 2, 2018 as one on which the Caring Society's feedback is outstanding. Dr. Blackstock provided the Caring Society's initial feedback verbally at the August 2 CCCW meeting and again at the September 5 CCCW meeting. So that there is no confusion, here are the comments again:

As Dr. Blackstock advised at the August 2 and September 5 CCCW meetings, there is a major gap in ISC's current approach as authority for major capital projects is required. The CHRT's orders for funding at actuals will not be effective in bringing in the new programming needed to provide substantively equal child and family services on-reserve if there is not sufficient or appropriate space in which that programming can be offered. Concrete steps to ensure that authority is provided for major capital are required without delay. The concerns regarding capital apply equally to the Child First Initiative and other programs run out of FNIHB – increased funding for programming will not meet the needs of communities if there is insufficient or inadequate space.

With regard to the discussion paper, while the more detailed list appended as Annex A is helpful, direct communication to FNCFS Agencies advising of the expansion of eligible expenditures is an important part of ensuring that the decisions made at HQ regarding eligibility have an impact on the ground.

As mentioned at the CCCW meetings, the Caring Society is also of the view that the $1.5 million threshold should be adjusted for inflation, at least back to its adoption, in order to preserve purchasing power for FNCFS Agencies. The $1.5 million should also be adjusted for FNCFS Agencies serving remote communities, given cost escalations involved with even minor capital projects in those settings.

Finally, when a capital envelope for FNCFS facilities is adopted, that envelope should have funding streams for both expansion projects (i.e. new space) and building condition projects (i.e. projects for building functionality that exceed minor capital thresholds). Ancillary costs, such as for planners, architects, engineers and staff time should be included as eligible costs for all project costs.

For clarification – the discussion document states that more information from IFSD may be required. If 70% is not a sufficient response rate, why not and what response rate would be required for ISC to move forward?

Should you have any questions, please do not hesitate!

All the best,

Andrea Auger
Reconciliation and Research Manager
First Nations Child & Family Caring Society of Canada
www.fncaringsociety.com
613-230-5885
Twitter: @Caringsociety
Facebook: /CaringSociety
Instagram: spiritbearandfriends

From: Wilkinson, Joanne (AADNC/AANDC) <joanne.wilkinson@canada.ca>
Sent: October 30, 2018 10:07 AM
To: Cindy Blackstock
Cc: Nafziger, Lisa (AADNC/AANDC); Brickey, Salena (AADNC/AANDC); Isaak, Paula (CANNOR)
Subject: RE: Capital

Dear Cindy,

As was discussed at the Consultation Committee meeting and previously with Paula (on September 5 and August 2, when the draft discussion paper was shared), there have been two issues related to major capital for FNCFS agencies (i) authorities and (ii) funds.

We are addressing the authorities gap through changes to the interim Terms and Conditions, which now include a much more extensive list of eligible costs for infrastructure purchase, maintenance and renovations and which no longer mention major or minor capital (as per the August 15 version of the Terms and Conditions, discussed on September 5).

In addition, as mentioned at Consultation Committee, we are removing the $1.5M cap for capital from the interim Terms and Conditions and will be raising it to $2.5M to account for inflation and other pressures. We will do this through a program directive, which will include information to support agencies and ISC regions and will be shared with the CCCW in draft form prior to the next meeting on November 19.

In terms of funds, agencies could use the increased Budget 2018 funding (ramp-up & remoteness allocations) or any surpluses they may have for capital expenditures. In addition, ISC continues to explore options to seek additional funds to support agency capital needs. We also continue to fund building repairs based on actuals and will continue to work with agencies to review other requests as they are received on a case by case basis.

We look forward to the additional analysis from IFSD regarding agency capital needs and anticipate that the multi-year planning process that agencies are undertaking with their communities will also include discussions related to capital. In addition, should there be a need for additional work with First Nations and agencies to determine capital needs, we will work with the CCCW on how best to do this.

Many thanks,
Joanne

From: Cindy Blackstock [mailto:cblackst@fncaringsociety.com]
Sent: Wednesday, October 24, 2018 10:51 AM

To: Isaak, Paula (CANNOR); Wilkinson, Joanne (AADNC/AANDC)
Subject: Capital

Good morning Paula and Joanne

In preparation for representations/testimony before the Tribunal next week, can you please advise what specific information INAC requires in order to provide what is known as “major” capital (i.e.: new buildings for prevention programs and staff) to FNCFS agencies and under Jordan’s Principle and what efforts INAC has undertaken to satisfy these information requirements?

Thank you

Cindy

Group Requests - Services	$247.2 M
Community Case Management	$204.5 M
Maternal and Child Health (new)	$58.1 M
Fetal Alcohol Spectrum Disorder (new)	$32.6 M
Aboriginal Head Start On Reserve (new)	$107.0 M
Individual Requests (CFI)	$82.9 M
Service Coordination	$20 M
Infrastructure	$38.4 M
First Nation-Led Dialogue	$15 M
Trilateral Tables	$4.8 M
Innovation fund	$30 M
Total:	**$840.5 million per year** ($2.5 billion over three years)

A. Group Request Data - Services

The Jordan's Principle Group Request expenditure data available from which to extract information for a cost estimate was incomplete, as not all funded recipient reports had been received when the data was rolled up, and also because the data collection instrument was filled out inconsistently. The Group Request data was variable across the regions and did not provide the consistency necessary for a cost analysis. Region-specific data from Manitoba was selected for use as it was about half of the data, the most complete of any region, and based on a province-wide model of service delivery. The national average and Manitoba average service costs were quite similar, likely because Manitoba was such a large proportion of the national costs.

In the analysis, submissions which did not have community populations were screened out, as were those which did not have any costs associated with the services. There were 23 unique submissions/communities in Manitoba that had costed services (4,079) and the covered population. Ten categories were used to aggregate the data into major types of services and activities (see Table 1 below). The highest service category was child development worker, with an average cost of $40,000 per service (service in this case is assumed to be per child). The second highest categories were respite care, and the services associated with health care professionals (therapies and counselling), each at approximately $2,580 per service. Crisis response and NIHB ($612 per service) and land based/cultural/life skills/recreational services ($380 per service) were the next highest categories.

An average cost of $284.70 was calculated using the 0-18 population in the 23 Manitoba community submissions.

Table 2 provides group service cost estimates by region, based on each region's 0-18 population and $284.70 per child, for a draft national cost estimate of $82.4 million.

Table 1: Group Request Data (Manitoba)

Service Category	# services provided to children	Cost	$ per service
Child Development Worker	17	681,384	40,081
assess/counselling/screening/therapy	302	780,009	2,583
Community, info sessions	1,510	42,184	28
land based, cultural, life skills, recreational	1,124	427,668	380
Crisis response,NIHB (food, MT, ME)	134	82,072	612
drop in, home visits,	90	26,465	294
mental well being	282	95,691	339
parenting	27	7,239	268
respite	573	1,483,476	2,589
school, tutoring,	20	875	44
Total	4,079	3,627,063	889

Table 2: Group Service Expenditures, by Region

	Regional on and off reserve pop, 0-18, 2017	284.70 Average cost per capita
Alberta	44,883	12,778,190
Atlantic	16,315	4,644,880
BC	37,023	10,540,448
Manitoba	55,629	15,837,576.
Northern	7,020	1,998,594
Ontario	51,819	14,752,869
Quebec	23,496	6,689,311
Sask	53,296	15,173,371
TOTAL	289,481	82,415,240

Based on historical costs, it is assumed that there is a considerable unmet demand for services in the regions (the expenditures in 2017/18 tripled from 2016/17). Assuming a similar tripling of costs will be maintained in 2019/20, then across all provinces, the Group Request (services) draft estimated cost is $**247,245,722**. (Note: pop growth and inflation were not independently assessed, as the tripling is assumed to be all inclusive.)

B. Community-based Case Management

Based on FNIHB's direction, one case manager per 50 families was used as the workload measure for the development of case managers at the community level. It is assumed that there are approximately 2 children per family in the 0-18 age bracket (First Nations fertility rate is about 2.8 children per woman so this is a conservative estimate), so that the case manager may be serving an average of 100 children on a population basis. Therefore, the calculation to determine case management costs is based on an assumption of 1 FTE is needed per 100 children.

The calculation was community specific, in that each community's 0-18 on reserve population was used to determine that community's FTE requirement. It was assumed that every community will need at least a 0.25 FTE, and therefore communities with less than 0.25 FTE were adjusted to a level of 0.25 FTE. [A buffer was built into this calculation, as every community's FTE was increased to the next nearest 0.25 value.]

A case manager salary was included in the cost development at $60,000 plus 23% for benefits, and also 20% for overhead costs. A second level of service, representing supervisory needs of case managers, was included, using the ratio of one supervisor for every 7 case managers. The supervisor salary was costed at $75,000 plus benefits plus overhead.

A remoteness factor was included, using 25% additional costs (salary and overhead), for 15% of the 0-18 population. (The assumption of 15% will be refined using the FNIHB remoteness categories). Draft cost estimate for the case manager function: **$204.5 million.**

Table 3: Case Manager Costs by Region

	Regional Cost	Regional 0-18 population, on reserve, 2017	Regional per capita cost
Alberta	9,526,911	8,310	1,146
Atlantic	32,146,865	29,121	1,104
BC	21,178,571	17,085	1,240
Manitoba	40,485,066	36,664	1,104
Northern	5,047,712	4,138	1,220
Ontario	33,829,436	29,627	1,142
Quebec	20,328,671	18,280	1,112
Sask	42,003,256	29,438	1,427
National	**204,546,487**	**172,663**	**1,187**

Note: the case manager cost development was carried out by Isaac Wolfe, under LLF direction.

Draft total Group Request (services and case manager) cost estimate: $451.7 million.

C. Upstream Costs

The cost to extend Maternal Child Health, Fetal Alcohol Syndrome Disorder and Aboriginal Head Start on Reserve to all communities was estimated using 2017/18 expenditures, 2017 population and 2015 community based reporting template (CBRT) data. In brief, the methodology involved:

Maternal and Child Health (MCH):

1. Per Child Cost: CBRT reach numbers were used to estimate the regional per child cost of those served (i.e. total 2017/18 expenditures/MCH children reached)
2. Estimate of need: Risk factors for perinatal clients from the CBRT were used. Risk factors are not mutually exclusive, however, perinatal smoking is the highest risk factor (42.1% nationally) and this was used to the estimate of need (i.e. 2017 0-6 population on reserve X .421)
3. The per child cost (#1) was multiplied with the population at risk (#2) to estimate the total cost (existing and new children). The resulting cost was adjusted to 2018 (using 2% inflation and 2% population growth).
4. Further adjustments included pop growth (2%) and inflation (2%) for 15 years on the existing funding (from 2002 to 2017).
5. Draft estimated NEW cost is a summation of #3 and #4 above, with existing costs subtracted. NEW cost: **$58.1 million**; New and existing cost: $79.3 million.

Fetal Alcohol Spectrum Disorder (FASD)

A similar approach was used as for MCH. The reach for FASD was not available, so it was assumed that the reach was comparable as for MCH, with an adjustment for the difference in covered population. For example, if the reach was 700 children in MCH, and the populations of the communities funded were 500 (FASD) and 800 (MCH), then the estimated reach of FASD was 700 X (500/800).

Draft estimated NEW cost: **$32.6 million**. New and existing cost: $41.4 million.

Aboriginal Head Start On Reserve

1. Per Child Cost: 2017/18 Regional expenditure/number of children attending AHSOR.
2. Need: 50% of the 2017 0-6 population on reserve (reflection of the 3-5 years of age priority population in AHSOR) minus the number of children now attending.
3. New cost: Per child cost (#1) X need (#2). Cost was adjusted to 2018 as above.

4. Adjustment for pop growth (2%) and inflation (2%) for 20 years on the existing funding.
5. Total cost: New cost (#3) and pop/inflation adjustment to existing cost (#4): **$107.0 million**.

D. CFI Expenditures (FNIHB Individual Requests)

Please see the file: 'Region CFI expenditures – projected costs 6 August 2018' for a description of the methodology.

The cost estimate is $27,638,518 based on 2017/18 data. Assuming a tripling of costs to cover unmet need, the CFI cost (individual requests) is $**82.9 million**.