Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

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

Complainants

-and-

CANADIAN HUMAN RIGHTS COMMISSION

Commission

-and-

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

Respondent

-and-

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL, and NISHNAWBE ASKI NATION

Interested Parties

BOOK OF AUTHORITIES OF THE INTERESTED PARTY NISHNAWBE ASKI NATION
Submissions of April 30 and May 1, 2020

FALCONERS LLP
Barristers-at-law
10 Alcorn Ave., Ste 204
Toronto, ON M4V 3A9

Tel: (416) 964-0495
Fax: (416) 929-8179
Email: julianf@falconers.ca
mollyc@falconers.ca

Julian N. Falconer (LSO# 29465R)
Molly Churchill (LSO# 72510P)

Lawyers for the Interested Party, Nishnawbe Aski Nation (NAN)

TO: **CANADIAN HUMAN RIGHTS TRIBUNAL**
Attn: Judy Dubois, Registry Officer
160 Elgin Street, 11th Floor
Ottawa, ON K1A 1J4

AND TO: **Robert Frater, Jonathan Tarlton, Patricia MacPhee, Kelly Peck, Max Binnie, & Meg Jones**
Justice Canada
Civil Litigation Section, Ste. 500
50 O'Connor St.
Ottawa, ON K1A 0H8
Tel: 613-952-1228
Fax: 613-954-1920

Counsel for the Respondent, the Attorney General of Canada

AND TO: **David P. Taylor**
Conway Baxter Wilson LLP/s.r.l.
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9
Tel: 613-691-0368
Fax: 613-688-0271

Sarah Clarke
Clarke Child & Family Law
36 Toronto Street, Suite 950
Toronto, ON M5C 2C5
Tel: 416-260-3030
Fax: 647-689-3286

Barbara McIsaac
Barbara McIsaac Law

Anne Levesque
Levesque Equality Law

Co-Counsel for the Complainant,
First Nations Child and Family Caring Society of Canada

AND TO: **Stuart Wuttke & Julie McGregor**
Assembly of First Nations
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Tel: 613-241-6789
Fax: 613-241-5808

David Nahwegahbow
Nahwegahbow Corbiere
5884 Rama Road, Suite 109
Rama, ON L3V 6H6
Tel: 705-325-0520
Fax: 705-325-7204

Co-Counsel for the Complainant, Assembly of First Nations

AND TO: **Brian Smith & Jessica Walsh**
Litigation Services Division
Canadian Human Rights Commission
344 Slater Street, 9th Floor
Ottawa, ON K1A 1E1
Tel: 613-947-6399
Fax: 613-943-3089

Counsel for the Canadian Human Rights Commission

AND TO: **Maggie Wente & Sinéad Dearman**
Olthuis, Kleer, Townshend LLP
250 University Avenue, 8th floor
Toronto, ON M5H 3E5
Tel: 416-981-9330
Fax: 416-981-9350

Counsel for the Interested Party, the Chiefs of Ontario

AND TO: **Justin Safayeni & Ben Kates**
Stockwoods LLP Barristers
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, Ontario M5K 1H1
Tel.: 416-593-7200
Fax: 416-593-9345

Counsel for the Interested Party, Amnesty International

INDEX

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

Table of Contents

I. Introduction

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families…for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities. (see 1996 report of the *Royal Commission on Aboriginal Peoples (RCAP), Gathering strength,* vol. 3, p. 10 part of the Tribunal's evidence record).

[1] **The Special Place of Children in Aboriginal Cultures**

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. (see *RCAP, Gathering strength* vol. 3, p. 21).

[2] This Panel recognizes the shame and the pain and suffering experienced by children, families and communities who were deprived of this vital right to live in their families and communities as a result of colonization, racism and racial discrimination.

[3] This shame is not for you to bear, it is one for the entire Nation of Canada to bear, in the hope of rebuilding together and achieving reconciliation.

II. Context

[4] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 (the Decision), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the Canadian Human Rights Act (the *CHRA*).

[5] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Department of Indigenous Services Canada (DISC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario (the 1965 Agreement) to reflect the findings in the Decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[6] In the 2016 CHRT 2 Decision, at para.485, the Panel wrote:

> Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in willfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000 under the statute.

[7] The Panel had outstanding questions for the parties in regards to compensation and deferred its ruling to a later date after its questions had been answered. Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The Panel advised the parties it would address the outstanding questions on remedies in three steps.

> First, the Panel will address requests for immediate reforms to the FNCFS Program, the 1965 Agreement and Jordan's Principle. Other mid to long-term reforms to the FNCFS Program and the 1965 Agreement, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Panel will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*. (see 2016 CHRT 10 at, paras.1-5).

[9] The Panel reiterated its desire to move on to the issue of compensation in a 2018 ruling and wrote as follows:

> The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the Decision. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief. (see 2018 CHRT 4 at, para 385). Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc. (see 2018 CHRT 4 at, para. 386).
>
> Moreover, the Panel added that it took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now. (see 2018 CHRT 4 at, para. 387).

[10] The Panel also said:

> Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here. (see 2018 CHRT 4 at, para. 388).

[11] In terms of the impacts of this case on First Nations children and their families the Panel added:

> In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination. (see 2018 CHRT 4 at, para. 389).

[12] After having addressed other pressing matters in this case, the Panel provided clarification questions to the parties on the issue of compensation. The Panel allowed the parties to answer those questions, to file additional submissions and to make oral

arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real

needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group namely, First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the AGC's position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The Caring Society states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations

children and families. Canada also ignored evidence-informed solutions that could have redressed the discrimination well before the complaint was filed, and certainly in advance of the hearings. Indeed, the Tribunal's findings are clear that Canada was reckless and was often more concerned with its own interests than the best interests of First Nations children and their families.

[18] The Caring Society submits that this case embodies the "worst case" scenario that subsection 53(3) was designed for, and is meant to deter. Multiple experts and sources, including departmental officials, alerted Canada to the severe and adverse effects of its FNCFS Program. Over many years, Canada knowingly failed to redress its discriminatory conduct and thus directly and consciously contributed to the suffering of First Nations children and their families. The egregious conduct is more disturbing given Canada's access to evidence-based solutions that it ignored or implemented in a piece-meal and inadequate fashion.

[19] The Caring Society further argues that the evidence is clear that the maximum amount of $20,000 in special compensation is warranted for every First Nations child affected by Canada's FNCFS Program and taken into out-of-home care since 2006. The Government of Canada willfully and recklessly discriminated against First Nations children under the FNCFS Program and it was not until the Tribunal's decision and subsequent compliance orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), 2018 CHRT 4 and 2019 CHRT 7) that Canada has slowly started to remedy the discrimination.

[20] As such, the Caring Society submits that Canada ought to pay $20,000 for every First Nation child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 *Decision*.

[21] Also, the Caring Society adds that every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care between 2006 and the point when the FNCFS Program is free from perpetuating adverse impacts is entitled to $20,000 in special compensation under subsection 53(3) of the *CHRA*. Canada is keenly aware

that many of the discriminatory aspects of the FNCFS Program remain unchanged and until long-term reform is complete, First Nations children will continue to experience discrimination. Those children deserve to be recognized and acknowledged, and Canada's continuation of this conduct in this program should be denounced, to (in the words of Mandamin J.) "provide a deterrent and discourage those who deliberately discriminate" in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

[22] The Caring Society contends that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children. Nonetheless, Canada did not take meaningful steps to implement Jordan's Principle for nearly another decade, after this Tribunal's numerous decisions and non-compliance orders requiring it to do so. By failing to implement it and making the informed choice to deny the true meaning of Jordan's Principle, Canada knowingly and recklessly discriminated against First Nations children. The Caring Society submits that the evidence in this case supports an award for special compensation pursuant to subsection 53(3) of the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

[23] The Caring Society is of the view that the special compensation ordered for (i) each First Nations individual affected by Canada's FNCFS Program who, as a child, was been taken into out-of-home care, since 2006; and (ii) for every for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's willful and/or reckless discriminatory approach to Jordan's Principle from December 2007 to November 2017, should be paid into a trust for the benefit of those children.

[24] The Caring Society is requesting an order similar to that granted by this Tribunal in 2018 CHRT 4: an order under section 53(2)(a) of the *CHRA* for the Caring Society, the AFN, the Commission, Chiefs of Ontario, Nishnawbe Aski Nation and Canada to consult on the appointment of seven Trustees. If the parties cannot agree on who the trustees should be, the seven trustees of the Trust would be appointed by order of the Tribunal. The mandate of the Trustees will be to develop a trust agreement in accordance with the

Panel's reasons, outlining among other things: (i) the purpose of the Trust; (ii) who the beneficiaries are; (iii) how a beneficiary qualifies for a distribution; (iv) programs that will be eligible and in keeping with the objective of the Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Trust will be administered.

[25] The Caring Society further requests an order that the parties report back within three months of the Panel's decision, with respect to the progress of the appointment of the Trustees. The Caring Society believes that an in-trust remedy will provide a meaningful remedy for First Nations children and families impacted by the willfully reckless discriminatory impact of the FNCFS Program and Jordan's Principle. It enables persons who were victims of Canada's discriminatory conduct to access services to remediate, in part, the impacts of discrimination.

[26] The Caring Society supports AFN's request for compensation in relation to both pain and suffering (section 53(2)(e)) and willful and reckless discrimination (section 53(3)) of the *CHRA*. Certainly, the victims in this case have experienced pain and suffering, with some First Nations children losing their families forever and some First Nations children losing their lives. In addition, on a principled basis, the Caring Society agrees with the AFN's request for individual compensation. We also recognize that an individual compensation process will require special and particular sensitivities regarding the significant issues of consent, eligibility and privacy. Many of the victims of Canada's discriminatory conduct are children and young adults who are more likely to experience historical disadvantage and trauma.

[27] According to the Caring Society, any process that is put in place will need to adopt a culturally informed child-focused approach that attends to these realities. Such persons may also have their own claims against Canada, whether individually or as part of a representative or class proceeding, and it is not possible for the parties to ascertain the views of all such potential claimants on individual compensation through the Tribunal's process. The Caring Society is also aware of the significant and complex assessment processes required to administer and deliver individual compensation. Best estimates suggest that an order for individual compensation for those taken into out-of-home care could affect 44,000 to 54,000 people. In terms of Jordan's Principle, after the Tribunal

issued its May 26, 2017 Order, the number of approvals significantly increased (indeed, over 84,000 products/services were approved in fiscal year 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.

[28] Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully advances that the Tribunal, assisted by all of the parties, is in the best position to decide the financial remedy at this stage of the proceeding. The Tribunal has experience in awarding financial compensation to victims of discrimination and has a sense, through a common-sense approach, of what is and what is not reasonable. Indeed, this Panel is expertly immersed in this case. It understands the FNCFS Program and Jordan's Principle, the impacts experienced by First Nations children and the importance of ensuring long-term reform. It has also demonstrated that the centrality of children's best interests in decision-making which is essential to justly determining how the victims of discrimination in this case ought to be compensated.

[29] The victims' rights belong to the victims. While the Caring Society supports the request made by the AFN, the Caring Society's request for an in-trust remedy does not detract or infringe on victims' rights to directly seek compensation or redress in another forum. It is for this reason that the Caring Society respectfully seeks an order under subsection 53(3) that Canada pay an amount of $20,000 as compensation, plus interest pursuant to s. 53(4) of the *CHRA* and Rule 19(2) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 until long-term reform is in place and for every for every First Nations child who did not receive an eligible service or product pursuant to Canada's discriminatory approach to Jordan's Principle since December 12, 2007 to November 2017.

[30] The Assembly of First Nations (AFN) is requesting an order for compensation to address the discrimination experienced by vulnerable First Nations children and families in need of child and family support services on reserve.

[31] The AFN submits that the Panel stated in the main decision: “Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Residential Schools system is one of the darkest aspects of Canadian history….the effects of Residential Schools continue to impact First Nations children, families and communities to this day”(see 2016 CHRT 2 at, para 412).

[32] The AFN submits the pain and suffering of the victimized children and families is significant according to the Affidavit of Dr. Mary Ellen Turpel-Lafond affirmed April 3, 2019, and it is also directly linked to the Respondent’s discriminatory practice. Based on the circumstances in this case, the AFN seeks on behalf of individual First Nations children and families the maximum compensation available under s. 53(2)(e) and 53(3) of the *CHRA*, on a per individual basis for any pain and suffering. Given the voluminous evidentiary record before the Tribunal in this matter, and the particular experience to date this Panel has had presiding over this matter, as well as the Panel’s expertise under the *CHRA*, the AFN believes the Tribunal is the appropriate forum to address individual compensation given the unique circumstances of this case and based on an expert panel advisory.

[33] Individuals subjected to the Respondent’s discriminatory practice experienced a great deal of pain and suffering and should receive compensation, in particular those who were apprehended as a result of neglect. The AFN notes that some individuals were apprehended as a result of abuse and access to prevention programs may have prevented such abuse. Thus, in these circumstances a need for a case-by-case approach becomes apparent thereby lending credibility to the AFN’s suggested approach to establishing an expert panel to address individual compensation. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including hearsay. Direct evidence from each individual impacted by the Respondent’s discriminatory practice is not necessarily required to issue an award for pain and suffering. Therefore, the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[34] The AFN has been mandated by resolution following a vote by Chiefs in Assembly to pursue compensation for First Nations children and youth in care, or other victims of

discrimination, and to request the maximum compensation allowable under the Act based on the fact that the discrimination was wilful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis (see Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

[35] The AFN submits that compensation be awarded to each sibling, parent or grandparent of a child or youth brought into care as a result of neglect or medical placements resulting from the Respondent's discriminatory practice, and that such compensation be the maximum allowable under the *Act*.

[36] The AFN submits no further evidence is required from the AFN or other parties to support and award the maximum compensation to the victims of discrimination as requested, but that the Tribunal can rely on its findings to date.

[37] Both the Caring Society and the AFN submit it would be a cruel process to require children to testify about their pain and suffering. Moreover, requiring each First Nation child to testify before the Tribunal is inefficient and burdensome.

[38] The AFN further submits that the effects of the Respondent's discriminatory practices are real and they are significant. As the Panel found, the needs of First Nations children and families were unmet in the Respondent's provision of child and family services which the AFN submits has caused pain and suffering for which compensation ought to be awarded. The discrimination as found by the Panel was occurring across Canada.

[39] The AFN recognizes that the payment of compensation to the victims of discrimination may be a significant endeavor, considering the large number of individuals and time period. An independent body, such as the Commission, could facilitate the compensation scheme and payments. Whichever body is tasked with issuing the compensation, such body will require timely, accurate and all relevant records from the Respondent. Provisions will need to be adopted to protect the victims from unscrupulous

money lenders and predatory businesses. Finally, a notice plan may facilitate connecting individuals who are entitled to compensation payments.

[40] The AFN's remedial request suggests that an expert panel be established and mandated to address individual compensation to the victims of the Respondent's discriminatory practice as an option. This function can be carried out by the Canadian Human Rights Commission should they elect to take on this task. If so, the Respondent should be ordered to fund their activities.

[41] Additionally, the AFN states that the request for compensation to be paid directly to the victim of the Respondent's discrimination is not unprecedented, and in fact many parallels can be drawn from the Indian Residential School Settlement Agreement (IRSSA). Parallels such as the Common Experience Payment (CEP) and its surrounding processes, as well as the Independent Assessment Process (IAP), provide guidance in how a body issuing payments could be established to address individual compensation with respect to First Nations children and families discriminated against and victimized in this case.

[42] The AFN also submits that its National Chief and Executive Committee work in collaboration with the Caring Society to ensure the administration and disbursement of any payments to victims of discrimination come from funds other than the awards to the victims, so that no portion of the quantum awarded be rolled back or claimed by lawyers or legal representatives for assisting the victims.

[43] Overall, the AFN is interested in establishing a remedial process that may include both monetary and non-monetary remedies under a process overseen by an independent body. Given the potential for conflicts of interest in such a process, there would be a need to ensure matters dealt with in the remedial process are free from the influence of the parties, in particular Canada. In the IRSSA, the IAP process was isolated from the outside litigation amongst the parties for this reason.

[44] The proposed remedial process to be overseen by the requested independent body would be non-adversarial in nature, which is another hallmark from the IRSSA that the AFN submits could be carried over in this case. Also, it could be based on an application process that is designed to be streamlined and efficient.

[45] The AFN advances that it is aware of the proposed class proceeding filed in Federal Court last month. Currently, the class action is in the beginning stages and is uncertified, and the nature of the action is very similar to the case at hand. The AFN questions the accuracy of paragraph 11 of the statement of claim which reads mid-paragraph: “No individual compensation for the victims of these discriminatory practices has resulted or will result from the Tribunal decision”. It would appear the claimant is anticipating that no individual compensation will result in this case before the Tribunal. In response, the AFN and the other parties have planned all along that compensation was a long-term remedy that should be addressed after the interim and mid-term relief was addressed. The parties are currently carrying out that plan. The AFN submits the Panel ignore that particular submission.

[46] The Chiefs of Ontario (COO) did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties’ requests for compensation.

[47] The Nishnawbe Aski Nation’s (NAN) goal is to ensure First Nations children receive compensation for the discrimination found by this Tribunal. The NAN is in support of the remedies sought by the Caring Society.

[48] The AGC relying on a number of cases makes several arguments that will not be reproduced in their entirety rather given that the Panel considered all of them it is appropriate to summarize them here and for the same above-mentioned reasons.

[49] The Attorney General of Canada (AGC) submits that remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing the systemic problems identified, and not awarding monetary as compensation to individuals. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal’s past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

[50] Moreover, the AGC states that the C*HRA* does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for

victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the Act. A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court (see T-402-19).

[51] The AGC submits this is a Complaint of Systemic Discrimination. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants. The Caring Society stated that it would be an “impossible task” to obtain such evidence. The absence of complainant victims and the assertion that it would be "impossible” to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.

[52] Also, the AGC argues, that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies. Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms. This complaint is advanced by two organizations, the AFN and the Caring Society who sought systemic changes to remedy discriminatory practices. It is not a complaint by individuals seeking compensation for the harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

[53] Additionally, the AGC contends the Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.

[54] Furthermore, the AGC submits the evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

[55] Likewise, the AGC adds that in their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. The framing of the complaint is important. In the Moore case, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination.

[56] Besides, the AGC argues that claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.

[57] According to the AGC, this Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered. In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies. An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim. The AGC submits further that no case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at

least one representative individual complainant providing the evidence needed to properly assess their compensable damages.

[58] Moreover, the AGC advances that neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties, and to extrapolate from the evidence of a group of representative complainants. However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis. The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence, and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62).

[59] The AGC adds that the Commission's submissions on compensation indicate that this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation ''en masse''. (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991 (although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not).

[60] In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995 (C.H.R.T.) at paras. 496-498. The *Canada Post* case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims).

[61] The AGC further contends that the Complaint is not a Class Action and the remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited

statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court.

[62] Also, the AGC submits that in *Moore v. British Columbia (Education),* 2012 SCC 61, [Moore]), the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education. The B.C. Tribunal relied on that evidence to award systemic remedies. However, the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint as framed by the Complainant' [emphasis in original]. The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim. According to the AGC, while the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The AGC adds that the lack of evidence of harm suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

[63] The AGC adds that the *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims. The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

[64] Furthermore, the AGC adds that given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec’s Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights in the civil law context) in *Commission des droits de la personne*

et des droits de la jeunesse c. Québec (Procureur général, 2007 QCTDP 26 (CanLII). The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court." The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members". Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute. The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where statutory conditions are met and therefore cannot, be transplanted into Tribunal proceedings without legislative authority.

[65] The AGC also argues that while not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the Federal Court Rules, which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the Rules to accommodate class proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

[66] Furthermore, according to the AGC, The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence

of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

[67] The AGC contends there is no legal basis for compensating the Complainants. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act*. The Tribunal's task is to adjudicate the claim before it. Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint. The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act*.

[68] In regards to pain and suffering, the AGC adds that Section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice. However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice." Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices'' with regards to the complainants. Redressing the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

[69] In regards to pain and suffering, the AGC adds that for discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behavior that is devoid of caution or without regard to the consequences of that behavior. Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination." The complainant organizations were not

victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with orders.

[70] The AGC submits this claim raises novel issues. There were no orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties". They do not demonstrate that Canada has acted without caution or regard to the consequences of its behavior. Concerns about the adequacy of the Government's response to studies and reports in the past do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons. Since the AGC's submissions, Bill C-92 received Royal assent.

[71] The AGC argues this Tribunal understands the limitations of its remedial jurisdiction. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised reasonably and on a principled basis considering the link between the discriminatory practice and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.

[72] Moreover, in 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the "APTN"), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. The AGC submits that while the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.

[73] Also, according to the AGC, the Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In Re: *C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) (*C.N.R.*), the Court found that compensation is limited to victims which made it “impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination” where, as here “by the nature of things individual victims are not always readily identifiable”.

[74] The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination. As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint: where the breach of a human rights obligation raises structural or systemic issues --- such as longstanding policy practices that discriminate against indigenous women - the underlying violations must be addressed at the structural or systemic level."

[75] The AGC also argues that any compensation must be paid directly to victims of the discrimination. There is no legal basis for the Caring Society's requests that compensation for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs. Compensation is only payable to victims under the term of the Act and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

[76] Furthermore, the AGC contends that compensation is inappropriate in claims alleging breaches of Jordan’s Principle in light of the fact there is no basis to award compensation under the *Act* to either the complainant organizations or non-complainant individuals for alleged breaches of Jordan’s Principle. As the Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.

[77] The AGC submits there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the Johnstone decision, relied on by the Caring Society, justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance arbitrary and unwritten policies, among other things, neither of which are the case here.

[78] According to the AGC, the Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation. The AGC submits neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

[79] The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the IRSSA and the AFN is requesting payment of compensation directly to victims and their families. The AGC says the Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the Tribunal question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

[80] Finally, according to the AGC, compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

[81] The Commission while not making submissions on the remedies sought made helpful legal arguments on the issue of compensation and in response to the AGC’s legal position on this issue which will be summarized here. The Commission agrees that any

award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses (emphasis ours).

[82] The Commission further submits that awards for pain and suffering under the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization. The award rightly includes compensation for harm to a victim's dignity interests. The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim. Medical evidence is not needed in order to claim compensation for pain and suffering, although such evidence may be helpful in determining the amount, where it exists.

[83] Furthermore, the Commission submits the Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment. The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions, and (ii) Supreme Court of Canada case law recognizing that children are a highly vulnerable group.

[84] According to the Commission, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.

[85] Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit

within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario Human Rights Code, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [Code] by effectively setting a 'licence fee' to discriminate''.

[86] The Commission adds that the Court of Appeal noted in *Lemire v. Canadian Human Rights Commission,* 2014 FCA 18, (*Lemire*), the wording of s. 53(3) of the *CHRA* does not require proof of loss by a victim. In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.

[87] Additionally, the Commission argues that Sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

[88] Also, the Commission advances the argument that in most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[89] In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties

would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

[90] The Commission further submits that in *Walden et al. v. Attorney General of Canada* (2010), the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[91] The Commission notes that in questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.

[92] The Commission further notes that in her questions, the Panel Chair asked if it might instead be preferable to have an expert panel do the preliminary work of identifying victims, and present their circumstances to the Tribunal for determination. If the Tribunal is inclined to go in this direction, the Commission simply observes that the Tribunal's remedial powers only allow it to make orders against the person who infringed the *CHRA* here, Canada. As a result, any order regarding an expert panel should not purport to bind the Commission or any other non-respondent to participate on an expert panel.

[93] Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's

participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

V. The Tribunal's authority under the Act and the nature of the claim

[94] The Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for *example Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 [*Robichaud];* Canada (House of Commons) v. Vaid, 2005 SCC 30 (CanLII) at para. 81; and Canada (*Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) at para. 62 [Mowat]).

[95] The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, 158, and further articulated by the *Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton* 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156 where the court stated:

[96] Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577) (see also 2018 CHRT 4 at, para. 29).

> It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered (…) (see 2018 CHRT 4 at, para. 30).

[97] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a

purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at, paras. 25 and 55), (see also 2016 CHRT 2 at, para.469).

[98] Moreover, the Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented. (see *Tanner v. Gambler First Nation,* 2015 CHRT 19 at para. 161 (citing *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII), at para. 37; and *Hughes v. Elections Canada,* 2010 CHRT 4 at para. 50).

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para.4, Translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

> ''Complaint forms are not to be perused in the same manner as criminal indictments''. (*Translation, see Canada (Procureur général) c. Robinson,* [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para.22).
>
> « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

> Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,

> (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada* 2013 CHRT 7, at para.3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway, 2017 CHRT 6 at para. 9 [Casler]; see also Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin,* see also, *First Nation* 2017 CHRT 34 at, paras. 34 and 36).

[103] It is useful to look at the claim in this case which in this case includes the complaint, the Statement of Particulars and the specific facts of the case to respond to the AGC's argument that this is a systemic claim and not suited for awards of individual remedies.

[104] The complaint form in this case alleges that: ''the formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures''. These services are vital to ensuring the First Nations children have the same chance to stay safely at home with support services as other children in Canada (see Complaint form at, pages 2-3).

[105] The Panel already found in past rulings that it is the First Nations children who suffer and are adversely impacted by the underfunding of prevention services within the federal funding formula. The Panel considered the claim including the complaint, Statement of Particulars as well as the entire evidentiary record, arguments, etc. to arrive at its findings. As exemplified by the wording above, the complaint specifically identifies First Nations children and the AFN and the Caring Society advanced the complaint on their behalf.

[106] Furthermore, the Statement of Particulars of the Caring Society and the AFN of January 29, 2013: "request pain and suffering and special compensation remedies under section 53(2) (e) of the *CHRA* and f…'' (see page 7 at para.21 reproduced below):

Relief requested:

> 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 in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

[107] In this case, the fact that there is no section 53 (2) (f) in the *CHRA* but rather a paragraph 3 is a small error that does not change the nature of the requested remedies. Moreover, this error was later corrected in the Caring Society's final submissions.

[108] It is clear from reviewing the Complainants' Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents' theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

[109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

[110] As shown by the AGC's position on the relief requested by the Complainants:

> 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 certain services and 21(5) of the Complainants Statement

> of particulars, the requested relief is beyond the jurisdiction of the Tribunal (...) No compensation should be awarded under section 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meet the definition of victim within 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 available, $20,000, multiplied by the number of Complainants, two, equals $40,000). (See AGC particulars at page 15, para. 64 and 66).

[111] The Panel finds this demonstrates that the AGC was fully aware that compensation remedy for victims/survivors who were not the Complainants was part of the Complainants' claim before the Tribunal. Moreover, it admitted that compensation was an issue to be determined by the Tribunal in a Consultation Protocol signed in these proceedings by all parties and by Minister Jane Philpott, as she then was, on behalf of Canada:

> WHEREAS, the Tribunal retained jurisdiction to ensure the implementation of its Decision, and subsequently directed that implementation be done in three steps, namely: (1) immediate relief; (2) mid to long term relief; and (3) compensation, and has reserved its ruling regarding the Complainants' motion for an award against Canada in relation to the costs of its obstruction of the Tribunal's process in relation to document disclosure and production (see Consultation Protocol, signed March 2, 2018 at page. 2)
>
> The Tribunal has directed that the implementation of its *Decision* be done in three steps, namely: (1) immediate relief, (2) mid to long term relief and (3) compensation. Canada commits to consult in good faith with the Complainants, the Commission and Interested Parties on all the three steps, to the extent of their respective interests and mandates. (see Consultation Protocol, signed March 2, 2018 at, para.4, page. 7)

VI. Victims under the CHRA

[112] Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:

> 40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is

> engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> Consent of victim
>
> (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

[113] This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent.

[114] In this case, the Commission referred the complaint to the Tribunal and does not oppose the remedy sought on behalf of victims.

[115] Consequently, the Panel agrees with the Commission that the *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[116] Additionally, the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, discussed the meaning of the term victim where the Court stated:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

[117] The Tribunal has already distinguished complainants from victims who are not complainants within the *CHRA* framework:

> On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be

> deemed as "victims" under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding. (see *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada),* 2011 CHRT 19 at, para.25).

[118] This speaks against the AGC's argument that the Tribunal cannot make awards to individuals that are not complainants and to the other AGC's argument that the Tribunal has no jurisdiction to award remedies for a "group" of victims represented by an organization.

[119] In *Walden,* both the Tribunal's liability and remedy decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage loss including benefit. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue (see [*Walden v. Canada (Social Development),* 2007 CHRT 56 (CanLII), at para.3).

[120] While the end result in that case was a consent order on pain and suffering remedies, the Tribunal could not make orders that would fall outside its jurisdiction under the *Act*.

[121] The AGC relies also on a Federal Court case to support its position that compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62.

[122] The Panel disagrees with the AGC's interpretation and application of the Federal Court decision to our case. The analysis, the factual matrix and the findings from the Federal Court are different from the case at hand. The Panel finds it does not support the AGC's position to bar the Tribunal from awarding compensation to non-complainant victims in this case.

[123] This case was always about children as exemplified by the claim written in the complaint and in the Statement of Particulars and the Tribunal's decisions. Moreover, the AGC is aware that the Tribunal views this case is about children. What is more, the Panel agrees that AFN and the Caring Society filed the complaint on behalf of a representative group who are identifiable by specific characteristics if not by name. Furthermore, the Panel believes it is important to consider the nature of this case where the victims/survivors are part of a group composed of vulnerable First Nations children.

[124] While there are other forums available for filing representative actions, the AFN stated that Tribunal was carefully chosen in this case due to the nature of the claim, but, also due to the means of redress available under the *CHRA* for members of a vulnerable group on whose behalf the AFN has advanced a case of discrimination contrary to the *Act*.

VII. Pain and suffering analysis

[125] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *CHRA*. In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) ["*Walden"]).* In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 (CanLII) at para. 27), (see 2019 CHRT 7 at, para.47). Therefore, in the presence of sufficient evidence and a remedy that flows from the claim, the Tribunal may make the orders it finds appropriate.

[126] In a recent Tribunal decision, *Lafrenière v. Via Rail Canada Inc.,* 2019 CHRT 16, at para.193 Member Perreault wrote about the pain and suffering award under section. 53(2) (e) of the *CHRA*:

> However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[127] The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (see Jane Doe v. Canada (Attorney General),* 2018 FCA 183 (*Jane Doe*), at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc., 2012 CHRT 10 at para. 115); and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).

[128] Furthermore, when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para.115 recently cited in *Jane Doe,* at, para.29).

[129] The pain and suffering remedy sought as part of this ruling is found at para. 53 (2) (e) of the *CHRA*. Section 53 (2) reads as follows:

> Complaint substantiated
>
> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[130] Section 53 imposes a logical requirement for any award of remedies that is, the remedy should flow from a finding that the complaint is substantiated. If this is the case, an array of remedies is available to the victim of the discriminatory practice. The wording of section 53(2) is unambiguous and allows the victim of the discriminatory practice to obtain any remedies listed in section 53 as the member or panel finds appropriate: ‘’(..) and include in the order any of the following terms that the member or panel considers appropriate’’. It is clear that the language of the *CHRA* does not prevent awards of multiple remedies even if systemic remedies have been ordered.

[131] The AGC’s argument that systemic discrimination requires systemic remedies is correct. However, the AGC’s argument that it precludes other awards of remedies as the Panel deems appropriate in light of the facts and the evidence before the Tribunal is incorrect.

[132] The way to determine the issue is to look at the Statute first:

> The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd*.

> (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21, see also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 at, para.12).

[133] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC),* [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13).

[134] Consequently, analyzing the specific facts of the case and weighing the accepted evidence in the Tribunal record is of paramount importance.

> Indeed, the Federal Court of Appeal recently described the exercise of statutory interpretation:
>
> To discern the meaning of “compensate”, the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by reading paragraph 53(2)(e) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the *Act*. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect. (see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at, paras.23).

[135] The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. As mentioned above, one should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[136] The AGC relies on the *Moore* case to support its assertion that individual remedies cannot be awarded in a systemic case. However, the Panel disagrees with the AGC's interpretation of this case.

[137] The Supreme Court decision in *Moore* did not say that both systemic and individual remedies cannot be awarded to victims of discriminatory practices rather it emphasizes the need for the remedy to be connected to the claim and the need for an evidentiary basis to make orders. The case of Jeffery Moore was a complaint of individual discrimination where the Tribunal went beyond the claim and made findings of systemic discrimination. This is the issue discussed by the Supreme Court which described the case as follows:

> This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public-school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[138] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a "service (…) customarily available to the public", contrary to s. 8 of the Human Rights Code, R.S.B.C. 1996, c. 210 ("Code"). (see *Moore* at paras. 1-2).

[139] Additionally, the Supreme Court discussed the remedy as follows: ''But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission''. (see *Moore* at paras.64).

[140] The case at hand on the contrary, is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families.

[141] It is worth mentioning that the *Decision* on the merits begins with this important finding: **This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.** (see 2016 CHRT 2, at para.1).

[142] In claiming there is no evidence in the record to support compensation to individual victims who are not complainant in this case, the Panel finds that the AGC does not consider section 50 (3)c of the *CHRA*: ‘’(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law’’. The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[143] The word “may” suggests that this limitation is imposed or not at the discretion of the Member or Panel.

[144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal’s findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal’s findings of the children's suffering in past and unchallenged decisions in this case.

[145] In *Canada (Social Development) v. Canada (Human Rights Commission*), 2011 FCA 202 at para.73 (“*Walden* FCA’’), as mentioned by the Commission, the Federal Court

(i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[146] The Panel does not accept that a systemic case can only prompt systemic remedies. As mentioned above, nothing in the *CHRA* prohibits the Tribunal's discretion to order systemic remedies along with individual remedies if the complaint is substantiated and the evidence supports it.

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation.

[149] The use of the ''words unnecessarily removed'' account for a distinction between two categories of children those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the *Decision*. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

[153] Throughout all the *Decision* and rulings, references were made to First Nations children and their families. The Panel did not focus on the complainants when analyzing the adverse impacts. The Panel analyzed the effects/impacts of the discriminatory practices on First Nations children and clearly expressed this. The findings focused on the agencies' abilities to deliver services and most importantly, the First Nations children, their families and their communities who are the victims/survivors of the discriminatory practices. First Nations children and families are referenced continuously throughout the *Decision*. The *Decision* starts with: ''**This decision concerns children.** More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities''.

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and Families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial

discrimination. The Panel also made numerous findings of adverse impacts toward First Nation children and families, adverse impacts that cause serious harm and suffering to children the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people,** in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para.459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves** (see 2016 CHRT 2 at, para.467).
>
> Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective**. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon**, including a denial of adequate child and family services, by the application of AANDC's FNCFS

Program, funding formulas and other related provincial/territorial agreements (see 2016 CHRT 2 at, para. 393).

As will be seen in the next section, **the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.** (see 2016 CHRT 2 at, para.394).

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

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today. (see 2016 CHRT 2 at, para. 404).

[…] To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this (...) (see 2016 CHRT 2 at, para.411).

In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day (see 2016 CHRT 2 at, para.412).

Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless (…) With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity (see 2016 CHRT 2 at, para. 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (see 2016 CHRT 2 at, para. 426).

(…) On that point, the Panel would like **to stress how important it is to address the issue of mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views from one Nation to another, surely the need to keep the children in their communities as much as possible is the same (see 2018 CHRT 4 at, para.62).

This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other. (see 2018 CHRT 4 at, para.66).

This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it.

There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some

> of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings (see 2018 CHRT 4 at, para. 121).
>
> Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short-term plan was presented to address this matter. **The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children** (see 2018 CHRT 2 at, para.132).
>
> The Panel finds (…) There is a real need to make further orders on this crucial issue to **stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities** (…) (see 2018 CHRT 4 at, para. 133).
>
> It is important to remind ourselves that this is about children experiencing **significant negative impacts on their lives**. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *Decision* at paras.341-347), (see also 2018 CHRT 4 at, para.166).
>
> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings. **It incentivizes the removal of children** rather than assisting communities to stay together. (see 2018 CHRT 4 at, para. 230).
>
> It is important to look at this case in terms of bringing Justice and not simply the Law, especially with reconciliation as a goal. **This country needs healing and reconciliation and the starting point is the children and respecting their rights.** If this is not understood in a meaningful way, in the sense that it leads to real and measurable change, then, the TRC and this Panel's work is trivialized and unfortunately t**he suffering is born by vulnerable children** (see 2018 CHRT 4 at, para. 451).

VIII. The Evidence in the Tribunal record

[156] In order to respond to the AGC's argument that there is a lack of evidence in the record to support a pain and suffering remedy, a review of some relevant elements of the evidence before this Tribunal follows:

Mr. Dufresne: Why did you file the complaint?

DR. BLACKSTOCK: I filed the complaint as a last resort. I -- I'm one of those people that believes that you have to try and work towards solutions first. And we did that not only once but we did that twice over a period of many years. We got to the place of documenting the inequality. In my view there was consensus that that inequality existed. We talked about and I believe with the respondent agreed with the harms to children that were a result of not taking action, that being there growing numbers of children in care and hardships for families, and the unequal access of services or the denial of services to children.

We developed solutions to that, first in the National Policy Review and secondly in the Wen:de reports. We even in the Wen:de reports took the time to present those results to central authorities in October of 2005, and nothing had changed remarkably at the level of the child. We felt that there was no other alternative than to bring a human rights complaint. And even as we brought it, I was very hopeful that that would be incentive enough for the respondent to take the action needed on behalf of the children, but we find ourselves here today. (See Testimony of Dr. Cindy Blackstock, StenoTran transcripts February 28, 2013, page 3, lines 17-25 and page 4, lines 1-19 vol 4) (emphasis added).

[157] Dr. Blackstock testified before the Tribunal and the Panel finds her testimony to be reliable and to speak to the issue of harm suffered by First Nations children as a result of the discrimination.

[158] Mr. Dubois is the Executive Director Touchwood agency and has a Bachelor of Social Work degree from the University of Calgary and also testified before the Tribunal:

(…) MR. DUBOIS: I raised the issue with Indian Affairs.

MR. POULIN: Why?

MR. DUBOIS: Because I wanted to get away from just being limited to having to -- it was a situation where you kind of -- **you had to break up a family under Directive 20-1 before you could provide the services. It's only when you took a child into care that you could start to rebuild the family.** I wanted to be proactive. And this goes back to our history as a First Nations people, including my history where, you know, having to endure boarding school, like my dad, my late father was in boarding school, and the damage it did to us or the interference that back then that the church had on our family systems, so I wanted to **get away from that. Like having lived that experience, we don't need more interference. We don't need more -- for lack of a better word, wreaking havoc on our families. I come with**

> **the frame of mind that our families need healing and I, as a trained professional, and others out there in Saskatchewan and the other agencies, you know, like there has to be a different way to do child welfare other than breaking families up. We want to heal. We need to heal.** We have to do things differently, which is why when I referenced the SDM it was really appealing to me because it focuses on our strengths, you know, it builds on what we are and what we have. (see Testimony of Derald Richard Dubois, April, 8, 2013, StenoTran transcript a, pp. 60-61 lines 7-24; 1-11, vol 9). See also testimony of Mr. Derald Richard Dubois, StenoTran transcripts April 8, 2013, page lines and page 4 lines vol 9).

[159] Mr. Dubois who is a child welfare professional refers to the Federal funding formula Directive 20-1 that was found discriminatory by this Panel causing significant adverse impacts to First Nations children and their families. What is more, he testifies of one of the worst of those adverse impacts being the unnecessary removal of children from their homes, families and communities.

[160] This is a reliable and powerful testimony that exemplifies the pain and suffering and harm done to First Nations children, families and communities as a result of the racial and systemic discrimination that is perpetuating historical wrongs.

[161] The Panel finds that unnecessarily removing a child from its family and community is a serious harm causing great suffering to that child, the family and the community.

[162] There is also evidence of harm/suffering to First Nations children and families in several reports forming part of the evidentiary record already considered and relied upon by the Panel in arriving to its findings of adverse impacts in the 2016 *Decision*. The Wen:de we are coming to the light of day, 2005 report (WEN DE) was filed into evidence before the Tribunal. The AGC had the opportunity to make submissions on this report and the Panel made findings on the reliability of this report. Moreover, the Tribunal accepted the findings in WEN DE as its own findings (See *Decision* 2016 CHRT 2 at, para.257): ‘’The Panel finds the NPR and WEN DE reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN’’. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this

Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program in a piece meal fashion.

[163] Additionally, Canada was part of this study and fully aware of its findings and impact of its practices on First Nations children which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in the 2005 year of the report which will also be revisited in the wilful and reckless section below. The Panel had reviewed all the WEN DE reports before accepting it as its own and included some references of those findings in the *Decision*. The following additional findings support the issue of compensation for pain and suffering of children and their families and inform the Panel in drafting its orders:

> Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the **key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse** (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing improvement. **The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently.** The **third factor, substance misuse, is within the personal domain for change but requires access to services.** Overall, CIS- 98 results suggest **that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children.** (emphasis ours).

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The WEN De report goes on to say that:

> (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see WEN DE at, pp.13-14) (emphasis ours).
>
> Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see WEN DE pp.13-14).
>
> **The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples** (…)
>
> Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting**

> **effect.** - **Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**
>
> The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see WEN DE at, pp.90-91).
>
> The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see WEN DE at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil,* La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered **a strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**

> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see WEN DE at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the government's failure to provide adequate funding and services (see WEN DE at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (WEN DE at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discuss the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself…. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.** Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:
>
> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life**. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.**
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**

> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[170] Another report filed in evidence supports the existence of pain and suffering of First Nations children and their families. Several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning. In 1996, more than 10% of Aboriginal children (age 0-14) were not living with their parents. see p. 7 Joint National policy review (NPR) exhibit filed into evidence. Akin to the WEN DE report, the Tribunal accepted the findings in the NPR as its own findings (See 2016 CHRT at, para.257) Additionally, Canada was part of this study and fully aware of its findings which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in 2000, year of the report. This will also be discussed later.

[171] More Recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. **She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.** (see 2018 CHRT 4 at, para.122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. **The day they remember most vividly was the day they were taken from their home**. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para.123).

> Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that **the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system**. (see 2018 CHRT 4 at, para.124).
>
> In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care. (see 2018 CHRT 4 at, para.125).
>
> According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. **She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.** (see 2018 CHRT 4 at, para.126).
>
> The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care. (see 2018 CHRT 4 at, para.127).

[172] The Panel received Ms. Wilson's evidence in 2017-2018 and has relied upon it in its ruling. The ruling was accepted by Canada in its submissions following receipt of an advanced confidential copy of the ruling and the Panel included Canada's submissions and the Panel's comments in the ruling:

> Finally, on the same day, the AGC (…) indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.
>
> The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree (see 2018 CHRT 4 at, paras.449-450).

[173] This was reiterated later on, as part of a consultation protocol with all parties in this case and signed by Minister Jane Philpott as she then was (see Consultation Protocol signed March 2, 2018).

[174] Moreover, Canada has accepted the TRC's report authored by the 3 Commissioners including Ms. Wilson, and undertook to implement all 94 calls to action (see 2018 CHRT 4 at, para.61). It is unlikely that Canada would accept the recommendations yet not the findings that led to those recommendations.

[175] What is more, the Panel believes that the highly credible TRC Commissioner like other adults referred to above speak on behalf of children and voice the harm and suffering endured by First Nation children who are vulnerable and need not to testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination.

[176] Furthermore, as mentioned above, the Tribunal has already recognized the need and importance for First Nations children, communities and Nations for urgent action to eliminate the removal of First Nations children from their families and communities as a result of the discrimination and Canada's part in remedying it in the March 2, 2018 Consultation protocol signed by Minister Philpott:

> To address what the Tribunal in paragraph 47 of the February 1st Ruling refers to as the "mass removal of children". As the Tribunal states: "There is urgency to act and prioritize the elimination of the removal of children from their families and communities". (Consultation protocol signed March 2, 2018 at, section d, page 5)
>
> To promote substantive equality for First Nations children, families and communities on reserves and in the Yukon in the delivery of child and family services, particularly in light of their higher level of needs because of historical disadvantages suffered by First Nations families, children and communities as a result of the legacy of colonialism and Indian Residential Schools. (Consultation protocol at, section g, page 5).

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve

the interplay of numerous underlying factors (see for example, 2016 CHRT 2 *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[178] Moreover, the Panel found that in this case we are in a unique constitutional context namely, Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act*, 1867. Furthermore, Canada, is in a fiduciary relationship with Aboriginal Peoples. What is more, Canada has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, the Panel found that more has to be done by Canada to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children (see 2016 CHRT 2 *Decision* at, para. 427).

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: ''Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same,

preventative services aren't funded, and all these children are being put into care." (See 2016 CHRT 2 *Decision* at, para.197).

[182] The pain and suffering caused by the unnecessary removal of First Nations children and their families and Canada's role is at least reasonably quantifiable to $20,000. While it is the maximum compensation allowed under section 53 (2) (e) of the *CHRA,* it is not much in comparison to the egregious harm suffered by the First Nations children and their families as a result of the racial discrimination and adverse impacts found in this case. Other pain and suffering caused by other actors could potentially be sought in other forums. The Panel's role is to quantify as best as possible the appropriate remedy to compensate victims/survivors as part of these proceedings with the evidence available.

[183] Furthermore, the AGC relies also on the *Public Service Alliance of Canada v. Canada Post Corporation case* (see 2005 CHRT 39 at para. 991) to suggest that the Tribunal cannot award remedies for pain and suffering to the non-complainant victims "en masse". The *Canada Post* case made a finding that there was a lack of evidence before the Tribunal and that there was no systemic case. This is different from this case where there is sufficient evidence to support findings of systemic discrimination and findings of suffering borne by the victims/survivors in this case, the First Nations children and their families.

[184] The evidence is ample and sufficient to make a finding that each First Nation child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grand-parent who had one or more child under her or his care who was unnecessarily removed from its home, family and community has suffered. Any parent or grand-parent if the parents were not caring for the child who had one or more child removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grand-parents, the

grand-parents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grand-parents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grand-parents.

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the *Decision*. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged *Decision*. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the *Decision* and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[188] The Panel need not to hear from every First Nation child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA.* We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47,62,66,121,133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The

novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[189] Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community.

[190] The Panel rejects the AGC's argument that there is no evidence of harm the victims suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation.

[191] The evidence is sufficient to establish a connection between the systemic racial discrimination and the First Nations children who did not receive services or did receive services that were inadequate and harmful. This was all explained in the *Decision* and it is now too late to challenge those findings. The children should not be penalized because the Panel had outstanding questions concerning compensation which prompted further submissions from the parties.

[192] Finally, on this point, the Panel rejects the assertion made by the AGC that there is no evidence permitting the Panel to determine the extent and seriousness of the harm in order to assess the appropriate compensation for the individual victims. Furthermore, the AGC's argument that there is no evidence of pain and suffering from children and families as a result of the discrimination is simply not true. This is a similar assertion that Canada has made on the evidence to prove the complaint on its merits. In fact, such a conclusion by Canada is concerning to say the least. It also raises questions from this Panel. The harm done to First Nations children who are vulnerable and to families and communities is precisely why the Panel issued numerous rulings requesting immediate action. This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special

circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Decision* on the merits 2016 CHRT at, para.346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 (CanLII) at para. 9; and, Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [Baker]). As explained by Professor Nicholas Bala:
>
> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para.346).
>
> Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at, para.3).

[193] This is where the urgency of remedying systemic racial discrimination comes from. It is clearly expressed in the Panel's rulings. Removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering.

[194] The Panel's urging Canada to act on a number of occasions was not expressed without a reason. It was for the reason that this case is about children and there is urgency to act and the Panel understood it.

[195] In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The

Court held the Minister's decision should follow the values found in international human rights law.

[196] The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para.448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the Decision at paras 437-439).

[197] The Panel agrees that remedies **under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

IX. Organizations cannot receive compensation and do not represent victims' argument

[198] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children (see 2017 CHRT 14 at, para.116).

[199] The Panel sees no merit in accepting the AGC's argument that if the Tribunal finds it has jurisdiction to award remedies under section 53 (2) (e) the AFN and the Caring Society should be awarded the remedies and not the First Nations children. This contradicts the AGC's own argument that acknowledges that the AFN and the Caring Society are organizations not victims (see para.110 above).

[200] In a previous ruling, the Panel discussed the AFN and the Caring Society's roles in representing First Nations children's rights:

> To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations

> representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials (see 2017 CHRT 14 at, para.118).

[201] However, it is true that the Complainants do not have a legal representation mandate given by each FN child and parent living on reserve to seek remedy on their behalf at the Tribunal. What they do have is a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their elected First Nations Chiefs. Some First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out. The opting-out possibility will form part of the compensation process discussed below.

[202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out. The Panel believes also that the COO and the NAN should be able to speak on behalf of their children and voice their needs and seek redress for compensation. Also, the Caring Society directed by Dr. Cindy Blackstock has worked tirelessly for numerous years to represent the best interest of children with an Indigenous lens and has invaluable expertise to assist the Panel and the parties in this process.

[203] This being said the Panel does not believe that it has jurisdiction to create another Tribunal to delegate its responsibilities under the *CHRA* to it. The compensation process will be discussed below.

X. The right to exercise individual rights, class action and victims' identification

[204] The Panel believes that individuals have the right to exercise their individual rights and for those who chose to do so, they should be able to opt-out from receiving the compensation ordered in this ruling.

[205] The Panel also notes that the class action has not yet been certified by the Federal Court. Moreover, the possibility of a future certified class action and, if successful, orders made for punitive damages remedies under the Charter amongst other things being offset by the capped remedies orders under the *CHRA made b*y this Tribunal is not a convincing argument to refrain from awarding compensation in these proceedings. Additionally, the Tribunal's orders below do not cover years 1991 to 2005. The Tribunal's orders below also cover First Nations children and First Nations parents or grandparents.

[206] The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy the discrimination and if applicable as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[207] In regards to identification of victims/survivors, as explained by the Caring Society, some of the children can be identified by the Indian Registry and following a process agreed upon by the parties who wish to participate. Therefore, their identities are not impossible to obtain and are readily available contrary to the situation in the *C.N.R*. case from the Federal Court of Appeal that the AGC relies upon. The AGC argues the Court concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The AGC added the Court found that compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable". Again, this is not the case here.

[208] The Panel finds this is a case where it is appropriate to compensate victims/survivors since the systemic racial discrimination and the adverse impacts found by

the Panel in its *Decision* subsequent rulings and this ruling, caused serious harm to victims/survivors. While the task to identify all the individuals is a complex one, it is not impossible given the Indian Registry and the Jordan's Principle process and records.

XI. Class actions and representative of the victims

[209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition.

[210] In any event, even proof by presumption of facts subject to being provided that such presumptions are sufficiently serious, precise and concordant, applies to class actions (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, para.132). More so in front of a Human Rights Tribunal allowed to receive any type of evidence under the *Act.*

XII. Jordan's Principle remedies

[211] There is no doubt that Jordan's Principle has always been part of the claim from the complaint to the Statement of Particulars to the presentation of evidence and the Tribunal's findings and orders. This question was answered and cannot be revisited.

[212] In sum, in honor and memory of Jordan River Anderson, 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 (see 2017 CHRT 35 at, para.19, i).

[213] 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. (see 2017 CHRT 35 at, para.19, ii).

[214] What is more, the Panel rejects the AGC's argument that compensation is inappropriate in Jordan's Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminate discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan's Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan's Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan's Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

> The purpose of the *CHRA* is to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as

> members of society, without being hindered in or prevented from doing so by discriminatory practices.
>
> (Section 2 of the *CHRA*).

[217] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities,* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. (see *Grant* at paras.103-104). Moreover, article 1 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at. 71 (1948), which provides that all human beings are born free and equal in dignity and in rights.

[218] The concept of objective appreciation of dignity when vulnerable mentally disabled persons who are not always in a position to appreciate their own self-dignity or breach there of as been recognized by the Supreme Court of Canada:

> Having regard to the manner in which the concept of personal "dignity" has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself. In the case before us, it appears to me that the majority of the Court of Appeal properly pointed out that, in considering the situation of the mentally disabled, the nature of the care that is normally provided to them is of fundamental importance. We cannot ignore the fact that the general objective of the services provided at the Hospital goes beyond meeting the patients' primary needs (see *Commission des droits de la personne v. Coutu*, 1995 CanLII 2537 (QC TDP), [1995] R.J.Q. 1628 (H.R.T.), at pp. 1652‑53). This is apparent from, inter alia, the legislator's intention (see An Act respecting health services and social services, R.S.Q., c. S‑4.2) and the fact that there is a certain level of social consensus concerning what sort of support services are required in order for the needs of these people to be met.

[219] This being said, the fact that some patients have a low level of awareness of their environment because of their mental condition may undoubtedly influence their own conception of dignity. As Fish J.A. observed:

> '' (…) however, when we are dealing with a document of the nature of the Charter, it is more important that we turn our attention to an objective appreciation of dignity and what that requires in terms of the necessary care and services. In the case at bar, I believe that the trial judge's findings of fact indicate, beyond a shadow of a doubt, that, although the discomfort suffered by the patients of the Hospital was transient, it constituted interference with the safeguard of their dignity, a right guaranteed by s. 4 of the Charter, despite the fact that, as the trial judge noted, these patients might have had no sense of modesty''. (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 105 and 106-108), (Public Curator).

[220] Furthermore, the Supreme Court found that disrupting services was an interference of the service recipients' dignity and causing them a moral prejudice under rules of civil liability and under the Charter:

> Moreover, the pressure that the appellants wanted to bring to bear on the employer inevitably involved disrupting the services and care normally provided to the patients of the Hospital, and necessarily involved intentional interference with their dignity (Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 109 and 124) *(Public Curator).*

[221] While this is not a class action or a civil liability or Charter case, the principle can be applied here to support the finding that the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of their dignity applying the objective appreciation of dignity principle. Under the *CHRA* this would be covered under section 53 (2) (e). This reasoning also apply to First Nations children and families in the case of the removal of a child from the home, family and community.

[222] What is more, the Tribunal has already made findings in past rulings in regards to gaps, delays and denials of essential services to First Nations children under Jordan's Principle and also its connection to child welfare, some of them are reproduced here:

> **Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating**

dedicated funds and resources to address some of these issues (see Decision at para. 356) (…) (see 2017 CHRT 14, at para.78).

The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: **that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve.** The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program (see 2016 CHRT 2 at, para.369).

Another medical related expenditure identified as a **concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist** (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3). (see 2016 CHRT 2 at, para.372).

In the Panel's view, **it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families.** Such an approach defeats the purpose of Jordan's Principle and results in **service gaps, delays and denials** for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see 2016 CHRT 2 at, para.381).

More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made (see 2016 CHRT 2 at, para.381).

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements **have resulted in denials of services and created various adverse impacts for many First Nations children and**

families living on reserves. Non-exhaustively, the **main adverse impacts** found by the Panel are: (…) **The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children** (see 2016 CHRT 2 at, para.458).

In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused (See 2017 CHRT 7 para. 9).

Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5) (See 2017 CHRT 7 para. 10).

The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances (See 2017 CHRT 7 para. 11).

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordan's Principle funds (See 2017 CHRT 7 Annex A letter Re: Choose Life Pilot Working Group, dated March 22, 2017 from Nishnawbe Aski Nation Grand Chief Alvin Fiddler to Dr. Valerie Gideon, Assistant Deputy Minister Regional Operations First Nations and Inuit Health Branch Health Canada).

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada,

admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on **Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children**. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. **After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, over 165 000 Jordan's Principle approved services have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel.**

In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that **Jordan's Principle is not a program, it is considered a legal rule by Canada.** This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle (see 2019 CHRT 7 at, para. 25).

The Panel is delighted to hear that **thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.** We would like to honor Jordan River Anderson and his family for their legacy. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the

> Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children. (see 2019 CHRT 7 at, para. 26).
>
> The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the Indian Act and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at, paras. 365-382 and 391) (see 2019 CHRT 7 at, para.73).

[223] All the above findings support a finding that First Nations children and their families experienced pain and suffering and a breach of their dignity as a result of gaps, delays and denials of essential services.

[224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.

> MS BAGGLEY: "Tomatoe/tomato".
>
> MR. WUTTKE: Between half a year and three quarters of a year?
>
> MS BAGGLEY: Yes, yes.
>
> MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?
>
> MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there's not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada's approach to Jordan's Principle that led to the Tribunals' rulings in this case.

[226] First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

> (3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand

> dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[228] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

> The Tribunal in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 (CanLII), recently reiterated this Panel's legal reasons on the special compensation, member Gaudreault wrote:
>
> In the decision rendered in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) [Family Caring Society], at paragraph 21, members Sophie Marchildon, Réjean Bélanger and Edwards P. Lustig addressed the special compensation provided under subsection 53(3) of the CHRA:
>
> The Federal Court has interpreted this section as being a ". . .punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone,* 2013 FC 113 (CanLII), at para. 155, aff'd 2014 FCA 110 (CanLII) [*Johnstone* FC]). A finding of wilfulness requires "(…) the discriminatory act and the infringement of the person's rights under the *Act* is intentional" (*Johnstone* FC, at para. 155). Recklessness involves ". . .acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (Johnstone FC, at para. 155), (see *Duverger* at para.293).

[229] The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para.13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

[230] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para.119).

[231] The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada who has international, constitutional and human rights obligations towards First Nations children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples:

> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (Wewaykum at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in Haida Nation, at paragraph 17:
> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31, (see *Decision* 2016 CHRT 2 at, para. 95).

[233] In light of Canada's obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor than cannot be overlooked.

[234] The Panel finds it has sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what we have referred to as a worst-case scenario under our *Act*.

[235] What is more, many federal government representatives of different levels were aware of the adverse impacts that the Federal FNCFS Program had on First Nations children and families and some of those admissions form part of the evidence and were referred to in the Panel's findings. A review of the Panel's findings contained in the *Decision* and rulings supports this.

[236] The Panel rejects Canada's position that the reports in the evidentiary record and findings cannot lead to a finding of wilful and reckless conduct by this Tribunal's findings because they were improving the services over time. WEN DE specifically cautioned against a piece meal implementation of the recommendations and that is precisely what Canada did. This was also explained in the *Decision.*

[237] In addition, the Tribunal already made findings about Canada's conduct and awareness of the adverse impacts to First Nations children and their families in past rulings although too numerous to reproduce them entirely in this ruling, some are above mentioned and some will be mentioned here and those findings cannot be challenged now:

> In another presentation, AANDC describes Directive 20-1 as "broken":
>
> **The current system is BROKEN, i.e. piecemeal and fragmented**
>
> **The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality**
>
> […]
>
> **The current program focus is on protection (taking children into care) rather than prevention (supporting the family)**
>
> […]
>
> **Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand**
>
> **INAC CFS has been unable to keep up with the provincial changes**
>
> **Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced**

> (Annex, ex. 35 at pp. 2-3 [Putting Children and Families First in Alberta presentation]) (see 2016 CHRT 2 at, para.270).
>
> Putting Children and Families First in Alberta presentation touts prevention as the ideal option to address these problems at page 4:
>
> **Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve**
>
> **Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health** (see 2016 CHRT 2 at, para.271).
>
> Finally, the Putting Children and Families First in Alberta presentation states at page 5:
>
> The facts are clear:
>
> **Wen:De Report - Early intervention/prevention is KEY**
>
> […]

[238] The above citations were presentations prepared by staff in the Federal Government supporting the fact that they were well aware of what needed to be done to stop the systemic racial discrimination and that prevention is a key component. This being said, while Canada increased prevention funds, it applied an insufficient and piece meal approach and the Panel also found this in the *Decision.*

[239] First Nation agencies have been lobbying Canada since 1998 to change the system (see 2016 CHRT 2 at, para.272). Ten years later, in a 2018 CHRT 4 ruling, the Tribunal had to order Canada to fund prevention services:

> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. **Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings**. **It incentivizes the removal of children rather than assisting communities to stay together** (see 2018 CHRT at, para. 230). All this time Canada knew the benefit of prevention services to keep children safe within their homes and families yet it did not sufficiently fund and reform the system to foster this shift. This is contrary to the Tribunal's order to provide services based on need, which requires

> Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, **Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children** (see 2018 CHRT 4 at para.143). [161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services. (see 2018 CHRT 4 at, para.161).
>
> **The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*.** Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief (see 2018 CHRT 4 at para.146).
>
> This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children (see 2018 CHRT 4 at para.195).

[240] The Panel made numerous findings on the need for prevention services to reverse the removal of First Nations children from their homes, families and communities:

> Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). **Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve** (see AANDC Evaluation of the Implementation of the EPFA in Alberta at pp. 16-18, 21-24) (see 2016 CHRT at, para.286).

Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at pp. 35-36) (see 2016 CHRT 2 at, para.291).

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

Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed (see 2016 CHRT 2 at, para.273).

(…) correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions (see 2016 CHRT 2 at, para.274).

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

> and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children (see 2016 CHRT 2 at, para.276).
>
> However, as the 2008 Report of the Auditor General of Canada, the 2009 Report of the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General of Canada, and the 2012 Report of the Standing Committee on Public Accounts pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA (see 2016 CHRT 2 at, para.278).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the 1965 Agreement in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see 2016 CHRT 2 at, para. 461).

[241] One of the most tragic and worst-case scenarios in this case and in the Jordan's Principle context is one of unreasonable delays in providing prevention and mental health services as exemplified in the situation in the Nation of Wapekeka. This delay was intentional and justified by Canada according to financial and administrative considerations. It was devoid of caution and without regard for the serious consequences on the children and their families. Some extracts of the Panel's findings are reproduced here:

> The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16) (see 2017 CHRT 14 at, para. 89).

While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle (see 2017 CHRT 14 at, para. 90).

Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see Transcript of Cross-Examination of Ms. Buckland at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16). (see 2017 CHRT 14 at, para. 91).

If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (Affidavit of Robin Buckland, January 25, 2017, Exhibit F, at p. 3); see also Transcript of Cross-Examination of Ms. Buckland at p. 82, lines 1-12] (see 2017 CHRT 14 at, para. 92).

More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process. (see 2017 CHRT 14 at, para. 93).

> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the Decision (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grand-parents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at a $20,000$ under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations

> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $ 20,000 to each First Nation child removed from its home, family and Community between **January 1, 2006** (date following the last WEN DE report as explained above) until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nation child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's Decisions 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living

on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to of substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent of a First Nation child removed from its home, family and Community between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grand-parent lost 3 children in those circumstances, it should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and

communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community from **January 1, 2006** until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out of home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $ 20,000 to each First Nation child removed from its home and placed in care in order to access services and for each First Nations child who

was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the CHRA. Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grand-parent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nation child, parent or grand-parent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware

of the discriminatory practices of its child welfare Program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nation child and parent or grand-parent identified in the orders above.

[254] Canada is ordered to pay $ 20,000 to each First Nation child and parent or grand-parent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grand-parent recognizes that some children may not have parents and were in the care of their grand-parents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grand-parent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grand-parents are caring for the child, both grand-parents are entitled to compensation as described above.

[256] For clarity, parents or grand-parents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grand-parent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be

compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grand-parents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common experience payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para.10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund

per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial Compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grand-parents until the age of majority.

[263] For all the other children who have no parents, grand-parents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grand-parents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the Social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nation child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grand-parents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than **December 10, 2019**. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation.

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[273] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past see for example, *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 20 at, para.21).

XVII. Retention of jurisdiction

[277] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Edward P. Lustig
Tribunal Members

Ottawa, Ontario
September 6, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 6, 2019

Date and Place of Hearing: April 25 and 26, 2019
Gatineau, Québec

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. and Max Binnie, counsel for the Respondent

Maggie Wente, counsel for the Chiefs of Ontario, Interested Party

Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 11
Date: May 5, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

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

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Table of Contents

I. Motion for interested party status

[1] The Nishnawbe Aski Nation (the NAN), specifically the NAN Chiefs Committee, seeks leave to intervene in these proceedings, at the remedies stage, as an interested party. The NAN is a political territorial organization that represents the socioeconomic and political interests of 49 First Nation communities located in Northern Ontario.

[2] Granting interested party status falls within the Tribunal's discretion pursuant to section 50(1) of the *Canadian Human Rights Act* (the *CHRA*) and Rules 3 and 8(1) of the Tribunal's *Rules of Procedure (03-05-04)*. As such, and subject to the rules of natural justice, the Tribunal is the master of its own procedure (see *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at pp. 568-569; and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian Affairs and Northern Development Canada*), 2013 CHRT 16 at para. 50).

[3] An application for interested party status is determined on a case-by-case basis, in light of the specific circumstances of the proceedings and the issues being considered. A person or organization may be granted interested party status if they are impacted by the proceedings and can provide assistance to the Tribunal in determining the issues before it. That assistance should add a different perspective to the positions taken by the other parties and further the Tribunal's determination of the matter. Furthermore, pursuant to section 48.9(1) of the *CHRA*, the extent of an interested party's participation must take into account the Tribunal's responsibility to conduct proceedings as informally and expeditiously as the requirements of natural justice and the rules of procedure allow (see *Nkwazi v. Correctional Service Canada*, 2000 CanLII 28883 (CHRT) at paras. 22-23; *Schnell v. Machiavelli and Associates Emprize Inc.*, 2001 CanLII 25862 (CHRT) at para. 6; *Warman v. Lemire*, 2008 CHRT 17 at paras. 6-8; and *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada)*, 2011 CHRT 19 at paras. 22-23).

[4] None of the parties in this matter oppose the NAN's motion. However, as master of its own procedure and pursuant to the requirements of the *CHRA*, the Panel must be satisfied that the NAN can bring a meaningful contribution to these proceedings and can

assist the Tribunal in determining the issues before it; and, if so, what the extent of NAN's participation should be.

[5] For the reasons that follow, the NAN's motion seeking interested party status is granted. The extent of its participation shall be limited to written submissions with respect to the specific considerations of delivering child and family services to remote and Northern Ontario communities and the factors required to successfully provide those services in those communities.

II. Interest in proceedings and assistance to be provided

[6] The NAN seeks to file written materials on the order resulting from this Panel's decision in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*). In the *Decision*, the Panel determined First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*). The Panel ordered Aboriginal Affairs and Northern Development Canada (AANDC), now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[7] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The NAN seeks to assist in this remedial clarification process. It submits that the Tribunal's remedies will have a direct impact on child and family services within its territory. That is, NAN communities are typically remote and isolated, without year-round road access, and dispersed amongst a swath of land covering two-thirds of Ontario. It claims to have unique subject-matter expertise with respect to the specific considerations of delivering child and family services to remote and northern communities and the factors required to successfully provide those services in those communities. In this regard, it is also engaged with the Government of Ontario on the development of an Aboriginal child and youth strategy. The NAN submits these discussions are addressing the same issues as those in the *Decision*, including Jordan's Principle, Ontario's *Child and Family Services Act*, and funding for prevention programs. The NAN seeks to bring its experience and knowledge before the Tribunal to ensure that any ordered remedies are designed and implemented pursuant to the particular context of remote and northern communities.

[9] Indeed, many of the Panel's findings with respect of the *1965 Agreement* were related to the circumstances and challenges faced by remote communities in Ontario. The Panel identified various factors which impact the performance and quality of the child and family services delivered to those communities and which can result in more children being sent outside the community to receive those services. Those factors include the added time and expense for Children's Aid Societies to travel to remote communities; the challenges remote communities face in terms of recruiting and retaining staff while dealing with larger case volumes; the lack of suitable housing, which makes it difficult to find foster homes in remote communities; the lack of surrounding health and social programs and services available to remote communities and their limited access to court services; and the lack of infrastructure and capacity building for remote communities to address all these issues (see the *Decision* at paras. 231-235, 245 and 392).

[10] The NAN's direct affiliation with remote communities experiencing these issues will ensure their interests inform any remedy issued by the Panel and will assist in crafting an effective and meaningful response to these issues. In the same vein, the NAN's involvement in developing an Aboriginal child and youth strategy with the Government of Ontario may assist the Panel in crafting effective and meaningful orders to address other

findings it made regarding the *1965 Agreement*; specifically, that the agreement has not been updated for quite some time and does not account for changes made over the years to the *Child and Family Services Act* for such things as band representatives and other mental health and prevention services. The Panel found this last issue was compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under Ontario's *Child and Family Services Act* (see the *Decision* at paras. 228-230, 235, 392 and 458).

[11] Given these findings in the *Decision* and the Panel's order to reform the *1965 Agreement* to reflect those findings, it is clear that the NAN has an interest in these proceedings and, more importantly, that it can potentially provide a meaningful contribution and assistance in determining the remaining remedial issues in this case.

III. Extent of participation

[12] Despite the NAN's interest and potential contribution, the Panel must ensure that its proposed intervention will not unduly affect the informality and expeditiousness of these proceedings or cause prejudice to the parties or the Tribunal. In this regard, the NAN proposes to file written submissions on remedies, addressing its unique perspective as an advocate for Ontario's northern and remote communities, without duplicating submissions already made.

[13] With already four parties and two interested parties to this litigation, the management of this case and hearing to date has presented numerous challenges in terms of satisfying the rights of the parties, but also in terms of effectively administering the Tribunal's limited time and resources. Adding another party to all this, especially at this late stage, is not only rare, but also adds to the challenge of effectively managing this case. That said, the Panel finds the benefit of the NAN's proposed intervention outweighs the impact it may have on the conduct of these proceedings.

[14] However, given we are at the remedial stage of these proceedings, the NAN's written submissions should only address the outstanding remedies and not re-open

matters already determined. The hearing of the merits of the complaint is completed and any further evidence on those issues is now closed. The Panel's role at this stage of the proceedings is to craft an order that addresses the particular circumstances of the case and the findings already made in the *Decision*. The Tribunal's remedial clarification and implementation process is not to be confused with a commission of inquiry or a forum for consultation with any and all interested parties. If that were the case, every First Nation community or organization could seek to intervene in these proceedings to share their unique knowledge, experience, culture and history. Processing those applications, let alone admitting further parties into these proceedings, would significantly hinder the Panel's ability to finalize its order.

[15] Furthermore, in not duplicating the submissions made by other parties, the NAN should limit its written submissions to the areas where it says it can provide a different perspective to the positions taken by the other parties. That is, the specific considerations of delivering child and family services to remote and northern communities in Ontario and the factors required to successfully provide those services in those communities. Pursuant to the NAN's unique perspective, the Panel expects its submissions to focus mainly on the application and reform of the *1965 Agreement*. Indeed, in a recent ruling in this matter (2016 CHRT 10), the Panel made orders on immediate relief in accordance with its findings in the *Decision*, but determined it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* following the determination of the NAN's motion (see paras. 28-29).

[16] Limiting the NAN's submissions in this manner recognizes the contribution it can make to these proceedings, while at the same time acknowledging the organizations already representing the main interests at stake in this matter. The Assembly of First Nations and the Chiefs of Ontario represent the various First Nations communities across Canada and Ontario. The interests of First Nations children, youth and families, along with the agencies that serve them, are represented by the First Nations Child and Family Caring Society of Canada. Furthermore, the Canadian Human Rights Commission (the Commission) represents the public interest and has led the majority of the evidence in this

matter, including the evidence relied upon by the Panel to make the findings in the *Decision* identified above about remote Ontario communities.

[17] With the assistance of these parties and interested parties, along with the NAN and INAC, the Panel believes it will have more than enough submissions to craft a meaningful and effective order in response to the *Decision*.

IV. Ruling

[18] The NAN shall be added as an interested party to these proceedings. It can file written submissions on remedies pursuant to the parameters outlined above.

[19] Within ten business days of this ruling, the NAN shall provide its written submissions on immediate relief items. INAC, the Caring Society, the AFN, the Chiefs of Ontario and the Commission will then have ten business days to respond to those submissions. Any reply thereto by the NAN can be filed within seven business days of INAC's response and the other parties' responses, if any.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 5, 2016

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 16
Date: September 14, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and –

Attorney General of Canada

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

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Outline

I. Update to remedial order

[1] This Panel continues to supervise Indigenous and Northern Affairs Canada's (INAC's) implementation and actions in response to findings that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or are differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*) [see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*)].

[2] Generally, INAC was ordered to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario* (the *1965 Agreement*) to reflect the Panel's findings in the *Decision*. INAC was also ordered to cease applying a narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle. The order and findings in the *Decision* are the main reference points from which the Panel bases any further orders.

[3] Following up on the general order in the *Decision*, in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10, the Panel reiterated and emphasized certain findings and adverse impacts from the *Decision* and ordered INAC to take measures to address those findings and adverse impacts immediately. To assist the Panel in assessing the implementation of the *Decision* and subsequent order, INAC was directed to provide a comprehensive report indicating how the findings in the Decision were being addressed to provide immediate relief for First Nations children.

[4] In response to INAC's reporting requirements and following further submissions from the parties thereon, this ruling updates the Panel's order in addressing the findings of the *Decision* in the short term. Other short, mid and long-term reforms of the FNCFS Program and the *1965 Agreement*, along with other requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*, will be dealt with at a later point.

[5] In general, the Complainants, the First Nations Child and Family Caring Society (the Caring Society) and the Assembly of First Nations (the AFN), along with the Commission and the Interested Parties participating at this stage of the proceedings, the Chiefs of Ontario (the COO) and the Nishnawbe Aski Nation (the NAN), are in agreement about the orders requested of the Panel to address the findings of the *Decision* in the short-term. Their submissions and requested orders are collectively referred to as those of the 'Complainants, Commission and Interested Parties' or 'CCI Parties' in this ruling. Where the submissions of the Complainants, Commission or Interested Parties may differ, those submissions are specifically outlined.

II. Preliminary remarks

[6] The Panel thanks the parties and interested parties for their most recent submissions. It has carefully considered them and found them to be very helpful. The Panel recognizes the time, effort and resources dedicated by the parties to complete them. Generally, the Panel is supportive of the majority of the orders requested made by the CCI Parties.

[7] The Panel is pleased to learn that the federal government has accepted to do a number of important things in response to the *Decision* and has made some progress in implementing the findings and orders from the *Decision*. Overall, the Panel believes the federal government is working towards reforming its approach to First Nations child and family services and implementing meaningful change for First Nations children and families.

[8] That said, and as addressed in this ruling, more progress still needs to be made in the immediate and long-term to ensure the discrimination identified in the *Decision* is remedied. In this regard, as emphasized in its last ruling (2016 CHRT 10), the Panel believes the dissemination of relevant and timely information continues to be of the utmost importance in rebuilding trust between the parties and avoiding conflicts and delays going forward.

[9] Generally, the Panel fails to understand why much of the information provided in INAC's most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS Program back in March 2016. INAC ought to have known this information was and remains important in responding to the Panel's information requests and reporting orders. Indeed, the Panel and the CCI Parties have been requesting this type of information for months now. It rests on INAC and the federal government to implement the Panel's findings and orders, and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation, ensures the Panel and the parties that this is indeed the case.

[10] INAC has also recognized the CCI Parties as partners in the reform process and identified a need to consult Indigenous peoples across Canada to obtain their input on reforms. While this is necessary and consistent with the federal government's duty to consult Indigenous peoples, again, improved communication surrounding such endeavours would greatly assist the Panel in understanding INAC's strategy to address the *Decision* and would help build the trust necessary to establish a partnership between the parties. It is also unclear if or who has been consulted among the Indigenous community at this point, including if any social workers or other experts in the field of child welfare have been consulted. On this last point, INAC has previously acknowledged that it does not have expertise in the provision of child and family services to First Nations. Therefore, the need to consult with experts in the field, including the Caring Society, should be a priority.

[11] Likewise, the Panel has made a number of comments since the *Decision* on the importance of the parties meeting to discuss reform of the FNCFS Program and the *1965 Agreement* in the immediate and long term. In this regard, the Panel notes the Caring Society, the AFN and INAC did not even acknowledge until their most recent submissions that they had met several times to discuss reforms and the reestablishment of the National Advisory Committee (the NAC). This is important information because the ability of the parties to work together at this immediate relief stage is a good way to test if the reinstatement of the NAC will yield success in reforming the provision of First Nations child

and family services in the long term. INAC needs to improve its communication and information sharing with the other parties and the Panel, while continuing to build the partnership it has acknowledged. In addition, the Panel requests that it be kept informed of any relevant memorandums of understanding and/or agreements reached between the parties and/or important meetings discussing the subject matter of this case.

[12] As always, the Panel continues to encourage the parties to communicate effectively and work together. It also remains willing to assist the parties in reaching that goal. While the Panel is committed to eradicating discrimination and seeing the provision of First Nations child and family services reformed, and will continue to supervise the implementation of its orders in this regard; it also steadfastly believes that collaboration amongst the parties outside the four walls of the Tribunal is the best way to ensure reconciliation and effective reforms now and into the future. All parties are clearly dedicated to reconciliation and should continue to attempt to work together towards that goal.

[13] That said, the Panel will make further orders if need be to ensure discrimination is eliminated. In this vein, the Panel will rule on some immediate relief measures in this ruling and will leave others to be discussed at a future in-person case management meeting. The Panel appreciates that some parties wish this remedial process would proceed more quickly. While the Panel shares this sentiment, remedying the discrimination found in the *Decision* is a complex matter and depends greatly on the way in which information is provided to the Panel. In fact, some CCI Parties have cautioned the Panel to be careful in how it crafts its orders in terms of adequacy and impacts. Consequently, the Panel wishes to ensure all parties have a full and ample opportunity to present their points of view and that it has all necessary information to make informed orders. Nonetheless, the Panel hopes to see change materialize at the earliest opportunity. It believes some of that change can happen immediately while INAC's First Nations child welfare system is being reformed through consultations with Indigenous peoples and the parties involved in this case. The Panel makes the following ruling in this regard.

III. The FNCFS Program

[14] INAC's report in response to the Panel's ruling in 2016 CHRT 10 provided some information on how it is immediately dealing with the shortcomings of the FNCFS Program identified in the *Decision*. INAC submits that it is addressing these shortcomings through new financial investments in the FNCFS Program, along with modifications to its existing funding formulas, until a full reform of the FNCFS Program can be completed. Hence, INAC is of the view that many of the immediate relief measures proposed by the CCI Parties need to be addressed as part of mid to long-term reform of the FNCFS Program, after thorough engagement with key partners.

[15] In its most recent report, INAC outlines the new financial investments in the FNCFS Program allocated by the federal government in Budget 2016 over the next five years, along with the budget allocation of each FNCFS agency for this fiscal year and the funding models used to generate those budgets.

[16] Generally, the CCI Parties submit that INAC has not shown whether or how new investments in the FNCFS Program will be sufficient to address the findings in the *Decision*, especially in the short term.

[17] For the reasons that follow, the Panel is of the view that further orders, including additional information and reporting by INAC, are required to ensure the findings in the *Decision* with respect to the FNCFS Program have been or will be addressed in the short term.

A. Adjustments to funding formula assumptions and flaws

[18] One of the main findings in the *Decision* is that INAC's FNCFS Program, which flows funding through formulas, Directive 20-1 and the Enhanced Prevention Focused Approach (EPFA), provides funding based on flawed assumptions about the number of children in care, the number of families in need of services, and population levels that do not accurately reflect the real service needs of many on-reserve communities. This results in inadequate fixed funding for operation costs (capital costs, multiple offices, cost of living

adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services. Most importantly, inadequate funding for operation and prevention costs provides an incentive to bring children into care because eligible maintenance expenditures to maintain a child in care are reimbursable at cost (see the *Decision* at paras. 384-389 and 458).

[19] In 2016 CHRT 10, the Panel ordered INAC to immediately take measures to address the assumptions and flaws in its funding formulas, including all the underlined items at paragraphs 20 and 23 of that ruling. INAC was to provide a comprehensive report explaining how those flaws and assumptions are being addressed in the short term to provide immediate relief to First Nations on reserve. The Panel's order also required INAC to provide detailed information on budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision* (see 2016 CHRT 10 at paras. 20-25).

[20] Since 2016 CHRT 10, INAC submits Canada's immediate relief investments will address and help to remediate the discrimination identified by the Tribunal and will improve outcomes for First Nations children and families. The investments will provide greater prevention services to families and support critically needed FNCFS Program stability, while ensuring that no disruption of services occurs during work to reform the FNCFS Program.

[21] Through increased investment in the FNCFS Program, INAC submits it is eliminating the use of Directive 20-1. Where Directive 20-1 applies, FNCFS Agencies will be provided funding through existing mechanisms this fiscal year, but with increased funding levels determined using the more updated EPFA costing model. In 2016-17, INAC

is investing $17.5 million for prevention services and programs as immediate relief for FNCFS Agencies still under the Directive 20-1 regime.

[22] For jurisdictions under the EPFA funding model, INAC indicates that updates include: additional funding to address population increases; allowing upward adjustments to be made for 26 agencies with more than 6% of children in care; adjustments to staff salaries to ensure comparability with provincial rates; updates to reflect changes in provincial standards (e.g. caseload ratios for social workers or other front line workers) and to support intake and investigation services; updates to service delivery standards, such as increasing the percentage used to calculate off-hour emergency services and increased funding for staff travel; increased funding for agency audit, insurance and legal services; and, increased amounts for the service purchase per child (i.e. service providers will receive $175 per 0-18 child served, regardless of jurisdiction).

[23] INAC submits that Budget 2016 amounts to address the flaws in Directive 20-1 and the EPFA are higher than what was identified by INAC in its 2012 *Way Forward Presentation* (see the *Decision* at paras. 295-298). Over five years, the *Way Forward Presentation* estimated $108 million to, among other things, expand the EPFA to the jurisdictions still under Directive 20-1, while topping-up existing EPFA jurisdictions. While the CCI Parties focus on Budget 2016's year 1 investment in stating that new funding falls short of the estimated five-year totals in the *Way Forward Presentation*, INAC submits the proper comparison is Budget 2016's year 5 investments. That is, Budget 2016 proposes $176.8 million in year 5 to, among other things, expand prevention based services in Directive 20-1 jurisdictions and top-up jurisdictions operating under the EPFA.

[24] With regard to small FNCFS Agencies, INAC indicates that agencies with less than 800 children in care will still be subject to scaling with respect to their core funding (expenses for Board of Directors, employee salaries, benefits, training and travel, funding for agency evaluations, audits, insurance, legal fees and administrative overhead). However, this does not decrease the funding provided to an agency for protection or prevention services. According to INAC, future approaches to funding small agencies will be part of longer term engagement with First Nations and provincial partners.

[25] The CCI Parties submit that the true measure of the impact of INAC's immediate relief measures is the extent to which the incentive to remove First Nations children from their homes has been reduced. They contend that INAC's compliance report is bereft of assurances that the incentives to bring children into care identified in the *Decision* will be reduced by its immediate relief investments and changes to its funding formulas; they also submit that INAC has not shown that additional program investments will allow FNCFS Agencies to provide services on par with those provided by the provinces.

[26] While upwards adjustments are being made for agencies serving more than 6% of children in care, the CCI Parties are unclear about the extent to which the actual percentage of children in care is being funded. Furthermore, there appears to be no upwards adjustments for agencies serving more than 20% of families in need. For small agencies, the CCI Parties submit that INAC was not given the option of deferring the problems caused by scaling core funding based on population levels.

[27] The CCI Parties request an order that INAC immediately make adjustments to its funding formulas to ensure operations budgets for FNCFS Agencies approximate actual costs. They suggest various modifications to INAC's funding formulas, including:

- increases to the base amounts in the formula, including for the child purchase amount;
- that FNCFS Agencies, serving a population where the percentage of children in care and percentage of families receiving services exceeds 6% and 20% respectively, be provided with an upward adjustment for their operations and prevention budgets in proportion to the excess percentages;
- that no downwards adjustments be applied to FNCFS Agencies with fewer than 6% of children in care and/or serving fewer than 20% of families;
- that adjustments to the fixed amount in the funding formula for population levels be increased; and

- that the fixed amount in the funding formula for all FNCFS Agencies serving fewer than 251 Registered Indian children be the same amount provided to agencies serving at least 251 Registered Indian children.

[28] The Panel recognizes the efforts made so far by INAC and its desire to improve the lives of First Nations children through negotiations with key partners. The Panel also finds INAC`s explanation outlined in paragraph 23 above to be reasonable in terms of the amount of funding being higher than the amount in the 2012 *Way Forward Presentation*. Aside from the overall amount of additional funding being invested in the FNCFS Program, the Panel was pleased to learn that new funding (approximately $28.4 million) was actually provided to FNCFS Agencies on July 1st, 2016, with other additional funds coming before the end of this fiscal year, in part to address some of the flawed assumptions in INAC's funding formulas.

[29] However, as stated in the *Decision* at paragraph 482, "[m]ore than just funding, there is a need to refocus the policy of the program to respect human rights principles and sound social work practice." The Panel is concerned to read in INAC`s submissions much of the same type of statements and reasoning that it has seen from the organization in the past. For example, that it is up to each FNCFS Agency to determine how they allocate their funding for such things as prevention and cultural programing (see *Decision* at paras. 187-189, 311, 313 and 314). This prompts the same question as at the time of the hearing: what if funding is not sufficient to allow for that flexibility? How has INAC determined that each agency has sufficient funding to comply with provincial child welfare standards and is still able to deliver necessary prevention and cultural services? The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination. Indeed, the Panel identified the challenges faced by small and/or remote agencies and communities across Canada, numerous times in the *Decision* (see for example paras. 153, 277, 284, 287, 291, 313 and 314). INAC has studied and been aware of these issues for quite some time and, yet, has still not shown it has developed a strategy to address them.

[30] The emphasis on discussions with key partners at tripartite tables is also something this Panel has seen in the evidence and heard from INAC many times throughout these proceedings (see *Decision* at paras. 138, 139, 191-197, 201 and 213-215). One main example of this in the evidence is the situations in Quebec and British Columbia. Despite many consultations, discussions and joint studies in the past, and even with ready and willing partners prepared to transition those provinces from Directive 20-1 to the EPFA, that transition has yet to occur or was significantly delayed (see *Decision* at paras. 73-77 and 314).

[31] While the Panel understands meaningful long-term reform and change will be accomplished in consultation with key partners, such as Indigenous peoples across Canada and the provinces, the purpose of immediate relief has been and still is to eliminate as many adverse impacts as possible at this time with the information that we have, the findings in the *Decision* and with the assistance of experts, FNCFS Agencies and the parties. Immediate relief is a temporary measure to remove as many adverse impacts as possible with the understanding that consultation, studies and data collection will translate into a more comprehensive and effective change of the FNCFS Program.

[32] Comprehensive reform will take some time. The Panel understands this and believes a complete reform will happen. However, immediate relief should be treated as such and not transformed into a long term remedy. While additional funding may address the most discriminatory aspects of INAC's funding formulas in the short term, the Panel is not currently in a position to determine if this is the case. The Panel acknowledges and appreciates much of the additional information INAC provided in response to its ruling in 2016 CHRT 10; however, even with this additional information, the rationale and/or methodology for allocating the additional funding is not fully explained and the supporting data and/or documentation, including the cost driver study and trend analysis on which INAC claims Budget 2016 investments in the FNCFS Program were developed is incomplete.

[33] That is, the Panel analyzing is not concerned with the specific amount of funding per se, but rather the way in which it is determined. It is the way in which the FNCFS Program is delivered and funding is determined that results in discriminatory effects for

First Nations children and families. The Panel's focus is on whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and their communities. While other key factors come into play in determining whether the amount of funding provided to FNCFS Agencies is adequate to address the needs of the communities they serve, such as remoteness and the extent of travel to meet children and families (which will be addressed later in this ruling), the assumptions about the number of children in care, the number of families in need of services and population levels are the starting point for addressing the discriminatory impacts of INAC's funding formulas.

[34] Therefore, leaving some of the assumptions and flaws in the funding formulas for long term reform to ensure everyone is consulted may be problematic. As said in the *Decision*, a piecemeal approach to reform is not an effective way to proceed (see *Decision* at paras. 185 and 331). While the Panel understands that INAC is determined to reform the entire FNCFS Program and believes it intends do so, it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFS Program has fostered for the past 15 years. Over that time, despite well documented problems with the program and consultations with its partners and at tripartite tables, INAC's system has failed to adapt to the needs of First Nations children and families (for example, see *Decision* at paras.134,138-141, 203, 311, 314-315, 383-394 and 456-467). The Panel understands this is no easy task and that the FNCFS Program cannot be reformed in an instant. However, this does not mean that effective measures cannot be implemented in the meantime. The Panel also agrees with the parties that a one-size-fits-all type of approach is not to be used; this was also addressed in the *Decision* (see para. 315).

[35] Throughout the *Decision*, the Panel highlighted the dichotomy between the objectives of the FNCFS Program and INAC's flawed methods for achieving those objectives (see for example para. 312). Many of those flaws can be corrected at this time, without the need for additional large scale consultation and study. Again, the purpose is to eliminate as many adverse impacts as possible while the system is being reviewed and reformed. Indeed, as indicated by the CCI Parties, INAC was not given the option to defer

addressing the assumptions and flaws in its funding formulas to address them solely in the long term. As the service provider, funder and FNCFS Program manager, INAC was given some flexibility in the manner in which to address the findings in the *Decision*. However, in 2016 CHRT 10, the Panel was clear that the immediate measures underlined and identified in that ruling had to be undertaken now while further long-term reform was being contemplated.

[36] The Panel reiterates its immediate relief orders that all items identified in paragraph 20 of 2016 CHRT 10, and not limited to the items that were underlined, must be remedied immediately, including the adverse effects related to:

- The assumptions about children in care, families in need of services and population levels;
- Remote and/or small agencies;
- Inflation/cost of living and for changing service standards; and
- Salaries and benefits, training, legal costs, insurance premiums, travel, multiple offices, capital infrastructure, culturally appropriate programs and services, and least disruptive measures.

[37] With specific regard to remote agencies, the Panel expects INAC to develop a strategy that takes into account such things as the additional costs associated with travel distances between service centers in terms of similarity to provincial statutory response times and managing impacts on service providers and the children and families they serve; the availability of surrounding services or lack thereof; and, the higher costs and cost of living in northern and/or isolated areas. Remoteness can affect each item in a FNCFS Agency's budget. The Panel will return to the issue of remoteness below.

[38] Again, the objectives of the FNCFS Program can only be met if INAC's funding methodology is focused on service levels and the real needs of First Nations children and families, which may vary from one child, family or Nation to another. A focus on the overall amount of funding, through the continued application of flawed funding formulas, does little, if anything, to correct the discrimination found in the *Decision*. Therefore, the Panel

orders INAC to immediately establish the funding assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC has indicated that, even where the number of children in care is below 6%, it will not reduce the amount of funding to such agencies. INAC is ordered to apply the same standard for the assumption of 20% of families in need of services. That is, it will not reduce the amount of funding for FNCFS Agencies that serve less than 20% of families in need of services.

[39] For agencies that have more than 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services. While INAC has indicated that it is allowing upward adjustments to be made for 26 FNCFS Agencies with more than 6% of children in care, there is insufficient information that those upward adjustments are based on an assessment of the actual levels of children in care. Furthermore, INAC has not indicated how it is addressing agencies serving more than 20% of families. As indicated below in its order at the end of this ruling, INAC will be required to report back to the Tribunal confirming that it has implemented this order and clearly demonstrate how it has done so. Again, this order is only meant to provide short-term relief given that a full reform of the FNCFS Program will occur in the long term following further consultation with Indigenous peoples, partners and experts from across Canada.

[40] For the assumptions in the funding formulas based on population levels, INAC is ordered to immediately stop formulaically reducing funding based on arbitrary population thresholds. Again, funding must be provided based on an assessment of the actual service level needs of FNCFS Agencies. As above, INAC will be required to report back to the Tribunal confirming that it has implemented this order and clearly demonstrate how it has done so.

[41] Relatedly, and as addressed in more detail below, the Panel needs more information on how INAC determined its five-year plan for investing in the FNCFS Program and in determining budgets for each FNCFS Agency. The Panel notes that there are already some costing model template documents filed in evidence with the Tribunal and in INAC's most recent submissions which provide some of this additional information.

However, this information still needs to be further detailed to clearly explain how the children's and families' needs are being addressed in response to the Panel's findings and orders.

[42] Furthermore, given INAC's emphasis on consultation in response to many of the items in this ruling, it would be helpful to the Panel and the other parties if INAC could provide a list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far in response to the findings in the *Decision*, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions.

B. Funding for legal fees, capital infrastructure, culturally appropriate services, child service purchase amount and the receipt, assessment and investigation of child protection reports

[43] According to INAC, the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services will be addressed as part of future reform discussions. Addressing some of these issues may require engagement and discussion with First Nations, FNCFS Agencies and provincial/territorial governments. According to INAC, unilateral action in addressing these important issues would be contrary to the federal government's commitment to renew the relationship between Canada and Indigenous peoples. INAC adds that immediate relief investments could be utilized by FNCFS Agencies to respond to individual community needs for culturally based programming and activities.

[44] With respect to the child service purchase amount, INAC indicates that it has increased it from $100 to $175 per child. On the receipt, assessment and investigation of child protection reports, INAC submits that Budget 2016 investments will provide approximately $45 million over the next five years in additional funding to support intake and investigation services, which include activities such as the receipt, assessment and investigation of child reports.

[45] For their part, the CCI Parties do not understand why the issue of funding legal fees, capital infrastructure and culturally appropriate programs and services cannot be addressed at this stage. There are actions that can be taken now to alleviate discrimination that fall entirely within federal jurisdiction and do not depend on corresponding provincial action, including simply adopting and adequately funding applicable provincial/territorial standards regarding these issues. Specifically, the CCI Parties request:

- Each FNCFS Agency be provided $75,000 in fiscal year 2016/2017 to develop and/or update a culturally based vision for safe and healthy children and families, and to begin to develop and/or update culturally based child and family service standards, programs and evaluation mechanisms;

- Legal fees related to children in care, and child welfare investigations and inquiries, be fully reimbursable according to the tariff employed by the federal government for the remuneration of outside counsel; and

- The costs of building repairs, where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations, be fully reimbursable.

[46] For the child service purchase amount, the CCI Parties request that it be increased to $200 per child. For costs related to the receipt, assessment and investigation of child protection reports, the CCI Parties submit that they should be fully reimbursable.

[47] As stated above in the previous section of this ruling, the Panel is not concerned with the specific amount of funding per se, but with the way in which it is determined: that it is based on an evaluation of the distinct needs and circumstances of each individual FNCFS Agency. Pursuant to this reasoning, the Panel has insufficient information at this time to make an order with respect to the request for a specific amount of funding for the development and/or update of culturally based child and family service standards, programs and evaluation mechanisms. The Panel recognizes that leaving it to FNCFS Agencies to use immediate relief investments to address this item does not ensure this

need is met, especially in the case of a small agency and/or remote community. However, the Panel will address this request at the upcoming in-person case management meeting.

[48] For legal fees, as indicated in 2016 CHRT 10 and reiterated at paragraph 36 above, the Panel expects INAC to address this issue as part of immediate relief measures while a longer-term solution is being developed. While the Panel understands the benefit of having discussions on funding for legal fees in the long term, this issue should also be addressed immediately. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is addressing this issue. This will form part of the upcoming in-person case management meeting.

[49] On the issue of building repairs, the Panel fails to understand why INAC cannot address it now, especially where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations. Again, while the Panel understands the benefit of having discussions on capital infrastructure in the long term, this urgent issue should also be addressed immediately. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is addressing this issue. This will form part of the upcoming in-person case management meeting.

[50] Finally, with regard to the issues of the child service purchase amount and the costs related to the receipt, assessment and investigation of child protection reports, again, the Panel requires further information on how INAC's funding allotment for this item meets the needs of individual FNCFS Agencies. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it determined funding for such costs. This will form part of the upcoming in-person case management meeting.

C. Adjustments for inflation

[51] Another significant finding in the *Decision* was INAC's failure to adjust Directive 20-1 funding levels since 1995, along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living.

[52] INAC indicates that the investments in Budget 2016 include an annual adjustment to address future cost drivers and growth. The cost drivers that account for average yearly growth include: maintenance growth, agency operating costs (e.g. rent, transportation, supplies and equipment), salaries and increases in ratios of children in care. According to INAC, the annual amount for growth and cost drivers was calculated at approximately 3% of program investments and it is providing $159 million in additional funding over the next five years to address these issues.

[53] The CCI Parties submit that INAC has failed to detail how much it is allocating for each "growth and future cost driver" and does not clearly detail how it arrived at corresponding allocations. Moreover, not all of the future cost drivers identified are linked to inflation. Indeed, the CCI Parties submit some of these cost drivers are linked to the FNCFS Program's legacy of discrimination (for instance, child maintenance costs). Additionally, they argue the annual adjustment for growth and future cost drivers does nothing to address the systemic disadvantage perpetuated by a lack of inflation adjustments over the last two decades.

[54] The CCI Parties request increased funding to restore lost purchasing power related to the failure to provide a compounded annual inflation adjustment pursuant to the Consumer Price Index. For fiscal years 2016-17 and forward, they request annual adjustments in funding for FNCFS Agencies according to the increase in the Consumer Price Index.

[55] INAC is ordered to detail how much it is allocating for each "growth and future cost driver" and to detail how it arrived at its corresponding allocations. Given the Panel has questions for INAC, the request for increased funding to restore lost purchasing power will be addressed during the upcoming in-person case management meeting.

D. Cost overruns and the reallocation of funds from other INAC programs

[56] The *Decision* also addressed evidence that where there were cost overruns for maintenance expenses, and before providing any additional funding, INAC required FNCFS Agencies to recover those overruns from their prevention or operations funding streams first. Relatedly, in the event maintenance costs exceeded the FNCFS Program budget, funds were reallocated from other INAC programs, such as housing and infrastructure, to meet those maintenance costs. This was described by the Auditor General of Canada as being unsustainable and as also negatively impacting other important social programs for First Nations on reserve.

[57] Again, INAC submits that Budget 2016 investments took into account cost drivers and growth considerations, including those impacting maintenance expenditures. If pressures exceed the allocated budget, additional resources can be secured. Funds will be allocated to agencies on an as-needed basis to respond to increases in maintenance expenses, provincial salary changes and any increases to the ratio of children in care.

[58] Furthermore, INAC submits that Budget 2016 investments will contribute to a more stable and predictable funding environment within INAC, thus reducing the need for reallocations from other critical programs such as infrastructure and housing. However, INAC notes that any commitment relating to funding for programs other than the FNCFS Program is beyond the scope of this complaint.

[59] The CCI Parties submit that only $51,830,765.38 will be conferred to FNCFS Agencies to cover cost overruns in 2016-17. Therefore, they request that INAC be ordered to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and operations funding streams. Moreover, the CCI Parties request an order that INAC cease its practice of reallocating funding from other First Nations programs to address shortfalls in the FNCFS Program.

[60] The Panel orders INAC to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and operations funding streams. Again, this ensures FNCFS budgets are in a better position to meet the actual needs of the children and families they serve.

[61] 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 made findings about the adverse impacts of this practice in the *Decision* (see for example paras. 373 and 390). Therefore, the Panel urges INAC to eliminate this practice.

E. Additional information requests

[62] The CCI Parties request further detail on the budget allocations for the FNCFS Program and FNCFS Agencies. Specifically, they note that INAC's compliance report states that much of the additional funding will be provided "at full implementation" and "over the next five years." In the CCI Parties' view, INAC has not provided an explanation as to why there is a five-year delay in taking action and requests INAC be ordered to cease its incremental approach to remedying discrimination. The CCI Parties are also unclear as to when exactly "full implementation" will be reached or when "over the next five years" many of INAC's proposed measures will come into effect.

[63] Furthermore, while INAC has provided the funding models that generated its budgets, the CCI Parties also request that it provide the raw data relied upon to calculate any funding increases, including how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba, and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services.

[64] According to INAC, 'full implementation' of Budget 2016 will be reached in Year 4 and again in Year 5 of its five-year plan. The financial projections for 2017-18 to 2020-21 were calculated by scaling the full annual investment of Years 4 and 5. Funding will be provided to agencies incrementally because, according to INAC, past experience and discussions with funding recipients have shown that incremental funding allows agencies enough time to hire, train and retain staff, based on the availability of qualified social workers and other staff, and to expand their prevention programming. INAC submits that this approach in no way means that Canada presumes that agencies lack the capacity to

implement immediate relief measures, but recognizes that it takes time to grow any organization and this is a mechanism to ensure funding does not lapse.

[65] INAC adds that the revised funding formulas used to support Budget 2016 investments were updated through a process undertaken over several years, and which include a comprehensive cost driver study and trend analysis based on the most current data available by jurisdiction. With specific regard to staff benefit packages, INAC states that the amount was calculated based on 20.45% of total salaries. This was the methodology agreed upon when EPFA was established. As part of longer-term reform to the FNCFS Program, INAC is open to further discussions with respect to changing the way in which future staff benefits allocations are calculated.

[66] Much of the information in INAC's most recent submissions, including information on its methods for determining the amount of new funding and the rationale for rolling it out incrementally, should have been provided months ago, especially given that INAC submits its cost study and trend analysis has been developed over several years. This information would have been helpful in moving forward with immediate relief measures more expeditiously. While the incremental funding approach may be following the past EPFA roll-out, the Panel requests the information above from INAC rather than be left with hypotheses. INAC is directed to disclose to the Panel and the CCI Parties, its cost study and trend analysis documentation on which it based its calculations for allocating Budget 2016 funding. . Furthermore, INAC is ordered to provide its rationale, data and any other relevant information in order to assist this Panel in understanding INAC's Budget 2016 investments and how they address the findings in the *Decision,* including how it arrived at financial projections beyond fiscal year 2016-2017; any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates; the information used to determine the caseload ratios in Quebec and Manitoba; and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance, and legal services.

IV. The 1965 Agreement in Ontario

[67] With respect to the *1965 Agreement* in Ontario, the *Decision* found that, while it was seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the *1965 Agreement* in Ontario also results in denials of services and adverse effects for First Nations children and families. The *Agreement* has not been updated for quite some time and does not account for changes made over the years to the Ontario's *Child and Family Services Act* for such things as mental health and other prevention services. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under the Ontario's *Child and Family Services Act*. The *Decision* also found that the lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further. Finally, the *Decision* indicated there is discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families, for example, through the appointment of a Band Representative and INAC's lack of funding thereof (see *Decisions* at paras. 223-246).

[68] Again, for the reasons that follow, the Panel is of the view that further orders, including additional information and reporting by INAC, are required to ensure the findings in the *Decision* with respect to the *1965 Agreement* have been or will be addressed in the short term.

A. Updating the *1965 Agreement*

[69] The CCI Parties request that the schedules of the *1965 Agreement* be updated to reflect the current version of Ontario's *Child and Family Services Act*. They also ask for an order ensuring funding for the full range of statutory services, including Band Representatives and children's mental health services, provided by the Ontario's child welfare legislation.

[70] On this issue, INAC has indicated that it will actively work with the province of Ontario and stakeholders, such as First Nations organizations, leadership, communities, agencies and front-line service providers, to achieve necessary reforms to the *1965 Agreement*. A meeting was held between officials at INAC and the Ontario Ministry of Aboriginal Affairs to discuss issues, including child welfare in Ontario. Subsequently, on March 11, 2016, the Minister of INAC met with the Ontario Minister of Aboriginal Affairs to discuss key priority areas, including FNCFS in Ontario and the need to review the *1965 Agreement*. According to Canada, these meetings have set the stage for further and more substantive discussions that will take place with First Nations, including the COO and other Interested Parties.

[71] Furthermore, on May 10, 2016, INAC's Ontario regional office sent a letter to Ontario Regional Chief Isadore Day and provincial Deputy Minister Deborah Richardson, advising them of immediate relief investments coming to Ontario for child and family services. This letter states that funding for Band Representatives will be considered as part of the FNCFS Program reform process.

[72] In terms of mental health services, INAC submits that $69 million will be invested over the next three years to provide immediate support for Indigenous mental wellness across Canada. This funding is in addition to the close to $300 million provided annually for community-based mental health and addictions programming on-reserve and in the territories. According to INAC, this new funding will support various measures, including some that are specific to Ontario.

[73] The Panel is pleased to learn about the significant new investments mentioned above. While it may address some of the adverse impacts highlighted in the *Decision*, again, the Panel is not in a position to assess the extent that it does so whether in the short or longer-term. INAC is ordered to provide its rationale, data and other relevant information to assist this Panel in understanding INAC’s Budget 2016 investments and how they are responsive to the needs of the First Nations children and how it addresses the findings in the *Decision*, in the short term, especially in terms of mental health services and Band Representatives.

[74] In this regard, the Panel is aware that, as opposed to provincial service delivery and the Ontario's *Child and Family Services Act*, federal health and social services to First Nations children are delivered through different departments. Nevertheless, the Panel made findings with the evidence before it in relation to the gaps and adverse impacts caused by the Federal government's involvement in health and social services to First Nations children in Ontario (for example, see the *Decision* at paras. 364-373 and 391-392). Overall, the Panel found the situation in Ontario fell short of the objective of the 1965 Agreement "…to make available to the Indians in the Province the full range of provincial welfare programs" (see Decision at para. 246). Again, the Panel wants to know how those findings are being addressed in the short term while the *Agreement* is being reformed.

B. Remoteness Quotient

[75] The NAN submits that a new remoteness quotient needs to be developed to ensure funding to remote northern communities reflects the high costs of living and the extraordinary costs of providing services in those communities. The new remoteness quotient should take into account cost of living; demographics of northern communities where children and youth form a significantly higher percentage of the population than the rest of Canada; the high rates of child deaths; and, high youth suicide rates.

[76] According to the NAN, the *Barnes Report* (Exhibit HR-11, Tab 219: David Barnes and Vijay Shankar, *Northern Remoteness, Study and Analysis of Child Welfare Funding Model Implications on Two First Nations Agencies, Tikinagan Child and Family Services and Payukotayno: James Bay and Hudson Bay Family Services* (Barnes Management Group Inc., 2006) provides a good example of what its proposed remoteness quotient could look like, and what a remoteness quotient could accomplish. However, the *Barnes Report* is specific to Ontario, identified several data gaps and was authored in 2006. As such, the NAN requests that an update to the *Barnes Report* be funded by the Federal government. The NAN further proposes that experts be engaged to develop a new remoteness quotient based on the *Barnes Report* and that the selection of the experts be by joint-agreement between the NAN and the Federal government. If no agreement is

reached within a reasonable but short timeframe, it requests the Panel select the appropriate experts.

[77] While a robust, empirically-based remoteness Quotient is being developed, the NAN submits adjustments reflecting northern remoteness realities can be undertaken in the immediate term and looks forward to working collaboratively with the parties on the mechanics of these adjustments.

[78] Whereas the NAN's submissions were mainly focused on the application of a robust remoteness quotient to determine funding for its own communities in Ontario, the AFN submits that the application of remoteness factors ought to be considered across Canada. Similarly, the Caring Society submits remoteness issues should not be dealt with through an "update" of the *Barnes Report* but rather as part of a comprehensive special study for Ontario and as part of the NAC process. The COO also expects the NAC process and the Ontario Special Study to yield data to inform a remoteness quotient, which in turn will inform programming and funding models.

[79] For its part, INAC states that it will engage on undertaking and providing support for research on this topic, building on the research contained in the *Barnes Report*, to analyze a possible remoteness quotient.

[80] The Panel agrees with the NAN that a remoteness quotient needs to be developed as part of medium to long term relief and that data needs to be appropriately collected. The Panel is also pleased to learn that INAC will engage on undertaking and providing support for research on this topic and to discuss a possible remoteness quotient. The Caring Society and the COO have provided interesting suggestions on how to develop a remoteness quotient. This topic will form part of the upcoming in-person case management meeting.

[81] The Panel again agrees with the NAN that while a robust, empirically-based remoteness quotient is being developed, adjustments reflecting northern remoteness realities can be undertaken in the immediate term. The Panel also agrees with the AFN that this should not only apply to Ontario but, rather, the application of remoteness factors ought to be considered across Canada. As indicated above at paragraph 36, in 2016

CHRT 10 the Panel ordered INAC to immediately address how it determines funding for remote FNCFS Agencies. That determination should account for such things as travel to provide or access services; the higher cost of living and service delivery in remote communities; the ability of remote FNCFS Agencies to recruit and retain staff; and, the compounded effect of reducing core funding for remote agencies that may also be small agencies (for example, see *Decision* at paras. 213-233 and 291). A standardized, one-size-fits-all approach to determining funding for remote agencies affects their overall ability to provide services and results in adverse impacts for many First Nations children and families. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it is determining funding for remote FNCFS Agencies that allows them to meet the actual needs of the communities they serve. This will form part of the upcoming in-person case management meeting.

C. Allocation of immediate relief funding

[82] INAC has indicated that Budget 2016 will provide new investments in Ontario of approximately $5.8 million in 2016-17. By 2019-20, the total annual allocation for prevention services in Ontario First Nations will be approximately $1,160 per child: an increase of approximately $560 per child from the current amount of funding.

[83] In order to provide immediate relief to children in Ontario, the CCI Parties submit that the funding should be distributed to Ontario First Nations regardless of the provincial government's concurrence. The CCI Parties further requests that a deadline be set for the distribution of those funds. According to the COO, it is in the process of arranging meetings with INAC and the Province of Ontario to discuss how the budgeted amount of funding for Ontario was determined and how it can be distributed. As such, it requests that INAC provide further information to assess the sufficiency of funding and ongoing reporting to ensure compliance with its commitments.

[84] The CCI Parties also submit that Budget 2016 investments do not address inflation. Therefore, they request INAC pay an amount of $5 million, adjusted for the compound rate

of inflation from 2012 values pursuant to the Consumer Price Index, to be divided among FNCFS Agencies in Ontario.

[85] INAC submits that it cannot flow funds to Ontario via the *1965 Agreement* without the Province's concurrence. At this time, Ontario has not agreed to allow immediate relief funding to be flowed through the *1965 Agreement*. Rather, according to INAC, Ontario has proposed that an alternative approach be found to create an interim arrangement outside of the *1965 Agreement* for INAC to flow funds for immediate relief. INAC states that it is actively working with the Province to find a means to provide immediate relief funding as soon as possible and is prepared to immediately flow the funding for on-reserve preventative services within Budget 2016 commitments. However, before any options are finalized, INAC will seek support from First Nations leadership. As work on the allocation of immediate relief funding in Ontario is ongoing, INAC requests the Tribunal not impose a deadline and instead allow the parties to work collaboratively to address this issue.

[86] With regard to the additional amount for inflation, INAC submits that its Budget 2016 investments account for cost drivers and yearly growth, for a five year investment of $70.5 million in additional program funding for service providers in Ontario.

[87] The Panel acknowledges INAC's investments and explanation. As work on the allocation of immediate relief funding in Ontario is ongoing, the Tribunal will not impose a deadline and instead will allow the parties to work collaboratively to address this issue. This is with the understanding that it will be addressed immediately and not delayed further. However, the Panel expects an update from INAC on this issue as part of its compliance report, and asks that it disclose the correspondence with the Province of Ontario referred to in its submissions. This will also be addressed during the upcoming in-person case management meeting.

[88] Similarly, for the same reasons mentioned in paragraph 55 above, the Panel needs additional information on the request for additional funding to address inflation. There is no doubt that inflation is a key factor which impacts overall service delivery and agency capacity to deliver those services. This was addressed in the *Decision* at paragraphs 311, 387 and 458. However, given the lack of detailed information regarding the determination

of funding for future “cost drivers and yearly growth” the Panel is unable to assess if in fact INAC’s investments are responsive to the needs of Ontario FNCFS Agencies. The Panel orders INAC to provide detailed information in its compliance report to clearly demonstrate how it has determined funding to account for future “cost drivers and yearly growth” and will discuss this issue at the upcoming in-person case management meeting.

D. Expanding the definition of ‘prevention services’

[89] The CCI Parties request an order that the definition of ‘prevention services’ in the *1965 Agreement* be expanded to include special needs rehabilitative and support services and respite care. The CCI Parties submit that if special needs supports and respite care are provided as a form of prevention services, this may lead to a reduction of children in care. Families will no longer have to make the decision between keeping their families together and having a child’s special needs unassessed or supported or breaking families apart by placing a child in care with an increased opportunity that the child will have better access to supports.

[90] Relatedly, the CCI Parties submit that children with special needs are at a significantly higher-than-normal risk of being apprehended due to their inability to travel to get access to the care and services they require. That is, children perceived to be in a position where they are not being provided with required care by their families may be viewed as children in need of protection. Funding for travel to access special needs services and assessments is not provided for under the *1965 Agreement*. Therefore, the CCI Parties request that the definition of ‘prevention services’ under the *1965 Agreement* include funding for travel to access all physician-prescribed health services, including special needs assessments and services.

[91] Finally, the CCI Parties request that the definition of ‘prevention services’ under the *1965 Agreement* be expanded to include the supports for families in crisis identified under Ontario’s recently announced Family Well-Being Program; and that Canada match the Ontario Government’s financial commitment of $80 million over three years to serve families in crisis under the Family Well-Being Program.

[92] In response, INAC states that it looks forward to participating in discussions on the Province of Ontario's definition of 'prevention services' and is committed to working with other federal partners, as well as Ontario and First Nations partners, to discuss the supports needed to reduce or prevent First Nations children from coming into care. However, it argues the request for a unilateral order expanding the definition of ‘prevention services’ under the *1965 Agreement* is not appropriate. That is, the *1965 Agreement* is between the Federal government and the Province of Ontario and will require joint provincial and federal agreement to undertake changes.

[93] The COO suggests that any order for an expanded definition of ‘prevention services’ be considered in the medium to long term relief stage, to allow for planning and consultation with First Nations, child welfare agencies or other proposed service providers; and to ensure that the appropriate service provider can be identified, has the required mandate, and is willing and able to provide such services.

[94] The Panel made findings in the *Decision* with regard to the services covered by the *1965 Agreement*, along with the difficulties faced by some First Nations children and families in accessing services in remote Ontario communities (see paras 223-244). However, the Panel agrees with the COO’s suggestion above that expanding the definition of ‘prevention services’ in the *1965 Agreement* should be considered in the medium to long term. That said, as part of INAC’s immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, and until an expanded definition of prevention services can be considered, INAC should consider reimbursing costs for travel to access physician-prescribed special needs services and assessments, special needs rehabilitative and support services and respite care, and support for families in crisis. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

E. Reinstate cost-sharing of capital expenditures

[95] The CCI Parties request an order that INAC reinstate the cost-sharing of capital expenditures under the *1965 Agreement* at the same allocation of 90%, as provided for in clause 4 of the *Agreement*.

[96] In response, INAC states that it will engage on the broader issue of infrastructure needs for the FNCFS Program as part of long-term reform efforts.

[97] As noted in the *Decision*, the *1965 Agreement* has not provided for the cost-sharing of capital expenditures since 1975 and, as a result, many FNCFS Agencies in Ontario lack funding to establish infrastructure necessary to deliver statutory child protection services (see paras. 244-245). Therefore, as part of INAC's immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, and until the broader issue of infrastructure needs under the *1965 Agreement* can be fully reviewed, INAC should develop an interim strategy to deal with the infrastructure needs of FNCFS Agencies. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

F. Eligibility

[98] According to the CCI Parties, in order to be eligible for federal funding under the cost-sharing formula of the *1965 Agreement*, children and youth must be: 1) registered Indians; and, 2) resident on reserve, Crown land, or off reserve less than 12 months. They submit that this residency and status requirement under the *1965 Agreement* has a significantly negative impact on children and youth who are entitled to be registered, but for a variety of reasons, have not been. In this regard, the CCI Parties suggest that the documentation requirements for registering a child at birth or while still young present a serious challenge. Therefore, they request that the *1965 Agreement's* residency and registered status requirements be amended to ensure that not only children and youth who are registered are eligible for services, but also children and youth who are entitled to be registered.

[99] According to INAC, residency and registered status is a national issue that will require the development of a comprehensive approach in collaboration with key partners. INAC states that it will pursue discussions on this issue as part of long-term reform efforts.

[100] Although eligibility under the *1965 Agreement* is not discussed per se in the *Decision*, the need for review and update of the *Agreement* was discussed in detail (see for example paras. 223-228). The Panel agrees that a comprehensive approach to eligibility needs to be developed in collaboration with key partners and that it is best addressed at the long term stage when the *1965 Agreement* is reformed. However, as part of INAC's immediate relief investments, which are being coordinated on an interim basis outside of the *1965 Agreement*, INAC should also consider addressing access to services for First Nations children 'entitled to be registered'. The Panel expects a detailed response from INAC on this issue and will discuss the issue with all parties at the upcoming in-person case management meeting.

G. Special study

[101] The CCI Parties request that, within one year, a special study be performed of the application of the *1965 Agreement* in Ontario. The study would be conducted by experts and through a mechanism developed through the agreement of the parties, and with accompanying funding that allows for the meaningful participation of FNCFS Agencies, First Nations governments, INAC and the Province of Ontario. According to the CCI Parties, the study would determine the adequacy of the *1965 Agreement* in achieving comparability of services; culturally appropriate services that account for historical disadvantage; and, ensuring the best interest of the child are paramount. Ultimately, the results of the study would inform medium to long term reforms to the *1965 Agreement*.

[102] The NAN agrees with the proposed study, but submits that it should specifically include a component that thoroughly reviews and addresses the effect of the *1965 Agreement* on northern remote communities. Also, it submits the study should include a comprehensive data collection component and the data be made available publicly.

[103] As noted in the *Decision*, the *1965 Agreement* has never undergone a formal review by INAC. The Panel agrees with the CCI Parties that a study would greatly assist in determining the adequacy of the *1965 Agreement* in achieving comparability of services; culturally appropriate services that account for historical disadvantage; and, ensuring the best interest of the child are paramount (see *Decision* at paras. 223-227). A study would also inform long-term reform to the *1965 Agreement* by identifying concrete measures INAC can take to redress the discrimination found in the *Decision* with respect to the *1965 Agreement*. While INAC has generally indicated that it is open to reviewing the *1965 Agreement*, its submissions did not specifically address the CCI Parties' request for a special study.

[104] Therefore, the Panel will reserve making an order with respect to the special study in Ontario pending a specific response from INAC on the issue. The Panel expects a detailed response from INAC on this issue prior to the upcoming in-person case management meeting and will further discuss the issue with the parties at that time.

H. One-time contingency fund

[105] The NAN requests an order for a one-time contingency fund to alleviate funding shortfalls for agencies serving remote and northern communities. According to the NAN, ameliorating the effects of existing deficits and debts will give more room and flexibility for such agencies to address the live, pressing and complex needs of children and families using child welfare services in remote and northern communities.

[106] This request was provided in the NAN's reply and therefore was not commented upon by the other parties. This request will form part of the upcoming in-person case management discussions.

V. Jordan's Principle

[107] In the *Decision*, the Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, delays were inherently built into the Federal

government's process for dealing with potential Jordan's Principle cases. It was also unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (see the *Decision* at paras. 379-382 and 458).

[108] In 2016 CHRT 10, the Panel ordered INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). It added that, pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[109] In response to that ruling, INAC indicated that it took the following steps to implement the Panel's order:

A. It expanded Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;

B. It expanded Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;

C. Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and

D. Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[110] In order to implement this new approach to Jordan's Principle, Canada has indicated that it will invest up to $382 million in new funding over three years. It will also engage with First Nations, the provinces and the Yukon on a long-term strategy over that time. Furthermore, Canada has indicated that it will provide an annual report on Jordan's

Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC has also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case. Further, it is assessing whether an off-business hour mechanism needs to be put in place.

[111] Moving forward, INAC states engagement will be a key component of its new approach to Jordan's Principle. It adds that Health Canada and INAC have written jointly to provinces and territories to initiate discussions related to Jordan's Principle. First Nations leaders will also be engaged on the design, management and delivery of the new approach to Jordan's Principle as well as longer-term policy and program reform. Moreover, INAC and Health Canada senior officials will meet with the AFN to discuss next steps and to develop specific details on implementation of a child-first approach. At the same time, headquarters and regional executives will engage their First Nations partners on the proposed approach.

[112] The CCI Parties request INAC provide further information and reporting on its implementation of the order and commitments above. They specifically ask for the following:

- Details of how Canada will consult with the parties, First Nations and FNCFS Agencies regarding all matters related to Jordan's Principle;
- Details as to what action INAC has taken to comply with the "government of first contact" provision in the order;
- Confirmation that INAC is applying Jordan's Principle to all jurisdictional disputes;
- Confirmation that INAC is applying Jordan's Principle to all First Nations children;
- Clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order; and

- Clarification as to how Canada will ensure that First Nations and FNCFS Agencies are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle.

[113] The CCI Parties further request that INAC post and keep up-to-date information regarding its implementation of Jordan's Principle, including its definition of Jordan's Principle, assessment criteria and process, remediation and appeal mechanism. Furthermore, on an annual basis, the CCI Parties request that INAC post non-identifying data on the number of Jordan's Principle referrals made, the disposition of those cases and the time frame for disposition, as well as the result of independent appeals. Finally, the CCI Parties request that INAC provide all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and FNCFS Agencies in question of any changes of such.

[114] The Panel is pleased with Canada's stated changes and investments in enacting the full meaning and scope of Jordan's Principle, but shares many of the same questions with respect to consultation and implementation as the CCI Parties. First, it would be helpful to the Panel and the other parties for INAC to provide a list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far with regard to Jordan's Principle, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions.

[115] INAC has also indicated that an interim guidance document was issued to regional Jordan's Principle focal points directing regional staff to "ensure that needed services for children will not be delayed due to case conferencing or policy review." However, Canada's submissions are unclear on the process that is being followed in dealing with a Jordan's Principle case. Canada's submissions state:

- Health Canada and INAC will provide further direction to their staff to initiate the implementation of this approach, as well as support the resolution of disputes or service gaps over the next three years based on provincial normative standards;

- Senior officials will engage with First Nations at the national and regional levels to plan the design and the implementation of the Service Coordination function and develop an effective approach to organize services for First Nations children on-reserve with disabilities;

- Further management of any such case will be done in a manner that will ensure the appropriate service or suite of services is being implemented in a timely manner;

- Additional training and orientation of focal points to the new definition and expanded scope of Jordan's Principle will begin immediately;

- A governance structure will be established to deal with Jordan's Principle cases when they arise; and

- Appeals will be heard in an expeditious way to ensure children with disabilities receive services in a timely manner.

[116] With regard to INAC's submissions above, the Panel is unclear as to what the current process is for dealing with Jordan's Principle cases and/or who is involved in processing these cases (INAC employees, social workers, health professionals, etc.). The Panel directs INAC to provide the following information:

- Details as to what action INAC has taken to comply with the "government of first contact" provision in the order;

- Clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order;

- Clarification as to how Canada will ensure that First Nations, FNCFS Agencies and the CCI Parties are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle; and

- Provide all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and inform the First Nations and FNCFS Agencies in question of any changes of such.

[117] On the issue of the breadth of INAC's new formulation of Jordan's Principle, the Panel notes that the motion unanimously passed by the House of Commons did not restrict the application of the principle solely to First Nations children on reserve, but to all First Nations children: "the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children" (see *Decision* at para. 353, emphasis added). INAC's formulation of Jordan's Principle is also not in line with the eligibility requirements for its own FNCFS Program, which applies to First Nations "resident on reserve or Ordinarily Resident On Reserve" (see ss. 1.3.2 and 1.3.7 of the *2005 FNCFS National Program Manual* and s. 1.1 of the *2012 National Social Programs Manual* at paras. 52-53 of the *Decision*). That is, the application of Jordan's Principle only to First Nations children living on reserve is more restrictive than the definition included in INAC's FNCFS Program. This type of restriction will likely create gaps for First Nations children and is not in line with the *Decision* (see paras. 362, 364-382 and 391).

[118] The Panel notes that, in responding to the findings in the *Decision* on Jordan's Principle, INAC's rationale for its new formulation of Jordan's Principle was in reference to two paragraphs of the *Decision* (see *Respondent's Further Reply Submissions Re Immediate Relief*, Justice Canada, July 6, 2016 at pp. 22-23), which it narrowly interpreted as indicating that Jordan's Principle should only apply to First Nations children on reserve. This type of narrow analysis is to be discouraged moving forward as it can lead to discrimination as found in the *Decision*. Rather, consistent with the motion unanimously adopted by the House of Commons, the Panel orders INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve.

[119] INAC's new formulation of Jordan's Principle also appears to narrow its application to only those First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." Without additional information, this formulation of Jordan's Principle once again appears to be

more restrictive than formulated by the House of Commons. The Panel requests that INAC explain in its compliance report why it formulated its definition of Jordan's Principle as such so that it can assess its full impact. This will also form part of the discussions at the upcoming in-person case management meeting.

[120] Finally, the Panel is satisfied that INAC has confirmed it is applying Jordan's Principle to all jurisdictional disputes. The Panel will assess this application through ongoing reporting.

VI. Other requested orders

A. No reductions in funding

[121] The CCI Parties request that INAC be ordered not to decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle.

[122] INAC agrees not to decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle.

[123] The Panel acknowledges INAC's undertaking above and will incorporate it in its order below.

B. Adoption of the principle that children and youth living in residential care must live as close as possible to their home communities

[124] The CCI Parties request an order that Canada adopt the principle that children and youth living in residential care must live as close as possible to their home communities and that necessary funding and resources be provided to ensure this fundamental principle is met.

[125] INAC submits that the decision on placement of a child brought into care is at the service providers' discretion. However, as part of the reform to the FNCFS Program, INAC states it will engage service providers, the provinces/territory and any other relevant

partner, including First Nations leadership and organizations, to facilitate opportunities for children placed in care outside of their communities to maintain a connection to their communities and cultures.

[126] This request will form part of the upcoming in-person case management discussions.

C. National Advisory Committee

[127] INAC has committed to the reestablishment of the NAC, and discussions with the AFN and the Caring Society on the formation of the committee are underway.

[128] The NAN requests an order that it be granted representation at the NAC and regional roundtables. Further, the NAN requests that the NAC include a northern remoteness subcommittee with representation from the NAN. Alternatively, if the Panel finds that the NAN’s proposal is premature, it requests that a deadline or schedule be set, by which the NAC, subcommittees and regional tables should be struck.

[129] INAC is supportive of the NAN's proposal to have a northern remoteness subcommittee included as part of the work of the NAC and states that it will raise this with the committee.

[130] The AFN submits that it would be premature to incorporate the NAC or its composition into an order. The parties envision the NAC as being a mechanism to address medium to long-term reforms of the FNCFS Program and the parties are focused on immediate relief at this stage.

[131] The Panel will address this issue at the upcoming in-person case management.

D. Canadian Incidence Study of Child Abuse and Neglect

[132] The CCI Parties request that INAC be ordered to immediately fund a new iteration of the Canadian Incidence Study of Reported Child Abuse and Neglect, including data collection specific to remote and northern First Nations communities.

[133] According to INAC, it is currently in the process of working with the Public Health Agency of Canada to provide funding for the Aboriginal component of the Canadian Incidence Study.

[134] The Panel believes a new iteration of the Canadian Incidence Study would be a useful tool in further informing reform to the FNCFS Program and the *1965 Agreement*. The Panel also acknowledges INAC's willingness to fund the Aboriginal component of the study as indicated above. The Panel expects INAC to indicate in its report if indeed it is providing funding for the Aboriginal component of the Canadian Incidence Study, including whether that component of the study will include data collection specific to remote and northern First Nations communities.

E. Updating policies, procedures and agreements

[135] The CCI Parties request that INAC be ordered to update its policies, procedures (including FNCFS Agency reporting procedures) and contribution agreements to comply with the Panel's order and communicate such reforms in detail and in writing to First Nations, FNCFS Agencies and the public.

[136] According to INAC, reform of the FNCFS Program will involve a redesign of its funding models, policies and procedures. However, such work will require significant analysis and collaboration with all relevant key partners and is therefore a longer-term process. In the interim, INAC submits that using existing funding mechanisms and procedures will ensure children and families continue receiving services and will prevent any disruption to services. It states that it will work with its partners to update and adjust processes as needed for next fiscal year.

[137] In the Panel's view, the request to update policies, procedures and agreements is captured by its general order to reform the FNCFS Program and *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*. The Panel understands this reform will be achieved in the longer term, with certain interim measures being put in place until that time as addressed in this ruling.

Considering the central importance of this matter and the need for a process along with interim measures to be put in place, this request will also form part of the upcoming in-person case management meeting.

F. Training and performance metrics for federal public servants

[138] The CCI Parties request INAC be ordered to ensure that its executives and staff receive 15 hours of mandatory training on: the Truth and Reconciliation Commission's final report (December 2015); the FNCFS Program (including formula development, assumptions, and program reviews); the *Decision*; and on the full meaning and scope of Jordan's Principle. It requests this training occur before August 31, 2016 and in a manner approved by the Commission and the Complainants.

[139] Relatedly, the CCI Parties also request that the annual performance evaluations of federal public servants who provide services to Aboriginal Peoples, or who assign work related thereto, include metrics designed to demonstrate how each individual has contributed to closing the socio-economic gap with respect to Aboriginal Peoples. It further requests that Canada develop mandatory intercultural competency programming for these employees.

[140] In response, INAC indicates that it looks forward to further discussions on improving the cultural sensitivity of its employees. However, it submits that the request that staff undertake specific training is beyond the scope of the complaint and seeking to have all staff trained is overly broad. Further, it submits the performance evaluations of specific federal public servants was not at issue in the complaint, nor were allegations made against specific employees. In INAC's view, the performance metrics request goes beyond the scope of the complaint, including any mandatory programming related thereto.

[141] Given that INAC is open to further discussions on this issue, the Panel will address this issue at the upcoming in-person case management meeting.

G. Funding for the Aboriginal Peoples Television Network

[142] The hearings in this matter were recorded and broadcasted by the Aboriginal Peoples Television Network (the APTN) pursuant to operating guidelines for coverage approved by the Panel (see *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 18; and *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2012 CHRT 23). One of those guidelines required APTN to retain the recordings of the hearing for three years.

[143] As the three-year period will be coming to an end shortly, and given the legal, social, moral and political importance of this case, the CCI Parties request that INAC be ordered to immediately provide $30,000 to the APTN to transfer the tapes of the Tribunal hearings onto a publicly accessible format and provide sufficient funds to the National Centre for Truth and Reconciliation to store and manage public access to the tapes.

[144] In response, INAC submits that the APTN was not a party to the complaint and, as such, the Tribunal should not grant it relief as part of the remedies. However, it is willing to further consider this undertaking.

[145] The Panel supports and believes in APTN's work and mission. It was very pleased with their involvement in filming the hearings in this matter. However, the Panel will not make the order requested. The Tribunal's remedial discretion must be exercised on a principled basis, considering the link between the discriminatory practice and the loss claimed (see *Chopra v. Canada (Attorney General)*, 2007 FCA 268 (CanLII), at para. 37). The APTN is not a party to this complaint, nor is it a victim of the discriminatory practices at issue. While there is no doubt that this case has a legal, social, moral and political importance that merited public broadcasting, this public interest is not linked to any findings of discrimination.

[146] Although the Panel will not make the order requested, it notes INAC is favorable to fund the transfer of the recordings. Given the recordings are of great importance and public interest, the Panel encourages INAC to do so.

H. Review decisions with respect to funding new agencies

[147] The CCI Parties request that INAC be ordered to review decisions to deny funding to support the development and operation of FNCFS Agencies, particularly with regard to the applications for new agencies by the Okanagan Nation Alliance and the Carcross First Nation.

[148] INAC believes this to be an important topic to be addressed through partner engagement on the FNCFS Program reform. Given the provincial/territorial legislative authority, this will require engagement and agreement with provincial and territorial governments, as well as with First Nations partners.

[149] Before contemplating an order, the Panel believes this request would benefit from further discussion as part of the upcoming in-person case management meeting.

I. Funding for research, scholarships and conferences

[150] The CCI Parties request that, for a minimum of ten years, INAC fully fund research and scholarships in relation to measuring the provision of child welfare services for First Nations children, along with issues such as control over and access to education, the revitalization of Indigenous legal orders, access to the economy and control over lands and resources. Further, they submit that such research and scholarship funding should be managed by an independent scholar-based oversight body. Thereafter, the CCI Parties request INAC fund annual conferences for the presentation of the research findings emanating from the above and that federal public servants involved in the provision of services to Aboriginal Peoples be required to attend.

[151] While INAC is open to further discussions on supporting research, it argues this specific request falls outside the scope of the FNCFS Program.

[152] Given that INAC is open to further discussion, this request will form part of the upcoming in-person case management meeting.

J. Appoint the Commission to engage all parties and create a draft order

[153] The AFN requests that INAC be ordered to engage in consultations with the Commission on immediate measures to redress the discrimination identified in the *Decision*. It asks that the Commission be appointed to engage all parties in a discussion on immediate relief and thereafter create a draft order, including specific dates for INAC to implement all of the elements of immediate relief. The Commission would then be required to submit the draft order, agreed upon by all parties, within 60 days of the date of this ruling.

[154] Furthermore, the AFN submits that the Panel should order INAC, or direct the Commission, to address the issue of resourcing the parties to ensure their meaningful participation in the process.

[155] INAC submits that it has already addressed a number of immediate relief measures, such as providing increased funding to FNCFS Agencies through an updated and improved funding formula. It would like to move forward with addressing medium and long-term reform through engagement with key partners. According to INAC, all work to reform the FNCFS Program will include engagement with key partners such as FNCFS Agencies, First Nations communities and leadership, the provinces, the Yukon Territory and the parties to this complaint.

[156] The AFN's request above was submitted in reply and the other CCI Parties did not have an opportunity to respond thereto. Therefore, this request could form part of discussions at the upcoming in-person case management meeting. INAC has also indicated it is open to providing funds for the CCI Parties' participation in meetings. Therefore, the Panel would like to know if INAC is agreeable to provide funds for the CCI Parties' participation in the upcoming in-person case management meeting and any subsequent meetings.

VII. Order

[157] In the *Decision*, INAC was ordered to cease its discriminatory practices and reform the FNCFS Program and the *1965 Agreement* to reflect the Panel's findings and to cease applying its narrow definition of Jordan's Principle and take measures to immediately implement the full meaning and scope of Jordan's Principle (see at para. 481). As mentioned above, the CCI Parties' request to update policies, procedures and agreements is captured by this general order to reform the FNCFS Program and the *1965 Agreement* in compliance with the findings in the *Decision*. For clarity, the Panel orders INAC to update its policies, procedures and agreements to comply with the Panel's findings in the *Decision*.

[158] In addition, to address this general order in the short term, INAC was subsequently ordered to immediately take measures to address a number of items. As indicated in 2016 CHRT 10 and reiterated in this ruling, those items were to be addressed immediately. Again, those items include addressing the adverse impacts related to the assumptions about the number of children in care, families in need of services and population levels; remote and/or small FNCFS agencies; inflation/cost of living; changing service standards; salaries and benefits; training; legal costs; insurance premiums; travel; multiple offices; capital infrastructure; culturally appropriate programs and services; and, least disruptive measures. INAC was then ordered to report back to the Panel to explain how those items are being addressed in the short term to provide immediate relief to First Nations children on reserve (see 2016 CHRT 10 at paras. 20 and 23).

[159] INAC was also ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the Panel also indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at para. 33).

[160] In addition to the orders in the *Decision* and in 2016 CHRT 10, and pursuant to the ruling above, the Panel orders as follows.

A. Additional Immediate measures to be taken

1. INAC will not decrease or further restrict funding for First Nations child and family services or children's services covered by Jordan's Principle (see paras. 121-123 above);

2. INAC will determine budgets for each individual FNCFS Agency based on an evaluation of its distinct needs and circumstances, including an appropriate evaluation of how remoteness may affect the FNCFS Agency's ability to provide services (see paras. 33, 37, 40 and 47 above);

3. In determining funding for FNCFS Agencies, INAC is to establish the assumptions of 6% of children in care and 20% of families in need of services as minimum standards only. INAC will not reduce funding to FNCFS Agencies because the number of children in care they serve is below 6% or where the number of families in need of services is below 20% (see para. 38 above);

4. In determining funding for FNCFS Agencies that have more that 6% of children in care and/or that serve more than 20% of families, INAC is ordered to determine funding for those agencies based on an assessment of the actual levels of children in care and families in need of services (see para. 39 above);

5. In determining funding for FNCFS Agencies, INAC is to cease the practice of formulaically reducing funding for agencies that serve fewer than 251 eligible children. Rather, funding must be determined on an assessment of the actual service level needs of each FNCFS Agency, regardless of population level (see para. 40 above);

6. INAC is to cease the practice of requiring FNCFS Agencies to recover cost overruns related to maintenance from their prevention and/or operations funding streams (see paras. 56-61 above); and

7. INAC is to immediately apply Jordan's Principle to all First Nations children (not only to those resident on reserve) (see paras. 117-118 above).

B. Reporting

1. By October 31, 2016, INAC is to provide a detailed compliance report indicating:

a. How it has complied with the immediate measures ordered above in section A of this order;

b. How it is immediately addressing funding for legal fees (see para. 48 above);

c. How it is immediately addressing the costs of building repairs where a FNCFS Agency has received a notice to the effect that repairs must be done to comply with applicable fire, safety and building codes and regulations, or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations (see para. 49 above);

d. How it determined funding for each FNCFS Agency for the child service purchase amount and the receipt, assessment and investigation of child protection reports (see para. 50 above);

e. How much it is allocating for each "growth and future cost driver" and to detail how it arrived at its corresponding allocations for each FNCFS Agency, including for Ontario (see paras. 51-55 above);

f. How new funding is immediately addressing the adverse effects identified with respect to the *1965 Agreement*, especially in terms of mental health services and Band Representatives (see paras. 69-74 above);

g. How it determined funding for remote FNCFS Agencies that allows them to meet the actual needs of the communities they serve, taking into account such things as travel to provide or access services, the higher cost of living and service delivery in remote communities and the ability of remote FNCFS Agencies to recruit and retain staff (see paras. 75-81 above);

h. How immediate relief funding is being distributed in Ontario (see paras. 82-88 above);

i. How it has complied with the order to immediately implement the full meaning and scope of Jordan's Principle (see paras. 107-120 above), including:

    i. confirmation that it is applying the principle to all First Nations children (not just to those resident on reserve);

    ii. an explanation as to why it formulated the application of the principle to children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports";

    iii. details as to what action it has taken to comply with the "government of first contact" provision in the order;

    iv. clarification as to what process will be followed to manage Jordan's Principle cases, how urgent cases will be addressed, and what accountability and transparency measures have been built into that process to ensure compliance with the order;

v. clarification as to how it will ensure that First Nations, CCI Parties and FNCFS Agencies are part of the consultation process with the provinces/territories, and in other elements of the implementation of Jordan's Principle;

vi. providing all First Nations and FNCFS Agencies with the names and contact information of the Jordan's Principle focal points in all regions and informing them of any changes of such; and

j. If it is providing funding for the Aboriginal component of the Canadian Incidence Study, including whether that component of the study will include data collection specific to remote and northern First Nations communities (see paras. 132-134 above).

C. Additional information to be provided

1. By September 30, 2016, INAC is directed to serve and file:

a. The rationale, data and any other relevant information it states it used to determine its five-year plan for investing in the FNCFS Program and in determining budgets for each FNCFS Agency, including its cost driver study and trend analysis documentation, how it arrived at financial projections beyond fiscal year 2016-2017, any steps taken to ensure comparability of staff salaries and benefit packages to provincial rates, the information used to determine the caseload ratios in Quebec and Manitoba and, generally, how it determined values for off-hour emergency services, staff travel, agency audits, insurance and legal services; and

b. The correspondence with the Province of Ontario referred to in its submissions (see paras. 85-87).

2. By October 31, 2016, INAC is directed to serve and file:

a. A list of the First Nations, FNCFS Agencies, provincial and territorial authorities, partners, experts or any other persons it has consulted with so far in response to the findings in the *Decision* and Jordan's Principle, along with its consultation plan moving forward. The list of any past consultations from January to September 2016 should include the agenda and summary of the discussions (see paras. 42 and 114 above);

b. A response indicating its views on the request that it reimburse costs for travel to access physician-prescribed special needs services and assessments, special needs rehabilitative and support services and respite care, and support for families in crisis as part of immediate relief investments in Ontario (see para. 94 above);

c. A response indicating its views on dealing with the infrastructure needs of FNCFS Agencies as part of immediate relief investments in Ontario (see para. 97 above);

d. A response indicating its views on the request to expand the eligibility requirements of the *1965 Agreement* as part of immediate relief investments in Ontario (see para. 100 above);

e. A response indicating its views on the request that it conduct a special study on the application of the *1965 Agreement* in Ontario (see paras. 103-104 above); and

f. A response indicating if it is agreeable to providing funds for the CCI Parties' participation in the upcoming in-person case management meeting and any subsequent meetings (see para. 156 above).

D. Retention of jurisdiction

[161] Given the ongoing nature of the Panel's orders, and given the Panel still needs to rule upon other outstanding remedial requests (see para. 4 above), the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following further reporting by INAC, the upcoming in-person case management meeting and any ruling on the other outstanding remedies.

VIII. In-person case management meeting

[162] The Tribunal will be in contact with the parties shortly to schedule an in-person case management meeting between the Panel and the parties. Subject to the availability of those involved, the intention is to have the meeting as soon as is possible. As indicated throughout this ruling, there will be many items up for discussion. Any other outstanding issues can also be discussed at the meeting.

[163] With the additional information and reporting requested as part of this ruling, the Panel's hope is that all outstanding short-term remedial requests can be resolved by the end of the meeting as to not delay immediate action any further. The Panel also hopes the meeting can be used to begin discussions on mid to long-term orders, including compensation under sections 53(2)(e) and 53(3) of the *CHRA*. Therefore, the parties should anticipate several days for this meeting.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
September 14, 2016

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

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

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

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

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Decision

Members: Sophie Marchildon and Edward Lustig

Table of Contents

À la douce mémoire de Réjean Bélanger

In loving memory of Réjean Bélanger

I. Acknowledgement

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

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

II. Complaint and background

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

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

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

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

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

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

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

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

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

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

III. Parties

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

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

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

IV. The hearing, disclosure and admissibility of documents

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

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

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

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

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

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

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

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

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

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

V. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Evidence indicating AANDC provides a "service"

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

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

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

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

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

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

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

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

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

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

b. Funding can constitute a service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

f. The Crown's fiduciary relationship with Aboriginal peoples

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. Summary of findings

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

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

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

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

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

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

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

i. General child welfare principles

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

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

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

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

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

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

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

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

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

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

a. The FNCFS Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Reports on the FNCFS Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Wen:De Reports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2008 Report of the Auditor General of Canada

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2009 Report of the Standing Committee on Public Accounts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2011 Status Report of the Auditor General of Canada

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

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

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

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

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

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

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

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

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

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

2012 Report of the Standing Committee on Public Accounts

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

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

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

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

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

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

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

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

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

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

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

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

c. 1965 Agreement in Ontario

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Other provincial/territorial agreements

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

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

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

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

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

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

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

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

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

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

iii. AANDC's position on the evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The choices of FNCFS Agencies and additional funding provided

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Comparator evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Jurisdictional disputes between federal government departments and between federal government departments and provinces have a significant and negative effect on the safety and well-being of Status Indian children […] the number of disputes that agencies experience each year is significant. In Phase 2, where this issue was explored in more depth, the 12 FNCFSA in the sample experienced a total of 393 jurisdictional disputes in the past year alone. Each one took about 50.25 person hours to resolve resulting in a significant tax on the already limited human resources.
>
> (Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

v. Summary of findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

i. Substantive equality

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

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

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

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

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

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

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

ii. Impact of the Residential Schools system

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

1-866-925-4419

a. History of Residential Schools

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

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

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

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

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

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

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

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

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

[…]

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

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

[…]

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

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

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

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

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

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

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

c. Intergenerational trauma of Residential Schools

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Complaint substantiated

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

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

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

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

- The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost.

- The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities.

- The failure to adjust Directive 20-1 funding levels, since 1995; along with funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

- The application of the *1965 Agreement* in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's *Child and Family Services Act*.

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

- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.

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

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

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

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

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

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

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

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

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

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

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

VII. Order

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

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

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

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

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

A. Findings of discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Compensation

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

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

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

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

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

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

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

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

D. Costs for obstruction of process

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

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

E. Retention of jurisdiction

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

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

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
January 26, 2016

VIII. Annex: exhibit references

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

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

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

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

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

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

17. **Exhibit HR-3, Tab 11**: Auditor General of Canada, *May 2008 Report of the Auditor General of Canada to the House of Commons, Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada* (Ottawa: Minister of Public Works and Government Services Canada, 2008)

18. **Exhibit HR-3, Tab 15**: House of Commons Report of the Standing Committee on Public Accounts, *Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Ottawa: Communication Canada-Publishing, March 2009, 40th Parliament, 2nd session)

19. **Exhibit HR-3, Tab 16**: *Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4, First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General* (Presented to the House of Commons on August 19, 2009) online: Parliament of Canada <http://www.parl.gc.ca/CommitteeBusiness/ReportsResponses.aspx>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. **Exhibit HR-13, Tab 289**: Aboriginal Affairs and Northern Development Canada, *Renewal of the First Nations Child and Family Services Program*, presentation by Sheilagh Murphy, Director General, Social Policy and Programs Branch, to DGPRC (November 2, 2012)

43. **Exhibit R-14, Tab 85**: Aboriginal Affairs and Northern Development Canada, *British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework*, working draft (December 19, 2013)

44. **Exhibit HR-14, Tab 351**: Indian and Northern Affairs Canada, *Comparability of Provincial and INAC Social Programs Funding*, attachment to an email sent by Serge Menard, Policy Analyst, Social Policy and Programs Branch (October 16, 2008)

45. **Exhibit HR-3, Tab 20**: *Private Members' Business*, 39th Parliament, 2nd Session, *Hansard*, 012 (October 31, 2007); and, *Vote No. 27*, 39th Parliament, 2nd Session, Sitting No. 36 (December 12, 2007)

46. **Exhibit R-14, Tab 41**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Indian and Northern Affairs Canada and Health Canada (June 24, 2009)

47. **Exhibit HR-11, Tab 235**: Memorandum of Understanding on the Federal Response to Jordan's Principle, between Aboriginal Affairs and Northern Development Canada and Health Canada (January 2013)

48. **Exhibit R-14, Tab 39**: Health Canada, *Update on Jordan's Principle: The Federal Government Response*, presentation (June 2011)

49. **Exhibit HR-15, Tab 420**: *Jordan's Principle Case Conferencing to Case Resolution Federal/Provincial Intake Form* (November 21, 2012)

50. **Exhibit R-14, Tab 54**: *Federal Focal Points Tracking Tool Reference Chart – Manitoba Region* (January 2013)

51. **Exhibit HR-6, Tab 78**: Indian and Northern Affairs Canada, *INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region*, attachment to an email sent by Bill Zaharoff, Director of Intergovernmental Affairs, British Columbia Region (June 3, 2009)

52. **Exhibit HR-3, Tab 10**: Government of Canada, *Statement of Apology - to former students of Indian Residential Schools* (June 11, 2008)

53. **Exhibit HR-14, Tab 340**: Amy Bombay, Kim Matheson and Hymie Anisman, "The Impact of Stressors on Second Generation Indian Residential Schools Survivors" (2011), 48(4) Transcultural Psychiatry 367

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)

Decision of the Tribunal Dated: January 26, 2016

Dates and Place of Hearing: February 25, 26, 27 and 28, 2013;
March 1, 2013;
April 2, 3, 4, 8 and 9, 2013;
May 13, 14, 21 and 22, 2013;
July 15, 16, 17, 19, 22 and 24, 2013;
August 7, 12, 28, 29 and 30, 2013;
September 3, 4, 5, 6, 11, 12, 23, 24, 25 and 26, 2013;
October 28, 29 and 30, 2013;
November 6, 2013;
December 5, 9 and 10, 2013;
January 9, 10, 13, 14 and 15, 2014;
February 10, 11, 12 and 13, 2014;
March 17, 18, 19 and 20, 2014;
April 2, 3, 4 and 30, 2014;
May 1, 7, 8, 14, 15, 28, 29 and 30, 2014;
October 20, 21, 22, 23 and 24, 2014

Ottawa, Ontario

Appearances:

Sébastien Grammond, Robert Grant, David Taylor, Anne Levesque, Sarah Clarke, Michael Sabet, Paul Champ and Yavar Hameed, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Philippe Dufresne, Sarah Pentney and Samar Musallam, counsel for the Canadian Human Rights Commission

Jonathan Tarlton, Melissa Chan, Patricia MacPhee, Nicole Arsenault, Ainslie Harvey, Michelle Casavant and Terry McCormick, counsel for the Respondent

Michael Sherry, counsel for the Chiefs of Ontario, Interested Party

Justin Safayeni, counsel for Amnesty International, Interested Party

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 14
Date: May 26, 2017
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Outline

I. Motions for immediate relief related to Jordan's Principle

[1] Jordan River Anderson of the Norway House Cree Nation was born with a serious medical condition. Because of a lack of available medical services in his community, Jordan's family turned to provincial child welfare care in order for him to get the medical treatment he needed. After spending the first two years of his life in hospital, Jordan could have gone to a specialized foster home close to his medical facilities in Winnipeg. However, for two years, Indigenous and Northern Affairs Canada ("INAC"), Health Canada and the Province of Manitoba argued over who should pay for Jordan's foster home costs. Ultimately, Jordan remained in hospital until he passed away, at the age of five, having spent his entire life in hospital.

[2] In recognition of Jordan, Jordan's Principle provides that where a government service is available to all other children, but a jurisdictional dispute regarding services to a First Nations child arises between Canada, a province, a territory, or between government departments, the government department of first contact pays for the service and can seek reimbursement from the other government or department after the child has received the service. It is a child-first principle meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them. On December 12, 2007, the House of Commons unanimously passed a motion that the government should immediately adopt a child-first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

[3] The Complainants and Interested Parties (with the exception of Amnesty International) have each brought motions challenging, among other things, Canada's implementation of Jordan's Principle in relation to this Panel's decision and orders in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 ("the *Decision*"). Canada and the Commission filed submissions in response to the motions. The motions were heard from March 22 to 24, 2017 in Ottawa. As with the hearing on the merits, the hearing of these motions was broadcasted on the Aboriginal Peoples Television Network.

[4] This ruling deals specifically with allegations of non-compliance and related requests for further orders with respect to Jordan's Principle. Other aspects of the parties' motions not dealt with in this ruling will be determined as part of a separate ruling.

II. Findings and orders with respect to Jordan's Principle to date

[5] In the *Decision*, this Panel found Canada's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Delays were inherently built into the process for dealing with potential Jordan's Principle cases. Furthermore, the Canada's approach to Jordan's Principle cases was aimed solely at inter-governmental disputes between the federal and provincial government in situations where a child had multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children (not just those with multiple disabilities). As a result, INAC was ordered to immediately implement the full meaning and scope of Jordan's Principle (see the *Decision* at paras. 379-382, 458 and 481). The *Decision* and related orders were not challenged by way of judicial review.

[6] Three months following the *Decision*, INAC and Health Canada indicated that they began discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. They anticipated it would take 12 months to engage First Nations, the provinces and territories in these discussions and develop options for changes to Jordan's Principle.

[7] In a subsequent ruling (2016 CHRT 10), this Panel specified that its order was to immediately implement the full meaning and scope of Jordan's Principle, not immediately start discussions to review the definition in the long-term. We noted there was already a workable definition of Jordan's Principle, which was adopted by the House of Commons, and saw no reason why that definition could not be implemented immediately. INAC was ordered to immediately consider Jordan's Principle as including all jurisdictional disputes (including disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). The Panel further

indicated that the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided (see 2016 CHRT 10 at paras. 30-34). Again, the ruling and related orders were not challenged by way of judicial review.

[8] Thereafter, INAC indicated that it took the following steps to implement the Panel's order:

- It corrected its interpretation of Jordan's Principle by eliminating the requirement that the First Nations child on reserve must have multiple disabilities that require multiple service providers;
- It corrected its interpretation of Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments;
- Services for any Jordan's Principle case will not be delayed due to case conferencing or policy review; and
- Working level committees comprised of Health Canada and INAC officials, Director Generals and Assistant Deputy Ministers will provide oversight and will guide the implementation of the new application of Jordan's Principle and provide for an appeals function.

[9] It also stated it would engage in discussions with First Nations, the provinces and the Yukon on a long-term strategy. Furthermore, INAC indicated it would provide an annual report on Jordan's Principle, including the number of cases tracked and the amount of funding spent to address specific cases. INAC also updated its website to reflect the changes above, including posting contact information for individuals encountering a Jordan's Principle case.

[10] While the Panel was pleased with these changes and investments in working towards enacting the full meaning and scope of Jordan's Principle, it still had some outstanding questions with respect to consultation and full implementation. In 2016 CHRT 16, the Panel requested further information from INAC with respect to its consultations on Jordan's Principle and the process for dealing with Jordan's Principle cases. Further, INAC

was ordered to provide all First Nations and First Nations Child and Family Services Agencies ("FNCFS Agencies") with the names and contact information of the Jordan's Principle focal points in all regions.

[11] Finally, the Panel noted that INAC's new formulation of Jordan's Principle once again appeared to be more restrictive than formulated by the House of Commons. That is, INAC was restricting the application of the principle to "First Nations children on reserve" (as opposed to all First Nations children) and to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports." The Panel ordered INAC to immediately apply Jordan's Principle to all First Nations children, not only to those residing on reserve. In order for the Panel to assess the full impact of INAC's formulation of Jordan's Principle, it also ordered INAC to explain why it formulated its definition of the principle as only being applicable to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" (see 2016 CHRT 16 at paras. 107-120). This third ruling was also not challenged by way of judicial review.

III. Canada's further actions in relation to Jordan's Principle

[12] In response to the present motions, Canada states that its definition of Jordan's Principle now applies to all First Nations children and is not limited to those residing on reserve or normally resident on reserve. It also applies to all jurisdictional disputes, including those between federal government departments.

[13] According to Canada, its revised interpretation of Jordan's Principle aims to ensure that anytime a need for a publicly-funded health, education or social care service or support for a First Nations child is identified, it will be met. Any jurisdictional issues that might arise will be dealt with after ensuring the need is met. New processes have been created so that the services needed for any Jordan's Principle case are not delayed due to case conferencing or policy review. Urgent cases are addressed within 12 hours; other cases within 5 business days; and, complex cases which require follow-up or consultation with others within 7 business days.

[14] Canada states it has also taken the necessary steps to ensure the requisite funding and human resources are available to implement the expanded definition of Jordan's Principle. In this regard, it has undertaken new policy initiatives to improve health and social service needs for First Nations children. According to Canada, the Child-First Initiative (the "CFI") supports the expanded application of Jordan's Principle by providing mechanisms for Canada to prevent or resolve jurisdictional disputes and gaps, before they occur. Canada submits the CFI identifies First Nations children at risk, through enhanced service coordination, and provides a source of funds to meet children's needs in cases where those needs cannot be met through existing publically available programs. Canada also points to the 2016/17 First Nations and Inuit Health Branch regional operation plan as supporting the correct interpretation of the application of Jordan's Principle. That plan calls for $64 million for First Nations mental health programs and services in Ontario, in addition to regular mental health programs.

[15] In addition, Canada submits that it is also focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available and given an opportunity to get involved and share their views.

[16] Finally, Canada states that while Jordan's Principle cannot fund everything, firm lines regarding what is recoverable are not being drawn. Any publicly-funded service that is available to other Canadian children is eligible under Jordan's Principle and has been covered when brought forward.

IV. Analysis

[17] The Complainants and the Interested Parties believe Canada has failed to comply with the Panel's orders to date, or certain aspects of those orders. Generally, each of their respective submissions focused on a different aspect of the complaint and made requests for immediate relief orders related to that focus. Based on statements made in their submissions and at the hearing, the Complainants and the Interested Parties are generally supportive of each other's positions and requested orders.

[18] The Commission believes that, despite a number of positive and encouraging developments, Canada is not yet in full compliance with this Panel's orders and, therefore, it is open to the Panel to provide additional clarification and/or guidance with respect to its orders.

[19] With respect to Jordan's Principle, the First Nations Child and Family Caring Society of Canada (the "Caring Society") and the Commission request that additional orders be made in relation to the definition of the principle, the dissemination of that definition to the public and stakeholders, and the process for dealing with Jordan's Principle cases and the tracking of those cases.

[20] The Assembly of First Nations (the "AFN") was originally concerned about its lack of involvement in Health Canada's Jordan's Principle activities given it has an Engagement Protocol with the First Nations and Inuit Health Branch. Health Canada has since invited the AFN to co-chair a working group on Jordan's Principle, which the AFN accepted. The AFN's submissions echo many of the concerns raised by the Caring Society and the Commission in terms of the definition and process surrounding Jordan's Principle.

[21] The Chiefs of Ontario's (the "COO") and the Nishnawbe Aski Nation's (the "NAN") submissions with respect to Jordan's Principle focus mainly on the provision of mental health services under the *Memorandum of Agreement Respecting Welfare Programs for Indians* ("the *1965 Agreement*") in Ontario. While this ruling will deal with Jordan's Principle generally, specific issues with respect to the *1965 Agreement*, along with other requests, will be dealt with in a separate ruling.

[22] In addition, the Panel highlights that NAN's motion had also sought a "Choose Life" order that Jordan's Principle funding be granted to any Indigenous community that files a proposal identifying children and youth at risk of suicide. Health Canada has since committed to establishing a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. As such, and at NAN's request, the Panel adjourned the request for a "Choose Life" order (see 2017 CHRT 7).

A. Legal arguments

(i) Burden of proof and compliance

[23] In general, and in deciding all aspects of the motions now before the Panel, the Caring Society and the AFN submit that Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. Canada is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. Furthermore, it would be unjust, having proved that Canada has discriminated against First Nations children and their families in a systemic way, to bear a "burden of proof" to show that discrimination is continuing in the absence of further orders.

[24] In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Complainants and the Interested Parties have, among other things, asked the Tribunal to find that Canada continues to discriminate, that it has not complied with the Panel's orders to date, and, in some cases, asked that the Tribunal issue an order declaring Canada non-compliant.

[25] The Commission submits that, where the Tribunal has retained jurisdiction to facilitate implementation of an order, and a dispute subsequently arises, it is open to the Tribunal to reconvene the hearing to: (i) make findings about whether a party has complied with the terms of the original order, and (ii) clarify and supplement the original order, if further direction is needed to address the discriminatory practice identified in the original order. In its view, despite a number of positive and encouraging developments, Canada has not yet brought itself into full compliance with the Tribunal's rulings regarding Jordan's Principle. It is therefore open to the Tribunal to provide additional clarification and/or guidance.

[26] Canada submits that there is no established legal test governing a motion for non-compliance before this Tribunal. The test to be met on this motion must accordingly be derived from the general principles that guide human rights law. According to Canada, the law is clear that the moving parties have the legal burden to prove their allegations on a

balance of probabilities: in this case, allegations of non-compliance. In Canada's view, the moving parties have not met their burden and, therefore, their motions should be dismissed. In any event, Canada states it has complied with the Tribunal's orders.

[27] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *Canadian Human Rights Act* ["the *Act*"]). In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2010 FC 1135 at paras. 61 and 67, aff'd 2011 FCA 202 ["*Walden*"]). In determining the present motions, this is the situation in which the Panel finds itself.

[28] In the *Decision*, while the Panel made general orders to cease the discriminatory practice and take measures to redress and prevent it, it also explained that it required further clarification from the parties on the relief sought, including how immediate and long-term reforms can best be implemented on a practical, meaningful and effective basis (see para. 483). Indeed, while the Panel was able to further elaborate upon its orders in its subsequent rulings based upon additional information provided by the parties, the Panel continued to retain jurisdiction over the matter pending further reporting from the parties, mainly from Canada (see 2016 CHRT 10 and 2016 CHRT 16). That is to say that, as opposed to determining the merits of a complaint, the Tribunal's determination of appropriate remedies is less about an onus being on a particular party to prove certain facts, and more about gathering the necessary information to craft meaningful and effective orders that address the discriminatory practices identified.

[29] Consistent with this approach, and as this Panel has previously stated, the aim in making an order under section 53 of the *Act* is to eliminate and prevent discrimination. On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *Act* and meaningful in vindicating any loss suffered by the victim of discrimination. However, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an

intricate task and may require ongoing supervision (see 2016 CHRT 10 at paras. 13-15 and 36).

[30] It is for these reasons that, absent a gap in the evidentiary record, the Panel does not consider the question of burden of proof to be a material issue in determining the present motions. As the Federal Court of Appeal stated in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at paragraph 42 ("*Chopra*"), "[t]he question of onus only arises when it is necessary to decide who should bear the consequence of a gap in the evidentiary record such that the trier of fact cannot make a particular finding." While discrete issues regarding the burden of proof may arise in the context of determining motions like the ones presently before the Panel, where the evidentiary record allows the Panel to draw conclusions of fact which are supported by the evidence, the question of who had the onus of proving a given fact is immaterial.

[31] In the same vein, the Panel's role in ruling upon the present motions is not to make declarations of compliance or non-compliance *per se*. Rather, in line with the remedial principles outlined above, the Panel's purpose in crafting orders for immediate relief and in retaining jurisdiction to oversee their implementation is to ensure that as many of the adverse impacts and denials of services identified in the *Decision* are temporarily addressed while INAC's First Nations child welfare programing is being reformed. That said, in crafting any further orders to immediately redress or prevent the discrimination identified in the *Decision*, it is necessary for the Panel to examine the actions Canada has taken to date in implementing the Panel's orders and it may make findings as to whether those actions are or are not in compliance with those orders.

[32] As the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 32, "[o]ften it may be more desirable for the Tribunal to provide guidelines in order to allow the parties to work out between themselves the details of the [order], rather than to have an unworkable order forced upon them by the Tribunal." This statement is in line with the Panel's approach to remedies to date in this matter. In order to facilitate the immediate implementation of the general remedies ordered in the *Decision*, the Panel has requested additional information from the parties, monitored Canada's implementation of its orders and, through its subsequent rulings, provided

additional guidance to the parties and issued a number of additional orders based on the detailed findings and reasoning already included in the *Decision*.

[33] While that approach has yielded some results, it has now been over a year since the *Decision* and these proceedings have yet to advance past the provision of immediate relief. The Complainants, the Commission and the Interested Parties want to see meaningful change for First Nations children and families and want to ensure Canada is implementing that change at the first reasonable occasion. The Panel shares their desire for meaningful and expeditious change. The present motions are a means to test Canada's assertion that it is doing so and, where necessary, to further assist the Panel in crafting effective and meaningful orders.

[34] This is the context in which the present motions have been filed. The Tribunal's remedial discretion must be exercised reasonably, in consideration of this particular context and the evidence presented through these motions. That evidence includes Canada's approach to compliance with respect to the Panel's orders to date, which evidence can be used by the Panel to make findings and to determine the motions of the parties.

(ii) Separation of powers

[35] In crafting further orders, Canada urges the Tribunal to bear in mind general principles regarding the appropriate separation of powers. That is, the Tribunal should leave the precise method of remedying the breach to the body charged with responsibility for implementing the order. According to Canada, the Tribunal would exceed its authority if it were to make orders resulting in it taking over the detailed management and coordination of the reform currently being undertaken.

[36] Canada submits deference must be afforded to allow it to exercise its role in the development and implementation of policy and the spending of public funds. Absent statutory authority or a challenge on constitutional grounds, courts and tribunals do not have the institutional jurisdiction to interfere with the allocation of public funds or the development of public policy. To the extent the Tribunal is being asked to make additional

remedial orders that would require it to dictate policies or authorize the spending of public funds, Canada contends those requests should be denied as they would exceed the Tribunal' s jurisdiction.

[37] Canada's separation of powers argument lacks specificity. Aside from one specific order requested by the Caring Society, which the Panel will address in a separate ruling, Canada has not pointed to any other orders requested by the other parties to which this argument would apply. For the purposes of this ruling, it has not identified any requested orders related to Jordan's Principle that may offend the separation of powers. In any event, as explained in the reasons below, any further orders made by the Panel are based on the findings and orders in the *Decision* and subsequent rulings, which Canada has accepted; the evidence presented on these motions; and, the Panel's powers under section 53(2) of the *Act*. In performing this analysis, Canada's generalized separation of powers argument is not particularly helpful.

B. Further orders requested

(i) Definition of Jordan's Principle

[38] Despite Canada's assurances that its definition of Jordan's Principle now applies to all First Nations children, regardless of their condition or place of residency, the Caring Society submits that government officials have been promulgating a restrictive definition of Jordan's Principle that still focuses on children with disabilities or with a critical short-term condition requiring heath or social services. The Caring Society adds that INAC has yet to undertake a review of past Jordan's Principle cases where services were denied. While Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied, the Caring Society and the AFN are unclear about the number of years into the past this process is considering.

[39] Moreover, the Caring Society is concerned that the definition of Jordan's Principle is limited to children as defined by provincial legislation. In some provinces, a child is defined as being under the age of 16. Such an approach is unacceptable to the Caring Society because Jordan's Principle is not restricted to services provided under a

province's child and family services legislation. Similarly, the Caring Society submits that Jordan's Principle requires an outcome-based, and not process-based, approach to access to services. That is, the provincial/territorial normative standard of care is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children.

[40] The Commission generally agrees with the Caring Society that the Tribunal should provide additional guidance by clarifying the exact definition of Jordan's Principle that is to be applied, going forward, to redress the discriminatory practices identified in the *Decision*. Considering the rulings already made by the Panel to date, the Commission suggested certain key principles that any definition of Jordan's Principle must include.

[41] While Canada has done some work to implement Jordan's Principle since the *Decision*, it still has not implemented its full meaning and scope. As mentioned above, in 2016 CHRT 16, the Panel indicated that a definition of Jordan's Principle that applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports" appeared to be more restrictive than formulated by Parliament. Following the Panel's request for further information, and pursuant to the evidence presented in the course of these motions, the Panel can now confirm that Canada has indeed been applying a narrow definition of Jordan's Principle that is not in compliance with the Panel's previous orders.

[42] Canada put forward three witnesses in response to the motions of the Complainants and the Interested Parties:

- Ms. Robin Buckland, Executive Director of the Office of Primary Health Care within Health Canada's First Nations and Inuit Health Branch;
- Ms. Cassandra Lang, Director, Children and Families, in the Children and Families Branch at INAC; and,
- Ms. Lee Cranton, Director, Northern Operations in Ontario Region within Health Canada's First Nations and Inuit Health Branch.

[43] Each of these three witnesses swore an affidavit and was cross-examined thereon by the other parties, all of which was put before the Panel in the context of these motions. Generally, the three witnesses presented similar testimonial evidence in support of Canada's position. However, as the Panel will explain in the pages that follow and with a primary focus on the evidence of Ms. Buckland, their testimony in relation to Jordan's Principle was not corroborated by the bulk of the documentary evidence emanating from Canada and dated over the last year since the *Decision*.

[44] Ms. Buckland is the federal government official responsible for implementing Jordan's Principle. She has been involved in doing so since the *Decision*'s release (see Gillespie Reporting Services, transcript of Cross-Examination of Robin Buckland, Ottawa, Vol. I at p. 15, lines 21-23 [*Transcript of Cross-Examination of Ms. Buckland*]).

[45] In her affidavit, Ms. Buckland states that the previous restrictions found in the definition of Jordan's Principle have now been eliminated, including the requirement that First Nations children must have multiple disabilities that require multiple service providers or that they must reside on reserve. Despite this, she states that families are often not coming forward to request support. In this regard, she indicates proactive efforts in partnership with service delivery organizations on the ground will need to continue and that Canada has commenced various engagement activities to help facilitate the broader application of Jordan's Principle (see *affidavit of Ms. Robin Buckland*, January 25, 2017, at paras. 3, 16-17).

[46] Ms. Buckland further explained that the current definition of Jordan's Principle, which applies to First Nations children with "disabilities and those who present with a discrete, short-term issue for which there is a critical need for health and social supports", was to focus efforts on the most vulnerable children:

> [I]t's more about looking for the highest area of need and, and trying to focus our efforts.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 17, lines 12-13.

> [A] child living on reserve with an interim, a condition or short-term condition or a disability affecting their activities of daily living was a focus of our efforts, was and is a focus of our efforts in terms of Jordan's Principle.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 39 lines, 17-21.
>
> Whenever you're working on a complex health issue, you always take a multi-modal approach to it. There's always different angles from which you need to be able to address the problem if you are going to make a difference. The focus on First Nations children on reserve with a disability or a short-term condition with -- that affects their activities of daily living is an effort, is our effort to try to get at a segment of the population, a subset of the population where we feel there is an opportunity to make -- where we feel there is the greatest need and where we feel there is an opportunity to make the greatest difference.
> So I think as I said earlier, we were -- it was unfortunate that our communications in the beginning did not -- were not properly prefaced, indicating that Jordan's Principle applies to all First Nations children.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 40, lines 10-25.
>
> We're trying to focus, we're trying to start somewhere and trying to -- where are we likely to find the greatest number of jurisdictional disputes.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 41, lines 4-6.
>
> Children with disability or critical interim need is, is a particular focus. Jordan`s Principle, as I mentioned just moments ago, applies to all first nations kids and who have an unmet need in terms of health and social needs.
>
> *Transcript of Cross-Examination of Ms. Buckland* at p. 275, lines 19-23.

[47] As the Caring Society points out at paragraph 24 of its December 16, 2016 submissions, the *Decision* found Canada's similarly narrow definition and approach to Jordan's Principle to have contributed to service gaps, delays and denials for First Nations children on reserve. Specifically, the evidence before the Panel in determining the *Decision* indicated Health Canada and INAC's approach to Jordan's Principle focused mainly on "inter-governmental disputes in situations where a child has multiple disabilities requiring services from multiple service providers" (see *Decision* at paras. 350-382). Indeed, the Panel specifically highlighted gaps in services to children beyond those with multiples disabilities. For example, an INAC document referenced in the *Decision,* entitled

INAC and Health Canada First Nation Programs: Gaps in Service Delivery to First Nation Children and Families in BC Region, indicates that these gaps non-exhaustively include mental health services, medical equipment, travel for medical appointments, food replacement, addictions services, dental services and medications (see *Decision* at paras. 368-373).

[48] As the Panel also highlighted in the *Decision*, the Federal Court likewise found Health Canada and INAC's focused approach to Jordan's Principle to be narrow and the finding that the principle was not engaged with respect to Jeremy Meawasige, a teenager with multiple disabilities and high care needs, to be unreasonable (see *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 ["*Pictou Landing*"]).

[49] The justification advanced by Ms. Buckland for the focused approach to Jordan's Principle is the same one advanced by Canada in the past and underscored by the Panel in the *Decision* (see paras. 359 and 368-369). Specifically, in a Health Canada PowerPoint presentation from 2011, entitled *Update on Jordan's Principle: The Federal Government Response* (Exhibit R-14, Tab 39 at p. 6), Canada indicated:

> This slide presents an overview of the federal response to Jordan's Principle. We acknowledge that there are differing views regarding Jordan's Principle. The federal response endeavors to ensure that the needs of the most vulnerable children at risk of having services disrupted as a result of jurisdictional disputes are met.
>
> […]
>
> The Government of Canada's focus is on children with multiple disabilities requiring services from multiple service providers whose quality of life will be negatively impacted by jurisdictional disputes. These are children who are the most vulnerable – children like Jordan.

[50] Despite the findings in the *Decision*, Canada has repeated its pattern of conduct and narrow focus with respect to Jordan's Principle. In February 2016, a few weeks after the release of the *Decision*, Canada considered various new definitions of Jordan's Principle. Those new definitions and their implications are found in a document entitled *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions*,

dated February 11, 2016 (*Exhibits to the Cross-Examination of Ms. Cassandra Lang on her affidavit dated January 25, 2017*, February 7-8, 2017, at tab 4):

Proposed Definition Options	Key Elements and Considerations
Option One: Jordan's Principle is a child-first approach to address the needs of First Nation children assessed as having disabilities/special needs by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements** Similar to the criteria and scope as original JP response but broader than original definition (which was limited to "children with multiple disabilities requiring services from multiple service providers), this approach maintains a focus on children with special needs. Broadens the definition of jurisdictional dispute to include intergovernmental disputes (not just federal/provincial) this responds **Considerations:** • May draw criticism due the continued focus on special needs (while broader) as the original JP response. • Maintaining the notion of comparability to provincial resources may not address the criticism of the Tribunal regarding the need to ensure substantive equality in the provision of services. • The focus on a dispute does not account for potential gaps in services where no jurisdiction is providing the required services.
Option Two: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, in the event that there is a dispute over payment of services between or within governments, First Nation children living on reserve (or ordinarily on reserve) will receive required social and health supports comparable to the standard of care set by the province (normative standard). The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** Similar to Option One with the exception of broadening the scope to include all First Nation children on reserve rather than limited to special needs. Maintains original focus on: • jurisdictional disputes • normative standards set by province (with a modification to move away from specific reference to geographical comparability **Considerations:** • Responds to the key direction of the Tribunal by broadening the scope beyond children with special needs. However, the broader scope may also dilute the focus on some of the most vulnerable children. • May have significant resources implications

Proposed Definition Options	Key Elements and Considerations
	and may go beyond current policy authorities and/or program mandates.
Option Three: Jordan's Principle is a child-first approach to address the assessed needs of First Nation c children by ensuring cross jurisdictional issues to not disrupt delay or prevent a child from accessing services. In the event that there is a dispute over payment of services between or within governments, First Nation children will receive required social and health supports. The agency of first contact will pay for the services until there is a resolution.	**Key Elements:** • Broader scope – does not limit the response to First Nation children living on reserve. • A dispute between governments or within government is still required in order to trigger JP. **Considerations:** • The inclusion of all First Nation children may have far reaching resource implications and will require additional policy and program mandates. • The continued focus on instances where there is a dispute may limit the ability for JP to respond to gaps in service (where no jurisdiction is providing the required service).
Option Four: Jordan's Principle is a child-first approach to address the assessed needs of First Nation children by ensuring cross jurisdictional issues to not disrupt, delay or prevent a child from accessing services. Under Jordan's Principle, First Nation children will receive required social and health supports. The issue of payment will be resolved by the government involved, the agency of first contact will pay for the services until there is a resolution.	**Key Elements:** A very broad application of the principle that includes all First Nation children and does not require an identified jurisdictional dispute in order to trigger JP. **Considerations:** • Considerable resource and policy and program implications • Goes beyond the Tribunal recommendations and has implications for federal mandate given that there are gaps in services that are not currently funded by any level of government. • Provinces may react to federal definition as it may put additional financial pressures on partners involved

[51] The Panel finds *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document relevant and reliable. Not only is it an internal government document filed into evidence but, similar to the August 2012 presentation entitled *First Nations Child and Family Services Program (FNCFS) The Way Forward* discussed in the *Decision* (see at paras. 292-302), it presents options that inform government decision making. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document specifies:

> The definitions and/or principles described above represent a menu of possible options (not mutually exclusive) that the federal government could draw from to meet the Tribunal's order to cease applying a narrow definition of Jordan's Principle and take measures to implement its full meaning and scope.

[52] Ultimately, it was "option one" that was selected for implementation, an option that *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document considers to not be fully responsive to the Tribunal's order. As the Caring Society and the Commission highlight in their submissions and the Panel confirmed in its review of the documents on record, including those referenced at pages 59-60 of the Caring Society's February 28, 2017 submissions, this definition and approach to Jordan's Principle was recently presented internally and externally to a number of organizations and First Nations in the following terms:

- First Nations children living on reserve with a disability or a short-term condition.
- First Nations children living on reserve with a disability or a short-term condition requiring health or social services.
- First Nations children with a disability or a critical short-term health or social service need living on reserve, or who ordinarily reside on reserve.
- First Nation child with a disability or a discrete condition that requires services or supports that cannot be addressed within existing authorities.
- First Nation children living on reserve with an ongoing disability affecting their activities of daily living, as well as those who have a short term issue for which there is a critical need for health or social supports.
- First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition affecting their activities of daily living have access to health and social services comparable to children living off reserve.
- First Nations children with a disability or interim critical condition living on reserve have access to needed health and social services within the normative standard of care in their province/territory of residence.

[53] These iterations of Jordan's Principle do not capture all First Nations children. Instead, as stated by the Caring Society at paragraph 15 of its December 16, 2016

submissions, they capture "…varying subsets of First Nations children with disabilities or short-term conditions." Notwithstanding the above, Ms. Buckland indicates that Canada still meant for Jordan's Principle to apply to all First Nations children and that the fact the definition does not reflect all First Nations children is a communications issue and not a narrow application of the principle.

[54] The Panel does not accept this explanation. Ms. Buckland's assertion is not supported by the preponderance of evidence presented on this motion, which includes various charts, communication documents, and even extracts from INAC's website.

[55] A significant example is *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document referred to above. The consideration of each of the four options indicates that the definition of Jordan's Principle adopted by Canada was a calculated, analyzed and informed policy choice based on financial impacts and potential risks rather than on the needs or the best interests of First Nations children, which Jordan's Principle is meant to protect and should be the goal of Canada's programming (see *Decision* at para. 482).

[56] Another example is a letter dated January 19, 2017, addressed to Ontario First Nation Chiefs and Council Members, entitled *Attention: Ontario First Nation Chiefs and Council Members, Subject: Update-Jordan's Principle- Responding to the needs of First Nations children* (*Answers to requests of Lee Cranton*, March 7, 2017, at tab 13). In the letter, the Ontario Regional Executive for the First Nations and Inuit Health Branch announces the implementation of a new initiative designed to address the health and social needs of First Nations children with "…an ongoing disability affecting their daily living, or for those with a short-term issue where there is a critical need for health or social services." The letter comes almost a year after the *Decision*, nearly 9 months after the April 2016 ruling and, more significantly, after the Panel indicated in its September 2016 ruling that Health Canada and INAC's definition of Jordan's Principle appeared to be overly narrow and not in line with the Panel's previous findings and orders.

[57] A Health Canada presentation entitled *Jordan's Principle – Child First Initiative* presented on September 15, 2016 to the Non-Insured Health Benefits Committee, and on

October 6, 2016 to the Innu Round Table, indicates that the new approach to Jordan's Principle, restricted to children with disabilities or critical interim conditions living on reserve, will continue up to 2019 (see September 15, 2016 presentation at *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at pp. 4-5; and, October 6, 2016 presentation at A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at pp. 4-5). At page 5, the presentation provides a "Then and Now" table comparing Canada's approach to Jordan's Principle from 2008-2016 to that in 2016-2019:

2008-2016	**2016-2019**
Dispute-based, triggered after declaration of a dispute over payment for services within Canada, or between Canada and a province	*Needs-based*, child-first approach to ensure access to services without delay or disruption due to jurisdictional gaps.
First Nations child living on reserve or ordinarily resident on reserve	Still First Nations child on reserve or ordinarily resident on reserve
	Are within the age range of "children" as defined in their province/territory of residence
Child assessed with: • multiple disabilities requiring multiple providers	Children assessed with needing health and/or social supports because of: • a disability affecting activities of daily living; OR • an interim critical condition affecting activities of daily living
Child required services comparable to provincial normative standards of care for children off-reserve in a similar geographic location	Child requires services comparable to provincial normative standards of care, AND requests BEYOND the normative standard will be considered on a case-by-case basis

[58] The *Jordan's Principle – Child First Initiative* presentation specifies that the goal of the new approach to Jordan's Principle is "…to help ensure that children living on reserve with a disability or interim critical condition have equitable access to health and social services comparable to children living off reserve" (at p. 6). At page 8, the October 6, 2016 presentation goes on to provide a "JP Fund – Eligibility Determination Checklist" which asks questions such as: is the request for a child as defined by provincial law? Does the child live on reserve or ordinarily lives on reserve? Does the child have a disability that impacts his/her activities of daily living at home, school or within the community, or has an interim critical condition requiring health or social services or supports? Does the request fall within the normative standard of care of the province or territory of residence?

[59] These presentations are meant to inform and guide individuals on how Canada is implementing Jordan's Principle. In another similar example, in a letter dated August 8, 2016, addressed to all First Nations and Inuit Health Branch and Band employed nurses in Alberta, with the subject line "Government of Canada's New Approach to Implementing Jordan's Principle" (see A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I at p.2), the Director of Nursing for the First Nations and Inuit Health Branch, Alberta Region, writes:

- Please read the information below/attached to orientate yourself to the new approach.
- There will be further details coming to help guide your assistance with these clients.
- As part of your regular work, if you see or are approached about a First Nations child with disabilities (short-term or long term) that may not be receiving the needed health or social services normally provided to a child off-reserve please contact FNIHB-AB.

[60] The letter attaches a guide illustrating the process to be followed in assessing a potential Jordan's Principle case. Despite the case-by-case analysis stated in other presentations for situations falling outside the eligibility criteria, the process indicated in the chart for nurses steers those cases away from the application of Jordan's Principle. The first question in the chart is: "Does the child have needs related to a disability or a short term health issue that are not being met?" If the answer is 'no', the chart indicates that the "Client/Family should access regular programming." If the answer to this first question is 'yes', then the next question is: "Are there programs on reserve, or easily accessed off reserve, that could meet those needs?" If the answer to this second question is 'no', the chart directs the nurses to: "Gather the related information and send to the JP focal point (JPFP) (See Contacts)." If the answer to the second question is 'yes', the nurse can "…make these referrals as they normally would i.e. Home Care, NIHB, PCN services."

[61] At the time of Ms. Buckland's cross-examination, in February 2017, INAC's website continued to espouse the narrow definition of Jordan's Principle:

> The Government of Canada's new approach to Jordan's Principle is a child-first approach that addresses in a timely manner the needs of First Nations children living on reserve with a disability or a short-term condition.
>
> "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children", Government of Canada (February 4, 2017), *Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 7; see also *Transcript of Cross-Examination of Ms. Buckland* at pp.43-45.

[62] Canada submits that it has now removed any restrictions in its definition of Jordan's Principle. However, only one document submitted prior to Ms. Buckland's cross-examination supports this point. A November 2016 presentation to the "ADM Oversight Steering Committee" states: "Jordan's Principle (JP) reflects a commitment to ensure all First Nations children receive access to services available to other Canadian children, in a timely manner" [Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at p. 2)]. It goes on to indicate that Health Canada and INAC are implementing a child-first approach, "addressing specific needs of children on a case-by-case basis." When compared to other presentations submitted into evidence, as outlined above, it does not appear that this presentation was widely communicated, within or outside government. It is also unclear that the principles enunciated therein have been implemented.

[63] Two other documents could be said to support Canada's assertion that it has now removed any restrictions in its definition of Jordan's Principle. Both those documents were submitted following Ms. Buckland's cross-examination and in answer to requests from the other parties.

[64] The first document is another presentation, dated December 21, 2016. It indicates, among other things, that Jordan's Principle applies to all First Nations children, that the Government of Canada recognizes that First Nations on reserve face greater difficulty in accessing Federal/Provincial/Territorial supports, and, that Canada is focused on the most

vulnerable children – those with a disability or critical short-term condition (see Health Canada, *Improving Access to Health and Social Services for First Nations Children*, presentation dated December 21, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, tab 3B, at pp. 2 and 5). The presentation does not specify who it was presented to and, again, when compared to other presentations submitted into evidence, it does not appear to have been widely distributed or communicated, if at all.

[65] The other document contains notes from a "February 10th" meeting with regional executives (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A). It states:

> Update on JP
> - applies to all FN children, not just on reserve
> - JP not limited to short term needs and disabilities
> - all FN children, all disputes, all needs
> - each order from CHRT has clarified our responsibilities
> - focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes
> - comms tools and key messages – getting these out
> - will be asked to go back to all stakeholders and clarify our directions
>
> […]
>
> Next Steps
> - will follow up with written lines which will say:
> - all FN children, on and off reserve
> - all jurisdictional disputes e.g. between departments
> - not limited to children with disabilities or short term critical needs

[66] Based on the wording of the notes, it is clear that they came from a meeting in February 2017: "applies to all FN children, not just on reserve" (this requirement was clarified in September 2016 in 2016 CHRT 16); "each order from CHRT has clarified our responsibilities" (only one order in February 2016); and, "focus was on disability because of greatest need and access issues and likelihood of jurisdictional disputes" (this more detailed "focus" characterization only arises following Ms. Buckland's cross-examination). Again, when compared to the other evidence, the definition of Jordan's Principle discussed at this meeting does not appear to have been widely distributed or communicated, if at all, and it is also unclear that the principles enunciated therein have now been implemented.

[67] Accordingly, the Panel finds the evidence presented on this motion establishes that Canada's definition of Jordan's Principle does not fully address the findings in the *Decision* and is not sufficiently responsive to the previous orders of this Panel. While Canada has indeed broadened its application of Jordan's Principle since the *Decision* and removed some of the previous restrictions it had on the use of the principle, it nevertheless continues to narrow the application of the principle to certain First Nations children.

[68] Presumably, while Canada could have implemented the actual definition of Jordan's Principle, as ordered by the Panel, and at the same time implemented a method to focus on the urgent needs of certain children, that was not the course of action taken by Canada. Having a broad definition does not exclude the possibility of having a process to deal with some children on a more urgent basis. However, there is a distinction between, on the one hand, having an inclusive definition and then attributing priorities in terms of urgencies and, on the other hand, limiting the definition with the result of excluding individuals for the sake of focusing on more vulnerable cases.

[69] Furthermore, the emphasis on the "normative standard of care" or "comparable" services in many of the iterations of Jordan's Principle above does not answer the findings in the *Decision* with respect to substantive equality and the need for culturally appropriate services (see *Decision* at para. 465). The normative standard of care should be used to establish the minimal level of service only. To ensure substantive equality and the provision of culturally appropriate services, the needs of each individual child must be considered and evaluated, including taking into account any needs that stem from historical disadvantage and the lack of on-reserve and/or surrounding services (see *Decision* at paras. 399-427).

[70] In this regard, the normative standard of care in a particular province may help to identify some gaps in services to First Nations children. It is also a good indicator of the services that any child should receive, whether First Nations or not. For example, in the hearing on the merits, the Panel heard that Health Canada will only pay for one medical device out of three and, if it is a wheelchair, it is paid for once every five years. The normative standard of care generally provides for all three devices to be paid for (see *Decision* at para. 366 and *Jordan's Principle Dispute Resolution Preliminary Report*

(Terms of Reference Officials Working Group, May 2009), Exhibit HR-13, tab 302). This example highlights the gap and flawed rationale contributing to Health Canada's policy, which does not take into account a child's growth over five years.

[71] However, the normative standard may also fail to identify gaps in services to First Nations children, regardless of whether a particular service is offered to other Canadian children. As *The Way Forward for the Federal Response to Jordan's Principle – Proposed Definitions* document identifies above, under the "Considerations" for "Option One": "The focus on a dispute [over payment of services between or within governments] does not account for potential gaps in services where no jurisdiction is providing the required services."

[72] This potential gap in services was highlighted in the *Pictou Landing* case mentioned above and in the *Decision*. Where a provincial policy excluded a severely handicapped First Nations teenager from receiving home care services simply because he lived on reserve, the Federal Court determined that Jordan's Principle existed precisely to address the situation (see *Pictou Landing* at paras. 96-97). Furthermore, First Nations children may need additional services that other Canadians do not, as the Panel explained in the *Decision* at paragraphs 421-422:

> [421] In her own recent comprehensive research assessing the health and well-being of First Nations people living on reserve, Dr. Bombay found that children of Residential School survivors reported greater adverse childhood experiences and greater traumas in adulthood, all of which appeared to contribute to greater depressive symptoms in Residential School offspring (see Annex, ex. 53 at p. 373; see also *Transcript* Vol. 40 at pp. 69, 71).
>
> [422] Dr. Bombay's evidence helps inform the child and family services needs of Aboriginal peoples. Generally, it reinforces the higher level of need for those services on-reserves. By focusing on bringing children into care, the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate the damage done by Residential Schools rather than attempting to address past harms. The history of Residential Schools and the intergenerational trauma it has caused is another reason - on top of some of the other underlying risk factors affecting Aboriginal children and families such as poverty and poor infrastructure - that exemplify the additional need of First Nations people to receive

> adequate child and family services, including least disruptive measures and, especially, services that are culturally appropriate.

[73] Therefore, the fact that it is considered an "exception" to go beyond the normative standard of care is concerning given the findings in the *Decision*, which findings Canada accepted and did not challenge. The discrimination found in the *Decision* is in part caused by the way in which health and social programs, policies and funding formulas are designed and operate, and the lack of coordination amongst them. The aim of these programs, policies and funding should be to address the needs for First Nations children and families. There should be better coordination between federal government departments to ensure that they address those needs and do not result in adverse impacts or service delays and denials for First Nations. Over the past year, the Panel has given Canada much flexibility in terms of remedying the discrimination found in the *Decision*. Reform was ordered. However, based on the evidence presented on this motion regarding Jordan's Principle, Canada seems to want to continue proffering similar policies and practices to those that were found to be discriminatory. Any new programs, policies, practices or funding implemented by Canada should be informed by previous shortfalls and should not simply be an expansion of previous practices that did not work and resulted in discrimination. They should be meaningful and effective in redressing and preventing discrimination.

[74] Canada's narrow interpretation of Jordan's Principle, coupled with a lack of coordination amongst its programs to First Nations children and families (as will be discussed in the next section), along with an emphasis on existing policies and avoiding the potential high costs of services, is not the approach that is required to remedy discrimination. Rather, decisions must be made in the best interest of the children. While the Ministers of Health and Indigenous Affairs have expressed their support for the best interest of children, the information emanating from Health Canada and INAC, as highlighted in this ruling, does not follow through on what the Ministers have expressed.

[75] Overall, the Panel finds that Canada is not in full compliance with the previous Jordan's Principle orders in this matter. It tailored its documentation, communications and resources to follow its broadened, but still overly narrow, definition and application of

Jordan's Principle. Presenting a criterion-based definition, without mentioning that it is solely a focus, does not capture all First Nations children under Jordan's Principle. Furthermore, emphasizing the normative standard of care does not ensure substantive equality for First Nations children and families. This is especially problematic given the fact that Canada has admittedly encountered challenges in identifying children who meet the requirements of Jordan's Principle and in getting parents to come forward to identify children who have unmet needs (see *Transcript of Cross-Examination of Ms. Buckland* at p. 43, lines 1-8).

[76] On this last point, the evidence indicates and the Panel wishes to highlight that any funding set aside to address Jordan's Principle cases that is not spent in a given year cannot be carried over into the next year. It is set and has to be spent on Jordan's Principle cases or it is returned to the consolidated revenue fund of Canada. In this regard, from July 2016 to February 2017, only approximately $12 million or a little over 15% of the $76.6 million budgeted for Jordan's Principle in 2016-2017 had been spent, $8 million of which was for respite care services in Manitoba [see "Jordan's Principle - Child First initiative", presentation to the Non-Insured Health Benefits Committee, September 15, 2016 (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, tab 5, at p. 10); "Jordan's Principle, Health Canada and INAC 2016-17 Dashboard, Service Access Resolution Funding", valid as of January 11, 2017 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit A); "Memorandum to Senior Assistant Deputy Minister, Requests for Funding for Respite Care and Allied Services under Jordan's Principle", October 3, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); "Memorandum to Senior Assistant Deputy Minister, Request for Funding in Manitoba Region for Specialized Therapy Services Under Jordan's Principle", December 9, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit B, at p. 2); and, "2016-17 JP-CFI Allocation by Region" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 9)].

[77] Canada's current approach to Jordan's Principle is similar to the strategy it employed from 2009-2012 and as described in paragraph 356 of the *Decision*. During that time, Canada allocated $11 million to fund Jordan's Principle. The funds were provided

annually, in $3 million increments. No Jordan's Principle cases were identified and the funds were never accessed and lapsed. The Panel determined it was Health Canada and INAC's narrow interpretation of Jordan's Principle that resulted in there being no cases meeting the criteria for Jordan's Principle (see *Decision* at paras. 379-382).

[78] Despite Jordan's Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada's approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating dedicated funds and resources to address some of these issues (see *Decision* at para. 356). In this sense, the evidence shows that Canada's funding of $382 million over three years for Jordan's Principle is not an investment that covers the broad definition ordered by the Panel in the *Decision* and subsequent rulings. Similar to Canada's past practice, it is a yearly pool of funding that expires if not accessed. Also, it is tailored to be responsive to the narrow definition Canada selected and, as specifically mentioned in Canada's own documents, this fund only covers First Nations children on reserve. Now, with a broadening of the definition of Jordan's Principle and the expiration of some of the funding, resources to address Jordan's Principle may become scarce [see "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A)].

[79] Again, the Panel recognizes that Canada made some efforts to implement Jordan's Principle and had a short time frame within which to do so following this Panel's ruling in April 2016. However, the same cannot be said for the numerous months following the April ruling, especially following the September 2016 ruling and up to the time of the hearing of these motions in March 2017. That said, the Panel believes Canada wants to comply with the *Decision* and related orders and has communicated as much [for example, see "Fact Sheet: Jordan's Principle - Addressing the Needs of First Nations Children" (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", May 18, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, at tab 5, p. 1)].

[80] Despite this, nearly one year since the April 2016 ruling and over a year since the *Decision*, Canada continues to restrict the full meaning and intent of Jordan's Principle. The Panel finds Canada is not in full compliance with the previous Jordan's Principle orders in this matter. There is a need for further orders from this Panel, pursuant to section 53(2)(a) and (b) of the *Act*, to ensure the full meaning and scope of Jordan's Principle is implemented by Canada. In this regard, to redress Canada's previous discriminatory practices, the Panel notes that there are no restrictions that it is aware of that would stop individuals who were previously denied funding under Jordan's Principle, or who would now be considered to fall within the application of Jordan's Principle, from now coming forward and submitting or resubmitting their request. In fact, as highlighted by the Caring Society, considering Canada's previously narrow application of Jordan's Principle from at least 2009 to present, it would be appropriate and reasonable for Canada to review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, to ensure compliance with the correct application of Jordan's Principle ordered in this ruling.

[81] All the Panel's orders with respect to the implementation of the full meaning and scope of Jordan's Principle are detailed in the "Order" section below, under "Definition of Jordan's Principle.

(ii) Changes to the processing and tracking of Jordan's Principle cases

[82] Canada believes its new processes ensure any Jordan's Principle case is not delayed due to case conferencing or policy review. As mentioned above, it alleges urgent cases are addressed within 12 hours, while other cases are addressed within 5 business days, and complex cases which require follow-up or consultation with others are addressed within 7 business days.

[83] The Caring Society submits that Canada's revised processes for dealing with Jordan's Principle cases still impose delays. The AFN shares the Caring Society's view that the arm of government first contacted still does not address the matter directly by funding the service and seeking reimbursement afterwards as is required by Jordan's

Principle. In this regard, Canada's service standards relate to the lapse of time for a decision to be made and not the time it takes for the services to be actually provided to a child. Therefore, Canada should be required to confirm to the Tribunal that its process has been modified so that the government organization that is first contacted pays for the service without the need for policy review or case conferencing before funding is provided.

[84] Also, the Caring Society points out that Canada lacks a transparent and independent mechanism for a family or service provider to appeal a Jordan's Principle case. While a family of a child can request an appeal, there are no appeal procedures described or provided, no timelines for the appeal process and no assurance that written reasons will be provided.

[85] Furthermore, the Caring Society submits that Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress. It is also not measuring its performance against its stated timelines for resolving Jordan's Principle cases. In this regard, the AFN highlights that Jordan's Principle is meant to cover gaps in federal funding to First Nations children; however, Canada has not yet developed an internal understanding of what those gaps are.

[86] The Commission agrees with the Caring Society's request that Canada immediately: (i) cease imposing service delays due to policy review or case conferencing, and (ii) implement reliable systems to ensure the identification of Jordan's Principle cases. However, there are arguably multiple different methods of compliance. Therefore, the Tribunal should simply set a specific deadline by which the required procedures should be put in place, and require that Canada report to the parties at that time on the means chosen.

[87] Aside from some answers from its witnesses, Canada did not specifically address the submissions with respect to the first contact principle, appeal mechanisms or tracking.

[88] As highlighted in the Panel's last ruling in this matter (2017 CHRT 7), in January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact

amongst a group of young children and youth. This information was contained in a detailed July 2016 proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

[89] The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see *affidavit of Dr. Michael Kirlew*, January 27, 2017, at para. 16).

[90] While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle.

[91] Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see *Transcript of Cross-Examination of Ms. Buckland* at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16).

[92] If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay

was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F, at p. 3); see also *Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 1-12].

[93] More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process.

[94] The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the *Decision*. According to Ms. Buckland, a Jordan's Principle case comes to Canada's attention through the local Jordan's Principle focal point, which receives the intake form and then sends it to headquarters. The case is then evaluated by staff at headquarters, who first evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service requested. It is unclear how long this intake and initial evaluation can take.

[95] For example, the Panel was provided with an exchange of emails between Health Canada and a First Nations mother looking for assistance in busing her son with severe cerebral palsy to an off-reserve service centre with a program for special needs children (*Exhibits to the cross-examination of Robin Buckland on her affidavit dated January 25, 2017*, February 6-7, 2017, at tab 12). Following the initial request and an exchange of further information on January 19 and 20, 2017, Health Canada provided an update to the mother on January 27, 2017 indicating that it is working with INAC to determine if their education program could address the request. The mother wrote to Health Canada on

February 3, 2017 requesting a further update from Health Canada because she had yet to hear back for them. Two weeks after receiving the initial request, Canada was still trying to navigate between its own services and programs. When presented with this case under cross-examination, Ms. Buckland indicated “So I guess there's additional work to be done and, and I'm not sure that I have a better answer for it than that” (*Transcript of Cross-Examination of Ms. Buckland* at p. 82, lines 10-12).

[96] Where an existing program cannot resolve the service need, headquarters staff will then determine whether the case can be determined at the staff level, the Executive Director level, or the Assistant Deputy Minister level. It is only at this point that Canada’s timelines come into play (urgent cases addressed within 12 hours, other cases within 5 business days, and complex cases within 7 business days). Even then, the evidence indicates these timelines were not fully implemented at the time of Ms. Buckland’s cross-examination. A draft flow chart entitled “Jordan’s Principle Approval Process”, dated February 20, 2017, and provided following Ms. Buckland’s cross-examination, is marked as being in draft format (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 11). As Ms. Buckland indicated in her cross-examination, the process is still being refined (see *Transcript of Cross-Examination of Ms. Buckland* at p. 119, lines 13-19).

[97] The evidence indicates, and Ms. Buckland testified as much, that access to Jordan’s Principle funding is a last resort (see *Transcript of Cross-Examination of Ms. Buckland* at p. 51, lines 3-9; pp. 65-67; p. 72, lines 6-21; and, pp. 76-78). The new Jordan’s Principle process outlined above is very similar to the one used in the past, which the Panel found to be contributing to delays, gaps and denials of essential health and social services to First Nations children and families. Ultimately, this process factored into the Panel’s findings of discrimination (see *Decision* at paras. 356-358, 365, 379-382, and 391).

[98] The new process still imposes delays due to exchanges among federal government departments, whether it is called case conferencing, policy review or service navigation. As the Panel found in the *Decision*, this added layer of administration is counterintuitive to a principle designed to address exactly those issues, which result in delays, disruptions and/or denials of goods or services for First Nations children. Pursuant to Jordan’s

Principle, once a service need is determined to exist, the government should pay for the service and determine reimbursement afterwards. In practical terms, this means that the delay in the process to evaluate the case to determine if an existing program within Health Canada or INAC will pay for the service should be eliminated. This administrative hurdle or delay, and the clear lack of coordination amongst federal programing to First Nations children and families, should be borne by Canada and not put on the shoulders of First Nations children and families in need of service.

[99] Jordan's Principle requires that there be a direct evaluation of need at the focal point or headquarters stage and that a decision be made expeditiously. Access to Jordan's Principle funding should be a priority, not a last resort. In this regard, no specific explanation was provided for why most cases will take an average of 5 business days to process. Given urgent cases can be processed within 12 hours, it is reasonable to assume that Canada can process most Jordan's Principle cases within a similar timeframe and shall be ordered to do so.

[100] For appeals, there is no formal process. In her affidavit, Ms. Buckland indicated that "Canada is implementing an approval and appeal process to review all requests in a timely manner" (*Affidavit of Robin Buckland*, January 25, 2017, at para. 11). Under cross-examination, she indicated that the appeals process is still being refined but currently consists of a family notifying the local Jordan's Principle focal point of the desire to appeal and that, thereafter, the case is referred to her for review at the Assistant Deputy Minister level (see *Transcript of Cross-Examination* of Ms. Buckland at p. 117, line 3, to p. 119, lines 3-19).

[101] In another draft flow chart entitled "Jordan's Principle Appeal Process", again in draft format and subject to further refinement, dated February 20, 2017 and provided following Ms. Buckland's cross-examination, a few additional details regarding the appeals process are elaborated upon (see *Answers to requests of Robin Buckland*, March 7, 2017, at tab 11; and, *Transcript of Cross-Examination of Ms. Buckland* at p. 117, line 3, to p. 119, line 19). Under "Guiding Principles" it mentions, among other things, that "[d]ecisions are consistently applied, and based on impartial judgement", that the "[p]rocess is open, available to the public, and easily understandable", and that "[d]ecisions are made within a

reasonable time period, without delay, and in keeping with established service standards of Jordan's Principle."

[102] However, it is unclear how these principles are incorporated into the actual appeals process. All that is described in the flow chart is that the regional Jordan's Principle focal point receives the request to appeal; the focal point then sends the request with any new or additional information for review to Health Canada's Senior Assistant Deputy Minister, First Nations and Inuit Health Branch and/or INAC's Assistant Deputy Minister, Education and Social Development Programs and Partnership. If the appeal is denied, the client is provided a rationale. No timelines are mentioned in the chart and no other information on the appeals process is found in the documentary record.

[103] In terms of the Jordan's Principle process overall, the Panel finds there is a clear need for improvement to ensure the principle is meeting the needs of First Nations children and addressing the discrimination found in the *Decision*. Pursuant to section 53(2)(a) of the *Act*, the Panel orders Canada to ensure its processes surrounding Jordan's Principle implement the standards detailed in the "Orders" section below, under "Processing and tracking of Jordan's Principle cases." In addition, Canada should turn its mind to the establishment of an independent appeals process with decision-makers who are Indigenous health professionals and social workers.

[104] In terms of tracking Jordan's Principle cases, there was little evidence to suggest Canada is formally doing so beyond a very basic level. As Ms. Buckland put it, tracking "…definitely needs to be augmented to further track with better detail" (*Transcript of Cross-Examination of Ms. Buckland* at p. 96, line 25, to p. 97, line; see also p. 72, line 22, to p. 73, line 22; p. 92, lines 12-15; and, p. 97, line 10, to p. 98, line 2). A November 2016 presentation to the Assistant Deputy Minister Oversight Steering Committee, entitled "Jordan's Principle: Engaging with partners to design long-term approach" (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H), indicates under "Activities & Timelines" at page 6 that from Fall 2016 to Winter 2017 a data collection tool will be rolled out for use by INAC and Health Canada Service Coordinators and Jordan's Principle focal points. However, in light of the narrow definition of Jordan's Principle that was being used by

Canada, as discussed above, it is likely that any current tracking of cases may not capture all potential Jordan's Principle case, gaps in services and all First Nations children.

[105] With regard to the AFN's submission that Canada has not yet developed an internal understanding of what the gaps in federal funding to First Nations children are, the Panel notes that the *Jordan's Principle – Child First Initiative* presentation, presented to the Innu Round Table on October 6, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I), under "Implementation Points" at page 12, states: "Conducting a province by province gap analysis of health and social services for on-reserve children with disabilities" (see also Health Canada, *Jordan's Principle – Child First Initiative*, presentation dated October 12, 2016 (A*ffidavit of Cassandra Lang*, January 25, 2017, Exhibit 2, Annex I, at p. 12).

[106] There are no timelines indicated for when this analysis will be completed and, based on the Panel's reasoning above regarding Canada's definition of Jordan's Principle, the analysis will need to be broadened beyond "on-reserve children with disabilities." The information that is collected must reflect the actual number of children in need of services and the actual gaps in those services in order to be reliable in informing future actions.

[107] Therefore, the Panel orders Canada to track and collect data on Jordan's Principle cases pursuant to the definition of Jordan's Principle ordered in this ruling. In order to ensure Jordan's Principle is being implemented correctly by Canada, the Panel agrees with the Caring Society that Canada should be formally tracking the number of Jordan's Principle cases that are approved, denied or in progress. Additionally, performance measures should be tracked in terms of stated timelines for resolving Jordan's Principle cases and in providing approved services. Consequently, pursuant to section 53(2)(a) of the *Act*, the Panel makes the remaining orders detailed in the "Order" section below, under "Processing and tracking of Jordan's Principle cases."

(iii) Publicizing the compliant definition and approach to Jordan's Principle

[108] Given Canada has disseminated a narrow definition of Jordan's Principle, the Caring Society requests that Canada be required to proactively, and in writing, correct the record with any person, organization or government who received, or could be in receipt of flawed material on Jordan's Principle. Relatedly, the Caring Society asks that Canada revisit any funding agreements or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle.

[109] The Caring Society is also concerned that Canada has failed to take any formal measures to ensure that all staff are aware, understand and have the tools and resources necessary to implement the findings in the *Decision* related to Jordan's Principle, along with the subsequent rulings and orders issued by the Panel in this regard.

[110] The Commission agrees that it would be appropriate for the Tribunal to supplement its initial order by directing Canada to take specific steps, within fixed timeframes, to adequately inform government officials, FNCFS Agencies and the general public about its compliant approach to Jordan's Principle. It adds that the Caring Society and the other parties to this complaint have invaluable expertise to contribute to any discussion about how best to educate the public about Jordan's Principle. Together, they can help to ensure that any public relations material contains up-to-date, reliable and first-hand information from those who work daily in delivering child welfare and other services to First Nations children. Therefore, the Commission asks that it, the Caring Society, the AFN and the Interested Parties be consulted by Canada on the distribution of any public education materials.

[111] Canada submits it is focusing on enhancing its communication efforts to ensure its First Nations partners are informed of the new approach, aware of new resources available to support First Nations children, and given an opportunity to get involved and share their views. It adds that, with Canada's initial work to reform its approach to Jordan's Principle complete, there is now greater room for engagement with the parties to this matter and other stakeholders regarding the impact of Canada's changes. According to

Canada, reform is an evolving process, and one that it acknowledges will benefit from engagement moving forward.

[112] In light of the evidence and findings with respect to the definition and processing of Jordan's Principle cases, the Panel finds there is a clear need for Canada to go back to its employees, the organizations it works with and its First Nation partners to inform them of the correct definition and processes surrounding Jordan's Principle. As stated previously, the multiple presentations made by Canada to date included a restricted definition of Jordan's Principle and its processes surrounding the principle have recently been changed and will continue to be changed following this ruling. Canada's previous definition of Jordan's Principle led to families not coming forward with potential cases and urgent cases not being considered as Jordan's Principle cases. Canada admittedly had difficulties identifying applicable children. A corrected definition and process surrounding Jordan's Principle warrants new publicity and education to public, employees, applicable organizations and all First Nation partners. INAC and Health Canada's websites would be a prominent and reasonable place to begin this publicity. Also, given the hearing of this complaint and the present motions was broadcasted on APTN, the Panel's believes this would also be an important and reasonable place to publicize the corrected definition and process surrounding Jordan's Principle.

[113] In doing so, there is no doubt that the Commission should be consulted. It has been actively involved in pursuing this case for over a decade and played a central role in leading the majority of the evidence at the hearing of the merits of the complaint. Furthermore, section 53(2)(a) of the *Act* specifically provides that the Panel can order that "…the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures…" (emphasis added).

[114] However, aside from the Commission, the *Act* and applicable case law suggest the Tribunal does not have the power to order consultation with other parties (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 164-169 [*Johnstone*]). Nevertheless, in the circumstances of this case, the Panel agrees that the Caring Society and other parties to this complaint have invaluable expertise to contribute to any

discussion about how best to educate the public, especially First Nations peoples, about Jordan's Principle.

[115] A number of important considerations lead to this conclusion. Primarily, the *Act* must be interpreted in light of its purpose, which is to give effect to the principle that:

> [A]ll individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices.

[116] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children. This was not the situation in *Johnstone*. As canvassed in the *Decision*, the relationship between Canada and Aboriginal peoples is trust–like, rather than adversarial, and the contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship (see *Decision* at para. 93, citing *R. v. Sparrow*, [1990] 1 SCR 1075, at page 1108). It is well established that in all its dealings with Aboriginal peoples, the Crown must act honourably (see *Decision* at para. 89, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16). This requires Canada to treat Aboriginal peoples fairly and honourably, and there is a special fiduciary relationship between the Crown and Aboriginal peoples (see *Decision* at paras. 91-95). The Crown also has a constitutional duty to consult Indigenous peoples on decisions that affect them and those consultations must be meaningful (see 2016 CHRT 16 at para. 10). The unique position that Aboriginal peoples occupy in Canada is recognized in section 35 of the *Constitution Act, 1982* and section 25 of the *Canadian Charter of Rights and Freedoms*. With respect to the *Act*, when section 67 was repealed in 2008, Parliament confirmed in section 1.1 of *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30, that:

> For greater certainty, the repeal of section 67 of the *Canadian Human Rights Act* shall not be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

[117] This case is about the provision of child welfare services to First Nations children and families. This is an area that directly affects the fundamental rights of First Nations children, families and communities and is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 9; and, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 75 [*Baker*]). As stated in the *Decision* at paragraph 346, in reference to Professor Nicholas Bala:

> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved in making decisions about children, not only for judges and lawyers, but for also assessors and mediators.

[118] To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials.

[119] This consultation is also reasonable based on Canada's submissions and actions in this matter. Canada has stressed consultation with First Nations peoples and organizations since the *Decision* (see for example *Respondent's Factum*, March 14, 2017, at paras. 36 and 39). It has also recognized the AFN and the Caring Society as key partners in the reform of its policies and programs. The AFN has been participating in the Executive Oversight Committee since July 2016. Dr. Cindy Blackstock, the Executive Director of the Caring Society, was also invited by the Minister of Health to participate in the Executive Oversight Committee [see *Affidavit of Robin Buckland*, January 25, 2017, at paras. 17-18; "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit F,

p. 2); Letter from The Honourable Jane Philpott, Minster of Health, to Dr. Cindy Blackstock, Executive Director, First Nations Child and Family Caring Society of Canada (December 22, 2016) (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit G); Health Canada, *Jordan's Principle: Engaging with partners to design long-term approach*, presentation dated November 2016 (*Affidavit of Robin Buckland*, January 25, 2017, Exhibit H, at pp. 3-7); "First Nations and Inuit Health Branch, Regional Executive Forum, Record of Discussion and Decisions", August 9, 2016 (*Answers to requests of Robin Buckland*, March 7, 2017, at tab 3A); and, "FNIHB SMC-P&P, Record of Decisions", September 14, 2016 (*Answers to Requests of Robin Buckland*, March 7, 2017, tab 5, p. 2)].

[120] Canada is committed to working with child and family services agencies, front-line service providers, First Nations organizations, leadership and communities, the Complainants, and the provinces and territories, on steps towards program reform and meaningful change for children and families (see 2016 CHRT 10 at para. 6). The Panel supports this commitment and an order to consult with the Complainants and the Interested Parties on how best to educate the public, especially First Nations peoples, about Jordan's Principle essentially reinforces what is already partially occurring in this matter. The Panel wants to ensure this commitment to partnership continues and is improved in a meaningful way by formalizing it in an order. Therefore, pursuant to section 53(2)(a) of the *Act*, the Panel makes the orders detailed in the "Order" section below, under "Publicizing the compliant definition and approach to Jordan's Principle."

(iv) Future reporting

[121] The Caring Society requests that, moving forward, Canada produce its compliance reports in the form of an affidavit and that a timeline be established very early on in the process to allow for cross-examination of the affiants, followed by the filing of written arguments and oral submissions. Exchanging evidence and having the opportunity to cross-examine makes the remedial process more transparent. The AFN is supportive of the Caring Society's request for future reporting, while the COO has made a similar request with respect to the orders it is requesting.

[122] The Commission takes no position on this request, other than to suggest that if such an order is to be granted, the Tribunal should include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[123] The Caring Society's proposed process for future reporting is similar to the process employed to hear and determine the present motions. The Panel found this process efficient and found the use of affidavit evidence, and having that evidence tested under cross-examination, was of great assistance to the Panel in determining the issues put before it.

[124] However, moving forward, the Panel would prefer that the cross-examination of affiants occur in a hearing before the Panel and be governed by the Tribunal process. In the present motions, the cross-examination occurred outside the Tribunal process, without the Panel present, and with a transcript of the evidence presented to the Panel afterwards for its consideration. This resulted in two issues. First, a dispute arose as to whether a party has an obligation, in the context of a cross-examination on an affidavit, to give undertakings to make inquiries and provide answers to which the affiant does not know the answers. Second, the Panel did not have the ability to ask its own questions to the witnesses.

[125] On the first issue, the NAN made requests for undertakings regarding Canada's refusal to fund the Wapekeka proposal for a mental health service team based within the community. Canada refused to provide undertakings because, in its view, the affiant answered the NAN's questions to the best of her ability, while other questions sought information that fell outside the scope of her employment. Furthermore, Canada states there is no legal obligation to provide undertakings during a cross-examination on an affidavit. The NAN submitted arguments and case law to the contrary and requested that the witness appear before the Panel to complete her evidence.

[126] The Panel refused this request because it was more akin to a discovery request in a civil action than to a cross-examination of a witness during a Tribunal hearing. While section 48.9(2) of the *Act* empowers the Chairperson to make rules governing discovery

proceedings before the Tribunal, no such rules have been made thus far. Rather, parties before the Tribunal have an obligation to disclose and produce arguably relevant documents throughout the Tribunal's proceedings [see Rules 6(1)(d) and (e); and, Rule 6(5) of the Tribunal's *Rules of Procedure (03-05-04)*]. The purpose of disclosure is to divulge the case a party intends to make, which in turn allows each party to effectively prepare and present its respective case. The question is whether the information sought is arguably relevant and necessary for the party to prepare its case before the Tribunal.

[127] While the information sought by the NAN is arguably relevant to the issues raised in its amended motion, and is highly important for the families and communities who lost their children, it did not prevent the NAN from making its case on its motion.

[128] The information was also not determinative for the Panel in order to make findings on the NAN's motion. The Tribunal was able to draw inferences from the affiant's inability to answer the NAN's questions. That is, with respect to the issues raised in the NAN's motion, the NAN's questioning was sufficient to shed light on the need for more rigorous processes surrounding access to Jordan's Principle funding to ensure the Wapekeka proposal situation is not repeated.

[129] In all fairness, while the Panel agreed to have the parties cross-examine affiants outside of the Tribunal's hearing process, no process with respect to undertakings was specifically agreed to by the parties or the Panel. Moving forward, if the Panel is present during cross-examinations, it can deal with these types of issues right away, without the need for further submissions or rulings.

[130] On the second issue, the Panel would like the opportunity to ask questions to the witnesses, should it have any. The advantage of having a cross-examination occur before the Panel is that it allows the Panel to efficiently ask its questions, without the need to recall a witness, while also allowing the parties the opportunity to ask additional questions arising out of those asked by the Panel.

[131] Therefore, future reporting by Canada in this matter will be supported by an affidavit or affidavits attesting to the information found in the report. Timelines will be established to allow for cross-examination of the affiants before the Panel, followed by the filing of written

arguments and, if necessary, oral submissions. In any future reporting in this matter, the Panel will keep in mind the Commission's suggestion that it include specifics about: (i) the metrics that are to be reported upon, (ii) the specific intervals at which reports are to be provided, and (iii) the length of time for which the reporting obligation is to continue.

[132] Pursuant to the above and to section 53(2)(a) of the *Act*, the Panel retains jurisdiction over the above orders until it is assured that they are fully implemented. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of those orders, pursuant to the process outlined in the "Order" section below, under "Retention of jurisdiction and reporting."

V. Orders

[133] The orders made in this ruling are to be read in conjunction with the findings above, along with the findings and orders in the *Decision* and previous rulings (2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16). Separating the orders from the reasoning leading to them will not assist in implementing the orders in an effective and meaningful way that ensures the essential needs of First Nations children are met and discrimination is eliminated.

[134] Specific timelines for the implementation of each of the Panel's orders are indicated below to ensure a clear understanding of the Panel's expectations and to avoid misinterpretation issues that have occurred previously in this matter (such as with the term "immediately").

[135] Pursuant to the above, the Panel's orders are:

1. **Definition of Jordan's Principle**

A. **As of the date of this ruling**, Canada shall cease relying upon and perpetuating definitions of Jordan's Principle that are not in compliance with the Panel's orders in 2016 CHRT 2, 2016 CHRT 10, 2016 CHRT 16 and in this ruling.

B. **As of the date of this ruling**, Canada's definition and application of Jordan's Principle shall be based on the following key 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.

C. Canada shall not use or distribute a definition of Jordan's Principle that in any way restricts or narrows the principles enunciated in order 1(b).

D. Canada shall review previous requests for funding that were denied, whether made pursuant to Jordan's Principle or otherwise, dating from **April 1st, 2009**, to ensure compliance with the above principles. Canada shall complete this review by **November 1st, 2017**.

2. Processing and tracking of Jordan's Principle cases

A. Canada shall develop or modify its processes surrounding Jordan's Principle to ensure the following standards are implemented by **June 28, 2017**:

i. The government department of first contact will evaluate the individual needs of a child requesting services under Jordan's Principle or that could be considered a case under Jordan's Principle.

ii. The initial evaluation and a determination of the request shall be made within 12-48 hours of its receipt.

iii. Canada shall cease imposing service delays due case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided.

iv. If the request is granted, the government department that is first contacted shall pay for the service without engaging in case conferring, policy review, service navigation or any other similar administrative procedure before funding is provided; and

v. If the request is denied, the government department of first contact shall inform the applicant, in writing, of his or her right to appeal the decision, the process for doing so, the information to be provided by the applicant, the timeline within which Canada will determine the appeal, and that a rationale will be provided in writing if the appeal is denied.

B. By **June 28, 2017** Canada shall implement reliable internal systems and processes to ensure that all possible Jordan's Principle cases are identified and addressed, including those where the reporter does not know if the case is a Jordan's Principle case.

C. By **July 27, 2017** Canada shall develop reliable internal systems to track: the number of Jordan's Principle applications it receives or that could be considered as a case under Jordan's Principle, the reason for the application and the service requested, the progression of each case, the result of the application (granted or denied) with applicable reasons, and the timelines for resolving each case, including when the service was actually provided.

D. Canada shall provide a report and affidavit materials to this Panel on **November 15, 2017** and every 6 months following the implementation of the internal systems outlined above, which details its tracking of Jordan's Principle cases. The need for any further reporting pursuant to this order shall be revisited on **May 25, 2018**.

3. Publicizing the compliant definition and approach to Jordan's Principle

A. By **June 09, 2017** Canada shall post a clear link to information on Jordan`s Principle, including the compliant definition, on the home pages of both INAC and Health Canada.

B. **By June 28, 2017**, Canada shall post a bilingual (French and English) televised announcement on the Aboriginal Peoples Television Network, providing details of the compliant definition and process for Jordan's Principle.

C. By **June 09, 2017**, Canada shall contact all stakeholders who received communications regarding Jordan's Principle since January 26, 2016 and advise them in writing of the findings and orders in this ruling.

D. By **July 27, 2017**, Canada shall revisit any agreements concluded with third-party organizations to provide services under the Child First Initiative's Service Coordination Function, and make any changes necessary to reflect the proper definition and scope of Jordan's Principle ordered in this ruling.

E. By **July 27, 2017**, Canada shall fund and consult with the Complainants, Commission and the Interested Parties to develop training and public education materials relating to Jordan's Principle (including on the *Decision* and subsequent rulings), and ensure their proper distribution to the public, Jordan's Principle focal points, members of the Executive Oversight Committee, managers involved in the application of Jordan's Principle/Child First Initiative, First Nations communities and child welfare agencies and any other applicable stakeholders.

4. Retention of jurisdiction and reporting

A. The Panel retains jurisdiction over the above orders to ensure that they are effectively and meaningfully implemented and to further refine or clarify its orders if necessary. The Panel will continue to retain jurisdiction over these orders until **May 25, 2018** when it will revisit the need to retain jurisdiction beyond that date.

B. Canada is ordered to serve and file a report and affidavit materials detailing its compliance with each of the above orders by **November 15, 2017**.

C. The Complainants and the Interested Parties shall provide a written response to Canada's report by **November 29, 2017**, and shall indicate: (1) whether they wish to cross-examine Canada's affiant(s), and (2) whether further orders are requested from the Panel.

D. Canada may provide a reply, if any, by **December 6, 2017**.

E. Any schedule for cross-examining Canada's affiant(s) and/or any future reporting shall be considered by the Panel following the parties' submissions with respect to Orders 4(C) and 4(D).

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
May 26, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: May 26, 2017

Date and Place of Hearing: March 22-24, 2017 at Ottawa, Ontario

Appearances:

David Taylor, Anne Levesque, Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and David Nahwegahbow, counsel for the Assembly of First Nations, the Complainant

Daniel Poulin, Samar Musallam and Brian Smith, counsel for the Canadian Human Rights Commission

Jonathan Tarlton and Melissa Chan, counsel for the Respondent

Maggie Wente and Krista Nerland, counsel for the Chiefs of Ontario, Interested Party

Julian N. Falconer and Akosua Matthews, counsel for the Nishnawbe Aski Nation, Interested Party

Most Negative Treatment: Check subsequent history and related treatments.

1989 CarswellOnt 126
Supreme Court of Canada

Lac Minerals Ltd. v. International Corona Resources Ltd.

1989 CarswellOnt 126, 1989 CarswellOnt 965, [1989] 2 S.C.R. 574, [1989] C.L.D. 1140, [1989] S.C.J. No. 83, 101 N.R. 239, 16 A.C.W.S. (3d) 345, 26 C.P.R. (3d) 97, 35 E.T.R. 1, 36 O.A.C. 57, 44 B.L.R. 1, 61 D.L.R. (4th) 14, 69 O.R. (2d) 287 (note), 6 R.P.R. (2d) 1, J.E. 89-1204, EYB 1989-67469

LAC MINERALS LTD. v. INTERNATIONAL CORONA RESOURCES LTD.

McIntyre, Lamer, Wilson, La Forest and Sopinka JJ.

Heard: October 11 and 12, 1988
Judgment: August 11, 1989
Docket: 20571

Counsel: *Earl A. Cherniak* and *J.L. McDougall*, for appellant.
Alan L. Lenczner and *Ronald G. Slaght*, for respondent.

Subject: Intellectual Property; Corporate and Commercial; Estates and Trusts; Property; Insolvency

Related Abridgment Classifications

Business associations
II Creation and organization of business associations
II.2 Partnerships
II.2.e Fiduciary obligations
Commercial law
VI Trade and commerce
VI.10 Trade secrets and confidential information
VI.10.a Elements of action
Estates and trusts
II Trusts
II.3 Constructive trust
II.3.b Gains by fiduciaries
Restitution and unjust enrichment
VI Benefits arising through wrongful acts
VI.3 Breach of confidence
Torts
XIII Invasion of privacy
XIII.3 Breach of confidence

Headnote

Partnership --- Relationship between partners — Fiduciary obligations
Trusts and Trustees --- Constructive trust — Gains by fiduciaries
Breach of confidence — Misappropriation of confidential information — Defendant learned confidential information about gold mining property during negotiations with plaintiff for joint venture exploitation — Defendant acquired property itself — Acquisition constituted breach of duty of confidence.
Fiduciary duty — Extent of duty — Fiduciary duties in commercial contexts arise only when plaintiff's legal rights are dependent upon exercise of discretion by defendant, and plaintiff cannot protect itself against abuse of that discretion — Revealing

confidential information does not itself create fiduciary duty in recipient — Negotiating joint venture does not create fiduciary duty — No fiduciary duty found.

Remedies — Breach of confidence — Constructive trust — Constructive trust available as restitutionary remedy for breach of confidence where plaintiff enjoys extra rights which proprietary claim affords — Mining property unique and difficult to evaluate — Plaintiff's property but for breach of confidence by defendant.

International Corona Resources Ltd. ("Corona") explored properties which held good potential for gold mining. Corona's chief geologist thought it appropriate to acquire property (the "Williams Property") adjacent to the property already claimed. When news of Corona's exploration reached LAC Minerals Ltd. ("LAC"), LAC suggested a joint venture to develop a gold mine on the Williams Property. Although negotiations proceeded for some time, no joint venture was ever concluded. LAC, however, acquired the Williams Property itself, and proceeded to develop a gold mine on it. Corona sued LAC for breach of fiduciary duty and breach of confidence.

At trial, the Court held that LAC had received the information about the Williams Property in confidence and that LAC had breached that confidence in acquiring the Williams Property. The Court also held that LAC had a fiduciary duty to Corona because the information in question had been revealed in the course of their well-developed joint venture discussions. Furthermore, there was a general custom in the mining industry that information revealed in confidence between potential joint ventures should not be used by one party to the detriment of the other. The trial Judge considered that in the particular circumstances of the case, the appropriate remedy was to grant Corona the Williams Property after Corona paid LAC for its expenses in developing the mine. Both the findings regarding liability and the remedy were affirmed by the Ontario Court of Appeal.

LAC appealed to the Supreme Court of Canada, alleging that there had been neither breach of confidence nor breach of fiduciary duty. LAC also appealed the remedy, alleging that even if there had been a breach, the appropriate remedy was damages, not the return of the mine. Corona cross-appealed to have the damages increased from the amount which the trial Judge had awarded in the alternative.

Held:

The appeal and cross-appeal were dismissed.

Breach of Confidence

Per La Forest J. (Lamer and Wilson JJ. concurring)

The requirements to establish breach of confidence were established in the English *Coco* case. First, the information must have been confidential. Second, the information must have been imparted in circumstances importing an obligation of confidence. Third, there must have been an unauthorized use of that information to the detriment of the party communicating it.

The information concerning the Williams Property was confidential, and was revealed by Corona to LAC in circumstances where it was reasonable to assume that LAC knew that the information revealed was confidential. LAC made unauthorized use of the information to the detriment of Corona when it purchased the Williams Property. LAC was not authorized to purchase the Williams Property for itself; throughout the joint venture negotiations, both parties understood that Corona would purchase the Williams Property. But for the actions of LAC, Corona would have acquired the Williams Property.

The test to determine breach was whether LAC had the express authority to use information gained from Corona to purchase the Williams Property. The evidence supported the inference that LAC could not satisfy the onus and thus demonstrate that it was so authorized.

Even if LAC was uniquely prevented from acquiring the Williams Property, LAC was not excluded from prospecting altogether. Backing LAC's ability to acquire the Williams Property would effectively still allow LAC the option of bargaining in good faith in the joint venture negotiations.

Per Sopinka J. (McIntyre J. concurring)

The correct test for breach of confidence was stated in the judgment of Justice La Forest.

The crucial information upon which LAC relied when it acquired the Williams Property was not public, even though a part of the information LAC relied upon was publicly known. This private information was the "springboard" which gave LAC a headstart in its efforts to acquire the Williams Property. The English *Copydex* case illustrated the principle that one party cannot make unauthorized use of private information as a springboard, even when some information available is public. In addition, the Courts below properly applied the "reasonable man" test in deciding that the private information was revealed to LAC in

confidence. LAC clearly made use of the private information in acquiring the Williams Property. LAC was not authorized to do so, and the acquisition amounted to a breach of confidence.

The parties had not agreed who would have owned the Williams Property if the joint venture had concluded. Nor was it certain whether Corona would have held the Williams Property for itself if LAC had not acquired the property. It was, however, certain that LAC was not authorized to acquire the Williams Property by itself.

Breach of Fiduciary Duty

Per Sopinka J. (McIntyre and Lamer JJ. concurring)

The Canadian *Frame v. Smith* case sets out the criteria for determing when fiduciary duties arise: (i) the fiduciary has power or discretion; (ii) the fiduciary can exercise that power or discretion unilaterally so as to affect the beneficiary's legal or practical interests; and (iii) the beneficiary is particularly vulnerable or dependent upon the fiduciary.

In commercial contexts, the court ought not to presume fiduciary relationships. Instead, the parties should protect themselves by contract. The drastic remedies available in equity should be reserved for special circumstances.

Fiduciary duties are an integral part of certain relationships, such as those between directors and corporations. Even within these relationships, however, all duties are not fiduciary. In other relationships, fiduciary duties may also arise. Dependency or vulnerability is, however, necessary before any fiduciary relationship can arise.

The Courts below failed to give enough weight to the requirement of dependency. It was irrelevant which party approached the other. The fact that Corona revealed information in confidence was not sufficient to establish a fiduciary duty, even if it did establish the separate cause of action for breach of confidence. Even if there were a well-recognized industry practice that information revealed in joint-venture negotiations was revealed in confidence, that practice would not here lead to a fiduciary duty falling upon the recipient. Finally, on-going negotiations could not establish a fiduciary duty, as there are on-going negotiations in any commercial matter.

Dependency could not be established in this case. Dependency arises when the beneficiary of the fiduciary duty cannot prevent injury from the exercise of discretion by the fiduciary, and the beneficiary has no practical remedy other than an action for breach of fiduciary duty. In this case, any dependency was incurred by Corona gratuitously. Corona sought no contractual protection for its information. Finally, Corona had other available remedies, including the action for breach of confidence upon which it succeeded.

Per La Forest J.

The basic criteria for determining when to imply fiduciary duties were stated in *Frame v. Smith*. Fiduciary duties have been found in three kinds of situations: (i) relationships which always impart fiduciary duties, such as the relationship between trustee and beneficiary, or director and corporation; (ii) relationships where the specific circumstances give rise to obligations; (iii) situations where the courts have characterized the relationship as "fiduciary" in order to invoke certain remedies. The third situation does not involve a legitimate use of the concept and should be rejected. The courts should be willing to grant appropriate remedies on a principled basis without the need for specific characterizations. The first relationship did not apply in the circumstances.

The second relationship was assessed under three criteria. First, confidence had to be established in the fiduciary, taking into account the reasonable expectations of the parties. This case concerned itself with more than a mere breach of confidence. LAC should have known that it had a duty not to act against Corona's interests, and this factor should be given significant weight. Second, industry practice was taken into account. It was reasonable that both parties would expect that LAC would not abuse Corona's trust. Corona's vulnerability was a third important factor, but it was a factor not necessary in every case of fiduciary duty. Where it would be reasonable in the circumstances to expect that the other party would act or refrain from acting contrary to the interests of another, then the other party must assume a duty of a fiduciary character to live up to these expectations. Notwithstanding, once LAC knew about the Williams Property, Corona was vulnerable to LAC's misuse of that information.

Per Wilson J.

There are relationships which are not in their essence fiduciary, such was found in the present case. However, this does not preclude a fiduciary duty from arising out of specific conduct. The mere disclosure of confidential information made Corona vulnerable to LAC. The aforementioned disclosure placed upon LAC a fiduciary duty not to misuse the information for its own benefit. LAC breached its duty.

Remedy for Breach of Confidence

Per La Forest J. (Lamer J. concurring)

A constructive trust over the Williams Property in favour of Corona was appropriate as a remedy. But for the acts of LAC, Corona would have held the Williams Property. That property should be restored to Corona.

Even though a restitutionary remedy is not always appropriate, it was appropriate in this case. It was appropriate to measure LAC's gain at Corona's expense rather than simply measure Corona's loss. Both the compensatory and restitutionary awards were equivalent, as Corona should have had the Williams Property all along.

The court should promote honest bargaining by having each party live up to the reasonable expectations of the other. Corona's reasonable expectations were that LAC would not misuse confidential information revealed during the negotiations. The Court could not enforce the reasonable expectations of the parties unless it deprived the offending party of all of its benefit flowing from the breach of those expectations. Damages would not properly compensate Corona for its loss, and damages would not deprive LAC of all that it gained. Restitution was the only remedy suitable in the circumstances.

A two-stage test should be satisfied before a constructive trust can be declared. First, a claim for unjust enrichment must have been established. Second, a constructive trust should be the appropriate remedy. The award of a constructive trust, however, would not depend on any special relationship between the parties, and would not be limited to circumstances in which a proprietary right had already been established. In effect, the constructive trust could both recognize and create a proprietary right. A constructive trust should be established when it would be just that the plaintiff enjoy the additional benefits flowing from the award of proprietary rights. It was difficult to value the Williams Property, and Corona would have had the property but for the infringement by LAC. Thus it was appropriate to award the Williams Property to Corona. However, on the same principles, Corona should pay LAC its development expenses.

Per Wilson J.

The Court should have awarded the more appropriate remedy where there were alternatives. There was unjust enrichment through the breach of confidence. A constructive trust was appropriate since the valuation of the Williams Property was uncertain.

Per Sopinka J. (McIntyre J. concurring)

Damages should be awarded for breach of confidence. No constructive trust should be imposed on the Williams Property.

The constructive trust should only arise when a proprietary right has been established, particularly in actions for breach of fiduciary duty. In this case, there was a breach of confidence, and a misappropriation of ideas. There was virtually no support in the case law for the imposition of a constructive trust over property acquired as a result of the misuse of confidential information. Furthermore, it was not clear that Corona would have held the Williams Property but for the breach of confidence. Since LAC might have had some interest in the Williams Property under the joint venture, and since it was not clear how much LAC relied upon the confidential information or other public information when it acquired the Williams Property, LAC should not be forced to give up the Williams Property.

The appropriate remedy of breach of confidence is damages to put the plaintiff in the position he would have been in had the breach not occurred. The focus should be on the loss to the plaintiff. The parties expected joint participation in the mining venture, with both parties contributing to development expenses and both parties having an interest in the Williams Property. Damages should be assessed on this basis.

Annotation

Holding in the Case

The reasons for judgment in this case can be divided into three groups. The only issue on which all the Justices agreed was that there had been a breach of confidence for which LAC was liable. Mr. Justice La Forest and Madam Justice Wilson considered that there had also been a breach of fiduciary duty, and that the appropriate remedy for both breach of confidence and breach of fiduciary duty was a constructive trust; Mr. Justice Sopinka and Mr. Justice McIntyre disagreed on both points. This meant that Mr. Justice Lamer was the deciding vote. He agreed with Mr. Justice Sopinka that there had been no breach of fiduciary duty, and with Mr. Justice La Forest that the remedies for breach of confidence could include a constructive trust which was appropriate in the case. Thus no one Justice wrote a majority decision on all the issues.

The holdings in the case must, therefore, be gathered from several judgments. The Court found that LAC breached a duty of confidence by acquiring the Williams Property for itself. LAC did not, however, owe Corona any fiduciary duty. The appropriate remedy for breach of confidence was a constructive trust. These specific holdings suggest the following general statement of

the law: fiduciary duties will rarely be found between parties to a commercial negotiation. However, when a party misuses confidential information learned during such negotiations, and acquires property on the basis of that misuse, he can be found to hold that property under a constructive trust for the discloser of the information. The Supreme Court of Canada has thereby limited the extent of fiduciary duties in commercial contexts, but it has recognized the constructive trust as an appropriate remedy in breach of confidence cases.

It is unfortunate that the entire Court did not hear this appeal, and that the Judges who heard it were divided on two of the issues in the case. As a result of this division, there will likely be further litigation on the scope of fiduciary duty, and the extent to which the constructive trust is a remedy for breach of confidence. Rather than settle the law, the Supreme Court may have simply clarified what are the competing views of the law and have provided grist for further litigation. This is especially so when the various overlapping and differing judgments may be cited as the view of the Supreme Court of Canada, whereas they more properly represent a mosaic of views. To an extent, therefore, this case should remain limited closely to its own facts.

This is unfortunate, as the case offers a clear presentation of the issues surrounding fiduciary duties in commercial contexts, and the appropriateness of the constructive trust as a remedy for breach of confidence. The longer judgments consider issues of policy, and attempt to bring the law in line with reasonable commercial expectations. If the Court was closely divided on the two key issues in the case, that fact merely suggests that there are strongly competing policies upon which argument is reasonably divided.

Breach of Confidence

The Supreme Court has not made major changes to the law of breach of confidence. All of the Justices agreed that the traditional test for breach of confidence applied. The main point of disagreement between La Forest J. and Sopinka J. was whether there was an understanding that Corona was to own the Williams Property, and would have done so had LAC not breached its duty of confidence.

Mr. Justice La Forest however, did suggest two refinements of the law affecting breach of confidence. First, he made it clear that when information is disclosed in confidence, the disclosee is entitled to use it only for those purposes explicitly authorized. The disclosee bears the onus of showing that the use was authorized. Especially in the commercial context, this is a heavy onus.

Mr. Justice La Forest also made it clear that when the confidential information concerns unique items or opportunities, it will not be subject to the fair licence remedy set out in the *Copydex (No. 2)* ([1969] 2 All E.R. 718 (C.A.)) case. This remedy is exercised by awarding the plaintiff an amount equal to a fair fee for licensing the information appropriated. The fair licence fee is especially useful when the plaintiff ordinarily licenses the information as part of its business. However, when the information relates to a unique business opportunity, and the information would not ordinarily be the subject of a licence, the fair licence fee remedy is not appropriate.

Breach of Fiduciary Duty

One important contest in this case was between two views on fiduciary duties in the commercial context: the dependency theory espoused by Mr. Justice Sopinka and the reasonable expectation theory espoused by Mr. Justice La Forest. In the end, Mr. Justice Sopinka carried two other Justices, and his dependency view narrowly prevailed.

Thus, the law now seems to be that fiduciary duty will be found rarely in commercial contexts.[1] The Supreme Court has rejected the position that fiduciary duties depend upon the reasonable expectation of the parties. Instead, it has accepted that fiduciary duties only arise when one party is dependent upon the exercise of discretion by another, and has no suitable remedy if that discretion is abused.

It is interesting to note that if this test were applied rigorously to relationships which have traditionally been considered to involve fiduciary duties, it could set them outside the fiduciary ambit. Thus, a client who retains a solicitor can protect himself by contract, and by a suit for professional negligence. This is unlike the true trust, in which the beneficiary can sue the trustee for breach of trust but has no other remedy. The beneficiary has no contractual protection. The trust relationship does not arise

by agreement, but because of the settlor creating the trust. Contractual protection is not, therefore, available to the beneficiary of a trust. Similarly, neither contractual protection nor a separate action in tort is available for many spouses with a claim on family assets. These are situations of true dependency on the discretion of another.

Dependency in a commercial context must be rare. In some banking relationships the customer might depend on the good faith of the bank and be unable to protect himself adequately by contract. However, dependency would be unlikely in any commercial negotiations. After all, if the parties are negotiating, they are working to create a contract between themselves, and can put into that contract whatever protections they wish.

The implications of Mr. Justice Sopinka's position are important. We assume that commercial bargaining leads to a fair agreement because each party is free to represent his own interest. Eventually, the parties will compromise to achieve a working relationship. The fairness of that relationship can be distorted by imbalances in information and power; when those imbalances are gross enough, the courts will declare agreements unenforceable for fraud, misrepresentation, duress or unconscionability.

But fiduciary duty is a very broad principle for controlling fairness. If, as a general rule, a fiduciary duty were to be imposed on parties involved in commercial negotiations, the very basis for the system of negotiation would fail. Instead of aggressively pursuing his own interest, each party would have to look out for the interest of the other party over his own. Such an obligation goes beyond "Do unto others ..." into "I am my brother's keeper." As we are told, the first time this was tried, the keeper murdered the brother. It is not a good omen.

The position taken by Mr. Justice La Forest — that the Court should protect the reasonable mutual expectations of the parties — leads to particular difficulty in the commercial context. Each party becomes a fiduciary for the reasonable expectations of the other party. Once the rules of the negotiation become clear, each side has a fiduciary duty to the other side to observe those rules. In theory, this does not bias the results of the negotiations between the parties; it merely ensures that parties do not take advantage of the rules. Any act that contravenes an expectation is a breach of fiduciary duty. In practice, however, there will surely be conflicts between the self-interest of one party and its fiduciary duty to uphold the expectations of the other party. Suppose, for instance, that a purchaser knows that the vendor is in a precarious financial position. Can the purchaser use that information to drive a hard bargain as to the purchase price, or must the purchaser hold that information as a fiduciary, and not only not lower the purchase price, but actually increase it to look after the interest of the other side?

In addition, there are bound to be debates about what is a "reasonable" expectation. Without a contract to establish their mutual expectations, how can parties demonstrate after the fact what was reasonable in the circumstances? An appeal to reasonable expectations is an invitation to have the court rewrite the bargain based on what the court considers reasonable. As parties proceed down the path of negotiations and approach the creation of an enforceable contract, the courts are extremely wary of being put in the position of rewriting the parties' bargain, if the parties' mutual intention is not apparent. [2]

Furthermore, the recognition of fiduciary duties in negotiations does not necessarily protect reasonable expectations in that context. Fiduciary duties impose the extra duty of acting for the benefit of the other party at the expense of one's own interests. Generally speaking, such a requirement does not fit the model of North American business reality. It might be interesting to speculate how one could arrange commercial negotiations that way, but neither business people nor their advisors have considered the matter deeply enough to be ready to throw over the traditional forms of bargaining. With respect, the position advocated by Mr. Justice La Forest on fiduciary duty cannot stand, and the decision of Mr. Justice Sopinka is to be preferred.

In any event, the position taken by Mr. Justice La Forest is stronger than necessary to achieve the result of promoting good faith bargaining. There is no need to impose the strict standards of fiduciary duty on commercial negotiations to promote fair dealing. Instead, fair dealing can be encouraged through the choice of the appropriate remedy.

The Constructive Trust and Good Faith Bargaining

On the question of the remedy to be awarded for the breach of confidence, however, the position of Mr. Justice La Forest seems preferable. He recognizes that the imposition of a constructive trust has the effect of depriving the offending party of any benefit

he might have taken from the transaction. If a party knows that he cannot benefit from misuse of the confidence inherent in a commercial relationship, he has a stronger incentive to bargain in good faith.

Mr. Justice Sopinka considered that compensation for breach of confidence should be based on the loss to the plaintiff. This position, however, has the effect of rewarding the party who breaches confidence. That party can keep all possible future gain merely at the cost of buying out the other party. Once he has found out the key information, the party in breach can assess the risk. If he thinks the transaction might be highly profitable, or if he thinks his share is inadequate, he can simply acquire the entire business opportunity himself. On the other hand, if the plaintiff sues and wins, the offending party will be forced to buy out the plaintiff at fair price, but will be able to keep the future increase in value for himself. Any well-financed party can use this technique of speculation to profit from the weaker financial position of others.

Thus, through his choice of remedy, Mr. Justice La Forest has found a way of requiring good faith bargaining without the necessity of imposing fiduciary duties. The Supreme Court has not left the parties defenceless, but has ruled that if parties fail to bargain in good faith, they will be deprived of the benefit they sought from the bargain. This seems a fairer way of regulating commercial negotiations, and more in keeping with the way such negotiations are conducted in fact.

Conclusion

In deciding the extent to which fiduciary duties arise in commercial negotiations, the Court had to consider two key questions: to what extent will the court intervene to rewrite the bargain between parties, and what standard of good faith is required in commercial negotiations. Mr. Justice La Forest advanced the position that the court should impose fiduciary duties, so that a higher standard of good faith would be imposed. Mr. Justice Sopinka, however, spoke for the position that courts should allow commercial parties to set their own bargaining rules, and the courts should interfere only in cases of severe abuse.

Mr. Justice Lamer created an intermediate position. By agreeing with Mr. Justice Sopinka to limit fiduciary duty, he stressed that the court should not generally intervene in commercial negotiations and "second guess" the understandings of the parties. However, by agreeing with Mr. Justice La Forest regarding the appropriate remedy for breach of confidence, Mr. Justice Lamer recognized that courts should enforce standards of bargaining in good faith.

Thus, the current position seems to be that commercial parties are free to establish by contract their own expectations to guide commercial negotiations. Courts will generally honour such agreements. If such an agreement is absent, the courts will not impose fiduciary standards on negotiating parties, but encourage them to negotiate in their own interests. However, if one party takes unfair advantage of confidential information revealed during the negotiations, the courts can award remedies which will deprive the offending party of all benefit of the unfair advantage. The courts, therefore, are encouraging commercial negotiations that are tough, but fair.

As important as the *LAC Minerals* case is, however, it touches only tangentially on the vexing question of whether there can be proprietary interests in confidential information in the non-criminal law context, a question raised, but not answered, by Lamer J. in *R. v. Stewart*, [1988] 1 S.C.R. 963, 65 O.R. (2d) 637 (note), 39 B.L.R. 198, 19 C.I.P.R. 161, 63 C.R. (3d) 305, 41 C.C.C. (3d) 481, 21 C.P.R. (3d) 289, 50 D.L.R. (4th) 1, 85 N.R. 171, 28 O.A.C. 219. In *LAC Minerals*, Mr. Justice La Forest, in reasons which formed the majority view as to the appropriate remedy, found it unnecessary to determine whether confidential information is property. On the other hand, Mr. Justice Sopinka, in reasons which formed the minority view as the appropriate remedy, commented that: "Although confidential information has some of the characteristics of property, the foothold as such is tenuous." However, given the context, neither Justice was willing to break any new ground and it can safely be said that the ground continues to lie fallow, waiting for the Court to grasp the plough and sow the seed of information-as-property.

Richard B. Potter, Q.C. and Hugh Laurence

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Words and phrases considered:

BREACH OF CONFIDENCE

. . . a breach of confidence . . . consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated.

CONFIDENTIAL INFORMATION

. . . the statement of Lord Greene in [*Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (Eng. C.A.)] at 215 is apposite:

The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

. . . . .

Although confidential information has some of the characterisitics of property, its foothold as such is tenuous . . .

CUSTOM

"Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be

given a broader definition. In any event, both courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym.

FIDUCIARY

Much of the confusion surrounding the term "fiduciary" stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in [*Frame v. Smith* (1987), [1987] 2 S.C.R. 99 (S.C.C.)]. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary.

This brings me to the second usage of fiduciary . . . a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.

The third sense in which the term "fiduciary" is used is markedly different from the two usages discussed above. It requires examination here because, as I will endeavour to explain, it gives a misleading colouration to the fiduciary concept. This third usage of "fiduciary" stems, it seems, from a perception of remedial inflexibility in equity. Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result.

FIDUCIARY RELATIONSHIP

. . . what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in [*Frame v. Smith* (1987), [1987] 2 S.C.R. 99 (S.C.C.)]. The majority, although disagreeing in the result, did not disapprove of the following statement, at 135-36:

. . . there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingrediends invariably identify the existence of a fiduciary relationship.

The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability.

The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement [E. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 7], quoted in [*Guerin v. R.* (1984), [1984] 2 S.C.R. 335 (S.C.C.)] that [at 384, S.C.R.]:

. . . [the] Hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion.

To the same effect is the discussion by Professor D.S.K. Ong in "Fiduciaries: Identification and Remedies" (1986), 8 Univ. of Tasmania Law Rev. 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

RESTITUTION

When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award) . . . In [*Air Canada v. British Columbia* (1989), [1989] 1 S.C.R. 1161 (S.C.C.)], I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued to his benefit, it is restored to him".

Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate.

UNJUST ENRICHMENT

The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the Courts will grant relief.

USAGE

It is not necessary to decide . . . whether a usage, properly established on the evidence, can give rise to fiduciary obligations. For these purposes I accept the definition of "usage" from Halsbury's Laws of England, 4th ed., vol. 12, para. 445, p. 28, as follows:

Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary . . .

VULNERABLE

The Oxford English Dictionary, 2nd ed., v. XIX, at 786, defines "vulnerable"; as follows:

Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm.

APPEAL from a decision of the Ontario Court of Appeal, reported at (1987), 62 O.R. (2d) 1, 44 D.L.R. (4th) 592, affirming decision of trial Judge, reported at (1986), 53 O.R. (2d) 737, finding breach of fiduciary duties and imposing constructive trust.

***La Forest J. (Wilson* and *Lamer JJ.* concurring in part) :**

Introduction

1 The short issue in this appeal is whether this Court will uphold the Ontario Court of Appeal and trial Court decisions ordering LAC to deliver up to Corona land (the Williams property) on which there is a gold mine, on being compensated for the value of improvements LAC has made to the property ($153,978,000) in developing the mine.

2 The facts in this case are crucial. The trial lasted some 5-1/2 months, and the hearing before the Court of Appeal took 10 days. The trial Judge made extensive findings of fact, and the Court of Appeal examined the record in detail and with care. The latter Court emphatically dismissed any argument that the trial Judge had overlooked or misconstrued the evidence, failed to make any necessary findings or made any erroneous inferences. It stated ((1988), 44 D.L.R. (4th) 592 at 595):

> Certainly the establishment of the facts in this case was fundamental and vital to the determination of the issues. It is submitted that erroneous inferences were taken from the facts, that evidence was overlooked or misconstrued, and that relevant findings were not made at all.
>
> There is no obligation on a trial judge to refer to every bit of conflicting evidence to show he has taken it into consideration, nor is he required to cite all the evidence to support a particular finding. In the instant case, the trial judge made some rather terse findings of fact in his recital of the events and of the relationship between the parties in the course of his lengthy reasons. On occasion he encapsuled a great deal of evidence in short form. However, the trial was a lengthy one, his reasons for judgment were lengthy and, as stated, he was not called on to cite every piece of relevant evidence to show he had considered it.
>
> . . . . .
>
> We can say in opening that we have not been persuaded that the learned trial judge overlooked or misconstrued any important or relevant evidence. There was ample evidence to support his conclusions on the facts and there is no palpable or overriding error in his assessment of the facts.

3 In this Court, LAC disclaimed any attack on the facts as found by the trial Judge, but they argued that the Court of Appeal erred in making further findings and drawing inferences from the facts so found. I accept the facts as they are set out in the judgments below, and I would respectfully add that, in my view, the Court of Appeal in no way misconstrued the purport of what it describes as the trial Judge's necessarily "rather terse findings of fact" in the course of lengthy reasons.

4 I have had the advantage of reading the reasons of my colleague, Justice Sopinka. He has given a general statement of the facts as well as the judicial history of the case, and I shall refrain from doing so. I should immediately underline, however, that while I am content to accept this statement as a general outline, it will become obvious that I, at times, take a very different view of a number of salient facts and the interpretation that can properly be put upon them, in particular as they impinge on the nature, scope and effect of the breach of confidence alleged to have been committed by LAC against Corona.

5 It is convenient to set forth any conclusions at the outset. I agree with Sopinka J. that LAC misused confidential information confided to it by Corona in breach of a duty of confidence. With respect, however, I do not agree with him about the nature and scope of that duty. Nor do I agree that in the circumstances of this case it is appropriate for this Court to substitute an award of damages for the constructive trust imposed by the Courts below. Moreover, while it is not strictly necessary for the disposition of the case, I have a conception of fiduciary duties different from that of my colleague, and I would hold that a fiduciary duty, albeit of limited scope, arose in this case. In the result, I would dismiss the appeal.

The Issues

6 Three issues must be addressed:

7 1. What was the nature of the duty of confidence that was breached by LAC?

8 2. Does the existence of the duty of confidence, alone or in conjunction with the other facts as found below, give rise to any fiduciary obligation or relationship? If so, what is the nature of that obligation or relation?

9 3. Is a constructive trust an available remedy for a breach of confidence as well as for breach of a fiduciary duty, and if so, should this Court interfere with the lower Courts' imposition of that remedy?

Breach of Confidence

10 I can deal quite briefly with the breach of confidence issue. I have already indicated that LAC breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows (p. 47):

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must 'have the necessary quality of confidence about it.' Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.

This is the test applied by both the trial Judge and the Court of Appeal. Neither party contends that it is the wrong test. LAC, however, forcefully argued that the Courts below erred in their application of the test. LAC submitted that "the real issue is whether Corona proved that LAC received confidential information from it and [whether] it should have known such information was confidential".

11 Sopinka J. has set out the findings of the trial Judge on these issues, and I do not propose to repeat them. They are all supported by the evidence and adopted by the Court of Appeal. I would not interfere with them. Essentially, the trial Judge found that the three elements set forth above were met: (1) Corona had communicated information that was private and had not been published. (2) While there was no mention of confidence with respect to the site visit, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to LAC under circumstances giving rise to an obligation of confidence. (3) LAC made use of the information in obtaining the Williams property and was not authorized by Corona to bid on that property. I agree with my colleague that the information provided by Corona was the springboard that led to the acquisition of the Williams property. I also agree that the trial Judge correctly applied the reasonable mean test. The trial Judge's conclusion that it was obvious to Sheehan, LAC's vice-president for exploration, that the information was being communicated in circumstances giving rise to an obligation of confidence, following as it did directly on a finding of credibility against Sheehan, is unassailable.

12 In general, then, there is no difference between my colleague and me that LAC committed a breach of confidence in the present case. Where we differ — and it is a critically important difference — is in the nature and scope of the breach. The precise extent of that difference can be seen by a closer examination of the findings and evidence on the third element of the test set forth above, and I will, therefore, set forth my views on this element at greater length.

13 With respect to this aspect of the test, it is instructive to set out the trial Judge's finding in full. He said ((1986), 25 D.L.R. (4th) 504) at 542-543:

> *Has Corona established an unauthorized use of the information to the detriment of Corona?*
>
> Where the duty of confidence is breached, the confidee will not be allowed to use the information as a springboard for activities detrimental to the confider: see *Cranleigh Precision Engineering, Ltd. v. Bryant et al.*, [1964] 3 All E.R. 289 (Q.B.).
>
> Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.
>
> Certainly Lac was not authorized by Corona to bid on the Williams property.

> I have already reviewed the evidence dealing with the acquisition of the Williams property by Lac and the efforts made by Corona through Mr. McKinnon and also directly to acquire the Williams property. *On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona.*
>
> I conclude that Corona has established the three requirements necessary for recovery based on the doctrine of breach of confidence.

[Emphasis added.] Later in his reasons he reiterated (p. 546) that "but for the actions of Lac, Corona would probably have acquired the Williams property".

14 The Court of Appeal was of the same view. It held (p. 657, D.L.R.) that:

> the evidence also amply sustains the finding that the confidential information which LAC received from Corona was of material importance in its decision to acquire the Williams property. In this latter regard it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property.

15 It was argued that this passage in the Court of Appeal's reasoning is a finding of fact that was not made by the trial Judge and that the record will not support. In my view, the Court of Appeal in no way extended the finding of the trial Judge. The portion of Holland J.'s reasons I have set out above was directed solely at the question of whether Corona had established an unauthorized use of the information to the detriment of Corona. He concluded that there had been an unauthorized use since LAC had not been authorized by Corona to bid on the Williams property. In other words, Corona did not consent to the use of the information by LAC for the purpose of acquiring the Williams land for LAC's own account, or, for that matter, for any purpose other than furthering negotiations to jointly explore and develop these properties. He also found that the information had been used to the detriment of Corona. When the sole question the learned trial Judge was addressing was whether LAC misused the confidential information Corona had provided to it and his sole conclusion was that "but for the actions of Lac, Corona would have acquired the Williams property *and therefore Lac acted to the detriment of Corona*" (emphasis added), I find the conclusion inescapable that the trial Judge found as a fact that but for the *confidential information received and misused*, Corona would have acquired the Williams property and that LAC was not authorized to obtain it.

16 If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.

17 There was some suggestion that LAC was only restricted from using the information imparted by Corona to acquire the Williams property for its own account, and had LAC acquired the claims on behalf of both Corona and LAC, there would have been no breach of duty. This, as I have noted, seems to me to misconstrue the finding of the trial Judge. What is more, the evidence, in my view, does not support that position. While Sheehan's letter of May 19, relied on by my colleague, may have been unclear as to who should acquire the Williams property, the events on June 30 make clear to me that both LAC and Corona contemplated Corona's acquisition of the Williams claims. The trial Judge, again making a finding of creditbility against Sheehan and Allen (LAC's president), accepted the evidence of Corona's witnesses, Bell and Dragovan, that not only was the Williams property discussed at the meeting on this latter date, but that Corona's efforts to secure it were discussed and that Allen advised Corona that they had to be aggressive in pursuing a patent group such as this. LAC in no way indicated to Corona, at this time or any other, that they were also pursuing the property. Yet 3 days later, Sheehan spoke with Mrs. Williams about making a deal for her property, and on July 6, 1981, LAC's counsel and corporate secretary submitted a written bid for the 11 patented claims. It strains credulity to suggest that on June 30 either LAC or Corona contemplated that Corona had given LAC confidential information so that LAC could acquire the property on either its own behalf or on behalf of both parties jointly. Certainly Corona would not have allowed the use of the confidential information for LAC's acquisition of the property to Corona's exclusion. Had the joint acquisition of the property been an authorized use of the information, surely there would

have been some discussion of LAC's efforts to that end at the June 30 meeting. Instead, LAC advised Corona to aggressively pursue the claims.

18 The evidence of LAC's president, Mr. Allen, and of the experts called on behalf of LAC also support the position that LAC was not entitled to bid on the property and that Corona could expect that LAC would not do so. Allen testified as follows, in a passage to which both Courts below attached central importance:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that *while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged*.

[Emphasis added.] All the experts called by LAC agreed with the tenor of this statement. The testimony of Dr. Derry is indicative. He testified as follows:

> Q. Ah, so now we have it this way: that if some — so I understand your evidence — if Sheehan knew, as apparently he does from the way you read the evidence, that Corona was intending to acquire the Williams property; correct?
>
> A. Yes
>
> Q. That, for at least some period of time, Lac is precluded from making an offer or outbidding Corona on that property?
>
> A. I would say early on, yes.
>
> Q. Yes. And that obligation or the rationale for that preclusion comes from the fact that it is recognized in the industry, is it not?
>
> A. Yes.

Whether these statements amount to a legally enforceable custom or whether they create a fiduciary duty are separate questions, but at the very least, they show that LAC was aware that it owed some obligation to Corona to act in good faith, and that that obligation included the industry-recognized practice not to acquire the property which was being pursued by a party with which it was negotiating.

19 Corona's activity following LAC's acquisition of the property is also noteworthy. The Court of Appeal thus described it (pp. 633-634, D.L.R.):

> Upon learning from Dragovan of the LAC offer to Mrs. Williams, Pezim immediately instructed his solicitor to act for Corona in the matter and Bell ordered LAC's crew engaged in the joint geochemical sampling programme to leave Corona's property. After Sheehan had learned of the termination of the geochemical study, he telephoned Bell on August 4th and was told by him that the reason for the termination was LAC's offer to Mrs. Williams. Sheehan said that he was still interested in a deal with Corona and Bell answered that he would have to discuss the matter with Pezim. On August 18th Sheehan and Pezim met in Vancouver to discuss the Corona property. The meeting was abortive. According to Pezim's evidence, and the trial judge so found, Pezim insisted that it was a condition of any deal that LAC 'give back' to Corona the Williams property. Subsequent negotiations between Sheehan and Donald Moore, a director of Corona, also failed to resolve the differences between LAC and Corona. After his meeting with Sheehan, Pezim, according to his testimony, instructed his solicitors to press on with the matter. This action was commenced on October 27, 1981, long before it was established that a producing gold mine on the Williams property was a probability.

This is certainly inconsistent with Corona having provided LAC the information so that LAC could acquire the property, whether alone or for their joint ownership.

20 This entire inquiry appears, however, to be misdirected. In establishing a breach of a duty of confidence, the relevant question to be asked is what is the confidee entitled to do with the information, and not to what use he is prohibited from putting it. Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use. In *Coco v. A.N. Clark (Engineers) Ltd.*, supra, at 48, Megarry J. said this in regard to the burden on the confidee to repel a suggestion of confidence:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

In my view, the same burden applies where it is shown that confidential information has been used and the user is called upon to show that such use was permitted. LAC has not discharged that burden in this case.

21 I am therefore of the view that LAC breached a duty owed to Corona by approaching Mrs. Williams with a view to acquiring her property, and by acquiring that property, whether or not LAC intended to invite Corona to participate in its subsequent exploration and development. Such a holding may mean that LAC is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable. LAC had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to LAC so that LAC and Corona could negotiate a joint venture for the exploration and development of the area, or LAC could, on the basis of publicly available information, have pursued property in the area on its own behalf. LAC, however, is not entitled to the best of both worlds.

22 In this regard, the case can be distinguished from *Coco v. A.N. Clark (Engineers) Ltd.*, in that here the confidential information led to the acquisition of a specific, unique asset. Imposing a disability on a party in possession of confidential information from participating in a market in which there is room for more than one participant may be unreasonable, such as where the information relates to a manufacturing process or a design detail. In such cases, it may be that the obligation on the confidee is not to use the confidential information in its possession without paying compensation for it or sharing the benefit derived from it. Where, however, as in the present case, there is only one property from which LAC is being excluded, and there is only one property that Corona was seeking, the duty of confidence is a duty not to use the information. The fact that LAC is precluded from pursuing the Williams property does not impose an unreasonable restriction on LAC. Rather, it does the opposite by encouraging LAC to negotiate in good faith for the joint development of the property.

Fiduciary Obligation

23 Having established that LAC breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary. In my view, regardless of the basis of liability, a constructive trust is the only just remedy in this case. Nonetheless, in light of the argument, I think it appropriate to consider whether a fiduciary relationship exists in the circumstances here.

24 There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. Indeed, the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law"; see P.D. Finn, *Fiduciary Obligations* (1977), at 1. It has been said that the fiduciary relationship is "a concept in search of a principle"; see Sir Anthony Mason, "Themes and Prospects" in P.D. Finn, *Essays in Equity* (1985), at 246. Some have suggested that the principles governing fiduciary obligations may indeed be undefinable (D.R. Klinck, "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on *International Corona Resources Ltd. v. Lac Minerals Ltd.*" (1988), 33 *McGill Law Journal* 600 at 603), while others have

doubted whether there can be any "universal, all-purpose definition of the fiduciary relationship" (see *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, 432; R.P. Austin, "Commerce and Equity — Fiduciary Duty and Constructive Trust" (1986), 6 O.J.L.S. 444, 445-446). The challenge posed by these criticisms has been taken up by Courts and academics convinced of the view that underlying the divergent categories of fiduciary relationships and obligations lies some unifying theme; see *Frame v. Smith*, [1987] 2 S.C.R. 99 at 134, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 per Wilson J.; Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; P.D. Finn, "The Fiduciary Principle" (1988), to be published by Carswell in T. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989); J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 L.Q.R. 51; T. Frankel, "Fiduciary Law" (1983), 71 *California Law Review* 795; J.R.M. Gautreau, "Demystifying the Fiduciary Mystique" (1989), 68 C.B.R. 1. This case presents a further opportunity to consider such a principle.

25 In *Guerin v. R.*, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161, Dickson J. (as he then was) discussed the nature of fiduciary obligations in the following passage, at 383-384 [S.C.R.]:

> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery.
>
> . . . . .
>
> Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, that 'the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion.' Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> *I make no comment upon whether this description is broad enough to embrace all fiduciary obligations*. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.
>
> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[Emphasis added.]

26 Wilson J. had occasion to consider the extension of fiduciary obligations to new categories of relationships in *Frame v. Smith*, supra. She found (p. 136, S.C.R.) that:

> there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not *the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent*.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[Emphasis added.]

27 It will be recalled that the issue in that case, though not originally raised by the parties but argued at the request of the Court, was whether the relationship of a custodial parent to a non-custodial parent could be considered a category to which fiduciary obligations could attach. Wilson J. would have been willing to extend the categories of fiduciary relations to include such parties. While the majority in that case did not consider it necessary to address the bases on which fiduciary obligations arise (essentially because it considered the statute there to constitute a discrete code), as will be seen from my reasons below, I find Wilson J.'s approach helpful.

28 Much of the confusion surrounding the term "fiduciary" stems, in my view, from its undifferentiated use in at least three distinct ways. The first is as used by Wilson J. in *Frame v. Smith*, supra. There the issue was whether a certain class of relationship, custodial and non-custodial parents, were a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty. This was made clear by Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.). She stated:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin "fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded. In determining whether the categories of relationships which should be presumed to give rise to fiduciary obligations should be extended, the rough and ready guide adopted by Wilson J. is a useful tool for that evaluation. This class of fiduciary obligation need not be considered further, as Corona's contention is not that "parties negotiating towards a joint-venture" constitute a category of relationship, proof of which will give rise to a presumption of fiduciary obligation, but rather that a fiduciary relationship arises out of the particular circumstances of this case.

29 This brings me to the second usage of fiduciary, one I think more apt to the present case. The imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected. I agree with this comment of Professor Finn in "The Fiduciary Principle", supra at 64:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out. But they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the 'fiduciary

> expectation'. Such a role may generate an actual expectation that that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

It is in this sense, then, that the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship; see D.W.M. Waters, *The Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 405. If the facts give rise to a fiduciary obligation, a breach of the duties thereby imposed will give rise to a claim for equitable relief.

30 The third sense in which the term "fiduciary" is used is markedly different from the two usages discussed above. It requires examination here because, as I will endeavour to explain, it gives a misleading colouration to the fiduciary concept. This third usage of "fiduciary" stems, it seems, from a perception of remedial inflexibility in equity. Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result. The clearest example of this is the judgment of Goulding J. in *Chase Manhattan Bank v. Israel-British Bank*, [1981] Ch. 105. There the plaintiffs had transferred some $2,000,000 to the defendant's account at a third bank. Due to a clerical error, a second payment in the same amount was made later that day. Instructions to stop the payment were made, but not quickly enough. The defendant bank was put into receivership shortly after the payment made in error was received, and as it was insolvent, the plaintiff could only recover the full amount of its money if it could trace it into some identifiable asset. Responding to the argument that, even if the funds could be identified, they could not be recovered since there was no fiduciary relationship, Goulding J. made the following comments, at 118-119, which it is worth setting out extensively:

> The facts and decisions in *Sinclair v. Brougham*, [1914] A.C. 398 and in *In re Diplock*, [1948] Ch. 465 are well known and I shall not take time to recite them. I summarise my view of the *Diplock* judgment as follows: (1) The Court of Appeal's interpretation of *Sinclair v. Brougham* was an essential part of their decision and is binding on me. (2) The court thought that the majority of the House of Lords in *Sinclair v. Brougham* had not accepted Lord Dunedin's opinion in that case, and themselves rejected it. (3) *The court (as stated in Snell, loc. cit.) held that an initial fiduciary relationship is a necessary foundation of the equitable right of tracing. (4) They also held that the relationship between the building society directors and depositors in Sinclair v. Brougham was a sufficient fiduciary relationship for the purpose: [1948] Ch. 465, 529, 540. The latter passage reads, at p. 540: 'A sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfillment*.' It is founded, I think, on the observations of Lord Parker of Waddington at [1914] A.C. 398, 441.
>
> *This fourth point shows that the fund to be traced need not* (as was the case in *In Re Diplock* itself) *have been the subject of fiduciary obligations before it got into the wrong hands. It is enough that, as in Sinclair v. Brougham [1914] A.C. 398, the payment into wrong hands itself gave rise to a fiduciary relationship*. The same point also throws considerable doubt on Mr. Stubbs's submission that the necessary fiduciary relationship must originate in a consensual transaction. It was not the intention of the depositors or of the directors in *Sinclair v. Brougham* to create any relationship at all between the depositors and the directors as principals. Their object, which unfortunately disregarded the statutory limitations of the building society's powers, was to establish contractual relationships between the depositors and the society. *In the circumstances, however, the depositors retained an equitable property in the funds they parted with, and fiduciary relationships arose between them and the directors. In the same way, I would suppose a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right*.

[Emphasis added.] It is clear that if a fiduciary relationship was necessary for the plaintiff to be entitled to a proprietary tracing remedy, then such a relationship would be found. It is equally clear that this relationship has nothing to do with the imposition of obligations traditionally associated with fiduciaries. For another example, see *Goodbody v. Bank of Montreal* (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 at 339 (H.C.), where a thief was considered to be a fiduciary so as to ground an equitable tracing order.

31 Professor Birks has described this approach as follows (Peter Birks, "Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity" (1987), *Lloyd's Maritime and Commercial Law Quarterly* 421 at p. 436):

> This approach moves the characterization of a relationship as fiduciary from the reasoning which justifies a conclusion to the conclusion itself: a relationship becomes fiduciary because a legal consequence traditionally associated with that label is generated by the facts in question.

Professor Weinrib has criticized it because ("The Fiduciary Obligation", supra, at 5):

> This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for remedy.

Megarry V-C commented on this approach to identifying a fiduciary obligation in *Tito v. Waddell (No. 2)*, [1977] Ch. 106, [1977] 3 All E.R. 129. In that case, the argument made was that [at 231-232, E.R.]:

> A was in a fiduciary position towards B if he was performing a special job in relation to B which affected B's property rights, at any rate if A was self-dealing. This ... could be put in two ways. First, there was a fiduciary duty if there was a job to be performed and it was performed in a self-dealing way. Alternatively, there was a fiduciary duty if there was a job to perform, and equity then imposed a duty to perform it properly if there was any self-dealing.

He rejected this position as follows, at 232 [E.R.]:

> I cannot see why the imposition of a statutory duty to perform certain functions, or the assumption of such a duty, should as a general rule impose fiduciary obligations, or even be presumed to impose any. Of course, the duty may be of such a nature as to carry with it fiduciary obligations: impose a fiduciary duty and you impose fiduciary obligations. But apart from such cases, it would be remarkable indeed if in each of the manifold cases in which statute imposes a duty, or imposes a duty relating to property, the person on whom the duty is imposed was thereby to be put into a fiduciary relationship with those interested in the property, or towards whom the duty could be said to be owed.
>
> . . . . .
>
> Furthermore, I cannot see that coupling the job to be performed with self-dealing in the performance of it makes any difference. If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing on some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

32 Megarry V-C held in that case that there was no fiduciary relationship and so no breach of the fiduciary obligations that would have been imposed by finding such a relationship. Self-dealing would only have been a breach of fiduciary obligation if a fiduciary obligation existed. Megarry V-C rejected the notion that one can argue from a conclusion (there has been self dealing) to a duty (therefore there is a fiduciary relationship) and then back to the conclusion (therefore there has been a breach of duty).

33 In my view, this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term. It will only be eliminated, however, if the Courts give explicit recognition to the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship.

34 To recapitulate, the first class of fiduciary is not in issue in this appeal. It is not contended that all parties negotiating towards a joint venture are a class to which fiduciary obligations should presumptively attach. As will be clear from my discussion of the third usage of the term fiduciary, I am not prepared to hold that because a constructive trust is the appropriate remedy a fiduciary

label therefore attaches, though I will deal later with why, even if the relationship is not fiduciary in any sense, a constructive trust may nonetheless be appropriate. The issue that remains for immediate discussion is whether the facts in this case, as found by the Courts below, support the imposition of a fiduciary obligation within the second category discussed above, and whether, acting as it did, LAC was in breach of the obligations thereby imposed.

35 In addressing this issue, some detailed consideration must be given to the analysis made by the Court of Appeal. Before that Court, LAC was attacking the trial Judge's conclusion that LAC was in breach of its fiduciary duty to act fairly and not to the detriment of Corona by acquiring the Williams property. I note that, in their discussions of this breach, neither Court below spoke of LAC's duty not to acquire the property for its own account to the exclusion of Corona, but rather spoke of a duty not to acquire the property *at all*. For the reasons I have outlined in my discussion of breach of confidence, and for reasons which I will more fully outline later, I am of the view that the Courts below were correct in their description of the duty owed.

36 The Court of Appeal agreed with the submission made by LAC that the law of fiduciary relations does not ordinarily apply to parties involved in commercial negotiations. Such negotiations are normally conducted at arm's length. They held, however, that in certain circumstances fiduciary obligations can arise, and it is a question of fact in each case whether the relationship of the parties, one to the other, is such as to create a fiduciary relationship. *United Dominions Corp. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aus. H.C.), was given as an example of where such an obligation might arise. In terms of the scheme I have outlined above, the Court of Appeal accepted that the first usage of "fiduciary" was not in issue, but that the second must be more closely examined.

37 Before undertaking that examination, the Court made the following comments on the relationship between fiduciary law and the law of confidential information, at 638-639 [D.L.R.]:

> the trial judge found that Corona imparted confidential information to LAC during the course of their negotiations. He recognized that the law regarding obligations imposed by the delivery of confidential information is distinct from the law imposing fiduciary duties and that it does not depend upon any special relationship between the parties. In *Canadian Aero Service Ltd. v. O'Malley* ... [1974] S.C.R. 592 at p. 616, Laskin J. said for the court:
>
> > The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.
>
> *That statement recognizes that the courts will provide relief for a breach of confidence in proper circumstances where there is no fiduciary relationship between the parties. On the other hand, a fiduciary relationship between parties may co-exist with a right of one of the parties to an obligation of confidence with respect to information of a confidential nature given by that party to the other party. It is indeed difficult to conceive of any fiduciary relationship where the right to confidentiality would not exist with respect to such information*.
>
> In the case at bar, the trial judge concluded that the legal principles regarding the obligations imposed by the delivery of confidential information and the obligations imposed as a result of the existence of a fiduciary relationship are intertwined. We are of the opinion that he was correct in this conclusion and that the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussions.

[Emphasis added.]

38 The Court of Appeal then discussed the several factors which in its view supported the finding of a fiduciary obligation. In doing so, they were specifically responding to LAC's submission that the correct approach is to ask "whether the relationship by law, custom or agreement is such that one party is obligated to demonstrate loyalty and avoid taking advantage for himself". In light of this submission to the Court below, I must say that it lies ill in the mouth of LAC to now assert before this Court that the custom or usage found by the Courts below cannot as a matter of law give rise to fiduciary obligations. Were I not of the view that that submission is in error, I incline to think that LAC may be estopped by its conduct below from raising it in this Court.

39 The Court of Appeal relied on four main factors in upholding the imposition of the fiduciary obligation. First, LAC was a senior mining company and Corona a junior, and LAC had sought out Corona in order to obtain information and to discuss a joint venture. Second, the parties had arrived at a mutual understanding of how each would conduct itself in the course of their negotiations, were working towards a common objective and had in fact taken preliminary steps in the contemplated joint exploration and development venture. Third, Corona disclosed confidential information to LAC and LAC expected to receive that confidential information in the course of the negotiations. Finally, there was established by LAC's own evidence a custom, practice or usage in the mining industry that parties in serious negotiation to a joint venture not act to the detriment of the other, particularly with respect to the confidential information disclosed, and the parties had reached the stage in negotiations where such an industry practice applied. In all these circumstances, the Court of Appeal found that it was just and proper that a fiduciary relationship be found, and a legal obligation not to benefit at the expense of the other from information received in negotiations imposed. By acquiring the Williams property, LAC had breached this obligation.

40 While it is almost trite to say that a fiduciary relationship does not normally arise between arm's length commercial parties, I am of the view that the Courts below correctly found a fiduciary obligation in the circumstances of this case and correctly found LAC to be in breach of it. I turn then to a consideration of the factors which in this case support the imposition of that duty. These can conveniently be grouped under three headings: (1) trust and confidence, (2) industry practice and (3) vulnerability. As will be seen these factors overlap to some extent, but considered as a whole they support the proposition that Corona could reasonably expect LAC to not act to Corona's detriment by acquiring the Williams land, and that Corona's expectation should be legally protected.

Trust and Confidence

41 The relationship of trust and confidence that developed between Corona and LAC is a factor worthy of significant weight in determining if a fiduciary obligation existed between the parties. The existence of such a bond plays an important role in determining whether one party could reasonably expect the other to act or refrain from acting against the interests of the former. That said, the law of confidence and the law relating to fiduciary obligations are not coextensive. They are not, however, completely distinct. Indeed, while there may be some dispute as to the jurisdictional basis of the law of confidence, it is clear that equity is one source of jurisdiction: see *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.). In *Guerin v. R.*, supra, Dickson J. noted that the law of fiduciary obligations had its origin in the law of confidence. Professor Finn thought it was settled that confidential information, whether classified as property or not, will attract fiduciary law's protection provided the circumstances are such as to attract a duty of confidence: "The Fiduciary Principle", supra, at 50. I agree with the view of both Courts below that the law of confidence and the law of fiduciary obligations, while distinct, are intertwined.

42 In a claim for breach of confidence, Gurry tells us (*Breach of Confidence* (1984), at 161-162):

> the court's concern is for the protection of a confidence which *has been created* by the disclosure of confidential information by the confider to the confidant. The court's attention is thus focused on the protection of the confidential information because it has been the medium for the creation of a relationship of confidence; its attention is *not* focused on the information as a medium by which a *pre-existing* duty is breached.

However, the facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way. A claim for breach of confidence will only be made out, however, when it is shown that the confidee has misused the information to the detriment of the confidor. Fiduciary law, being concerned with the exaction of a duty of loyalty, does not require that harm in the particular case be shown to have resulted.

43 There are other distinctions between the law of fiduciary obligations and that of confidence which need not be pursued further here, but among them I simply note that unlike fiduciary obligations, duties of confidence can arise outside a direct

relationship, where for example a third party has received confidential information from a confidee in breach of the confidee's obligation to the confidor: see *Liquid Veneer Co. v. Scott* (1912), 29 R.P.C. 639 (Ch.), at 644. It would be a misuse of the term to suggest that the third party stood in a fiduciary position to the original confidor. Another difference is that breach of confidence also has a jurisdictional base at law, whereas fiduciary obligations are a solely equitable creation. Though this is becoming of less importance, these differences of origin give to the claim for breach of confidence a greater remedial flexibility than is available in fiduciary law. Remedies available from both law and equity are available in the former case, equitable remedies alone are available in the latter.

44 The Court of Appeal characterized the relationship in the present case as one of "trust and cooperation". LAC and Corona were negotiating, and on the evidence of Sheehan, negotiating in good faith, towards a joint venture or some other business relationship. It was expected during these negotiations that Corona would disclose confidential information to LAC, and Corona did so. This was in conformity with the normal and usual practice in the mining industry. The evidence accepted by both Courts below established a practice in the industry, known to LAC, that LAC would not use confidential information derived out of the negotiating relationship in a manner contrary to the interests of Corona. Holland J. found that it "must have been obvious" to Sheehan that he was receiving confidential information. In light of that finding, it should be apparent that the lowest possible significance can attach to the absence of discussions between the parties relating to confidentiality. LAC, in the view of the Court of Appeal, felt that it had some obligation to confirm areas of interest with Corona, and did so with respect to staking other property in the area. The trial Judge, noting that Corona had "agreed" to LAC staking in the area, thought that this gave rise to an "informal understanding as to how each would conduct itself in anticipation of" the conclusion of a formal business relationship. In all these circumstances, I am of the view that both parties would reasonably expect that a legal obligation would be imposed on LAC not to act in a manner contrary to Corona's interest with respect to the Williams property.

Industry Practice

45 Both Courts below placed considerable weight on the evidence of Allen to the effect that there was a "duty" not to act to the other party's detriment when in serious negotiations through the misuse of confidential information. For ease of reference, I set out his testimony here again:

> If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.

All of LAC's experts agreed with this statement. The trial Judge, in reliance on this evidence said, at 537-538:

> **The Evidence of the Experts on Liability**
>
> . . . . .
>
> *Whether the conduct of the parties, according to the experts, imposed fiduciary obligations on Lac*
>
> . . . . .
>
> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

The Court of Appeal affirmed the conclusion that Corona had established a "custom or usage" in accordance with the principle set forth in *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), and that the trial Judge was correct in applying that case.

46 Undoubtedly experts on mining practice are not qualified to give evidence on whether fiduciary obligations arose between the parties, as the existence of fiduciary obligations is a question of law to be answered by the court after a consideration of

all the facts and circumstances. Thus, while the term "fiduciary" was not properly used by the trial Judge in this passage, the evidence of the experts is of considerable importance in establishing standard practice in the industry from which one can determine the nature of the obligations which will be imposed by law.

47 It will be clear then, that in my view LAC's submissions relating to custom and usage were largely misdirected. The issue is not, as LAC submitted, what is "the legal effect of custom in the industry". Rather, it is what is the importance of the existence of a practice in the industry, established out of the mouth of the defendant and all its experts, in determining whether Corona could reasonably expect that LAC would act or refrain from acting against the interests of Corona. Framed thus, the evidence is of significant importance.

48 I must at this point briefly advert to the law relating to custom and usage. LAC submitted that the Court of Appeal erred in using the terms "custom" and "usage" interchangeably. "Custom" in the sense of a rule having the force of law and existing since time immemorial is not in issue in this case. Indeed, Canadian law being largely of imported origin will rarely, if ever, evince that sort of custom. Custom in Canadian law must be given a broader definition. In any event, both Courts below were not using the term in such a technical sense, as is clear from the fact that both substituted the term "practice" as a synonym. It is not necessary to decide, and I do not decide, whether a usage, properly established on the evidence, can give rise to fiduciary obligations. For these purposes I accept the definition of "usage" from *Halsbury's Laws of England*, vol. 12, 4th ed., para. 445, at 28, as follows:

> Usage may be broadly defined as a particular course of dealing or line of conduct generally adopted by persons engaged in a particular department of business life, or more fully as a particular course of dealing or line of conduct which has acquired such notoriety, that, where persons enter into contractual relationships in matters respecting the particular branch of business life where the usage is alleged to exist, those persons must be taken to have intended to follow that course of dealing or line of conduct, unless they have expressly or impliedly stipulated to the contrary.

49 I should mention that I have the greatest hesitation in saying that the only circumstances in which a legal obligation can arise out of a notorious business practice is when a contract results. The cases cited against implying terms in a contract have no relevance to negotiating practices. When the parties have reduced their understandings to writing, it is obviously the proper course for Courts to be extremely circumspect in adding to the bargain they have set down (see, for example, *Burns v. Kelly Peters & Associates Ltd.*, 41 C.C.L.T. 257, 16 B.C.L.R. (2d) 1, [1987] 6 W.W.R. 1, [1987] I.L.R. 1-2246, 41 D.L.R. (4th) 577 (C.A.), per Lambert J.A., at 601 [D.L.R.]; *Nelson v. Dahl* (1879), 12 Ch. D. 568, 28 W.R. 57 (C.A.), aff'd (1881), 6 App. Cas. 38, [1881-85] All E.R. Rep. 572, 29 W.R. 543 (H.L.); *Norwich Winterthur Insurance (Insurance) Ltd. v. Can. Stan. Industries of Australia Pty. Ltd.*, [1983] 1 N.S.W.C.R. 461 (C.A.). In any event, it is not, in my opinion, necessary to determine if the practice established by the evidence of LAC's executives and experts amounts to a legal usage. It is clear to me that the practice in the industry is so well known that at the very least Corona could reasonably expect LAC to abide by it. There is absolutely no substance to the submission of LAC that this practice is vague or uncertain. It is premised on the disclosure of confidential information in the context of serious negotiations. I do not find it necessary to define "serious", and will not interfere with the concurrent findings of the Courts below. The industry practice therefore, while not conclusive, is entitled to significant weight in determining the reasonable expectations of Corona, and for that matter of LAC regarding how the latter should behave.

Vulnerability

50 As I indicated below, vulnerability is not, in my view, a necessary ingredient in every fiduciary relationship. It will of course often be present, and when it is found it is an additional circumstance that must be considered in determining if the facts give rise to a fiduciary obligation. I agree with the proposition put forward by Wilson J. that when determining if new classes of relationship should be taken to give rise to fiduciary obligations then the vulnerability of the class of beneficiaries of the obligation is a relevant consideration. Wilson J. put it as follows in *Frame v. Smith*, at 137-138 [S.C.R.]:

> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands

> of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

However, as I indicated, this case does not require a new class of relationships to be identified, but requires instead an examination of the specific facts of this case.

51 The Oxford English Dictionary, 2nd ed., v. XIX, at 786, defines "vulnerable" as follows:

> that may be wounded; susceptible of receiving wounds or physical injury ... open to attack or injury of a non-physical nature; esp. offering an opening to the attacks of raillery, criticism, calumny, etc.

Persons are vulnerable if they are susceptible to harm, or open to injury. They are vulnerable at the hands of a fiduciary if the fiduciary is the one who can inflict that harm. It is clear, however, that fiduciary obligations can be breached without harm being inflicted on the beneficiary. *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, is the clearest example. In that case a fiduciary duty was breached even though the beneficiary suffered no harm and indeed could not have benefitted from the opportunity the fiduciary pursued. Beneficiaries of trusts, however, are a class that is susceptible to harm, and are therefore protected by the fiduciary regime. Not only is actual harm not necessary, susceptibility to harm will not be present in many cases. Each director of General Motors owes a fiduciary duty to that company, but one can seriously question whether General Motors is vulnerable to the actions of each and every director. Nonetheless, the fiduciary obligation is owed because, as a class, corporations are susceptible to harm from the actions of their directors.

52 I cannot therefore agree with my colleague, Sopinka J., that vulnerability or its absence will conclude the question of fiduciary obligation. As I indicated above, the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act or refrain from acting in a way contrary to the interests of that other. In any event, I would have thought it beyond argument that on the facts of this case Corona was vulnerable to LAC.

53 The argument to the contrary seems to be based on two propositions. First, Corona did not give up to LAC any power or discretion to affect its interests. Second, Corona could have protected itself by a confidentiality agreement, and the Court should not interfere if the parties could have, but did not in fact protect themselves. In my view there is no substance to either of these arguments.

54 The first is rebutted by the facts. LAC would not have acquired the property but for the information received from Corona. LAC in fact acquired the property. In doing so it affected Corona's interests. All power and discretion mean in this context is the ability to cause harm. Clearly that is present in this case. LAC acquired a power or ability to harm Corona by obtaining the Williams property. Corona gave it that power by giving up information about the property and about Corona's intentions. Having regard to the well-established practice in the mining industry, Corona would have had no expectation that LAC would use this information to the detriment of Corona.

55 This leads to the second point. This Court should not deny the existence of a fiduciary obligation simply because the parties could have by means of a confidentiality agreement regulated their affairs. That, it seems to me, is an unacceptable proposition, particularly on the facts of this case. The concurrent findings below are that Sheehan was aware the information he was receiving was confidential information and that it was being received in circumstances of confidence. It is clear that a claim for breach of confidence is then available if the information is misused. Why one would then go and enter into a confidentiality agreement simply confirming what each party knows escapes me. I cannot understand why a claim for breach of confidence is available absent a confidentiality agreement, but a claim for breach of fiduciary duty is not. The fact that the parties could have concluded a contract to cover the situation but did not in fact do so does not, in my opinion, determine that matter. Many claims

in tort could be avoided through more prudent negotiation of a contract, but courts do not deny tort liability; see Gautreau, supra, at 11; *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, 37 C.C.L.T. 117, 42 R.P.R. 161, 34 B.L.R. 187, 31 D.L.R. (4th) 481, 75 N.S.R. (2d) 109, 186 A.P.R. 109, 69 N.R. 321, [1986] R.R.A. 527, var'd [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv. The existence of an alternative procedure is only relevant in my mind if the parties would realistically have been expected to contemplate it as an alternative. It is useful here to once again refer to the evidence of LAC's experts. Dr. Robertson testified as follows:

> Q. Do large companies generally or typically make use of such agreements [confidentiality agreements]?
>
> A. *They are not common*. In the last five years they have become increasingly so. Even prospectors now ask large companies for confidentiality agreements.
>
> This whole process is data dissemination. They rarely have anything so highly confidential that a large company will trade away its right to do what it wants to do in return for, in essence, very little back.

[Emphasis added.] Dr. Derry testified to similar effect:

> Q. In 1981, in your view, how could Corona have protected itself if it both wanted to acquire more ground and it also wanted to allow the visit by Lac Minerals?
>
> A. *It would be unusual*, but I think it would have to ask the visitor to make some assurance, probably a written assurance, that he would not acquire ground or conflict with the interest of the owning company.

[Emphasis added.] The present litigation is, according to the evidence of Corona's witness Dr. Bragg, one of the reasons that confidentiality agreements are being used with increasing frequency. Where it is not established that the entering of confidentiality agreements is a common, usual or expected course of action, this Court should not presume such a procedure, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There is no reason to clutter normal business practice by requiring a contract.

56 In this case the vulnerability of Corona at LAC's hand is clearly demonstrated by the circumstances in which LAC acquired the Williams property. Even though the offer from Corona would have paid to Mrs. Williams $250,000 within 3 years plus a 3 per cent net smelter return, Mrs. Williams accepted the offer from LAC which paid only half that return. It is nothing short of fiction to suggest that vis-à-vis third parties or each other LAC and Corona stood on an equal footing. Corona was a junior mining company which needed to raise funds in order to finance the development of its property. This is why Corona welcomed the overture of LAC in the first place. LAC was a senior mining company that had the ability to provide those funds. Indeed LAC used this as a selling point to Mrs. Williams when it advised her that it was "an exploration and development company with four gold mines in production and had been in the mining and exploration business for decades".

57 I conclude therefore that Corona was vulnerable to LAC. The fact that these are commercial parties may be a factor in determining what the reasonable expectations of the parties are, and thus it may be a rare occasion that vulnerability is found between such parties. It is, however, shown to exist in this case and is a factor deserving of considerable weight in the identification of a fiduciary obligation.

Conclusion on Fiduciary Obligations

58 Taking these factors together, I am of the view that the Courts below did not err in finding that a fiduciary obligation existed and that it was breached. LAC urged this Court not to accept this finding, warning that imposing a fiduciary relationship in a case such as this would give rise to the greatest uncertainty in commercial law, and result in the determination of the rules of commercial conduct on the basis of ad hoc moral judgments rather than on the basis of established principles of commercial law.

59 I cannot accept either of these submissions. Certainty in commercial law is, no doubt, an important value, but it is not the only value. As Mr. Justice Grange has noted ("Good Faith in Commercial Transactions" (1985), *L.S.U.C. Special Lectures* 69), at 70:

> There are many limitations on the freedom of contract both in the common law and by statute. Every one of them carries within itself the seeds of debate as to its meaning or at least its applicability to a particular set of facts.

In any event, it is difficult to see how giving legal recognition to the parties' expectations will throw commercial law into turmoil.

60 Commercial relationships will more rarely involve fiduciary obligations. That is not because they are immune from them, but because in most cases, they would not be appropriately imposed. I agree with this comment of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.*, supra, at 455:

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

61 A fiduciary relationship is not precluded by the fact that the parties were involved in pre-contractual negotiations. That was made clear in the *United Dominions Corp.* case, supra, where the majority held, at 680 [A.L.J.R.], that:

> A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them.

The fact that the relationship between the parties in that case was more advanced than in the case at bar does not affect the value of the conclusion. See also *Fraser Edmunston Pty. Ltd. v. A.G.T. (Qld) Pty. Ltd.* (1986), Queensland S.C. 17. It is a question to be determined on the facts whether the parties have reached a stage in their relationship where their expectations should be protected. In this case the facts support the existence of a fiduciary obligation not to act to the detriment of Corona's interest by acquiring the Williams property by using confidential information acquired during the negotiation process.

62 The argument on morality is similarly misplaced. It is simply not the case that business and accepted morality are mutually exclusive domains. Indeed, the Court of Appeal, after holding that to find a fiduciary relationship here made no broad addition to the law, a view I take to be correct, noted that the practice established by the evidence to support the obligation was consistent with "business morality and with encouraging and enabling joint development of the natural resources of the country". This is not new. Texts from as early as 1903 refer to the obligation of "good faith by partners in their dealings with each other extend[ing] to negotiations culminating in the partnership, although in advance of its actual creation" (C.H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands*, 2nd ed. (Salem: Ayer Pub. Co., 1983). In my view, no distinction should be drawn here between negotiations culminating in a partnership or a joint venture.

Remedy

63 The appropriate remedy in this case can not be divorced from the findings of fact made by the Courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of LAC in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both Courts below awarded the Williams property to Corona on payment to LAC of the value to Corona of the improvements LAC had made to the property. The trial Judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

64 The issue then is this. If it is established that one party (here LAC) has been enriched by the acquisition of an asset, the Williams property, that would have, but for the actions of that party been acquired by the plaintiff, (here Corona), and if the

acquisition of that asset amounts to a breach of duty to the plaintiff, here either a breach of fiduciary obligation or a breach of a duty of confidence, what remedy is available to the party deprived of the benefit? In my view the constructive trust is one available remedy, and in this case it is the only appropriate remedy.

65 In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by LAC, Corona would have acquired the property. In *Air Canada v. B.C.*, [1989] 1 S.C.R. 1161, [1989] 4 W.W.R. 97, 36 B.C.L.R. (2d) 145, 95 N.R. 1, 59 D.L.R. (4th) 161, 2 T.C.T. 4178, [1989] 1 T.S.T. 2126, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession *or would have accrued for his benefit*, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." In my view the fact that Corona never owned the property should not preclude it from pursuing a restitutionary claim: see Birks, *An Introduction to the Law of Restitution* (New York: Oxford U. Press, 1985), at 133-39. LAC has therefore been enriched at the expense of Corona.

66 That enrichment is also unjust, or unjustified, so that the plaintiff is entitled to a remedy. There is, in the words of Dickson J. in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, "an absence of any juristic reason for the enrichment". The determination that the enrichment is "unjust" does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the Courts will grant relief. Restitution is a distinct body of law governed by its own developing system of rules. Breaches of fiduciary duties and breaches of confidence are both wrongs for which restitutionary relief is often appropriate. It is not every case of such a breach of duty, however, that will attract recovery based on the gain of the defendant at the plaintiff's expense. Indeed this has long been recognized by the courts. In *Re Coomber*, [1911] 1 Ch. 723 at 728-29, (C.A.), Fletcher Moulton L.J. said:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. *There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them*.

[Emphasis added.]

67 In breach of confidence cases as well, there is considerable flexibility in remedy. Injunctions preventing the continued use of the confidential information are commonly awarded. Obviously that remedy would be of no use in this case where the total benefit accrues to the defendant through a single misuse of information. An account of profits is also often available. Indeed in both Courts below an account of profits to the date of transfer of the mine was awarded. Usually an accounting is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense. Occasionally, as in this case, the measures coincide. In a case quite relevant here, this Court unanimously imposed a constructive trust over property obtained from the misuse of confidential information: *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557. More recently, a compensatory remedy has been introduced into the law of confidential relations. Thus in *Seager v. Copydex Ltd.*, [1969] 2 All E.R. 718, [1969] 1 W.L.R. 809 (C.A.), an inquiry was directed concerning the market value of the information between a willing buyer and a willing seller. The defendant had unconsciously plagiarized the plaintiff's design. In those circumstances it would obviously have been unjust to exclude the defendant from the market when there was room for more than one participant.

68 I noted earlier that the jurisdictional base for the law of confidence is a matter of some dispute. In the case at bar however, it is not suggested that either the contractual or property origins of the doctrine can be used to found the remedy. Thus while there can be considerable remedial flexibility for such claims, it was not argued that the Court may not have jurisdiction to award damages as compensation and not merely in lieu of an injunction in the exercise of its equitable jurisdiction, and since I am of the view that a constructive trust is in any event the appropriate remedy, I need not consider the question of jurisdiction further.

69 In view of this remedial flexibility, detailed consideration must be given to the reasons a remedy measured by LAC's gain at Corona's expense is more appropriate than a remedy compensating the plaintiff for the loss suffered. In this case, the Court of Appeal found that if compensatory damages were to be awarded, those damages in fact equalled the value of the property. This was premised on the finding that but for LAC's breach, Corona would have acquired the property. Neither at this point nor any other did either of the Courts below find Corona would only acquire one half or less of the Williams property. While I agree that, if they could in fact be adequately assessed, compensation and restitution in this case would be equivalent measures, even if they would not, a restitutionary measure would be appropriate.

70 The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions. Likewise with the protection of confidences. In the modern world the exchange of confidential information is both necessary and expected. Evidence of an accepted business morality in the mining industry was given by the defendant, and the Court of Appeal found that the practice was not only reasonable, but that it would foster the exploration and development of our natural resources. The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties. The approach taken by my colleague, Sopinka J., would, in my view, have the effect not of encouraging bargaining in good faith, but of encouraging the contrary. If by breaching an obligation of confidence one party is able to acquire an asset entirely for itself, at a risk of only having to compensate the other for what the other would have received if a formal relationship between them were concluded, the former would be given a strong incentive to breach the obligation and acquire the asset. In the present case, it is true that had negotiations been concluded, LAC could also have acquired an interest in the Corona land, but that is only an expectation and not a certainty. Had Corona acquired the Williams property, as they would have but for LAC's breach, it seems probable that negotiations with LAC would have resulted in a concluded agreement. However, if LAC, during the negotiations, breached a duty of confidence owed to Corona, it seems certain that Corona would have broken off negotiations and LAC would be left with nothing. In such circumstances, many business people, weighing the risks, would breach the obligation and acquire the asset. This does nothing for the preservation of the institution of good faith bargaining or relationships of trust and confidence. The imposition of a remedy which restores an asset to the party who would have acquired it but for a breach of fiduciary duties or duties of confidence acts as a deterrent to the breach of duty and strengthens the social fabric those duties are imposed to protect. The elements of a claim in unjust enrichment having been made out, I have found no reason why the imposition of a restitutionary remedy should not be granted.

71 This Court has recently had occasion to address the circumstances in which a constructive trust will be imposed in *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, 35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385, 92 N.R. 1, 57 D.L.R. (4th) 321. There, the Chief Justice discussed the development of the constructive trust over 200 years from its original use in the context of fiduciary relationships, through to *Pettkus v. Becker*, supra, where the Court moved to the modern approach with the constructive trust as a remedy for unjust enrichment. He identified that *Pettkus v. Becker*, supra, set out a two-step approach. First, the Court determines whether a claim for unjust enrichment is established, and then, secondly, examines whether in the circumstances a constructive trust is the appropriate remedy to redress that unjust enrichment. In *Hunter v. Syncrude*, a constructive trust was refused, not on the basis that it would not have been available between the parties (though in my view it may not have been appropriate), but rather on the basis that the claim for unjust enrichment had not been made out, so no remedial question arose.

72 In the case at hand, the restitutionary claim has been made out. The Court can award either a proprietary remedy, namely that LAC hand over the Williams property, or award a personal remedy, namely a monetary award. While, as the Chief Justice observed, "the principle of unjust enrichment lies at the heart of the constructive trust": see *Pettkus v. Becker*, at 847 [S.C.R.], the converse is not true. The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and

will only be imposed in appropriate circumstances. Where it could be more appropriate than in the present case, however, it is difficult to imagine.

73 The trial Judge assessed damages in this case at $700,000,000 in the event that the order that LAC deliver up the property was not upheld on appeal. In doing so he had to assess the damages in the face of evidence that the Williams property would be valued by the market at up to 1.95 billion dollars. Before us there is a cross-appeal that damages be reassessed at $1.5 billion. The trial Judge found that no one could predict future gold prices, exchange rates or inflation with any certainty, or even on the balance of probabilities. Likewise he noted that the property had not been fully explored and that further reserves may be found. The Court of Appeal made the following comment, at 651 [D.L.R.], with which I am in entire agreement:

> there is no question but that gold properties of significance are unique and rare. There are almost insurmountable difficulties in assessing the value of such a property in the open market. The actual damage which has been sustained by Corona is virtually impossible to determine with any degree of accuracy. The profitability of the mine, and accordingly its value, will depend on the ore reserves of the mine, the future price of gold from time to time, which in turn depends on the rate of exchange between the U.S. dollar and Canadian dollar, inflationary trends, together with myriad other matters, all of which are virtually impossible to predict.

To award only a monetary remedy in such circumstances when an alternative remedy is both available and appropriate would in my view be unfair and unjust.

74 There is no unanimous agreement on the circumstances in which a constructive trust will be imposed. Some guidelines can, however, be suggested. First, no special relationship between the parties is necessary. I agree with this comment of Wilson J. in *Hunter v. Syncrude*, supra, at 213 [B.C.L.R.]:

> Although both *Pettkus v. Becker* and *Sorochan v. Sorochan* were 'family' cases, unjust enrichment giving rise to a constructive trust is by no means confined to such cases: see *Deglman v. Guaranty Trust Co.*, [1954] S.C.R. 725. Indeed, to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles.

As I noted earlier, the constructive trust was refused in *Hunter v. Syncrude*, not because the parties did not stand in any special relationship to one another, but because the claim for unjust enrichment was not made out. Similarly, in *Pre-Cam Exploration*, supra, it cannot be said that the parties stood in a "special relationship" to one another, but a constructive trust was nonetheless awarded. In *Chase Manhattan*, supra, a constructive trust was imposed, but to describe the banks as standing in a special relationship one to the other would be as much of a fiction as describing them as fiduciaries. Insistence on a special relationship would undoubtedly lead to that same sort of reasoning from conclusions. Courts, coming to the conclusion that a proprietary remedy is the only appropriate result will be forced to manufacture "special relationships" out of thin air, so as to justify their conclusions. In my view that result can and should be avoided.

75 Secondly, it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role. Thus, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognize and create a right of property. When a constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable which the Court is doing. Goff and Jones, *The Law of Restitution*, 3rd ed. (London: Sweet & Maxwell, 1986), at 78, take the position that:

> the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over such assets.
>
> It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted; the extent of that claim is a different matter, which should be dependent upon the defendant's knowledge of the true facts. There are certain claims which must always be personal. Such are claims for services rendered under an ineffective contract; the plaintiff is then in no different position from any unsecured creditor. In contrast there are

> other claims, for example, those arising from payment made under mistake, compulsion or another's wrongful act, where a restitutionary proprietary claim should presumptively be granted, although the court should always retain a discretion whether to do so or not.

76 In their view, a proprietary claim should be granted when it is just to grant the plaintiff the additional benefits that flow from the recognition of a right of property. It is not the recognition of a right of property that leads to a constructive trust. It is not necessary, therefore, to determine whether confidential information is property, though a finding that it was would only strengthen the conclusion that a constructive trust is appropriate. This is the view of Fridman and McLeod, *Restitution* (Toronto: Carswell, 1982), at 539, where they say:

> there appears to be no doubt that a fiduciary who has consciously made use of confidential information for private gain will be forced to account for the entire profits by holding such profits made from the use of the confidential information on a constructive trust for the beneficiary-estate. The proprietary remedy flows naturally from the conclusion that the information itself belonged to the beneficiary and there has been no transaction effective to divest his rights over the property.

77 I do not countenance the view that a proprietary remedy can be imposed whenever it is "just" to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to "some mix of judicial discretion ... subjective views about which party 'ought to win' ..., and 'the formless void of individual moral opinion'", per Deane J. in *Muschinski v. Dodds* (1985), 160 C.L.R. 583 at 616. As Deane J. further noted at 616:

> Long before Lord Seldon's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other.

78 Much of the difficulty disappears if it is recognized that in this context the issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy. Thus, in *Hunter*, supra, had the restitutionary claim been made out, there would have been no reason to award a constructive trust, as the plaintiff's claim could have been satisfied simply by a personal monetary award; a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property. Among the most important of these will be that it is appropriate that the plaintiff receive the priority accorded to the holder of a right of property in a bankruptcy. More important in this case is the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer. Here as well it is justified to grant a right of property since the concurrent findings below are that the defendant intercepted the plaintiff and thereby frustrated its efforts to obtain a specific and unique property that the Courts below held would otherwise have been acquired. The recognition of a constructive trust simply redirects the title of the Williams property to its original course. The moral quality of the defendants' act may also be another consideration in determining whether a proprietary remedy is appropriate. Allowing the defendant to retain a specific asset when it was obtained through conscious wrongdoing may so offend a court that it would deny to the defendant the right to retain the property. This situation will be more rare, since the focus of the inquiry should be upon the reasons for recognizing a right of property in the plaintiff, not on the reasons for denying it to the defendant.

79 Having specific regard to the uniqueness of the Williams property, to the fact that but for LAC's breaches of duty Corona would have acquired it, and recognizing the virtual impossibility of accurately valuing the property, I am of the view that it is appropriate to award Corona a constructive trust over that land.

80 Before turning to the cross-appeal, I must make brief reference to the relevance of the fact that Corona entered an arrangement with Teck under which the latter not only obtained an interest in the Corona property, but also an interest in the

result of this lawsuit. Since I view this case as one where a restitutionary claim has been made out, the position of Teck is irrelevant. The focus must be on the enrichment LAC received at Corona's expense. That enrichment was found as a fact to be the Williams property. Subsequent to acquiring it, Corona would likely have entered a joint venture agreement with LAC. LAC has no one to blame but itself for that joint venture not coming about. Only because of LAC's breach of duty did the arrangement with Teck result. The fact that it is not proved that Teck demanded a share of the litigation as the price for joining with Corona is irrelevant. It cannot be said that such an agreement was unreasonable in the circumstances. Given LAC's breach of duty to Corona, and Corona's awareness of that breach, there is no way that LAC would ever have acquired an interest in the Williams property. Corona was entitled to cease negotiating with LAC and pursue other opportunities.

81 If, however, this case is viewed as my colleague Sopinka J. views it, as a case of compensation, then the position of Teck is relevant. Corona had to enter into an agreement with someone. Corona contemplated eventually owning approximately a one-half interest in the developed properties. To award only an estimated value of a one-half interest in the property when that half will be further subdivided is, in essence, to award Corona only a one-quarter interest in the Williams property. As I am of the view that damages are not an appropriate award, I need not discuss this matter further.

The Cross-Appeal

82 I can deal shortly with the cross-appeal. LAC has been enriched at the expense of Corona by acquiring the Williams property. Having acquired that property in breach of a duty of confidence and in breach of a fiduciary obligation, that enrichment is unjustified. Likewise, however, Corona will receive an enrichment when LAC hands over the property, in the amount of the value of the improvement of the land to Corona. That value is equal to what would have been spent by Corona to develop both properties, less what Corona in fact spent. The trial Judge made a $50,000,000 downward adjustment to the amount LAC spent, directing a reference to determine the exact amount in the event the parties disputed the adjustment. I would affirm that award. The three elements of a claim for restitution are made out, namely there is an enrichment (the mine), that enrichment accrued to Corona at LAC's expense, and the enrichment is unjustified. The enrichment is not justified since, on the assumption that Corona had acquired the Williams property, it would of necessity have had to expend funds to develop the mine. In these circumstances, LAC is entitled to a restitutionary remedy, namely a lien on the Williams property to the extent that Corona was saved a necessary expenditure.

83 In view of this conclusion it becomes unnecessary to address the contingent cross-appeal by which Corona asked that damages be reassessed at $1.5 billion. I would dismiss the appeal with costs and dismiss the cross-appeal with costs.

***Lamer J.* (concurring in part):**

84 I have read the judgments of my colleagues, La Forest J. and Sopinka J. I am in agreement with my brother Sopinka J. and for the reasons set out in his judgment that the evidence does not establish in this case the existence of a fiduciary relationship.

85 I am in agreement with both of my colleagues, and concur in their reasons in support thereof, that there was a breach of confidence on the part of LAC Minerals Ltd.

86 As regards the appropriate remedy, I am of the view that the approach taken by La Forest J. is the proper one.

87 I would accordingly dismiss the appeal with costs and dismiss the cross-appeal with costs.

***Wilson J.* (concurring in part):**

88 I have had the advantage of reading the reasons of my colleagues, Mr. Justice Sopinka and Mr. Justice La Forest and I agree with my colleague, Mr. Justice La Forest, as to the appropriate remedy in this case. I propose to comment briefly on the three issues before the Court on this appeal as identified by them:

(1) Fiduciary Duty

89 It is my view that, while no ongoing fiduciary *relationship* arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary *duty* arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of vulnerability to LAC's misuse of that information. At that point LAC came under a duty not to use that information for its own exclusive benefit. LAC breached that fiduciary duty by acquiring the Williams property for itself.

90 It is, in other words, my view of the law that there are certain relationships which are almost per se fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to LAC confidential information concerning the Williams property. LAC became at that point subject to a fiduciary duty *with respect to that information* not to use it for its own use or benefit.

(2) Breach of Confidence

91 I agree with my colleagues that LAC's conduct may also be characterized as a breach of confidence *at common law* with respect to the information concerning the Williams property. The breach again consisted of LAC's acquisition of the Williams property for itself, such property being the subject of the confidence.

(3) The Remedy

92 It seems to me that when the same conduct gives rise to alternate causes of action, one at common law and the other in equity, *and the available remedies are different*, the Court should consider which will provide the more appropriate remedy to the innocent party and give the innocent party the benefit of that remedy. Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on LAC in favour of Corona with respect to the property. Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most surely be achieved in this case through the award of an in rem remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.

93 It is, however, my view that this is not a case in which the available remedies are different. I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability. It would be strange indeed if the law accorded them widely disparate remedies. In his article on "The Role of Proprietary Relief in the Modern Law of Restitution", John D. McCamus, Cambridge Lecture 1987, 141 at 150, Professor McCamus poses the rhetorical question:

> Would it not be anomalous to allow more sophisticated forms of relief for breach of fiduciary duty than for those forms of wrongdoing recognized by the law of torts, some of which, at least, would commonly be more offensive from the point of view of either public policy or our moral sensibilities than some breaches of fiduciary duty?

94 I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the in rem remedy is appropriate to either cause of action.

95 I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs.

Sopinka J. **(dissenting — concurred in part by *McIntyre* and *Wilson JJ.*):**

96 This appeal and cross-appeal raise important issues relating to fiduciary duty and breach of confidence. In particular, they require this Court to consider whether fiduciary obligations can arise in the context of abortive arm's-length negotiations between parties to a prospective commercial transaction. Also at issue are the nature of confidential information and the appropriate remedy for its misuse.

The Facts

97 The facts are fully developed in the reasons for judgment of the trial Judge, Holland J., (1986) 53 O.R. (2d) 737, and in the judgment of the Ontario Court of Appeal, (1987) 62 O.R. (2d) 1. My recital of them, here, will therefore be skeletal in nature. From time to time in these reasons, some of the facts relating to specific issues will be examined in greater detail.

98 The parties to these proceedings are International Corona Resources Ltd. (which I will refer to as either "Corona" or the "respondent") and LAC Minerals Ltd. (which I will refer to as either "LAC" or the "appellant"). Corona, which was incorporated in 1979, was at material times a junior mining company listed on the Vancouver Stock Exchange. LAC is a senior mining company which owns a number of operating mines and is listed on several stock exchanges. This action arises out of negotiations between Corona and LAC relating to the Corona property, the Williams property and the Hughes property, all of which are located in the Hemlo area of northern Ontario.

99 The Corona property consists of 17 claims with an area of approximately 680 acres. The Williams property consists of 11 patented claims, covering a total of about 400 acres, and is contiguous to the Corona property and to the west. The Hughes property consists of approximately 156 claims and surrounds both the Corona and Williams properties, except to the north of the Williams property. It is now in the names of Golden Sceptre Resources Ltd., Goliath Gold Mines Ltd. and Noranda Exploration Co.

100 In October 1980, Corona had retained Mr. David Bell, a geologist consultant to carry out an extensive exploration program on its property which involved extensive diamond drilling. Bell hired Mr. John Dadds, a mining technician, to assist him. The core that was obtained from the drilling was identified, logged and then stored inside a core shack built on the Corona property. Assay results were sent to Bell and to the Corona office in Vancouver. Some of the results were communicated to the Vancouver Stock Exchange in the form of news releases and assay results, and were published from time to time in the George Cross Newsletter, a daily newsletter published in Vancouver.

101 The results of this exploratory work led Bell to an interesting theory. The trial Judge describes it in some detail:

> Mr. Bell testified that by February, 1981, he was sufficiently encouraged by the results of the drilling programme that he decided that it was time to acquire the Williams property and the claims to the north. Mr. Bell stated that within the first month of drilling his opinion of the geology changed from what he initially thought was a secondary intrusive model, from reading the literature of the area, to a syngenetic deposit, that is a deposit formed at the same time and by the same process as the enclosing rocks. He concluded that the mineralization and gold values were not tied into a vein but rather that the mineralization was in a zone, or beds, of megasediment that indicated a volcanic origin. In Mr. Bell's opinion, in all likelihood, the distribution of gold could be spread over quite a large area and there could be pools or puddles of ore, indicating to him that the exploration programme should be extended along the zone to adjoining properties.

102 This increased the interest in surrounding properties and Bell, on behalf of Corona, requested Mr. Donald McKinnon, a prospector who was familiar with the properties, to attempt to acquire the Williams property. Representatives of LAC read about these results in the March 20, 1981 George Cross Newsletter and arranged to visit the Corona property. This property visit took place on May 6, and Bell had arranged for Dadds to have core, assay results, sections, maps and a drill plan available at the core shack. Those present at the meeting consisted of Nell Dragovan, then president of Corona, and Messrs. Bell, Dadds, Sheehan (vice-president for exploration of LAC), and Pegg (a LAC geologist). The visitors were shown cores, sections, logs with assay results added and a map showing the staking in the area. Bell discussed progress to date, plans for the future and

his theory of the geology. Sheehan and Pegg both examined the cores and, after the meeting in the core shack, which Bell said lasted about 45 minutes, they went outside. Bell took a map and explained where the earlier drilling had taken place as well as the location of future holes, and discussed the geology further. He also indicated that the formation was continuing to the west on the Williams property and that Corona wanted to continue its exploration there. Outcrops in the area were also inspected. Bell said that before he left, Sheehan told him that he "wanted me to drop into Toronto when I was there and to further the discussions of their visit and talk about possible terms". A meeting was arranged for May 8 in Toronto at LAC's head office.

103 Holland J. found as a fact that there were no discussions regarding confidentiality during the May 6 property visit except in connection with an unrelated matter.

104 Following the site visit, Sheehan and Pegg returned quickly to LAC's exploration office in Toronto and instructed LAC personnel to gather information on the Hemlo area from the LAC library of files. They then went to the assessment office of the Ontario department of mines to obtain copies of all claim maps, reports, publications and assessment work files that were available on the area. Sheehan told a LAC geologist to ascertain what claims would be necessary to cover the favourable belt to the east of the Corona property. The geologist decided that about 600 claims should be staked and immediately thereafter, on May 8, LAC began staking what are now known as the White River claims.

105 On May 8, Bell and Sheehan met and discussed the geology of the area, its similarity to the Bousquet area of Quebec, at which both Pegg and Sheehan had worked, and the possible terms of an agreement between Corona and LAC. Sheehan told Bell of LAC's staking to the east. Bell said that the two men discussed the properties around the Corona property. Corona's interest in the Williams and Hughes properties was mentioned and Sheehan gave Bell advice on how to pursue a patented claim. Bell told Sheehan that Corona had somebody doing that, without mentioning McKinnon by name. A number of avenues for progress were discussed and Sheehan said that he would send a letter outlining the terms that were discussed. Again, nothing was said regarding confidentiality.

106 On May 19, Sheehan wrote to Bell as follows:

> Further to our meeting in Toronto I would like to give you this letter as further evidence of our sincerity in joining with Corona re exploration in the Hemlo area.
>
> As we discussed there are a number of avenues that could be explored regarding a working arrangement re the property and to that end I will list the various possibilities:
>
> (a) Corona could have our Company do a financing and ultimately we would scale it forward so as to control Corona.
>
> (b) We form a joint venture where Long Lac [a Lac subsidiary] spends say 1.5 to 2.0 times amount spent by Corona for a 60% interest. Beyond that point we spend on a 60-40 basis or use a dilution formula down to a minimum should one party decide to stop contributing. In addition Lac would have to spend a definite amount of money to reach a threshold before they would acquire any interest.
>
> (c) A possible significant cash payment with a variation in interests as a result of the amount of cash payment. Followed by a Lac work proposal.
>
> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.
>
> I believe at some point within the next few weeks we should have an understanding that Corona and Lac should seriously examine an avenue for continual work in the area. Perhaps you could give our management a presentation of results to date i.e., sections, general geology, longitudinal presentation — location potential etc. Based on foregoing we could then arrive at a sound basis for structuring a working agreement.

107 The trial Judge found that the reference to the Hughes ground was intended to include the Williams property as well. Bell replied by letter dated May 22 as follows:

> I am in receipt of your letter dated May 19, 1981 regarding the Hemlo Property.
>
> First may I thank you for your fine hospitality during my brief visit to Toronto.
>
> I am forwarding a copy of your proposal to Vancouver for the other directors to review. We are presently well into our Phase II, exploring and extending the previous examined parameters outlined in Phase I. Our present plans are to complete 30,000 to 35,000 feet of diamond drilling at which time a general over-all review will take place.
>
> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.
>
> In the mean time I do believe we should keep in touch and maintain the fine relationship presently established.

108 Bell wrote to Dragovan by letter dated May 23 which stated, in part, the following:

> Enclosed is a copy of a letter received from Long Lac Minerals Exploration Limited, also please find a copy of my letter to Lac in reply. This letter from Lac should be discussed with all directors.

109 On May 27, Corona released to the Vancouver Stock Exchange encouraging assay results of a drill hole, which the trial Judge referred to as the "discovery hole". These results were published in the George Cross Newsletter of May 29, and further results confirming an extension of the "discovery hole" were released on June 4 and published in the George Cross Newsletter of June 8.

110 Subsequently, the results of further drill holes that were encouraging were published by Corona. On June 8, Mr. Murray Pezim, a stock promoter from Vancouver, became a director of Corona. Pezim arranged for Bell to make a presentation in Vancouver on behalf of Corona to a large number of brokers. Some of the information developed by Bell was imparted to those present at this meeting.

111 On June 15 a meeting was also arranged for June 30 at LAC's head office in Toronto, at which Bell was to make a presentation in accordance with Sheehan's letter of May 19. Following the meeting, sections, a detailed drill plan and apparently a vertically longitudinal section were left with LAC. Mr. Peter Allen, the president of LAC, advised Bell to be aggressive in his pursuit of the Williams property and Bell responded that Corona had somebody pursuing this property on their behalf. Allen told Sheehan to get a proposal out to Corona and Sheehan indicated that he would have such a proposal out within 3 weeks.

112 According to Bell, no one from LAC ever told him that they would not acquire the Williams property and LAC was never told that the information given to it was private, privileged or confidential. Although the evidence was contradictory, the trial Judge found as a fact that the pursuit by Corona of the Williams property was mentioned at the meeting. This and other information revealed to LAC went beyond the information that had been made public. This finding was confirmed by the Court of Appeal. The trial Judge also found that it was agreed that a proposal would be sent by LAC to Corona within 3 weeks, and that the purpose of the meeting was to discuss a possible deal between Corona and LAC in order to provide Corona with the financing needed to develop a mine.

113 Meanwhile, on June 8, McKinnon had spoken to Mrs. Williams by telephone and made an oral offer for the Williams property, which was followed by a written offer prepared by solicitors. On July 3, after some searching, Sheehan located Mrs. Williams by telephone and made an oral offer to her. She asked for a written offer and by letter dated July 6, 1981, LAC's legal counsel put it in writing.

114 On July 21, McKinnon again spoke to Mrs. Williams who told him that she had another offer and that he should contact her Toronto solicitor. On July 22, McKinnon told Bell of the other offer and it was agreed by Bell and Dragovan that Corona

should make an offer to Williams directly. At this time, no one from Corona knew that the other offer was from LAC. On July 23, Corona's solicitor prepared an offer, which was delivered on July 27. Also on July 23, Mrs. Williams' Toronto solicitor disclosed LAC's name to Corona's solicitor. LAC's offer was accepted on July 28 and a formal agreement was signed on August 25, 1981.

115 After hearing that the LAC offer had been accepted, Pezim turned the matter over to his solicitors. On August 18, 1981, Sheehan went to Vancouver to attempt to resume negotiations with Pezim, who asked for the return of the Williams property. No agreement was reached. Later, Mr. Donald Moore, another director of Corona attempted to revive negotiations with Sheehan, without success.

116 After the Corona — LAC relationship had come to an end, Corona concluded an agreement with Teck Corp. (hereinafter referred to as "Teck") dated December 10, 1981, which was subsequently amended by agreements dated August 13, 1982 and December 14, 1983. These agreements, while providing for a joint venture in connection with the possible development of a mine on the Corona property, also purport to give Teck a 50 per cent interest in the fruits of Corona's lawsuit against LAC, with Teck agreeing to pay certain costs.

The Judgments Below

Ontario High Court

117 The trial Judge considered the liability of LAC under three heads pleaded by Corona: contract, breach of confidence and breach of fiduciary duty. Holland J. concluded that no binding contract was entered into by the parties but found LAC liable under the other two heads of liability, breach of confidence and breach of fiduciary duty. He decided that the appropriate remedy for breach of fiduciary duty was the return of the Williams property to Corona but allowed LAC's claim for a lien for the cost of improvements, and the amounts paid to Williams excluding royalty payments. The actual amount spent by LAC on developing the property was $203,978,000 but this was discounted by $50,000,000 to take into account the fact that if Corona had not been deprived of the Williams property, it would have developed the property and the Williams property as one mine, thereby achieving a saving represented by the discount. Either party was entitled to undertake a reference to determine the amount by which the Williams property was enhanced by virtue of LAC's expenditure if dissatisfied with the trial Judge's estimate of the discount of $50,000,000. LAC was ordered to transfer the property to Corona upon payment by Corona to LAC of these amounts.

118 A reference was also ordered to determine the amount of the profits obtained by LAC from the Williams property. LAC was ordered to pay the amount of such profits to Corona with interest.

119 With the agreement of counsel, damages were assessed in the event that, on appeal, a court should decide that damages were the appropriate remedy. The assessment was made on the principles applicable to breach of fiduciary duty. The amount was $700,000,000 being the value of the mine as of January 1, 1986 on the basis of a discounted cash flow approach.

Court of Appeal

120 The Court of Appeal affirmed the findings of the trial Judge with respect to breach of confidence and fiduciary duty. It also confirmed the remedy with the addition of its opinion that a constructive trust was an appropriate remedy for both the breach of confidence and fiduciary duty. The Court did not deal with the appellant's attack on the assessment of damages. In the result, the appeal was dismissed with costs. I will deal more fully with the reasons of both the trial Judge and the Court of Appeal when discussing the issues.

The Issues Before This Court

121 The issues raised in this appeal can be conveniently grouped under three headings:

(1) Fiduciary Duty

122 Did a fiduciary relationship exist between Corona and LAC which was breached by LAC's acquisition of the Williams property?

(2) Breach of Confidence

123 Did LAC misuse confidential information obtained by it from Corona and thereby deprive Corona of the Williams property?

(3) Remedy

124 What is the appropriate remedy if the answer to (1) or (2) is in the affirmative?

(1) Did a Fiduciary Relationship Arise between LAC and Corona?

125 The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in *Equity and Commercial Relationships*, ed., P.D. Finn, The Law Book Company, 1987, explains why:

> It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

It was submitted that the departure of the Courts below from this salutary rule has resulted in a plethora of claims that would impose fiduciary relationships in a commercial-type setting. Writing in *The Advocates' Society Journal*, Aug. 1988, Colin L. Campbell supports this point of view. He states at 44:

> The *Lac-Corona* decision, together with the decision in *Standard Investments v. Canadian Imperial Bank of Commerce* determining that a banker could be held to a fiduciary duty when he revealed information obtained in confidence, has given rise to a plethora of claims to impose fiduciary obligations where the parties' relationship has been formalized by a contract. In addition to the above principles, such obligations have been imposed on bankers, lawyers, stockbrokers, accountants, and others.

126 In *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, Dawson J. continued, at 493-94:

> The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in *Weinberger v. Kendrick* (1892) 34 Fed Rules Serv (2d) 450. And in *Barnes v. Addy* (1874) 9 Ch App 244 at 251, Lord Selborne LC said: 'It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them.'

127 In our own Court, in *Guerin v. R.*, [1984] 2 S.C.R. 335, at 384, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 Dickson J. (as he then was) referred to a passage from Professor Weinrib's article, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at 4, wherein the fiduciary obligation is described as "the law's blunt tool". In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

128 While equity has refused to tie its hands by defining with precision when a fiduciary relationship will arise, certain basic principles must be taken into account. There are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like. The categories of

relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation. As pointed out by Dickson J. in *Guerin v. R.*, supra, p. 384 [S.C.R.]:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

129 The nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional circumstances it is not. See J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1986), at 21-22. Furthermore, not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature. Southin J., in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), observed that the obligation of a solicitor to use care and skill is the same obligation as that of any person who undertakes to carry out a task for reward. Failure to do so does not necessarily result in a breach of fiduciary duty but simply a breach of contract or negligence. She issued this strong caveat against the overuse of claim for breach of fiduciary duty (at 362):

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the Latin 'fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

130 When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice. Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the Court consider: what are the essential ingredients of a fiduciary relationship and are they present? While no ironclad formula supplies the answer to this question, certain common characteristics are so frequently present in relationships that have been held to be fiduciary that they serve as a rough and ready guide. I agree with the enumeration of these features made by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 78 N.R. 40, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 . The majority, although disagreeing in the result, did not disapprove of the following statement, at 135-136:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts arising from the case-law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, *A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts*, (3rd ed. 1955); Ernest J. Weinrib, 'The Fiduciary Obligation' (1975), 25 U.T.L.J. 1; Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968), 84 *L.Q.R.* 472; George W. Keeton and L.A. Sheridan, *Equity* (1969), at pp. 336-52; Shepherd, *supra*, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

131 It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.

132 The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson J. in *Hospital Products v. United States Surgical Corp.*, supra, at 488, that:

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.

133 The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin*, supra, that [at 384, S.C.R.]:

> [T]he Hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion.

To the same effect is the discussion by Professor D.S.K. Ong in "Fiduciaries: Identification and Remedies" (1986), 8 Univ. of Tasmania Law Rev. 311, in which he suggests that the element which gives rise to and is common to all fiduciary relationships is the "implicit dependency by the beneficiary on the fiduciary". This condition of dependency moves equity to subject the fiduciary to its strict standards of conduct.

134 Two caveats must be issued. First, the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In *Tito v. Waddell (No. 2)*, [1977] Ch. 106 at 230, [1977] 3 All E.R. 129 Megarry V-C said:

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

135 Second, applying the same principle, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty.

136 In my opinion, both the trial Judge and the Court of Appeal erred in coming to the conclusion that a fiduciary relationship existed between Corona and LAC. In my respectful opinion, both the trial Judge and the Court of Appeal erred by not giving sufficient weight to the essential ingredient of dependency or vulnerability and too much weight to other factors. The latter are as follows:

(a) that the state of the negotiations attracted the principle in *United Dominions Corp. Ltd. v. Brian Pty. Ltd.* (1985), 60 A.L.R. 741, 59 A.L.J.R. 676 (Aust. H.C.);

(b) that LAC had sought out Corona;

(c) that the geochemical program constituted an embarkation on a joint venture;

(d) that Corona had divulged confidential information to LAC;

(e) that a practice in the mining industry supported the existence of a fiduciary relationship;

(f) that the parties were negotiating towards a common object.

The United Dominions Case

137 This is a decision of the High Court of Australia involving a joint venture between three parties, United Dominion Corp. (UDC), Security Projects Ltd. (SPL) and Brian Pty Ltd. (Brian). Land was purchased with money provided by the joint venture and was to be developed for a hotel and shopping centre. SPL acted as agent for the joint venturers and held moneys in trust which had been provided by the joint venture. UDC acted as principal financier of the project with the balance of the funds being provided by the other joint venturers. Prior to the alleged breach of fiduciary duty, the percentage participation of each joint venturer had been set and substantial amounts had been contributed by them. The land was mortgaged to UDC as security for borrowings by SPL which acted as agents for Brian and others in this respect. All this was consistent with the terms of a draft joint venture agreement that had been circulated among the participants and eventually was executed.

138 The mortgage which SPL granted to UDC contained a "collateralisation clause" which had the effect of subjecting lands of the joint venture to debts incurred by SPL extraneous to the joint venture. UDC was "fully aware that the land registered in the name of SPL was held in circumstances which required SPL to account to the intended partners" (per Gibbs C.J. at 678).

139 The enforcement of the collateralisation clause by UDC resulted in the loss of Brian's investment and of course it obtained no return thereon.

140 In light of the above, the Court concluded that the parties had embarked on a joint venture which the Court found to be plainly a partnership. The Court further found that prior to the grant of the first mortgage, the "arrangements between the prospective joint venturers had passed far beyond the stage of mere negotiations" (at 680). Clearly, if the draft agreement had not been signed subsequently, an agreement substantially in accordance with its terms would have been found to exist by the Court. Prior to its execution, the relationship of UDC, SPL and Brian was that of a de facto partnership or joint venture. Furthermore, Brian entrusted SPL with its funds and its interest in the land with the full knowledge of UDC. Brian was therefore "at the mercy of their discretion". In this respect the case is clearly distinguishable from the case at bar. The trial Judge found that LAC and Corona "were clearly negotiating towards a joint venture or some other business relationship". The respondent had pleaded that a partnership agreement existed between it and the appellant but this claim was abandoned. In this respect, the trial Judge found as follows: "The most that can be said is that the parties came to an informal oral understanding as to how each would conduct itself in anticipation of a joint venture *or some other business arrangement*". [Emphasis added.]

141 The parties here had not advanced beyond the negotiation stage. Indeed, they had not as yet identified what precisely their relationship should be. Furthermore, Corona did not confer on LAC any discretionary power to acquire the Williams property. LAC proceeded unilaterally to acquire the property for itself allegedly making use of confidential information, and that essentially is the ground of Corona's complaint.

142 The Court of Appeal recognized that this case differed from the *United Dominions* case, supra, (p. 317). In its opinion, however, the other factors present in the case which I have enumerated above, (a) to (f), made up for the difference.

143 I cannot find that (b) adds very much to the case in favour of a finding that a fiduciary relationship existed. In every commercial venture, one of the parties approaches the other. Corona was seeking a senior mining company and LAC responded with an expression of interest. This is not an indicium of a fiduciary relationship. Nor can I accept that (c), the arrangement as to the geochemical program, was a step in the implementation of a joint venture. The trial Judge did not so find and the evidence is too sketchy to be able to relate this activity to any proposed agreement between the parties, the nature of which itself was undetermined. With respect to (d) as explained above, the supply of confidential information is not necessarily referable to a fiduciary relationship and is therefore at best a neutral factor. The other two factors, (e) and (f), require more extensive consideration.

(e) The Practice in the Industry

144 The trial Judge concluded as follows:

> I conclude, following *Cunliffe-Owen*, supra, that there is a practice in the mining industry that imposes an obligation when parties are seriously negotiating not to act to the detriment of each other.

145 He did so on the basis of the following evidence with which all experts were in agreement:

> [Mr. Allen] A. If one geologist goes to another geologist and says, are you interested in making some sort of a deal and between the two of them, they agree that they should consider seriously the possibility of making a deal, I think for a short period of time that while they are exploring that, that any transference of data would be — I would hope the geologists would be competent enough to identify the difference between published, unpublished, confidential and so on but in the case that they weren't, there was just some exchange of conversation or physical data, then I would say that while both of them were seriously and honestly engaged in preparing a deal, that Lac and the other party would both have a duty towards each other not to hurt each other as the result of any information that was exchanged.
>
> . . . . .
>
> Q. ... Does the obligation not to harm each other that you referred to, et cetera, flow from the fact that they were in negotiation or discussion about a possible deal itself so long as it's a serious matter as you said?
>
> . . . . .
>
> [Mr. Allen]. Yes.

No examples were apparently given illustrating the operation of this practice. *Cunliffe-Owen v. Teather & Greenwood*, [1967] 3 All E.R. 561, [1967] 1 W.L.R. 1421 (Ch.), which was referred to by the trial Judge and relied on by the Court of Appeal, is a contract case. The principle is well established in contract law. It is accurately expressed by Ungoed-Thomas J. at 1438 [W.L.R.]:

> For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.
>
> The burden lies on those alleging 'usage' to establish it.
>
> The practice that has to be established consists of a continuity of acts, and those acts have to be established by persons familiar with them, although, as is accepted before me, they may be sufficiently established by such persons without a detailed recital of instances. Practice is not a matter of opinion, of even the most highly qualified expert, as to what it is desirable that the practice should be. However, evidence of those versed in a market — so it seems to me — may be admissible and valuable in identifying those features of any transaction that attract usage

146 It is understandable that, in a contract setting, a practice that is notorious and clearly defined and relevant to the business under discussion should be incorporated as a term. It can readily be inferred that the parties agreed to it. It is a considerable leap from this principle to erect a fiduciary relationship on the basis of such a practice. No authority was cited to the Court that this concept can simply be transplanted in this fashion. It is significant that the trial Judge did not rely on this evidence in finding that a fiduciary obligation existed (pp. 776-777). Moreover, accepting the evidence at face value, it is more consistent with the obligation of confidence. The practice relates to a duty which arises upon the exchange of confidential information. Furthermore, in the absence of any illustrations of the operation of the practice, we are left with an expert's opinion on what is essentially a question of law — the existence of a fiduciary duty. The practice among geologists to act honourably towards each other is no doubt admirable and a practice to be fostered, but it should not be used to create a fiduciary relationship where one does not exist.

(f) Common Object

147 The Court of Appeal stressed that the parties were not simply negotiating an ordinary commercial contract but were negotiating in furtherance of a common object. This factor does not particularly distinguish negotiations in furtherance of any partnership or joint venture. All such negotiations seek to achieve a common object, namely the accomplishment of the business venture for which the partnership or joint venture is sought to be formed. I do not see how this factor can elevate negotiations to something more.

(1) Dependency or Vulnerability

148 In my opinion, this vital ingredient was virtually lacking in this case. Its absence cannot be replaced by any of the factors mentioned above. The Court of Appeal dealt with it as follows:

> It was a case of negotiations between a junior mining company (Corona) whose primary activities were those of locating, staking and evaluating mining claims and a senior mining company (LAC) whose activities included all of the above together with the practice and experience of bringing into production and operating gold mining properties. It was a case of the senior company seeking out the junior company in order to obtain information with respect to mining claims already owned by the junior company and to discuss a joint business venture. Having regard to the practice found to exist in the industry with respect to the obligation not to act to the detriment of each other, particularly with respect to confidential information disclosed, it was to be expected that Corona would divulge confidential information to LAC during the course of their negotiations. In those circumstances, it is only just and proper that the court find that there exists a fiduciary relationship with its attendant responsibilities of dealing fairly including, but not limited to, the obligation not to benefit at the expense of the other from information received by one from the other.

149 This statement seems to imply that there was a kind of physical or psychological dependency here which attracted fiduciary duty. Illustrations of this type of dependency are not difficult to find. They include parent and child, priest and penitent and the like. Clearly, a dependency of this type did not exist here. While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact that they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary. In *Frame*, supra, Wilson J. dealt with this indicia of fiduciary duty in the following language (at 137-138 [S.C.R.]):

> This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.); affirmed [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of discretion or power to be exercised, i.e., any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power ... are adequate in such a case.

150 If Corona placed itself in a vulnerable position because LAC was given confidential information, then this dependency was gratuitously incurred. Nothing prevented Corona from exacting an undertaking from LAC that it would not acquire the Williams property unilaterally. And yet the trial Judge found that while the Williams property was discussed by Bell and Sheehan, the latter did not agree *not* to acquire the Williams property. Indeed it does not appear that LAC was ever asked to refrain from so doing. In the letter dated May 19, Sheehan wrote to Bell in part as follows:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

The reference to the Hughes ground included the Williams property. It would seem that the possibility of Corona participating could only come about if the property were acquired. This would suggest that the parties contemplated that LAC might acquire the property in which event Corona would have a possibility of participating. At the very least LAC might reasonably have considered that such a course of action was open to it. In view of the abandonment by Corona of any contractual claim, I conclude that even this limited protection was not secured by any contractual arrangement.

151 Accordingly, if Corona gave up confidential information, it did so without obtaining any contractual protection which was available to it. This and the fact that misuse of confidential information is the subject of an alternate remedy strongly militate against the application here of equity's blunt tool. I now turn to that alternate remedy, breach of confidence.

(2) Breach of Confidence

152 Both the trial Judge and the Court of Appeal applied three criteria in determining whether a breach of confidence had been made out by the respondent. These elements are:

(i) Confidential Information: Did Corona supply LAC with information having a quality of confidence about it?

(ii) Communication in Confidence: Did Corona communicate this information to LAC in circumstances in which an obligation of confidence arises?

(iii) Misuse of Information: Did LAC, by acquiring the Williams property to the exclusion of Corona, misuse or make an unauthorized use of the information?

153 The trial Judge made findings of fact in favour of the respondent with respect to each of these criteria:

(i) Confidential Information

In the present case much of the information transmitted by Corona to Lac was private and had not been published. There is no doubt, however, that Corona wished to attract investors. Drill hole results were published on a regular basis and incorporated in George Cross Newsletters. Mr. Bell permitted himself to be quoted in the March 20 George Cross Newsletter and made a presentation to a group of stockbrokers in Vancouver.

Mr. Bell also quite freely discussed the Corona results with brokers, investors and friends. Lac, however, was told more than the general public. Mr. Sheehan was shown the core, the drill plan and sections on May 6th. He discussed the geology with Mr. Bell on May 6th, May 8th and June 30th, and a full presentation with up-to-date results was made to Lac on June 30th.

(ii) Communication in Confidence

I find as a fact that on May 6, 1981, there was no mention of confidentiality with respect to the site visit, except in connection with New Cinch. I prefer the evidence of Messrs. Bell and Dadds to that of Messrs. Sheehan and Pegg. Clearly the information was confidential and this must have been obvious to Mr. Sheehan.

The information, although partly public, was, I have found, of value to Lac and was used by Lac. It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

(iii) Misuse of Information

Mr. Sheehan and Dr. Anhuesser testified that the information Lac acquired from Corona was of value in assessing the merits of the Williams property and Mr. Sheehan said that he made use of this information in making an offer to Mrs. Williams.

Certainly Lac was not authorized by Corona to bid on the Williams property.

154 There are concurrent findings of fact and these should not be disturbed by this Court unless we are satisfied that they are clearly wrong. The appellant did not attack either the basic criteria or these findings of fact as such, but rather "the rules by which the existence of the elements as a matter of law are to be determined".

155 With respect to the first element, the appellant submitted that although some of the information was private, much of it was public. This combination did not act as a springboard to give the appellant an advantage over others. Essentially, the appellant submitted that the desirability of acquiring the Williams property could have been deduced from information which was public and it got no head start by obtaining information from the respondent.

156 In this regard the statement of Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Coy.* (1948), 65 R.P.C. 203, [1963] 3 All E.R. 413n (C.A.), (leave to appeal to House of Lords refused) at 215 [R.P.C.], which was quoted by the trial Judge, is apposite:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

157 *Seager v. Copydex*, [1967] 2 All E.R. 415, [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a satisfactory grip. At 931 [W.L.R.], Lord Denning M.R. stated:

> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

158 Corona had conducted an extensive exploration program on its own property. The information which it obtained was pertinent in evaluating the Williams property. Its geologist, Bell, had developed a theory that the source of the zone of gold mineralization on Corona's property was volcanogenic. This meant that gold could be spread over a large area with "pools" of ore throughout. This led him to conclude that the exploration program should be extended to the neighbouring properties which included the Williams property. Bell was the geologist who first firmly believed that it was the land of Havilah and his enthusiasm spread to his principals. This information was developed from the results of the exploration program and the application of Bell's knowledge as a geologist. LAC got the benefit of this information. It had the advantage of several discussions with Bell who interpreted his findings and explained his volcanogenic theory. Bell allowed LAC's representatives to examine the drill cores and the individual assays. LAC's representatives were also advised that Corona was actively pursuing the Williams property. The trial Judge found as a result that:

> On all the evidence I conclude that the site visit and the information disclosed by Corona to Lac was of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

159 This information was the springboard which led to the acquisition of the Williams property. Sheehan admitted that the offer to Mrs. Williams was based in part on information obtained from Corona. The degree of reliance on Bell's input

is graphically illustrated by the fact that after LAC had optioned the Williams property, it located its three drill holes on the Williams property in the same area in which Bell would have located his next three holes, westerly from the Corona property.

160 It was suggested in argument that although some of the information was of a private nature, it was not incremental in the sense that it did not enhance the information so as to make the Williams property more desirable. This contention is effectively refuted by the actions of LAC. Immediately after the May 6 meeting, something in that meeting triggered a frenzy of activity on the part of LAC, including a staking of 640 claims, several further meetings with Corona and the acquisition of the Williams property. I agree therefore with the conclusion of the Courts below that the information obtained from Corona by LAC went beyond what had been imparted publicly in the George Cross Newsletters or the public investors' meeting. Furthermore, it put LAC in a preferred position vis-à-vis others with respect to knowledge of the desirability of acquiring the Williams property.

161 With respect to the second element the appellant submitted that the trial Judge did not apply the reasonable man test in determining whether the information was imparted in circumstances in which an obligation of confidence arises. The trial Judge in his reasons cited with approval the reasonable man test enunciated in *Coco v. A. N. (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.). Moreover, the trial Judge referred to the passage of Megarry J. at 48 which follows the articulation of that test:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

The trial Judge found that it was obvious to Sheehan that the information was confidential and that:

> It was transmitted with the mutual understanding that the parties were working towards a joint venture or some other business arrangement and, in my opinion, was communicated in circumstances giving rise to an obligation of confidence.

162 These findings were made at least in part on the basis of a preference of the evidence of Bell and Dadds to that of Sheehan and Pegg. As did the Court of Appeal, I accept them.

163 With respect to the third element, LAC submits that it did not misuse the information because it went to the public record and then started staking and making the inquiries which eventually culminated in the acquisition of the Williams property. The trial Judge has found, however, that the information obtained from Corona was of value to LAC in assessing the merits of the Williams property and LAC made use of this information to the detriment of Corona. This finding is amply supported by the evidence and should be accepted.

164 The trial Judge also found that LAC was not authorized by Corona to bid on the Williams property. I interpret this to mean that Corona did not advise LAC that it could bid on the Williams property. Furthermore, as noted above, Sheehan never expressly agreed that LAC would refrain from acquiring the Williams property. The trial Judge so found. There was an "informal oral understanding as to how each would conduct itself in anticipation of a joint venture or some other business arrangement". The terms of this informal arrangement as they relate to the acquisition of the Williams property are very sketchy. I have set out above the evidence and findings of fact that relate to this matter, including the portion of the letter of May 19, 1981 which states:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued.

165 As I said earlier in my reasons, that statement is neutral as to who would acquire the property. It is consistent with either Corona or LAC acquiring the property but subject to the loose oral arrangement that they were working toward a joint venture or other business arrangement which would involve participation by Corona in accordance with one of the formulae set out in the May 19 letter or an arrangement similar thereto.

166 On this basis, acquisition by LAC of the Williams property to the exclusion of Corona was not an authorized use of the confidential information which it received from Corona and which was of assistance in enabling LAC to get the property for itself.

167 In summary, the three elements of breach of confidence were made out at trial, affirmed on appeal, and notwithstanding the able submissions for the appellant, I find the decision of the trial Judge and the Court of Appeal unassailable on this branch of the case. Accordingly, with respect to liability for breach of confidence, the appeal fails.

(3) Nature of Remedy for Breach of Confidence

168 The trial Judge dealt with remedy solely on the basis of breach of a fiduciary duty. On this basis he ordered that upon payment to LAC of the amounts referred to above, the mine be transferred to Corona.

169 The Court of Appeal affirmed the trial Judge but after expressing the view that it "is artificial and difficult to consider the question of the proper remedy for breach of the obligation of confidence on the hypothesis that there is no co-existing fiduciary obligation", it concluded that a constructive trust would in such circumstances be a possible remedy.

170 Furthermore, based on the fact that (i) but for "LAC's actions, Corona would have acquired the Williams property" and (ii) "it may fairly be said that, but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property", the Court of Appeal concluded that it was the appropriate remedy.

Constructive Trust or Damages

171 The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected. See Gurry, *Breach of Confidence*, (Oxford: Clarendon Press, 1984) at 25-26, and Goff & Jones, *The Law of Restitution*, 3rd ed., (London: Sweet & Maxwell, 1986) at 664-667.

172 This multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility in fashioning a remedy. The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy. See *Nichrotherm Electrical Co. v. Percy*, [1957] R.P.C. 207, 213-14; Gurry, supra, at 26-27; and Goff & Jones, supra, at 664-65. A constructive trust is ordinarily reserved for those situations where a right of property is recognized. As stated by the learned authors of Goff & Jones, supra, at 673:

> In restitution, a constructive trust should be imposed if it is just to grant the plaintiff the additional benefits which flow from the recognition of a right of property.

Although confidential information has some of the characteristics of property, its foothold as such is tenuous (see Goff and Jones, supra, at 665). I agree in this regard with the statement of Lord Evershed in *Nichrotherm*, supra, at 209, that:

> a man who thinks of a mechanical conception and then communicates it to others for the purpose of their working out means of carrying it into effect does not, because the idea was his (assuming that it was), get proprietary rights equivalent to those of a patentee. Apart from such rights as may flow from the fact, for example, of the idea being of a secret process communicated in confidence or from some contract of partnership or agency or the like which he may enter into with his collaborator, the originator of the idea gets no proprietary rights out of the mere circumstance that he first thought of it.

173 As a result, there is virtually no support in the cases for the imposition of a constructive trust over property acquired as a result of the use of confidential information. In stating that such a remedy is possible, the Court of Appeal referred to Goff & Jones, supra, at pp. 659-674. The discussion of proprietary claims commences at 673 with the statement which I have quoted above and thereafter all references to constructive trust pertain to an accounting of profits. No reference is made to any case in which a constructive trust is imposed on property acquired as a result of the use of confidential information.

174 In Canada as in the United Kingdom, the existence of the constructive trust outside of a fiduciary relationship has been recognized as a possible remedy against unjust enrichment. See Waters, *Law of Trusts in Canada*, 2nd ed., 1984, at 386-397.

175 In Canada this device has been sporadically employed where the unjust enrichment occurred in the context of a pre-existing special relationship between the parties. Thus in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 117 D.L.R. (3d) 257, 34 N.R. 384, Dickson J. (as he then was) spoke of "a relationship tantamount to spousal". In *Nicholson v. St. Denis* (1975), 8 O.R. (2d) 315, 57 D.L.R. (3d) 699 (C.A.), leave to appeal to the Supreme Court of Canada refused (1975), 8 O.R. (2d) 315n, 57 D.L.R. (3d) 699n, MacKinnon J.A. refused the remedy in the absence of "a special relationship" between the parties. In *Unident v. Delong* (1981), 50 N.S.R. (2d) 1, 98 A.P.R. 1, 131 D.L.R. (3d) 225 (T.D.), Hallett J., quoting MacKinnon J.A., refused restitution where a special relationship could not be shown.

176 In *Pre-Cam Exploration & Development Ltd. v. McTavish*, [1966] S.C.R. 551, 56 W.W.R. 697, 50 C.P.R. 299, 57 D.L.R. (2d) 557, an employee acting on information which he obtained entirely in the course of his employment, staked certain claims which would otherwise have been staked by the employer. This Court affirmed the decision of the trial Judge who held that the employee was a trustee of the claims for his employer. In his reasons for the Court, Judson J. stated, at 555, that:

> it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term 'fraud' by the learned Chief Justice at trial was fully warranted.

In these circumstances, Judson J. referred to the use of the constructive trust. I do not consider that that decision lays down any principle that makes the remedy of a constructive trust an appropriate remedy for misuse of confidential information except in very special circumstances.

177 Although unjust enrichment has been recognized as having an existence apart from contract or tort under a heading referred to as the law of restitution, a constructive trust is not the appropriate remedy in most cases. As pointed out by Professor Waters in *Law of Trusts in Canada*, supra, at 394, although unjust enrichment gives rise to a number of possible remedies:

> the best remedy in the particular circumstances is that which corrects the unjust enrichment without contravening other established legal doctrines. In most cases, as in *Deglman v. Guar. Trust Co. of Can. and Constantineau* itself, a personal action will accomplish that end, whether its source is the common law or equity, providing as it often will monetary compensation.

178 While the remedy of the constructive trust may continue to be employed in situations where other remedies would be inappropriate or injustice would result, there is no reason to extend it to this case.

179 The conventional remedies for breach of confidence are an accounting of profits or damages. An injunction may be coupled with either of these remedies in appropriate circumstances. A restitutionary remedy is appropriate in cases involving fiduciaries because they are required to disgorge any benefits derived from the breach of trust. In a breach of confidence case, the focus is on the loss to the plaintiff and, as in tort actions, the particular position of the plaintiff must be examined. The object is to restore the plaintiff monetarily to the position he would have been in if no wrong had been committed. See *Dowson & Mason Ltd. v. Potter*, [1986] 2 All E.R. 418, [1986] 1 W.L.R. 1419 (C.A.) and *Talbot v. General Television Corp. Pty. Ltd.*, [1980] V.R. 224. Accordingly, this object is generally achieved by an award of damages, and a restitutionary remedy is inappropriate.

180 The Williams property was acquired as a result of information which was in part public and in part private. It would be impossible to assess the role of each. The trial Judge went no further than to find that the confidential information was "of value" to LAC and

> of assistance to Lac not only in assessing the Corona property but also in assessing other property in the area and in making an offer to Mrs. Williams.

181 The Court of Appeal went further and stated that "but for the confidential information LAC received from Corona, it is not likely that it would have acquired the Williams property". The reasons do not disclose any factual basis for extending the finding of the trial Judge and I see no basis for so doing. The best that can therefore be said is that it played a part. When

the extent of the connection between the confidential information and the acquisition of the property is uncertain, it would be unjust to impress the whole of the property with a constructive trust.

182 The case has been presented on the basis that either a transfer of the property or damages is the appropriate remedy. The respondent contends that the former is appropriate and the appellant the latter. No submissions were made in oral argument for or against an accounting of profits. Moreover, damages were assessed in the alternative in the event that on appeal this was considered the appropriate remedy. In all the circumstances, therefore, I have concluded that of the two alternatives presented, damages is the proper remedy.

183 It is, therefore, necessary to determine the basis upon which damages will be assessed. The formula for the measure of damages does not appear to be seriously disputed, although the application of the formula is. In *Dowson & Mason Ltd. v. Potter*, supra, Sir Edward Eveleigh adopted the statement of Lord Wilberforce in *General Tire & Rubber Co. v. Firestone Tyre & Rubber Co.*, [1975] 2 All E.R. 173, [1975] 1 W.L.R. 819 (H.L.) in a breach of confidence action. Lord Wilberforce was dealing with the measure of damages applicable to economic torts. He stated, at 177 [E.R.]:

> As in the case of any other tort (leaving aside cases where exemplary damages can be given) the object of damages is to compensate for loss or injury. The general rule at any rate in relation to 'economic' torts is that the measure of damages is to be, so far as possible, that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the wrong (*Livingstone v. Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn).

184 In applying this test it is necessary to consider what the wrong is and what the position of the plaintiff would have been if he had not sustained the wrong. To put it shortly, what loss was caused to the plaintiff by the defendant's wrong?

185 In my opinion, the wrong committed by LAC was the acquisition of the Williams property for itself and to the exclusion of Corona. That was contrary to the understanding found to exist by the trial Judge that the parties were working towards a joint venture or some other business arrangement.

186 This set the parameters of the permitted use of the confidential information and its use within these parameters was not a misuse of it. LAC did not agree to refrain from acquiring the property and Corona did not tell LAC not to acquire the property. This would be surprising unless the parties thought that in keeping with their efforts to conclude a joint business arrangement, either one could acquire it for that purpose. This is supported by the letter of May 19 in which Sheehan set out three alternative "possibilities" for a working arrangement with Corona. That is followed with a paragraph relating to the Williams property. For ease of reference I will again reproduce the relevant correspondence:

> As discussed we should entertain the possibility of Corona participate [sic] in the Hughes ground and that should be actively pursued. In addition we are staking ground in the area and recognizing Corona's limited ability to contribute we could work Corona into the overall picture as part of an overall exploration strategy.

Bell's reply states in part:

> At this point, until I hear otherwise from the directors in Vancouver, I like your idea of Corona's contribution with Long Lac Minerals Exploration Limited as part of an overall exploration programme in the area.

187 The correspondence reflected the discussion between the parties up to that point. In my view it can only be read as envisaging a participation by Corona with LAC in the Williams property. Either party could acquire it for this purpose. This is further supported by the following evidence of Sheehan which was elicited on cross-examination. This evidence was relied on by the trial Judge in concluding that a statement made by Bell at the meeting of May 8 that Corona was "happy with our land position" was made in the context of additional staking and not that it (Corona) was not interested in acquiring the Williams property:

> Q. Mr. Sheehan, on May 8th — and, my Lord, page 803, question 3971:
>
> > Q. Can you tell me now then, please, your discussion with Mr. Bell on the 8th as it concerns the Hughes property?

> A. My best recollection of that discussion was where the Hughes property was concerned was I was discussing the area in general. I believe I had indicated to Mr. Bell that we would be staking in the area.
>
> MR. McDOUGALL: You have given that evidence.
>
> THE DEPONENT: With respect to the Hughes property, I had suggested the possibilities that we pick up the Hughes property, that is to say Lac, that Corona may pick it up, that any combination of those factors could be addressed. In other words, if indeed we were going to make a deal, Lac could fund Corona since he had indicated that they were just a small company without much money.

A. Yes, that's correct.

Q. Were you asked those questions and did you give those answers?

A. Yes.

MR. LENCZNER: And we have this already in one of the tabs, my Lord, with regard to the May 19th letter, but let me just — I had better pull out the tab. It is tab 146.

Q. Page 863, the answer you gave:

> A. Well, I think I had discussed with Mr. Bell in that meeting and I may have referred to this in previous testimony that the patented ground as well as the Hughes ground should be picked up and that's what that is referring to there.

A. Yes.

Q. So that you had discussed with Bell on May 8th, picking up the Hughes ground and the patented ground?

A. Yes.

Q. And that Lac could pick it up, Corona could pick it up?

A. Yes.

Q. Or you would even fund Corona to pick it up?

A. Yes, we would do the funding.

Q. In addition to all of that, you said you had a staking programme going down to the east and he could participate in that if he wanted?

A. Yes, we could bring him into that.

Q. In that context, I suggest to you he said, 'We are happy with our land position'?

A. It was in that context that he said, 'No, I'm happy with my land position and we will continue drilling and doing the Phase II programme'.

188 The trial Judge is correct in his finding that Corona was interested in "the possession of either Williams or Hughes". There is no finding, however, that acquisition by LAC of the Williams property as part of the joint exploration program along with continued negotiations towards an agreement on the basis of one of the scenarios outlined in the letter of May 19 would have constituted a breach of mutual understanding under which the confidential information was supplied to LAC. Furthermore, I am satisfied that had that occurred, the most likely conclusion is that LAC and Corona would have continued to negotiate and Corona would have made a deal with LAC for their respective participation in a joint venture including the Williams property.

Corona could not finance the development on its own property without the assistance of a senior mining company. Accordingly, it entered into an agreement with Teck on somewhat similar terms as those proposed by LAC. Even after it discovered that LAC had acquired the Williams property, a director, Moore, sought to continue the negotiations. His evidence in part is as follows:

> Q. What is it that you were setting about doing then in your attempts to reach Mr. Sheehan?
>
> A. Well, the stage — the stage was still set, even at that point, for — to continue with this joint venture. Lac had picked up a big piece of ground in the area, 600 claims, and Corona had a nice start, that Williams' claims were off on the side. We felt that they should be ours. But it was, uh, it was still possible in that scenario, in my opinion, to make a joint venture, even with — all the pieces were still there to make a good deal.

189 But for LAC's breach, those negotiations would likely have continued and it would have resulted in Corona acquiring an interest in the Williams property of 50 per cent or perhaps a small percentage interest. It would have also acquired a corresponding obligation to contribute on the same basis. Corona's damages should therefore be calculated on the basis of the loss of this interest.

190 In his reasons the trial Judge stated:

> If Corona had obtained the Williams property, Corona may well have entered into a joint venture agreement with Lac covering the Corona and Williams properties together with the White River claims. Corona's damages would be assessed accordingly in an action for breach of contract.

Holland J. went on to hold that based on his finding of a fiduciary duty the appropriate remedy was a restitutionary remedy requiring the whole of the property to be returned to Corona upon payment of the added value. I have decided that there is no breach of a fiduciary duty and therefore, as in contract, account must be taken of the fact that but for the breach by LAC, a joint venture agreement would likely have resulted. Damages should be assessed accordingly.

Assessment of Damages

191 The appellant, in its factum, para. 177, submits as follows:

> If it is found that, through misuse of information relating to Corona's intentions or otherwise, the loss suffered by Corona was the loss of the opportunity to acquire and to explore the Williams property, Corona would be entitled to damages. However, its loss is not to be measured by LAC's gain. Corona is to be put in the same position it would have been if it had not sustained the wrong. In making that assessment in the case of a lost opportunity the correct approach is:
>
> i) to determine the form of business arrangement that Corona would have been obliged to have entered into with a senior mining partner and the proportionate interest that Corona would probably have conceded to that partner. The later arrangement with Teck suggests this would be 55%. Sheehan suggested 60%;
>
> ii) to value the property as improved by LAC. This was done by the trial judge and produced a figure of $700,000,000.00 after tax, being the value created by the size of the facilities LAC decided to put on the Williams property. LAC disputed this assessment on appeal but the Court of Appeal did not deal with this issue. LAC's submissions on the value of the property as improved by LAC are set out in Appendix 'A'. In addition, Corona may have decided or been compelled to exploit the property with a lower rate of extraction. The value of the property must be discounted to reflect that eventuality;
>
> iii) to deduct from that discounted figure the 60% (or 55%) interest of the senior partner;
>
> iv) to deduct from that figure a capitalized estimate of the costs Corona would have had to contribute to the exploration and exploitation of the property; and
>
> v) to deduct a further amount to reflect Corona's own share of responsibility for its loss.

192 I agree that this approach generally gives effect to the principles which I have stated above. I would not, however, include item (v) to deduct a further amount to reflect Corona's own share of responsibility for its loss. This is essentially a plea of contributory negligence for which there is no support in the findings of fact or evidence.

(i) The Business Arrangement

193 In determining the nature of the business arrangement that the parties would likely have concluded, the arrangement with Teck is very pertinent. This arrangement was set out in a number of agreements. For my purposes I refer primarily to an agreement dated December 10, 1981 (property agreement) with the "Joint Venture Agreement" attached as Schedule B, and the "Area of Interest Agreement" contained in a letter dated August 13, 1982 as amended by an agreement made as of December 19, 1983, particularly paras. 3.2 and 5. Under these agreements, the parties entered into the following arrangement.

194 (a) Corona Property: Teck undertook to complete exploration and development work and prepare a feasibility study with respect to 17 properties. The initial costs were financed out of a fund to which both Teck and Corona contributed $1,000,000. Teck acquired a 55 per cent interest upon completion of the feasibility study and election to bring the property into production, leaving Corona with 45 per cent. Thereafter development was to be financed in accordance with the respective interests of the parties, i.e. 55 per cent by Teck and 45 per cent by Corona.

195 (b) Other Property: Any property in the area not covered by the property agreement subsequently acquired by either Teck or Corona would be shared on a 50-50 basis with contributions accordingly. This provision was expressly extended to the Williams property contingent on Corona obtaining a favourable judgment.

196 In the circumstances, I conclude that Corona would have concluded with LAC a business arrangement with respect to the Williams property substantially similar to that which it concluded with Teck: a 50-50 property interest with participation in the development costs in the same ratio. Although this is a slightly higher percentage in favour of Corona than that proposed by Sheehan and agreed upon with Teck in respect of Corona's own property, it is the figure that was applied to the Williams property in the Teck agreement. The benefit of any doubt as to whether it should be 45 per cent or 50 per cent should be given to the innocent party Corona rather than to the party in breach.

(ii) Value of Improved Mine

197 The trial Judge fixed the value at $700,000,000 after tax. Both parties take issue with this assessment. While there is some merit in some of the issues raised by each side, it has not been established that this is a wholly erroneous assessment and I accept it. I will deal with several of the criticisms which raise an issue of law or principle. Other objections are primarily factual and the findings of the trial Judge should be accepted.

198 First, although not directly raised in this Court, the appellant submitted below that the date for valuation was the date of breach and not the date of trial. The trial Judge chose January 1, 1986, a date during the latter period, applying equitable principles. Having regard to the flexibility possessed by the Court to do justice in an action for breach of confidence, I have no difficulty in applying those principles to this assessment to the extent of adopting the later date. To do otherwise would be to ignore the vast potential that the Williams property possessed at the time it was acquired by LAC. That potential can best be valued by determining its value as of the date fixed by the trial Judge.

199 The trial Judge elected to adopt a discounted cash flow approach to value the Williams property as opposed to a market capitalization approach. Although I recognize that each approach has its strengths and weaknesses, I am not prepared to hold that the trial Judge erred in opting for a discounted cash flow of the mine on the Williams property over the life of the mine to ascertain its present value. In my opinion, there is ample evidence to support the conclusion that this was the proper means to assess the value of the property.

200 I am also of the opinion that the trial Judge correctly applied this Court's decision in *Florence Realty Co. Ltd. v. R.*, [1968] S.C.R. 42, 65 D.L.R. (2d) 136 in deducting corporate taxes from the cash flow to determine the value of the mine.

201 Furthermore, the figure of $700,000,000 was based on the payment of a 1-1/2 per cent net smelter return to Mrs. Williams in accordance with the contract negotiated by LAC. Although Corona offered a 3 per cent net smelter return to Mrs. Williams, which would reduce the value of the property, I accept the figure of 1-1/2 per cent as the likely figure which would have been paid if LAC had not been in breach of confidence.

(iii) Damages for Loss of Interest in Mine

202 Damages for loss of Corona's interest in the mine are therefore assessed at $350,000,000 which is 50 per cent of $700,000,000.

(iv) Contribution to Development Costs

203 I agree with the appellant that Corona should not have the value by which the mine was increased by the expenditures made by LAC without contributing in accordance with its interest. LAC presented evidence that it had expended $203,978,000 in developing the Williams property. The trial Judge held that had Corona developed the two properties together then a number of savings would have been realized over the sums expended by both LAC and Corona in developing their two mines independently. The trial Judge suggested that there would have been only two shafts rather than three, only one mill and only one group of service facilities. For this reason, he estimated that LAC spent an additional $50,000,000 by virtue of its independent development of the Williams property.

204 I agree that this sum is to be deducted from the expenditures by LAC in developing the Williams property. The operative principle of damages is to place Corona in the position it would have occupied had there been no breach of confidence by LAC. If LAC had acquired the property for the benefit of both parties, the two properties would have been developed jointly rather than separately. LAC is, therefore, responsible for the extra costs incurred as a result of the inability to take advantage of any natural economies of scale.

205 Accordingly, $50,000,000 is to be deducted from the figure of $203,978,000 representing LAC's improvements to the property, for a difference of $153,978,000. One-half of this sum ($76,989,000) must be deducted from $350,000,000 for a difference of $273,011,000.

206 This does not fully dispose of the assessment of damages. Several further items having a possible bearing on the amount require consideration. In arriving at the figure of $153,978,000 the trial Judge expressed some uncertainty with respect to the quantum of the deduction of $50,000,000 from the $203,978,000 which resulted in a difference of $153,978,000. Accordingly, a reference was directed but only if either party was dissatisfied with the trial Judge's figure. The formal order expressed it as a reference concerning the amount of $153,978,000. As I read the trial Judge's reasons, the uncertainty was in the amount of the deduction and not the $203,978,000 expenditure by LAC which was based on its records. Nevertheless, I propose to direct a reference in the same terms as the trial Judge.

207 In addition, the trial Judge ordered that the amounts paid to Mrs. Williams, exclusive of royalty payments, should also be paid by Corona. This cost of the acquisition of the property would have been necessary had no breach occurred. Corona would have been obliged to pay one-half of these payments. Accordingly, one-half of the amounts paid to Mrs. Williams exclusive of royalty payments must be deducted from the award of damages of $273,011,000 or from that figure as varied by any reference undertaken as indicated above.

208 The trial Judge also directed that the appellant pay the respondent the profits, if any, obtained by the appellant from the operation of the Williams mine. The foundation for this order was the restitutionary remedy which I have found to be inappropriate. Accordingly, no such order is made. The respondent is, however, entitled to pre-judgment interest in accordance with s. 138(1)(b) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11. If, therefore, a notice has been served as provided by that provision, the respondent will be entitled to interest in accordance with that section. The respondent is also entitled to post-judgment interest in accordance with s. 139 of the *Courts of Justice Act*.

Disposition

209 In the result, I would allow the appeal in part and dismiss the cross-appeal. I would set aside the judgment at trial and the order of the Court of Appeal and direct that judgment should issue as follows:

1. The plaintiff is entitled to recover from the defendant damages in the sum of $273,011,000 less one-half of all sums paid to Mrs. Williams with the exceptioon of royalties, subject to the right of either the plaintiff or defendant to undertake a reference to the Master concerning the deduction of $153,978,000.

2. The plaintiff is entitled to recover pre-judgment interest from the defendant on the sum referred to in para. 1, or as varied on a reference, in accordance with s. 138(1)(b) of the *Courts of Justice Act* from the date of service of any notice, and post-judgment interest on the said sum in accordance with s. 139 of the *Courts of Justice Act*.

3. The plaintiff's is entitled to recover from the defendant the costs of the action.

210 I would also order that the appellant recover from the respondent the costs of the appeal and cross-appeal to the Court of Appeal and the costs of the appeal and cross-appeal to this Court.

Appeal and cross-appeal dismissed.

Footnotes

1 A similar approach was taken in the British Columbia case *57134 Manitoba Ltd. v. Palmer* (1985), 30 B.L.R. 121, 65 B.C.L.R. 355, 8 C.C.E.L. 282, 7 C.P.R. (3d) 477 (S.C.), aff'd (1989), 44 B.L.R. 94, 37 B.C.L.R. (2d) 50, 26 C.P.R. (3d) 8 (C.A.).

2 See, for example, *Bahamaconsult Ltd. v. Kellogg Salada Can. Ltd.* (1976), 15 O.R. (2d) 276 (C.A.), leave to appeal to S.C.C. dismissed (1976), 15 O.R. (2d) at 276n (S.C.C.), and *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250, 15 B.L.R. 89, 130 D.L.R. (3d) 205 (C.A.).

- **Date:** 20150511
- **File:** 566-02-5573
- **Citation: 2015 PSLREB 41**

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

LARRY KIRBY

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Kirby v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before:
Margaret T.A. Shannon, adjudicator
For the Grievor:
David Yazbeck, counsel
For the Employer:
Magdalena Persoiu, counsel

Heard at Kingston, Ontario,
January 14 to 17 and July 14 to 17, 2014.

I. Individual grievance referred to adjudication

1 The grievor, Larry Kirby, alleged that he was discriminated against, in violation of articles 1 and 9 of the collective agreement between the Treasury Board and the Public Service Alliance of Canada ("the bargaining agent") for the Operational Services Group (all employees) with an expiry date of August 4, 2011 ("the collective agreement"; Exhibit 21) and the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*), when the Correctional Service of Canada (CSC or "the employer") failed to accommodate his disability in the workplace and to provide him with a harassment-and discrimination-free workplace. Despite the allegation of harassment, the grievor relied on the failure to accommodate at the hearing of this matter.

2 The grievance was referred to the former Public Service Labour Relations Board ("the former Board") for adjudication on July 4, 2011, and the hearing into the grievance occurred in January and July 2014. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Board as well as the former Public Service Staffing Tribunal. Adjudicators who were seized of a grievance before November 1, 2014, continue, however, to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that *Act* read immediately before that day (see *Economic Action Plan 2013 Act, No. 2,* S.C. 2013, c. 40, s. 396).

II. Summary of the evidence

A. The grievor's evidence

3 The grievor testified that he had been employed with the CSC since 1992. He started his career as a correctional officer 01 (CX-01). In 1998, he accepted a position at Kingston Penitentiary (KP) as an institutional driver. His duties as an institutional driver involved delivering freight, messenger services and escort services on a weekly rotation. In 2000, escort duties were assigned to correctional officers as a means of accommodating injured or ill correctional officers rather than assigning these duties to the drivers.

4 In 2005, the grievor injured his back at work and was no longer able to perform the freight part of his duties. Also in 2005, the KP reduced its number of drivers, increasing the grievor's workload. His ability to perform his driver duties was further impaired by depression and anxiety issues, which caused him difficulties focusing on multiple tasks at a time. He was off work from September 7, 2005, to January 23, 2006, when he commenced work as an escort driver at the KP. (Escort duties were a single focus and met both his physical and mental disability accommodation needs.)

5 During the period he was off work, the grievor and the employer worked together to identify his limitations and a suitable accommodation to meet his needs. Several positions were considered based on the grievor's qualifications and limitations, including a parole officer position and a position handling inmate complaints and claims against the Crown, which he agreed to do in combination with escort driving duties.

6 On October 31, 2005, his bargaining agent representative, Louise Flanagan, advised the grievor that she had met with the Warden and the Assistant Warden, Material Services, to facilitate the

grievor's return to work. She relayed their message to him that there was no possibility of offering him accommodation as an escort driver as a correctional officer was being accommodated in that role. According to the Warden, the grievor had to be accommodated within his job. Furthermore, she could not justify additional training, which the grievor required for the parole officer job, because he had turned it down in the past. According to the Assistant Warden, the grievor had also already turned down a four-month opportunity to return to work handling claims against the Crown.

7 The process of identifying a suitable accommodation continued, and on January 6, 2006, the grievor was advised that the correctional officer was being removed from his accommodation as an escort driver. The grievor met with representatives from the KP (Dave Reynolds), CSC labour relations and his bargaining agent on January 13, 2006. The grievor was advised that he would likely start as an escort driver at the KP on January 23, 2006, and that in the employer's opinion, this was a permanent accommodation.

8 The grievor did return to work on January 23, 2006, as anticipated. He received a letter on January 24, 2006, from Dave Reynolds, Chief, Material Management, CSC, who was at the meeting on January 13, 2006, advising him of his assignment and that it would be reviewed in three to six months. The grievor was very concerned about this apparent change to the employer's approach to his accommodation. At no time did he anticipate that this was a short-term assignment. His restrictions were permanent and ongoing, and he required long-term workplace accommodation.

9 On February 10, 2006, the grievor attended a meeting with Donna Morrin, who was Warden at the KP at the time; Gerry Henderson, KP Deputy Warden; Cheryl Hogan, from the local CSC labour relations office; and Derek Dunnets, his bargaining agent representative. The meeting was called so that the Warden could discuss the grievor's accommodation as an escort driver with him. At that meeting, the Warden told the grievor that his physician was the grievor's advocate and so would say whatever he wanted his physician to say. She stated that all employees were expected to perform all the functions of their jobs, which in the grievor's case included freight and messenger services.

10 The period of accommodation progressed, and on May 1, 2006, the grievor was asked to provide the employer with an updated medical report, which he did. The doctor advised the employer that the grievor was progressing well with the accommodation measures in place. This was one of the 17 doctors' reports the grievor provided to the employer throughout the accommodation process. According to him, every time one was provided, the employer wanted another one and was never satisfied with the information, always wanting more.

11 At the meeting on February 10, 2006, Warden Morrin asked the grievor why he had not accepted the parole officer position offered to him. He explained that he was interested in it and had qualified for such a position through a competition but that he had never been offered such a position at the KP. He clarified that he had turned down an acting assignment as a parole officer but that he had never refused a full-time offer. With this clarification, the Warden offered the grievor an acting assignment as a parole officer at Millhaven Institution.

12 Despite the grievor's expressed interest in the Warden's offer, nothing materialized until September 11, 2006, when the grievor was contacted by a Human Resources representative, who advised him that it appeared that the Millhaven Institution assignment was going to come to reality. On September 12, 2006, the grievor was informed that the Millhaven Institution opportunity had been offered to another employee. The grievor was offered a parole officer opportunity at Collins Bay Institution (CBI) instead. He felt pressured to accept without being afforded the time to consider the offer. He agreed to take the positon, but as soon as he began working there the same day, he started feeling ill. The next day, September 13, 2006, he was again offered an assignment at Millhaven Institution, which he accepted.

13 On October 25, 2006, the grievor began treatment for high blood pressure. Five days later, on October 30, 2006, he started work at Millhaven Institution and immediately felt unwell. By November 1, 2006, he could no longer stay at work because he felt so ill. He went home and called his bargaining agent representative to discuss returning to the escort driver position at the KP. On November 2, 2006, the grievor spoke to Acting Assistant Warden, Material Services, KP, Michelle Vermette, and advised her that he was unable to work at Millhaven Institution and requested that he be immediately returned to the escort driver position at the KP.

14 The grievor returned to the KP escort driver position on November 6, 2006. On April 17, 2007, he met the new assistant warden, Material Services, Tim Byrne, in the corridor at the KP. In the presence of another employee, Mr. Byrne advised the grievor that he intended to meet with him to discuss his accommodation. This upset the grievor as he felt that Mr. Byrne had breached his privacy. The grievor claims that Mr. Byrne again breached his privacy on June 22, 2007, when he called the grievor's physician in an attempt to obtain his medical information. The grievor reported these breaches of privacy to his bargaining agent representative, stating that in his opinion, he was being harassed by Mr. Byrne. On July 5, 2007, the grievor filed a harassment grievance against Mr. Byrne. The new warden at the KP, Theresa Westfall, upheld the grievance on September 10, 2007.

15 A month later, the grievor met with Ms. Westfall, Mr. Byrne, his bargaining agent representatives and members of the CSC's Human Resources Division to discuss the continuation of his accommodation as an escort driver. Ms. Westfall reiterated and agreed with Ms. Morrin's statement that employees are expected to carry out the full range of duties in their job descriptions. On February 13, 2008, Ms. Westfall advised the grievor that he was being referred to Health Canada for an assessment in order to clarify his limitations. At the same time, Ms. Westfall reiterated that CSC policy was that accommodations were temporary in nature and could not be permanent. She also reiterated that the grievor was expected to be able to complete all his job duties as set out in his job description. He agreed to participate in the process but reserved the right to challenge it if he felt the need.

16 When not driving escorts, the grievor spent his time on duty in the drivers' room at the KP. If he was needed, the correctional supervisor in the Keeper's Hall would contact him via cellphone, radio or email or via a telephone located at his workstation. On July 9, 2008, Mr. Byrne advised the grievor that the drivers' room was no longer available and that he was to vacate it and relocate to other premises near the Security Division offices. The grievor disagreed with this change as the drivers' room was strategically located directly outside the KP perimeter wall and

close to the Keeper's Hall, which provided for the efficient and swift performance of his duties. He advised Mr. Byrne that he considered this retribution for the harassment complaint he had filed and that it constituted intimidation and an abuse of authority.

17 When Ms. Westfall became aware of the grievor's allegations, she asked Mr. Byrne to meet with the grievor and remind him that he was accommodated as an escort driver for the Security Division, which needed him nearby. There had been complaints from the Security Division to the warden about being able to access the grievor when he was located in the driver's office.

18 On September 8, 2009, the employer received the Health Canada assessment of the grievor's needs. Following this, the grievor received an email from Brian Joyce, the new Assistant Warden, Material Services, KP, stating that due to the several limitations mentioned in the Health Canada assessment, the current escort driver accommodation was no longer viable. The grievor's accommodated work duties were terminated immediately, and the grievor was sent home on sick leave.

19 The next day, the grievor received a letter from Ms. Westfall advising him that there were no positions at the KP that met the restrictions outlined in Health Canada's assessment despite the conclusion by its physician that the grievor could work full-time as a passenger driver performing escort duties. He was directed to apply for long-term disability on the expiry of his sick leave credits.

20 The grievor sought other employment as a driver and discovered that he required an upgrade to his driver's licence. On November 19, 2009, he emailed Mr. Joyce, requesting CSC assistance with the cost of this upgrade training. The grievor had found positions within CORCAN (a CSC rehabilitation program) and with the Department of National Defence, which required a class A driver's licence; he had a class B licence. Mr. Joyce acknowledged this request and reminded the grievor of the employer's request that he provide it with an updated resume, which it could forward to prospective employers. The grievor eventually provided the requested resume in hard copy; but he refused to provide it in electronic format. Nor did he agree that his resume could be scanned by the employer and forwarded to potential employers.

21 The grievor never returned to work at the KP. His search for alternate employment continued as did his request to be returned to escort duties full-time, consistent with the recommendations of his physicians and Health Canada. Ms. Westfall did not consider rebundling duties as an option. In January 2011, the grievor's psychologist again recommended a return to escort driver duties. However, all attempts by the grievor to re-establish his accommodation as an escort driver were rebuffed by the employer. The escort driver duties were again being assigned to correctional officers regardless of the fact that they fell within the institutional driver job function.

22 During the period after the grievor was put off work, the CSC proposed several options for him to consider. He was asked to register with the Public Service Commission (PSC) for admission to its priority placement list, which caused him concern as he was required to provide the PSC with a doctor's certificate stating that he was fit to return to work when he had never been unfit to work in the first place. He merely required accommodation. Driver's positions at the

CBI and Bath Institution were discussed with him, but nothing materialized that met his limitations.

23 In May 2012, Jay Pyke became the warden at the KP. He met with the grievor in September 2012, and for the first time, the concept of rebundling duties was considered. On September 12, 2012, Mr. Pyke contacted the grievor's physician, Dr. MacLeod, concerning the possibility of a driver position at the CBI, where it was possible to modify the work of the driver so that the grievor could be assigned solely to escort duties. Mr. Pyke's areas of concern were related to the transfer of prisoner effects and to the grievor's ability to lift more than 20 pounds.

24 Dr. MacLeod replied to Mr. Pyke on October 16, 2012, after having met with the grievor. In the response, Dr. MacLeod stated that given how the grievor had been treated by the CSC to that point, a return to work in any capacity there would likely make the grievor ill and it was not in his best interests to return to work there.

25 The grievor was angry about the way in which the employer had approached his request for accommodation. He had always been fit to work as an escort driver, yet the employer had kept him out of the workplace since 2009. He was willing to take on the task of investigating inmate claims, as suggested by Ms. Westfall, but the employer did nothing to facilitate this after he indicated his interest. Other requests to meet and for training and telework went unanswered. He was never contacted for follow-up about his allegations of harassment against Ms. Westfall as the Assistant Commissioner, Human Resource Management, promised in response to his grievance dated July 6, 2010 (Exhibit 1, tab 44).

26 In January 2013, the grievor was added to the PSC priority system. The last contact the grievor had with the CSC was following a meeting on February 12, 2013, with Mr. Pyke and other CSC representatives. He did receive notices from the PSC when positions became available, but he did not qualify for 99.5% (according to the grievor's assessment) of them based on the job titles and descriptions posted on the PSC website.

27 From the time he was put off work by Ms. Westfall, the grievor has not returned to the workplace. While he was never formally dismissed or laid off from the public service, work has not been assigned to him since the escort driving duties were terminated. In the interim, he exhausted all his sick leave benefits and the long term disability benefits to which he was entitled

B. Dave Reynold's Testimony

28 Mr. Reynolds testified that he was Chief, Material Management, KP, beginning in 2002 and that he supervised the grievor during this time. The grievor was one of three drivers at the KP reporting to him, who were later reduced to two, and by fall 2005, it was further reduced to one driver. An institutional driver was expected to operate a variety of vehicles, provide freight delivery and messenger services, and drive security vehicles for inmate transfers at the KP. With the reduction in the number of drivers, duties and services were eliminated, and the driver schedule was revised. After the first round of reductions, both drivers performed all three functions until it became too much. As a result, the escort driver function was turned over to correctional officers.

29 The grievor was the last of the KP's three drivers. He was initially accommodated with light duties while he healed from a back injury. He subsequently requested different duties with less stress. In conjunction with his human resources advisors, Mr. Reynolds sought information from the grievor's treating physicians on how he could be accommodated and what his functional limitations and abilities were. This information was then used to identify what job the grievor was able to do. While Mr. Reynolds believed that he had sufficient information to do this, his supervisors demanded more, which Mr. Reynolds had difficulty getting from the grievor. At his supervisor's direction, Mr. Reynolds contacted the grievor on at least five more occasions to secure additional information and an explanation of his limitations.

30 Based on the medical information available, the grievor could not perform several of the job duties that required lifting, including the messenger services portion, which involved delivering parcels exceeding the weight restrictions on what he could lift. The escort duties portion also entailed lifting an inmate's personal effects when the inmate was being transferred to another institution. The freight duties were at times accomplished mechanically but still involved lifting heavy freight since not all freight was moved on pallets. However, the decision was made to accommodate the grievor as an escort driver, which was intended to last six months and to be reviewed three months after it began in January 2006.

31 It was not uncommon that when the grievor was occupied with an escort, a correctional officer would perform escort driver duties, even though there were no other escort driver positions.

32 At some point during the period of accommodation, the grievor was moved to the Keeper's Hall, where security duties were managed. Mr. Reynolds was solely responsible for managing his attendance. His schedule was provided to him directly by the Keeper's Hall. Before then, he had been housed in the driver's office with two other drivers. Over time, with driver attrition, the grievor came to treat the driver's office as his own. When another need for the office arose, he was moved to the Keeper's Hall to address issues the security office was having contacting him when he was needed. The grievor viewed Mr. Reynolds' actions as harassment and as an attempt to intimidate him. After the grievor filed a harassment complaint against him, Mr. Reynolds had no further contact with the grievor.

33 Mr. Reynolds was trained at CSC Staff College on the employer's duty to accommodate before he dealt with the grievor's return to work. This training identified the roles and the responsibilities of those involved in the process. He was not aware of the concept of bundling duties in an attempt to accommodate a disabled employee. Regardless, it would not have been a possibility when dealing with the grievor's situation, even though the escort driver functions could have been bundled with duties involving the investigation of claims against the Crown.

34 In June 2008, Mr. Reynolds completed a job analysis form, which CSC Human Resources and the KP Return-to-Work and Accommodations Committee used to identify suitable accommodation options, even though the grievor's accommodation request was made in 2005 and he had been accommodated as an escort driver since January 2006. Mr. Reynolds did not know why it took so long for the employer to seek this information. He used a job description written in 1989 to complete the job analysis form.

35 Between 2000 and 2005, a correctional officer was accommodated in the escort driver role even though this was part of the driver's job description. Between 2006 and 2009, when he was put off work, the grievor was the KP escort driver. From 2009 until the KP closed in 2013, correctional officers were used as escort drivers. Unscheduled escorts had regularly been assigned to correctional officers.

36 Mr. Reynolds was not aware of why the grievor was ultimately removed from the escort driver role. Mr. Reynolds was led to believe that there was an inconsistency between the grievor's actual state of health and the description in the grievor's doctors' notes. The employer was apparently concerned that performing escort duties would aggravate the grievor's condition. Elements of the job were considered triggers even though there was no evidence of them triggering anything in the 3.5 years the grievor had been driving escorts. There had been issues with the grievor being unreachable at times, which caused a negative operational impact. Other than that, to the best of Mr. Reynolds' knowledge, the accommodation arrangement had worked well for the KP.

C. Evidence of Theresa Westfall

37 From August 2007 to March 2010, Ms. Westfall was the warden at the KP. In this role, she dealt with the grievor's return to work and accommodation requests. She was aware of her predecessors' attempts to accommodate him. When she took over as warden, the grievor was performing escort driver duties, which was intended to be a temporary accommodation, not ongoing. The grievor's treating professionals had not indicated that he required a permanent accommodation and that he was unable to perform the full range of the duties of his institutional driver position. To her knowledge, escort driver duties by themselves did not constitute a legitimate position. However, she admitted that the escort driver duties were a good fit for the grievor, based on his physician's recommendations.

38 On September 27, 2007, Ms. Westfall sent a request to the grievor's treating professional (Exhibit 1, tab 83), seeking an updated clarification of his medical limitations. Before she sent the request, she met with the grievor about other possible positions, including a clerk (CR-03) position as an inmate grievance coordinator, which was a full-time funded position. The escort driver position in which he was accommodated was not a substantive position, although the KP was funded for the cost of performing prisoner escorts.

39 The grievor had both physical and psychological limitations, so Ms. Westfall consulted both of his treating physicians, who indicated that the limitations were indefinite and that no circumstances warranted a change. The escort driver role suited both the grievor's physical and mental limitations. Neither physician recommended a return to the full institutional driver position.

40 Ms. Westfall decided to monitor the case and discuss it on a regular basis with grievor and his bargaining agent. Her plan was to find a full-time indeterminate position that would meet his needs. According to her, the employer was not obligated to create an escort driver position in order to accommodate the grievor even though doing so would have caused the KP no hardship

as the cost of escorts was provided for in its budget. In her view, no undue hardship was imposed on the CSC in continuing the escort driver position either temporarily or permanently.

41 Ms. Westfall allowed the escort driver arrangement to continue on a temporary basis. She met with the grievor and his bargaining agent representative and advised them that this was an interim measure, to remain in place only until a suitable full-time funded indeterminate position was found. In the meantime, Ms. Westfall asked the grievor whether he would be able to deal with inmate complaints.

42 Consequently, the grievor advised his psychologist that he had been denied the escort driver position and sought her opinion of the inmate grievance coordinator position. According to the psychologist, the grievance coordinator position was not suitable for the grievor (Exhibit 1, tab 78). Given the psychologist's opinion, it was agreed that he would continue as an escort driver until a suitable position could be found.

43 In July 2008, Ms. Westfall referred the grievor to Health Canada for an assessment. In her letter to Dr. Glass of Health Canada, Ms. Westfall expressed her concerns with the grievor continuing as an escort driver, which were that he was not fully occupied 40 hours per week and that as a result of his assignment solely to escort duties, his home department was short-staffed (Exhibit 2, tab 20).

44 About a year later, in August 2009, Dr. Glass responded to Ms. Westfall's referral (Exhibit 2, tab 25). In his opinion, the restrictions identified by the grievor's treating medical practitioners were valid. Ms. Westfall viewed the grievor's functional limitations as very narrow and as leaving the CSC with no flexibility in assigning work to the grievor. She consulted with her labour relations representative and return-to-work coordinators and determined that there were no funded positions within the KP that would suit the grievor's limitations. According to Ms. Westfall, the grievor would only consider an escort driver position within the KP and was unwilling to look elsewhere. This was not an option, in her opinion, since an indeterminate full-time escort driver position did not exist.

45 Given that no job could be found to meet the grievor's limitations, he was put on sick leave with pay until a job could be found. When his sick leave ran out, he was directed to apply for long-term disability. Ms. Westfall was willing to bundle driver duties with the CR-03 inmate grievance co-ordinator position, but the CR-03 component would not have been suitable to meet his limitations. When all options were exhausted, Ms. Westfall referred the grievor's case to the Regional Return-to-Work and Accommodations Committee to review and determine if a suitable position was available elsewhere in the region. According to Ms. Westfall, the problem in accommodating the grievor was that he was only interested in one position – that of escort driver.

46 Ms. Westfall tried to find suitable driver positions outside the CSC. This required that the grievor prepare an updated resume and agree to having it shared with perspective employers. He did provide a hard copy of his resume but refused to present it in electronic format, which would have allowed CSC representatives to share it easily. Despite this, the search for a suitable alternate position continued. Throughout the process of searching, several meetings were held

with the grievor and his bargaining agent representative. Ms. Westfall conducted job searches on the employer's websites and forwarded the results to the grievor for his consideration.

47 According to Ms. Westfall, it is not usual for a warden to be involved in an accommodation process to the degree she was. She undertook this level of involvement because of issues that had developed between the grievor and Messrs. Byrne and Reynolds, who had received complaints from correctional managers who had claimed to have had difficulty finding the grievor when he was needed for an emergency escort. For this reason, he was moved out of the driver's office and relocated to the security area. In addition, he had filed a harassment complaint against Mr. Byrne, alleging that he had shared the grievor's private information inappropriately and had contacted the grievor's doctor directly, without authorization. According to the grievor, Mr. Reynolds also harassed him, although Ms. Westfall was never provided with the details of what Mr. Reynolds was alleged to have done.

48 Return-to-work and accommodations matters at the CSC are governed by its "Commissioner's Directive CD 254," entitled *Occupational Safety and Health and Return to Work Programs* ("CD 254"; Exhibit 2, tab 76), and its "Guidelines 254-2" (Exhibit 2, tab 77). Paragraph 27 of Guidelines 254-2 speaks to the modification of work methods and procedures and job restructuring as options for accommodating an employee. According to Ms. Westfall, she would have considered rebundling duties within the institutional driver position, but the grievor sought the removal of all duties except escort driving, which would have entailed the creation of a new position that would have been unfunded. He was unable to perform the bulk of the duties of his substantive position (although the cost of performing escorts was funded).

49 The escort driver position was created as an interim measure. Continuing it on an indeterminate basis would not have been an effective use of the KP's budget as it would have required funding a position over and above the KP's funded allotment. The fact that the grievor continued in the escort driver role for 3.5 years was unusual, and continuing to allow it was no longer an option. In the meantime, resources were allocated to fund a temporary replacement to perform those duties of the institutional driver that the grievor was unable to perform.

50 The cost of prisoner escorts came out of the security budget envelope for salaries and overtime for correctional officers. The KP was funded for two to three escorts per day as emergency, medical or temporary absence escorts were assigned to correctional officers performing other duties there. This budget was used to pay the grievor's salary as an escort driver. There was no funded position within the grievor's home department to cover the cost of the escort driver. When the KP budget manager directed that a full-time funded position be found for the grievor, Ms. Westfall contacted Health Canada. She was not able to create long-term accommodation positions without violating her responsibilities under the *Financial Administration Act* (R.S.C. 1985, c. F-11).

51 Ms. Westfall, together with Josh Bowen, a labour relations subject matter expert at the CSC, reviewed the institutional driver job description in light of the Health Canada report. The majority of the driver duties at the KP had to be eliminated. They looked elsewhere for options as not all driver positions at the different institutions within the CSC's Ontario Region were the same. The grievor was sent home on sick leave while the search continued, despite Dr. Glass's

recommendation that he be accommodated as an escort driver, as Ms. Westfall viewed the grievor's accommodation needs as other than temporary; the escort driver role, although long-standing, was never intended to be a permanent accommodation.

52 CSC representatives continued to identify possible accommodation opportunities. Those that the CSC felt were appropriate were to be sent to the grievor's physicians for review. Every job considered included the possibility of rebundling tasks. The decision to cease the escort driver function as an accommodation for the grievor was financial. At no point did the CSC claim undue hardship as a reason for its decision.

D. Evidence of Josh Bowen

53 Mr. Bowen provided return-to-work and labour relations advice to KP management. His role in accommodating the grievor was to move the accommodation process along. This was one of his first accommodation-related files. According to him, when determining whether a position is a suitable accommodation, the rule of thumb is to stick as closely to the employer's original job description as possible. If it is not possible to accommodate an employee within his or her job description, then other positions within the same skill set and pay range are considered. In the grievor's case, Mr. Bowen was looking at positions at the CR-03, CR-04 and AS-01 groups and levels, with the closest to the original classification being at CR-03.

54 Mr. Bowen communicated with the grievor many times in person, through his bargaining agent and via email. The grievor was very involved in the accommodation process and often disagreed with the CSC on the best way to move ahead. KP management was open to hearing his concerns and, to the best of its ability, meeting his preferences. Whether or not he agreed, the CSC might have proceeded if a suitable accommodation solution could have been found.

55 The grievor was invited to participate in the discussion of his case at the Regional Return-to-Work and Accommodations Committee meeting but declined (Exhibit 2, tab 35). However, his bargaining agent representative did attend, and the Committee reviewed and discussed the grievor's file on November 30, 2010.

56 At the meeting, certain personal information concerning the grievor's medical condition was discussed, which he felt breached his right to privacy. As a result, he withdrew his consent, and his file was withdrawn from the Committee, which ceased discussing it. Despite this, the search for a suitable position for the grievor continued (Exhibit 2, tabs 40 and 41). Driver positions at 8 Wing Trenton in Trenton, Ontario, and within the CSC's Ontario Region at Bath, Collins Bay, Pittsburgh and Warkworth Institutions were all considered.

57 In November 2009, the grievor contacted the CSC, inquiring as to the availability of funds with which to upgrade his driver's licence. This request was denied as no information was provided to the CSC to demonstrate that there was a prospect of any job if the training were provided.

58 According to Mr. Bowen, the goal of an accommodation is to keep the employee within his or her position, to avoid creating a job. Every possible option, starting with the original position,

must be considered. His search for a position for the grievor was focused on whole jobs, not duties. The CSC and the grievor fundamentally disagreed concerning this approach and whether escort driver duties constituted a sufficient position to have him employed and productive 40 hours per week. While consideration was given to the grievor's preferences, they did not determine the position to be offered. He and his medical practitioners refused the CSC's attempts to rebundle administrative tasks such as grievance coordination with the escort driver role so that the grievor would be busy when escorts were not required. His psychologist felt that this would require multitasking, which was contraindicated by the grievor's condition.

59 The medical reports provided to the CSC limited the scope of the search for a proper accommodation for the grievor. While the CSC would have considered new options had he proposed some, none were presented. Consequently, the focus of the search was on clerical or administrative options within the region, with the possibility of bundling certain administrative functions with driving escorts. By 2011, the search was focused on finding a job the grievor could do rather than on rebundling possibilities.

60 At no point was escort driving intended to be a full-time job. It was offered to the grievor as a temporary accommodation while a search for a suitable indeterminate option progressed. When the search proved unsuccessful, Michelle Vermette, Assistant Warden, Management Services, CSC, asked the grievor to register with the PSC as a disability priority, which broadened his entitlement for placement across the federal public service (Exhibit 2, tab 50). This required the grievor to obtain a medical certificate stating that he was able to return to work on a specified date. He responded to this request in a lengthy email (Exhibit 2, tab 53). He refused to provide further medical certificates certifying his fitness to return to work as he had always been fit to work and still would have been at work had the CSC not sent him home. He did eventually reconsider registering (Exhibit 2, tab 54) and then did so. The medical certificate he provided in support of his disability priority entitlement request indicated that a return to the CSC was no longer a desirable option (Exhibit 2, tab 55). He expressed concerns with the suitability of all the job postings the PSC forwarded to him.

61 Ms. Vermette contacted her colleagues at the CBI to see if they could accommodate the grievor as an escort driver. The CBI had both regional and institutional driver positions, and it was hoped that there was more possibility to rebundle tasks to suitably accommodate the grievor. The Assistant Warden, Management Services, CBI, felt that it would be possible to bundle enough duties to create a position for the grievor by adjusting the tasks assigned to other drivers there. Ms. Vermette raised this option with the grievor and received no response.

62 Ms. Vermette and the grievor had further discussions when a garbage truck driver position opened at the CBI. He was licensed appropriately to drive a garbage truck. In addition, Ms. Vermette spoke to her counterparts at other institutions who employed drivers. She also forwarded short-term job postings to the grievor as options to get him back in the workplace. Ms. Vermette was aware of the Health Canada recommendation that the grievor be accommodated as an escort driver, but this accommodation was intended only to be temporary. Other driver-type positions elsewhere in the region were ruled out based on the grievor's limitations.

E. Evidence of Kelly Wall

63 Kelly Wall is the CSC's regional return-to-work advisor. She worked closely with the KP and provided assistance with its attempt to accommodate the grievor. Once the grievor was advised in January 2012 that his disability benefits would end in March 2012, she was actively involved with CSC staffing to search for potential positions for him. She used the list of his limitations provided to her by CSC labour relations in her search. She forwarded a job posting for a maintenance technician to Lisa MacInnes, in CSC labour relations, as a possibility. Ms. MacInnes indicated that the grievor thought that this position was unsuitable, which eliminated the possibility of positions at CSC regional headquarters.

64 Ms. Wall continued to work with Ms. Vermette and the KP's new warden, Mr. Pyke, to find positions at other institutions within the CSC's Ontario Region. She considered positions at the CBI, the regional garage, regional headquarters, CORCAN and Frontenac Institution. She considered modifying positions and rebundling the duties of other positions, which would have allowed the grievor to drive escorts full-time (Exhibit 2, tab 61). More information was required from the site (the CBI) to determine if this would be possible.

65 When the CSC received the grievor's request for assistance for upgrading his driver's licence, there was a question of whether the employer was obligated to provide the assistance. The grievor had no immediate job prospect, so the CSC determined his request premature. Vocational rehabilitation was not an option for him as he had no compensable injury.

66 Ms. Wall was not aware of what happened with the other options that were identified. Several people other than her were involved in discussions with the grievor on exploring these options, including Ms. MacInnes.

F. The evidence of Lisa MacInnes

67 Ms. MacInnes was a labour relations advisor at the KP from April 2010 until October 2013. During that time, she provided advice to management on labour relations issues, discipline, grievances, and return-to-work and accommodation matters. She was actively involved in the grievor's file commencing in April 2010, when she took the file over from Mr. Bowen. In 2012, she had the first conversation with the grievor concerning the PSC priority entitlement list and the possibility that a job for him existed elsewhere than the CSC. Other than that, her communication with the grievor was in writing through his bargaining agent representative. She was involved in drafting an action plan (Exhibit 2, tab 43), the goal of which was to facilitate the grievor's return to work.

68 Under this action plan, the employer was to send a letter to the grievor's physician to obtain clarification on the grievor's limitations and his ability to perform his substantive position. In addition, the physician was asked to identify what tasks could be taken from other positions in an effort to rebundle tasks and provide the grievor full-time employment. A draft of this letter was shared with the grievor on December 9, 2010. He disagreed with the employer's intention to send the letter to both of his physicians (Exhibit 1, tab 50), which caused Ms. MacInnes concern because addressing the letter to only one of two treating physicians, as the grievor suggested, could have resulted in pertinent information being missed. No agreement was ever reached with the grievor on the letter's content, although it was redrafted based on some of his concerns.

69 Positions were identified and forwarded to the grievor and his bargaining agent representative. No job offer resulted, as the positions identified were not suitable or, as with the maintenance technician position at Regional Headquarters, the grievor was concerned that he did not have the qualifications. He and his bargaining agent brought forward the escort driver position at the KP as the only option.

70 After the possibility of a driver's position at the CBI fell through, the employer agreed to rebundle tasks. To this end, Ms. MacInnes met with the grievor in September 2012. Before any offer could be made, additional up-to-date medical information outlining the grievor's limitations was required. The response to this request was that despite being physically able to do the job being considered, it was not possible for him to return to the CSC (Exhibit 2, tabs 67 and 68).

71 In January 2013, Ms. MacInnes met with the grievor to discuss what other steps could be taken to ensure his return to work. She encouraged him to work with the PSC. As he could not return to the CSC, it was incumbent on him to seek employment elsewhere, with the assistance of the CSC and the PSC. Ms. MacInnes felt that her meetings with the grievor were positive and that they had a common goal. Despite this, after a meeting, Ms. MacInnes would usually receive a written communication (letter or email) from the grievor stating how upset he was with how the meeting went and bringing up unresolved issues he had from the past.

72 While the grievor was open to considering some proposals, he was not open to others. Despite Ms. MacInnes's genuine efforts to find him something, the grievor was not willing to accept any of the options presented. In the end, the strongest proposal, the precedent setting step at the KP of rebundling duties, failed when the grievor would not agree to letters being sent to his doctors. Telework was eliminated as an option as the problem the parties encountered was task-oriented, not location-oriented. Regardless, in order to telework, a position must exist.

G. Evidence of Jay Pyke

73 Following the January 2013 meeting with the grievor, the CSC considered severing ties with him. Mr. Pyke put an end to discussions about past concerns; to continue to discuss the past was non-productive. Rather than move directly to terminating the grievor's employment, Mr. Pyke agreed to wait until the outcome of the hearing.

74 Mr. Pyke was Warden at the KP from April 1, 2010, to September 30, 2013. When he arrived, he met with labour relations and the return-to-work committee for a status update on all outstanding cases. He was briefed by Mr. Joyce, the grievor's manager, on the lack of progress that had been made on the grievor's file. Mr. Joyce raised the question of whether the employer would pay for the training to upgrade the grievor's driver's licence. Mr. Pyke denied the request in the absence of a conditional offer of employment for the grievor.

75 Mr. Pyke set about implementing the action plan the parties had developed by drafting a letter seeking information on the grievor's limitations from his doctors. He sent two drafts of this letter to the grievor, who responded with further changes. Following his seven-page response to the second draft, no further drafts were sent to him.

76 The response Mr. Pyke received in January 2011 from the grievor's psychologist, Dr. Nogrady, caused him concerns; he wondered if the doctor had even seen Mr. Pyke's request for information. Her response (Exhibit 2, tab 25) spoke to self-reported information provided to her by the grievor. It did not speak to the employer's expressed concerns. She merely reiterated that the grievor was able to perform escort duties.

77 Despite the grievor's apparent lack of compliance with the action plan, Mr. Pyke continued his attempts to accommodate him. He was willing to bundle escort duties with other duties. He and the grievor had cursory discussions about this possibility, but nothing developed, as Mr. Pyke still required further medical information.

78 When Mr. Pyke received the letter from Dr. MacLeod in October 2012 (Exhibit 2, tab 67) stating that the grievor was no longer able to work at the CSC in any capacity, followed by Dr. Nogrady's letter confirming this opinion (Exhibit 2, tab 68), Mr. Pyke concluded that a return-to-work at the CSC was not an option. The only option was to refer the grievor to the PSC priority list.

79 The grievor emailed Mr. Pyke, outlining his opinion of his entitlements (Exhibit 2, tab 69), and Mr. Pyke responded on November 30, 2012 (Exhibit 2, tab 70). The grievor wrote a 23-page response to Mr. Pyke's letter (Exhibit 1, tab 64).

80 After one final meeting with the grievor and his bargaining agent representative, Mr. Pyke concluded that they had come full circle and that an impasse had been reached. After this, no further contact with the grievor was made; the parties agreed that a third party would be required to resolve the matter.

81 Mr. Pyke described the tone of his meetings with the grievor as strained at times but overall as not bad and not adversarial.

III. Summary of the arguments

A. For the grievor

82 Between 2006 and 2009, the grievor was accommodated by assigning him the driving escort duties at the KP. Warden Westfall made the decision to remove him from the workplace because, despite the fact he had been working full-time driving escorts, the escort driver position did not meet the criteria for a full-time indeterminate position. According to Ms. Westfall, the escort driver position was never intended to be a permanent accommodation even though nothing prevented that from happening. She clearly testified that continuing to accommodate the grievor in the escort driver role caused no undue hardship for the CSC. All the medical practitioners involved recognized this as the best accommodation for the grievor.

83 In the absence of any undue hardship, the employer's refusal to continue to accommodate the grievor as an escort driver was a violation of its duty to accommodate. It should not have sent him home on sick leave. Its insistence on a position in which he could perform all the duties and

functions changed with the departure of Ms. Westfall, when CSC management actively began to consider rebundling duties to ensure he was actively employed.

84 It was open to Warden Pyke to reinstate the previous accommodation arrangement, which was the best way to end the discrimination against the grievor, but this was never considered as an option. What the doctor said in 2012 and whether the grievor cooperated with the search for another position are irrelevant. None of the problems the parties incurred would have happened had the employer not refused to continue to accommodate the grievor as an escort driver.

85 Section 15 of the *CHRA* requires that the employer prove that it has accommodated an employee to the point of undue hardship. The Supreme Court of Canada (SCC) has said that in the absence of a *bona fide* occupational requirement, accommodation to the point of undue hardship must be proven (see *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, at para 54 and 62; the "*Meiorin*"case).

86 At paragraph 62 of *Meiorin*, the SCC stated that the employer must establish that it cannot accommodate the claimant affected by a standard without experiencing undue hardship. The burden of proof shifts to the employer once a *prima facie* case of discrimination has been made. To justify sending the grievor home, the CSC had to prove it was an undue hardship to keep him in the workplace as accommodated as the existence of a *bona fide* occupational requirement was not at issue in this case.

87 The first things to examine when looking to accommodate an employee in the workplace should be that employee's capabilities (*Meiorin*, at para 64). The employer had found an accommodation that used the grievor's capabilities and met his needs for 3.5 years. It should have been changed only if it had become an undue hardship. The employer's witnesses testified that it was not an undue hardship to continue the escort driver accommodation but that doing so did not fit within the employer's policies and procedures. In *Meiorin*,at para 68, the SCC stated that employers must build into workplace standards the concept of equality and change them if necessary to meet the duty to accommodate disabled employers.

88 At para 22 and 32 of *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, ("*Grismer*"), the SCC defines accommodation as what is required to avoid discrimination. The employer bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship is serious risk or excessive cost. The employer did not rely on risk as a reason for refusing to continue to accommodate the grievor as an escort driver. The sole reason his accommodation was terminated in 2009 was that the employer was looking at the nature of the position; that is, it was not a full-time indeterminate position.

89 The Canadian Human Rights Tribunal (CHRT), in *Richards v. Canadian National Railway*, 2010 CHRT 24, at para 216, outlines the method for analyzing the procedural part of the accommodation process followed by the employer. Furthermore, at paragraph 223, the CHRT makes it clear that consistent with the SCC rulings in *Meiorin* and *Grismer*, an employee's individual assessment is an essential step in the accommodation process. Each individual is

judged according to his or her personal abilities and not to presumed characteristics, which are frequently based on bias and historical prejudice.

90 When dealing with an accommodation request, an employer must recognize that handicaps have both physical and mental components (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, at para 77 to 83). The employer must consider both elements when determining the suitability and feasibility of an accommodation. The CSC did not consider the impact of its actions on the grievor when, after more than three years, it terminated his accommodation for financial reasons.

91 The employer has accepted that rebundling duties was one means of accommodating the grievor (see Exhibit 2, tabs 76 and 77). Its policies allow for a position to be altered in order to accommodate an employee. Rebundling job duties has been recognized as an effective means of accommodating a disabled worker in the workplace when no one job would do so (*Tarxien Co. v. C.A.W. Loc. 1090* (1997), 62 L.A.C. (4th) 129, at 146 and 149). Ms. Westfall refused to look at rebundling duties; she was focused on full-time indeterminate positions in which the grievor could do the full range of duties. Her inflexibility resulted in a breach of the *CHRA*.

92 The stand Ms. Westfall took that neither she nor the CSC was under any obligation to turn the escort driver role into a full-time indeterminate position for the grievor is inconsistent with the law. The employer is not obligated to create work in order to accommodate the grievor, but in this case Ms. Westfall knew that work existed (*Audet v. Canadian National Railway*, 2006 CHRT 25; *Essex Police Services Board v. Essex Police Association* (2002), 105 L.A.C. (4th) 193; and *Ontario Liquor Boards Employees' Union v. Ontario (Liquor Control Board)*, [2002] O.G.S.B.A. No. 32 (QL)).

93 There was a positive onus on the employer to explore all options in order to accommodate the grievor, and it did not end when the grievor's treating physicians, Dr. MacLeod and Dr. Nogrady, stated that it was not possible for the grievor to return to work at the CSC based on the effects of his past treatment by the CSC (Exhibit 1, tab 94). The employer could have sat down and discussed the past relationships with management, but Mr. Pyke was not willing to do so. The grievor's problems were linked to the past, which he needed to address in order to return to the workplace. Regardless, whatever happened in 2012 was moot; it would not have happened had Ms. Westfall not withdrawn the escort driver role from the grievor in 2009.

94 The issues with the grievor's productivity and the employer's ability to find him were performance issues, not accommodation issues. These were the reasons he was sent home; it was not a question of undue hardship. Ms. Westfall stated in her testimony that there was no undue hardship. She did not actually know how occupied he was during the workday. No one at the KP doubted that he was busy. Even if there was a lack of work, the employer should have explored options and assigned the grievor more work. Ms. Westfall admitted that the escort driver role was a good fit for the grievor based on his doctors' recommendation.

95 The employer knew that the grievor's disability was likely permanent and ought to have considered the escort driver position as a permanent accommodation as recommended by the doctors, including Health Canada's Dr. Glass (Exhibit 1, tabs 85, 89 and 90). The employer

chose not to and, as a result, caused further injury to the grievor. Equity says that a wrongdoer cannot benefit from his or her wrongdoing. Nor should the employer in this case be allowed to rely on how sending the grievor home in 2009 affected the grievor as proof of his non-cooperation with the process; otherwise, the employer would benefit from its discriminatory behaviour.

96 Between 2008 and 2009, the employer looked only for full-time indeterminate positions in order to accommodate the grievor. Ms. Westfall was prepared to create a temporary escort driver position but would not consider creating a full-time indeterminate one. She was interested only in finding a suitable full-time funded position, and when none arose, she decided she had no other option but to send the grievor home on sick leave, which was a clear violation of the employer's duty to accommodate. The employer was obligated to provide him with other viable options to meet his accommodation requirements, not merely sending him home to wait, particularly when, for all purposes, the existing accommodation was working and met all his needs.

97 Bundling duties should have been given due consideration by Ms. Westfall. Her failure to was a clear violation of the employer's duty to accommodate the grievor. The fact that the employer, subsequent to Ms. Westfall's departure, was willing to consider bundling driver duties at the CBI shows that it recognized that bundling duties to create a position in which to accommodate the grievor was a suitable means by which to meet his accommodation needs.

98 The grievor was shocked when he was sent home without explanation and put on leave. He was given no opportunity to respond to the employer's concern. He requested the reasons for the termination of his accommodation in writing (Exhibit 1, tab 24) and was advised by Ms. Westfall that no suitable positions existed at the KP or in the CSC's Ontario Region in which to accommodate him (Exhibit 1, tab 25), despite the fact that Dr. Glass of Health Canada stated that the grievor was fit to perform the duties of an institutional driver (Exhibit 2, tab 25).

99 After Mr. Pyke's arrival as KP warden in April 2010, the grievor's file was reviewed, in December 2010. The only reason Mr. Pyke gave for this delay contacting the grievor was that he wanted to ensure that he had things in order before he contacted the grievor. This explanation is insufficient since the grievor had been off work since 2009. A further delay of 18 months occurred when the parties could not agree with the content of a letter seeking further clarification of the grievor's medical restrictions. He provided the employer with what he thought was acceptable (Exhibit 1, tab 90) and heard nothing further for 18 months. It was clear from the evidence that at a meeting of the parties on February 12, 2013, Mr. Pyke was not interested in responding to the grievor's concerns over his treatment by KP management.

100 The employer's witness, Mr. Bowen, suggested that the grievor was uncooperative with the employer's attempts to find him a suitable accommodation. There was clearly a difference of opinion between the grievor and Mr. Bowen, which is not the same as a refusal to cooperate. Both Ms. Westfall and Ms. Vermette stated that the grievor was cooperative. He asked for training, explored options outside the CSC, tried the parole officer position found by the employer, expressed an interest in telework, and was clearly engaged and cooperative with the process until communication from the employer ceased from Mr. Pyke's arrival until September

2012. From the fall of 2012 until January 2013, the grievor attended several meetings in order to resolve his accommodation issues. Even though he was initially reluctant to register for the PSC priority list, he ultimately did.

101 Human rights jurisprudence requires that the grievor be put in the position he would have been but for the discrimination (see *Impact Interiors Inc. v. Ontario (Human Rights Commission)*, [1998] O.J. No. 2908, at para 2 (QL); *Chopra v. Canada (Attorney General)*, 2006 FC 9, at para 41, and 2007 FCA 268, at para 27 and 29; *Canada (Attorney General) v. Morgan*, [1992] 2 F.C. 401 (C.A.). Had the grievor been allowed to continue as an escort driver, he would likely still be employed full-time. In addition, under sections 53(2)(*e)* and 53(3) of the *CHRA*, if he is successful in proving he was a victim of discrimination, he is entitled to general damages for pain and suffering, plus additional damages for willful or reckless discrimination. The parties should be left to determine the appropriate compensation due him in the event that the grievance is upheld.

B. For the employer

102 The main issue to be determined is whether the employer has fulfilled its duty of accommodation to the point of undue hardship. The grievor was employed by the CSC as an institutional driver. His main duties were to perform messenger duties, to deliver freight and to drive prisoner escorts. Eventually, he was accommodated by removing the messenger and freight functions from his daily activities, leaving only the escort function. According to Ms. Westfall, this accounted for less than 70% of his paid hours. Mr. Pyke and Ms. Westfall both testified that there was no such position as an escort driver at the KP; nor were there sufficient escorts to constitute a full-time position for the grievor.

103 When the grievor assumed the escort driver role in January 2006, it was clearly indicated to him that this was a temporary accommodation (Exhibit 2, tab 10). There was no indication until the employer received the Health Canada report that the grievor required a permanent accommodation. At no time during the 3½ years he was driving escorts was there any indication that he was permanently disabled. When this was confirmed by Health Canada, the employer began to look for a permanent full-time option in which to accommodate him, according to Ms. Westfall. While the search continued, the employer requested updates on the grievor's limitations. There was nothing malicious in these requests. The employer was entitled to know the status of his limitations to ensure that he was accommodated properly.

104 Over the course of more than two years, the doctors' reports focused exclusively on the escort driver function as the only accommodation suitable for the grievor. No such position existed, so the employer sought a third opinion, from Health Canada. Its report took more than one year to arrive. The employer should not be penalized for continuing to accommodate the grievor as an escort driver in the meantime.

105 Once it became evident that the grievor was permanently disabled, a new accommodation was required. The problem, according to Ms. Westfall, was finding the funding for a suitable full-time position that met his extensive limitations. She did not rule out bundling duties as a possibility. When the grievor's physician confirmed that he was not able to perform the duties of

an inmate grievance coordinator (Exhibit 1, tab 78) in November 2005, he was accommodated in his existing position doing limited duties, and the idea of combining the inmate grievance coordinator duties with driving escorts was abandoned.

106 Both Ms. Westfall and Mr. Pyke had concerns over the impact on the grievor of stressful situations occurring while he was on an escort. Such a situation could have posed a safety threat to him and the public. Neither warden was willing to accept the risk the grievor's continued accommodation posed to the public. Wardens have the liberty to determine the appropriate level of acceptable risk.

107 Between 2006 and 2012, the employer made continuous and vigorous efforts to find sufficient duties to combine with driving escorts to create a full-time position. The duties sought were within the same group and level to avoid the necessity of classifying a position cobbled together from positions of several groups and levels. The intention was to bundle duties within the same classification to create full-time employment for the grievor. In addition, he was further accommodated by his placement on the PSC priority list.

108 The evidence is clear that the grievor received notice of approximately 50 job possibilities by virtue of his placement on the PSC priority list. He looked at one, decided he did not meet the qualifications and went no further. He did not apply to any of these positions. Clearly, he was not cooperating with the accommodation process. Returning phone calls and responding to emails did not mean he was cooperating with the employer in the accommodation process. Every proposal made to him was met with a "No." There was no willingness on his part to find a middle ground. The only acceptable option to him was the escort driver position, which was not acceptable to the employer. He was rigid in his approach to accommodating his needs and would not compromise.

109 The employer's efforts continued after 2009. Ms. Westfall contacted other departments, looking for possible accommodation options (Exhibit 2, tab 33). Eventually, the CBI agreed to accept the grievor as an escort driver. When consulted for their approval of this option, the grievor's doctors indicated that he should not return to work at the CSC. The point of undue hardship was reached.

110 Since the *Meiorin* decision, the employer's duty to accommodate to the point of undue hardship has been refined (see *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, and *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4). The duty to accommodate an employee is to ensure he or she is able to work and is not excluded from employment on the basis of a prohibited ground under the *CHRA*. *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68, at para 27 and 28, set out the proper method of analysis to determine if an employee is being discriminated against by not being accommodated.

111 According to *Gibson*, the employee is required to establish a *prima facie* case of discrimination. The grievor has not met his burden of proof. The evidence shows that the employer met its obligations when he was offered the escort driver position at the CBI.

According to Mr. Pyke, the Warden at the CBI was willing to offer the grievor the escort driver position there if his doctor approved. The doctor did not (see Exhibit 2, tab 65).

112 There was no misunderstanding of the grievor's limitations, which remained unchanged until October 2012. While he was at work and after he was sent home in 2009, the employer continued its search for options to accommodate his needs. The grievor refused to entertain these options. Nor would he entertain the possibility of being a part-time escort driver (see Exhibit 1, tab 81). The employer made extensive and conscientious efforts to find a solution that would allow the grievor to be gainfully employed in light of his limitations (see *Spooner v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 60, at para 137).

113 In 2009, after receiving the Health Canada report, Ms. Westfall determined that there were safety issues with the grievor driving escorts and that there were insufficient escorts for a driver to constitute full-time employment. The employer must take into account the work context and the health and safety of its other workers (see *Sioui v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 44, at para 91).

114 The employer, as it did in *Sioui*, fulfilled its obligation by making numerous efforts to find the grievor a suitable position as well as ensuring he had access to PSC resources (see *Sioui*, at para 92).

115 Undue hardship depends on the facts of the situation. The employer was not required to unduly interfere with its workplace; nor was it required to incur undue expense in order to accommodate the grievor (see *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Commission Scolaire Régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970).

116 The employer is not required to create a job. The problem that the employer faced was finding enough duties that could be combined to make a full-time position. It accommodated the grievor for 3.5 years as an escort driver and should not be penalized for its effort (see *Shaw Pipe Protection (A Shaw Co.) v. United 59*, [2013] A.G.A.A. No. 20 (QL), and *Lafrance v. Treasury Board (Statistics Canada)*, 2009 PSLRB 113).

117 The only accommodation the grievor would accept was that of an escort driver. An employee is not entitled to his or her preferred work as a reasonable accommodation (see *Lafrance*, at para 115). The employer made continuous efforts to find the grievor a job in his preferred area, which came to fruition with the position at the CBI. These efforts met their end in October 2012 when his doctor said the grievor could not return to the CSC.

118 The employer has discharged its duty to accommodate the grievor. He was provided sick leave, was offered other positions and had his employment protected. The employer explored a wide range of options and showed nothing but good faith. It looked at long-term and short-term options, but the grievor was not interested in short-term options. He declined all efforts by the employer to return him to the workplace. He was only interested in escort driver positions. The duty to accommodate does not guarantee an employee an immediate or perfect accommodation.

Nor can an employee pick and choose what he or she will do (see *Calgary District Hospital Group v. U.N.A.*, 28 C.L.A.S. 86; *Sysco Foodservices of Toronto v. Teamsters, Local 419*, [2009] O.L.A.A. No. 320 (QL); *Honda Canada Inc. v. Keays*, 2008 SCC 39; and *Callan v. Suncor Inc.*, 2006 ABCA 15).

119 A grievor loses his or her right to an accommodation by turning down a reasonable option, so the grievor's conduct is relevant in deciding if the employer has discharged its duty to accommodate (see *Renaud*,at pages 30 and 31). The grievor was not contributing positively to the accommodation process. He met every suggestion with a negative response. An employee is expected to accept a reasonable compromise and to communicate his or her limitations (see *Chang v. Federal Express Canada Ltd.*, [2013] C.L.A.D. No. 209 (QL); *Spooner*; and *King v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 122).

120 The employer argues that in the event that I decide that the employer has breached its duty to accommodate the grievor and that he is entitled to damages, he has a duty to mitigate his losses. He received disability insurance from the time the grievance was filed until March 2012. No evidence has been provided of any loss. It is public knowledge that the KP was closed in 2013 and that many of its employees were subject to workforce adjustment. Any reinstatement of the grievor to the workplace should be limited to the period from when he was removed from the workplace to the date on which he would have been subject to workforce adjustment or laid off.

121 Any pain and suffering to which the grievor was subjected resulted from his unwillingness to deal with the past and to move on. Mr. Pyke took the approach that he could not fix the past and that he wanted to fix the future. Others continued to work on solutions even after the unsuccessful attempt to resolve the accommodation issues between Mr. Pyke and the grievor. Any humiliation and stress the grievor suffered were not caused by being sent home. Stress was an issue for the grievor before he left the workplace.

122 The parties developed an action plan (Exhibit 2, tab 43) at a meeting on December 1, 2010. The grievor refused to cooperate with the plan by providing objective medical reports. Those he provided reflected only his version of the facts as relayed to his physicians. His lack of cooperation resulted in a failure by the parties to reach a mutually agreeable resolution. The grievor played a role in any delays accommodating him. He refused to move forward unless perceived wrongs from his employment past were addressed.

123 There is no evidence of egregious conduct by the employer under subsection 53(3) of the *CHRA*. When Ms. Westfall made the decision to remove the grievor from the workplace in 2009, there were no other duties available that met his limitations and that could have been cobbled together to make him a full-time position.

C. Grievor's rebuttal

124 There is no evidence before me to prove that the grievor was not occupied on a full-time basis driving escorts. The only evidence that he was came from him. Ms. Westfall acknowledged that he was busy. His evidence was not challenged. At best, the decision was made for monetary

reasons. Ms. Westfall acknowledged that the employer would have suffered no undue hardship had the escort driver accommodation continued.

125 As for the issue of the stressful nature of the work, Health Canada accepted that despite the grievor's need to avoid stressful occupations, driving passenger escorts was acceptable (Exhibit 1, tab 89). With due deference to Ms. Westfall's decision as KP warden, any concerns over safety in the event that the grievor continued to drive escorts was not expressed; nor is there any mention of it in the letter given to him when he was sent home. In order for the possibility of a safety risk to justify the termination of the grievor's accommodation, the employer had to establish a *bona fide* occupational requirement or undue hardship.

126 *Meiorin* sets out the test for undue hardship. The employer has provided no evidence of a standard rationally tied to the escort driver job or necessary for the fulfillment of a work-related purpose that establishes undue hardship. Speculating about the existence of a safety issue is not sufficient for the purposes of establishing undue hardship. Clear and cogent evidence of safety concerns, which are not anecdotal or impressionistic, are required (see *Meiorin*, at para 79). The employer's concerns, as expressed at the hearing, provided no analysis of the risk concern and were purely speculative and hypothetical.

IV. Reasons

127 Section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to continue to employ any individual or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Disability is a prohibited ground of discrimination (subsection 3(1) of the *CHRA*). Section 25 of the *CHRA* defines "disability" as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

128 In order to establish that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination, which is one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at para 28)). The Board cannot take into consideration the employer's answer before determining whether a *prima facie* case of discrimination has been established (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para 22).

129 It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the claim of discrimination to be substantiated. The grievor had only to show that discrimination was one of the factors in the employer's decision (see *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para 7). The standard of proof in discrimination cases is the civil standard of the balance of probabilities (see *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 F.C. 789 (C.A.)).

130 As I will explain later in this decision, I find that the grievor has established a case of discrimination on a *prima facie* basis for which the employer has not presented evidence

demonstrating that its actions were in fact not discriminatory or established a statutory defence that justifies the discrimination; as a result, the grievor's claim is substantiated.

131 The grievor was employed by the CSC at the KP as an institutional driver. Due to his disability, he was unable to perform the messenger and freight functions of his job. The parties recognized his disability and accommodated him on a temporary basis commencing in January 2006 as an escort driver, in accordance with the restrictions identified by the grievor's medical professionals, which were accepted by the employer.

132 The grievor continued to perform solely escort driver duties rather than the full range of institutional driver duties outlined in his job description between January 2006, and September 8, 2009, when he was advised via email that his accommodation had ended as it was impossible to continue it, due to the detailed limitations outlined in the medical report received from Health Canada (see Exhibit 1, tab 23). This medical report confirmed that the grievor's restrictions were considered a permanent disability and that he required workplace accommodation due to these medical limitations. It also stated that he was capable of continuing in his accommodated duties as an escort or passenger driver provided that sufficient work was available (see Exhibit 2, tab 25). Nonetheless, the employer decided to terminate the grievor's employment duties and directed that he go on sick leave. As such, I find that the grievor has established on a *prima facie* basis that the employer engaged in a discriminatory practice by refusing to continue to employ him and adversely differentiating in relation to his employment on account of his disability (s. 7 of the *CHRA*).

133 Once a *prima facie* case has been established, the employer can avoid an adverse finding by calling evidence showing that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35, at para 13). Where the employer leads evidence to rebut the *prima facie* case, it is up to the grievor to establish that the employer's evidence is false or a pretext, and that the true motivation behind the respondent's actions was, in fact, discriminatory.

134 Ms. Westfall was the KP warden in September 2009 and was responsible for the decision to remove the grievor from the workplace and to end his accommodation of solely performing escort duties. She freely admitted that the escort work existed and was required and that she received funding in her operational budget to pay for the costs of transporting prisoners. Furthermore, she unreservedly testified that to continue to accommodate the grievor as an escort driver would have caused no undue hardship to the employer. Her rationale for ending the accommodation, provided by the grievor, was based on the fact that his disability was considered permanent and that in her opinion he needed to be accommodated in a full-time indeterminate position as it was not the employer's practice to create a position in which to accommodate a disabled employee. Furthermore, she believed that based on the Health Canada report, despite the fact that it recommended that the grievor remain as an escort driver, a safety issue was at play, and she was not willing to accept the risk of allowing the grievor to continue in the escort driver role.

135 The employer relied on subsection 15(2) of the *CHRA* as a statutory defence to what would otherwise have been an act of discrimination against the grievor. That subsection reads as follows:

Exceptions

15. *(1) It is not a discriminatory practice if*

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement; (...)

Accommodation of needs

15. *(2) For any practice mentioned in paragraph (1)(*a*) to be considered to be based on a* bona fide *occupational requirement and for any practice mentioned in paragraph (1)(*g*) to be considered to have a* bona fide *justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.*

136 The former Board has had occasion to consider this issue on several occasions, one of which was in *Sioui*, in which the Vice Chairperson wrote the following:

…

75. The application of the obligation to accommodate was interpreted in British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU), *[1999] 3 S.C.R. 3 (*Meiorin*), at para 54. To summarize, when an employer applies an employment standard, it must justify that standard by showing that (1) it is rationally connected to job performance, (2) the standard was adopted because it was necessary to fulfill a legitimate work-related purpose and (3) the standard is reasonably necessary for accomplishing that job. The employer must be able to demonstrate that it is impossible to accommodate employees with the same characteristics without suffering undue hardship.*

76. The criteria developed in Meiorin *have provided a framework for assessing the legitimate purpose of an employment standard and the intent of the employer when the standard was adopted in order to determine its validity. In addition to those criteria, there is a test — reasonableness — used to assess whether the standard was necessary in the context of the job in question. The courts have also ruled that the criteria must be applied with common sense and flexibility:* Meiorin, *at paragraph 63;* Commission scolaire régionale de Chambly v. Bergevin, *[1994] 2 S.C.R. 525, at 546;* Central Alberta Dairy Pool v. Alberta (Human Rights Commission), *[1990] 2 S.C.R. 489, at 520-521; and* McGill University Health Centre (Montreal General Hospital), *at para 15.*

…

137 Despite Ms. Westfall's claims that for safety reasons, the grievor could not continue as an escort driver in 2009, there was no evidence led establishing that there was a true threat to the safety of prisoners who were being escorted or correctional officers who accompanied the grievor and the prisoners on those escorts. I find that the employer has not established the existence of a threat to safety to support its claim to the exceptions set out in subsections 15(1) and 15(2) of the *CHRA*. I agree with the grievor's counsel that more than mere speculation that a threat exists is required to satisfy the *Meiorin* test.

138 Furthermore, Mr. Pyke, who was also the KP warden, following Ms. Westfall, and who was also involved in refusing to accommodate the grievor either temporarily or permanently as an escort driver, provided nothing in his evidence to support his conclusion that an unacceptable threat to safety would have arisen were the grievor allowed to continue driving escorts.

139 The decision to terminate the grievor's accommodation as an escort driver was an arbitrary decision by Ms. Westfall, the need for which was unsupported by the evidence. Ironically, the evidence is that the Warden at the CBI did not envisage such a threat. His institution employed escort drivers, and he would have agreed to employ the grievor in this capacity but for a medical report dated October 22, 2012, indicating that due to the stress that the accommodation process caused the grievor, he was unable to work in any capacity within the CSC (see Exhibit 2, tab 68).

140 I recognize that there was an ongoing attempt to find a full-time permanent accommodation for the grievor. Numerous witnesses testified to that effect, including him. This process was fraught with tension and discord between the parties and no doubt contributed to the lengthy delay returning him to the workplace.

141 Despite these ongoing efforts, the fact remains that no undue hardship would have been caused by allowing the grievor to remain as an escort driver at the KP even on a temporary basis while a more permanent solution was sought. The employer did not choose to pursue this option; nor would it consider it. Moreover, if the grievor had performance issues related to his discharge of the escort duties, such as described by witnesses for the employer, the proper method of dealing with them would have been under the different performance management policies the employer had in place and not by terminating an otherwise reasonable and effective accommodation.

142 Based on these facts, the grievor has established that he is disabled and is in need of workplace accommodation. It has also been established that the employer had initially properly accommodated his medical limitations by limiting his driver duties to escorts rather than requiring him to perform the full range of the driver duties in his job description.

143 However, the employer has not demonstrated that its refusal to continue to employ the grievor was based on a *bona fide* occupational requirement nor has it provided any convincing evidence to rebut the grievor's *prima facie* case of discrimination. Therefore, I conclude that the employer has refused to continue to employ the grievor on the basis of his disability, which is prohibited by section 7 of the *CHRA* and violates article 19 of the collective agreement.

144 As a member of the new Board, I have the authority pursuant to paragraph 226(2)(*b*) of the *PSLRA* to award damages to the grievor as a result of the employer's discriminatory practice under subsections 53(2)(*e*) and (3) of the *CHRA*, which provide as follows:

Complaint substantiated

53. *(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:*

(...)

(e) *that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.*

Special compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

145 The CSC has accepted that it is under a duty to accommodate its disabled or injured employees as is evidenced by CD 254 (Exhibit 2, tab 76), in which the CSC commits to the following:"2. To provide employees of the Correctional Service of Canada who incur an injury or illness the support and assistance to return to fully productive employment, as soon as medically feasible …."

146 All the witnesses who testified on behalf of the employer recognized this obligation. Yet, despite medical information provided by the medical professionals who treated the grievor as well as the employer's consultant, and based on the existence of a threat that was speculative at best, the employer not only discriminated against the grievor but recklessly and wilfully disregarded its policies on workplace accommodations as well as the *CHRA*.

147 Paragraph 27 of the guidelines to CD 254 (Exhibit 2, tab 77) indicates that when essential duties of a job cannot be eliminated, modifications may be made to the work method and procedure and that job restructuring is a possibility. By limiting the grievor's duties to driving escorts, the employer did restructure the grievor's job and successfully accommodated him. There was no reasonable justification for ceasing to accommodate him in this role or for refusing to continue it even temporarily while the search for a suitable permanent accommodation was ongoing. Had the employer done this, at the very least, the grievor would have remained in the workplace.

148 As I stated in *Taticek v. Treasury Board (Canada Border Services Agency)*, 2015 PSLREB 12, at para 114, the SCC noted in *Renaud*, that employees seeking accommodation have a duty to

cooperate with their employers by providing information as to the nature and extent of their alleged disabilities that will enable the employers to determine the necessary accommodations. The grievor properly fulfilled this duty. He was free with the medical information, which identified his restrictions and a suitable accommodation. He did consider other alternatives and did try working in the parole officer position. His doctor reviewed other options proposed by the employer on his behalf. He requested job training. He registered with the PSC, albeit reluctantly, as requested by his employer. His frustration with the process and the employer's lengthy delay in finding a suitable accommodation should not be considered as evidence of his unwillingness to cooperate with the employer in the accommodation process. Like the grievor, I fail to comprehend why the employer arbitrarily decided after more than three years to terminate the escort driver role in which, up to then, he had been successfully accommodated.

149 The purpose of the *CHRA* as expressed in its section 2 is to ensure that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on disability (among other things). The employer has interfered with the grievor's ability to live the life that he wished and would have been able to provide for himself but for the employer's actions.

150 Counsel for the employer argued that there is no evidence of any measurable degree of pain and suffering for which the grievor should be compensated under s. 53(2)(*e*) of the *CHRA*. Contrary to what the employer's representative has argued, I believe that there is evidence of the grievor's pain and suffering before me, including the physician's letter (Exhibit 2, tab 68), in which she clearly outlines the impact of the employer's actions on the grievor and the amount of stress these actions have caused.

151 Based on this and the other evidence presented before me, I assess an award of $10 000 to be paid by the employer to the grievor pursuant to paragraph 53(2)(*e*) of the *CHRA*. In addition, I assess an award of $2500 to be paid by the employer to the grievor pursuant to subsection 53(3) of the *CHRA* in recognition of the employer's wilful and reckless disregard of its obligations under the *CHRA*,CD 254 and the Treasury Board *Policy on the Duty to Accommodate Persons with Disabilities in the Federal Public Service* (Exhibit 2, tab 75) and for not taking every reasonable step to properly accommodate the grievor. The employer's attempts at accommodating the grievor after the ill-thought decision to withdraw the escort driving duties from him mitigated the employer's wilful and reckless conduct, as was the case in *Milano v. Triple K. Transport Ltd.*,2003 CHRT 30. For this reason, I have assessed damages under subsection 53(3) of the *CHRA* at the lower end of the available damages spectrum.

152 The grievor's counsel requested that in the event that the grievance was allowed, I would allow the parties time to determine between themselves what amounts are due to the grievor under the headings of lost wages, accumulated sick leave, vacation and other benefits under the collective agreement.

153 As the KP was closed in 2013, any loss of wages shall be calculated to the date of its closing, following which the grievor shall be entitled to any benefits he would otherwise have

been entitled to under the workforce adjustment provisions of his collective agreement, including that of consideration for a reasonable job offer. As noted earlier in this decision, the parties have provided me with extensive arguments in support of their cases. Counsel provided me with two volumes of case law to support their respective arguments. While I read each case, I have referred only to those of primary significance in my decision.

154 For all of the above reasons, I make the following order:

V. Order

155 Grievance 566-02-5573 is allowed.

156 The employer shall pay the grievor the sum of $10 000 pursuant to paragraph 53(2)(*e*) of the *CHRA* within 60 days of this decision.

157 The employer shall pay the grievor the sum of $2500 pursuant to subsection 53(3) of the *CHRA* within 60 days of this decision.

158 The matter will be remitted to the parties for a period of 60 days from the date of this decision, during which time the parties are to determine and agree upon what other compensatory amounts are due the grievor, as set out earlier in this decision.

159 No later than 60 days from the date of this decision, the parties will advise the Board whether they successfully reached an agreement as set out earlier in this decision.

160 In the event that the parties are unable to reach an agreement as set out earlier in this decision, the matter will be scheduled for a further hearing to be held no later than 90 days from the date of this decision or at the adjudicator's first availability after that date.

161 I will retain jurisdiction to deal with matters arising out of this order for a period of 180 days from the date of this decision.

May 11, 2015.

Margaret T.A. Shannon,
adjudicator

Date modified:
2015-06-09

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2016 CHRT 10
Date: April 26, 2016
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and -

Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

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

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

Interested Parties

Ruling

Members: Sophie Marchildon and Edward Lustig

Table of Contents

I. Continuation of remedial order

[1] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (the *Decision*), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the *Canadian Human Rights Act* (the *CHRA*).

[2] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Indigenous and Northern Affairs Canada (INAC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the *Memorandum of Agreement Respecting Welfare Programs for Indians* applicable in Ontario (the *1965 Agreement*) to reflect the findings in the *Decision*. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[3] Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[4] The Panel advised the parties it would address the outstanding questions on remedies in three steps. First, the Panel will address requests for immediate reforms to the FNCFS Program, the *1965 Agreement* and Jordan's Principle. This is the subject of the present ruling.

[5] Other mid to long-term reforms to the FNCFS Program and the *1965 Agreement*, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Parties will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*.

II. Progress to date

[6] INAC accepts the *Decision* and has not sought judicial review of its findings or general orders. It is committed to working with child and family services agencies; front-line service providers; First Nations organizations, leadership, and communities; the Complainants; and the provinces and territories, on steps towards program reform and meaningful change for children and families. It has also specifically committed to the following:

- A full-scale reform of its child welfare program.
- Review of the *1965 Agreement*.
- Not to reduce or restrict funding to the FNCFS Program
- To immediately re-establish the National Advisory Committee.
- And, it supports the new iteration of the Canadian Incidence Study.

[7] INAC's submissions also indicated that immediate relief in response to the *Decision* would include increased funding for the FNCFS Program. The 2016 federal budget allocated $634.8 million over five years for the FNCFS Program. According to INAC, $71.1 million is to be provided in 2016-2017 for the following:

- $54.2 million for:
    - immediate adjustments to Operations and Prevention through additional investments to update existing funding agreements;
    - increases to the per child service purchase amounts (including for prevention services);
    - funding for intake and investigation services;
    - upward adjustments for agencies with more than 6% of children in care; and,

- investments for providing federal support to expand provincial case management systems on reserve.

- $16.2 million for prevention funding in Ontario, British Columbia, New Brunswick, Newfoundland and Labrador and Yukon at nationally-consistent levels across all jurisdictions.

- $700,000 to INAC resources for outreach, engagement and effective allocation of funding to service providers.

[8] In addition to the funding identified in the 2016 budget, INAC also commits to provide additional funding for:

- maintenance funding to respond to budgetary pressures created as a result of provincial legislative changes to service delivery requirements, as they arise; and

- support for an engagement process going forward in conjunction with the National Advisory Committee and Regional Tables to work on medium and long-term reform.

[9] The Panel acknowledges the commitments made by the Federal government so far and is encouraged by its efforts to implement the Tribunal's orders.

III. Updated order

[10] It is worth reiterating some of the Tribunal's remedial principles in order to foster a common understanding of the Panel's goals and authorities in crafting a remedy in response to the *Decision*.

[11] Human rights legislation expresses fundamental values and pursues fundamental goals. In fact, the Supreme Court of Canada has confirmed the quasi-constitutional nature of the *CHRA* on many occasions (see for example *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84 at pp. 89-90 [*Robichaud*]; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 81; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 62 [*Mowat*]). In line with this special status, the

CHRA must be interpreted in a broad, liberal and purposive manner so that the rights enunciated therein are given their full recognition and effect (see *Mowat* at paras. 33 and 62).

[12] Likewise, when crafting a remedy following the substantiation of a complaint, the Tribunal's powers under section 53 of the *CHRA* must be interpreted so as to best ensure the objects of the *Act* are obtained. Pursuant to section 2, the purpose of the *CHRA* is to give effect to the principle that:

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…

[13] It is the Tribunal's responsibility to consider this dominant purpose in crafting an order under section 53 of the *CHRA*. Consistent with that purpose, the aim in making an order under section 53 is not to punish the person found to be engaging or to have engaged in a discriminatory practice, but to eliminate and prevent discrimination (see *Robichaud* at para. 13; and *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134 [*Action Travail des Femmes*]).

[14] On a principled and reasoned basis, in consideration of the particular circumstances of the case and the evidence presented, the Tribunal must ensure its remedial orders are effective in promoting the rights protected by the *CHRA* and meaningful in vindicating any loss suffered by the victim of discrimination (see *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 25 and 55; and *Action Travail des Femmes* at p. 1134).

[15] That said, constructing effective and meaningful remedies to resolve a complex dispute, as is the situation in this case, is an intricate task. Indeed, as the Federal Court of Canada stated in *Grover v. Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para. 40 [*Grover*], "[s]uch a task demands innovation and flexibility on the part of

the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility."

[16] Aside from orders of compensation, this flexibility in fashioning effective remedies arises mainly from sections 53(2)(a) and (b) of the *CHRA*. Those sections provide the Tribunal with the authority to order measures to redress the discriminatory practice or prevent the same or similar practice from occurring in the future [see s. 53(2)(a)]; and to order that the victim of a discriminatory practice be provided with the rights, opportunities or privileges that are being or were denied [see s. 53(2)(b)].

[17] The application of these broad remedial authorities can override an organization's right to manage its own enterprise and, with particular regard to section 53(2)(b), can afford the victim of a discriminatory practice a remedy in specific performance (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paras. 165 and 167, varied on other grounds in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110; and *Canada (Attorney General) v. McAlpine* (1989), 12 CHRR D/253 (FCA) at para. 6). In line with ensuring remedial orders are effective in promoting the rights it protects, section 53(2)(a) can also be used to craft remedies designed to educate individuals about the rights enshrined in the *CHRA* (see *Schuyler v. Oneida Nation of the Thames*, 2006 CHRT 34 at paras. 166-170; and *Robichaud v. Brennan* (1989), 11 CHRR D/194 (CHRT) at paras. 15 and 21).

[18] With specific regard to the circumstances of this case, section 53(2)(a) of the *CHRA* has been described as being designed to meet the problem of systemic discrimination (see *Action Travail des Femmes* at p. 1138 referring to the *CHRA*, S.C. 1976-77, c. 33, s. 41(2)(a) [now s. 53(2)(a)]). To combat systemic discrimination, "it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged" (*Action Travail des Femmes* at p. 1139). That is, for the Tribunal to redress and prevent systemic discriminatory practices, it must consider any historical patterns of discrimination in order to design appropriate strategies for the future (see *Action Travail des Femmes* at p. 1141).

[19] It is with these remedial principles in mind that the Panel approaches the task of continuing to craft an effective and meaningful order to address the discriminatory practices identified in the *Decision*.

A. The FNCFS Program

[20] The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short and long term were summarized at paragraphs 384-389 (see also para. 458) of the *Decision* and include (emphasis added):

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. These assumptions ignore the real child welfare situation in many First Nations' communities on reserve. Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.
>
> [385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.
>
> [386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations

in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure

> reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.

[21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the *Decision*. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the *Decision* and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the *Decision* addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the *Decision*. Instead of being immediate relief, some of these items may now become mid-term relief.

[22] Again, while it appreciates the Federal government's commitments and efforts to date, the Panel requires more clarity from INAC moving forward to ensure its orders are effectively and meaningfully implemented. As the Assembly of First Nations stated in its submissions; "[a]n order for immediate relief to the FNCFS Program should be meaningful but temporary until such time that the FNCFS Program can be completely overhauled." The Panel agrees with this statement. To address this, the Panel believes the best course of action is for INAC to provide ongoing reporting to the Tribunal. That is, the Panel will supervise the implementation of its orders by way of regular detailed reports created by INAC, to which the parties will have an opportunity to provide submissions.

[23] The Panel orders INAC to immediately take measures to address the items underlined above from the findings in the *Decision*. INAC will then provide a comprehensive report, which will include detailed information on every finding identified above and explain how they are being addressed in the short term to provide immediate relief to First Nations children on reserve. The report should also include information on

budget allocations for each FNCFS Agency and timelines for when those allocations will be rolled-out, including detailed calculations of the amounts received by each agency in 2015-2016; the data relied upon to make those calculations; and, the amounts each has or will receive in 2016-2017, along with a detailed calculation of any adjustments made as a result of immediate action taken to address the findings in the *Decision*.

[24] INAC is directed to provide this report within four weeks of this ruling. Following reception of the report, and given the length of time that has elapsed since the *Decision*, an in-person case management meeting will then occur to provide an opportunity for the parties and Panel to discuss the report, ask questions, and make submissions, if any. Thereafter, the Panel will issue a further ruling if necessary. The Tribunal will canvass the parties for dates for this case management meeting in the days following the release of this ruling.

[25] The Panel recognizes that INAC provided additional information regarding its 2016 budget allocation for the FNCFS Program following the close of submissions for this ruling and invited the parties to meet to discuss the issue. The Complainants raised concerns with the timing and manner in which this information was sent to the Tribunal. Neither is interested in another round of submissions on the issue at this time. The Panel did not consider INAC's additional information regarding the 2016 budget as part of this ruling. However, in a much more detailed fashion, this information will presumably form part of the material to be included in the report to follow and the other parties will have an opportunity to provide submissions thereon.

B. The *1965 Agreement*

[26] The Panel's main finding with regard to the *1965 Agreement* was that it had not been updated to ensure on-reserve communities in Ontario could fully comply with the *Child and Family Services Act*, including the provision of Band Representatives and mental health services (see the *Decision* at paras. 217-246 and 458).

[27] The Federal government has indicated that it has met with the Government of Ontario and expressed a need to review the *1965 Agreement*. It submits these preliminary

meetings have set the stage for more substantive discussions that will take place with First Nations.

[28] Furthermore, following the *Decision* and while submissions were being filed in advance of this ruling, the Nishnawbe Aski Nation (NAN) filed a motion seeking interested party status. NAN seeks to address the design and implementation of the Panel's orders with specific regard to the context of remote and northern communities in Ontario.

[29] Notwithstanding NAN's motion, the Panel made a commitment to the parties to rule upon immediate relief items expeditiously and wanted to rule upon as many of those items as possible in this ruling. However, given the Panel will rule upon NAN's motion shortly following the release of this ruling and that there may be further submissions to consider on the *1965 Agreement*, the Panel believes it would be more appropriate to address any immediate relief items with respect to the *1965 Agreement* after receiving those further submissions from the parties.

C. Jordan's Principle

[30] In the *Decision*, the Panel found the Federal government's definition and implementation of Jordan's Principle to be narrow and inadequate, resulting in service gaps, delays and denials for First Nations children. Namely, that delays were inherently build into the Federal government's process for dealing with potential Jordan's Principle cases and that it was unclear why the government's approach to Jordan's Principle cases focused on inter-governmental disputes in situations where a child has multiple disabilities, as opposed to all jurisdictional disputes (including between federal government departments) involving all First Nations children and not just those with multiple disabilities (see the *Decision* at paras. 379-382 and 458).

[31] According to the Federal government, INAC and Health Canada have begun discussions on the process for expanding the definition of Jordan's Principle, improving its implementation and identifying other partners who should be involved in this process. Over the next two to three months, it will begin engaging First Nations and the provinces and

territories in these discussions. It anticipates options for changes to Jordan's Principle could be developed within twelve months.

[32] However, the Panel's order specifically indicated that INAC was to "…immediately implement the full meaning and scope of Jordan's principle" (the *Decision* at para. 481). While it understands a period of time may have been needed to meet with partners and stakeholders and put a framework in place, the Panel did not foresee this order would take more than three months to implement. The order is to "immediately implement", not immediately start discussions to review the definition in the long-term. There is already a workable definition of Jordan's Principle that has been adopted by the House of Commons. While review of this definition and the Federal government's framework for implementing it may benefit from further long-term review, the Panel sees no reason why the current definition cannot be implemented now.

[33] Therefore, the Panel orders INAC to immediately consider Jordan's Principle as including all jurisdictional disputes (this includes disputes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities). Pursuant to the purpose and intent of Jordan's Principle, the government organization that is first contacted should pay for the service without the need for policy review or case conferencing before funding is provided.

[34] INAC will report to the Panel within two weeks of this ruling to confirm this order has been implemented.

D. Other issues

[35] The Complainants made various other submissions with respect to implementing the Panel's orders in the short term. While some were addressed by INAC, others were not (see for example para. 16 of the First Nations Child and Family Caring Society's submissions dated March 31, 2016; and paras. 12-15 of the Assembly of First Nations' submissions dated March 3, 2016). It would be helpful to the Panel and the parties if INAC could respond to those additional immediate relief items as part of its report on the FNCFS Program ordered above. Therefore, in its FNCFS Program report, the Panel directs INAC

to address the immediate relief items sought by the Complainants that have not been addressed in INAC's submissions to date.

E. Retention of jurisdiction

[36] Remedial orders designed to address systemic discrimination can be difficult to implement and, therefore, may require ongoing supervision. Retaining jurisdiction in these circumstances ensures the Panel's remedial orders are effectively implemented (see *Grover* at paras. 32-33).

[37] Given the ongoing nature of the orders above, and given the Panel still needs to rule upon other outstanding remedial requests, the Panel will continue to maintain jurisdiction over this matter. Any further retention of jurisdiction will be re-evaluated following the further reporting by INAC and the Panel's ruling on the other outstanding remedies.

IV. Concluding remarks by Panel Chairperson

[38] I wish to share some concluding remarks with the parties. Member Lustig has read and supports these remarks.

[39] The hearings in this matter were held in a spirit of reconciliation, with an overarching goal of maintaining an atmosphere of peace and respect. Respect for all involved was paramount and, given the nature of the case, respect for Aboriginal peoples not only participating in the proceedings, but also following the proceedings in person and on the Aboriginal Peoples Television Network. Fostering this atmosphere of peace and respect is of paramount importance considering the Tribunal's key role in determining fundamental human rights and in safeguarding the public's confidence in the administration of justice, especially for Aboriginal peoples.

[40] In dealing with the remaining remedial issues in this case, we should continue to aim for peace and respect. More importantly, I urge everyone involved to ponder the true meaning of reconciliation and how we can achieve it. I strongly believe that we have an

opportunity, all of us together, to set a positive example for the children across Canada, and even across the world, that we are able to do our part in achieving reconciliation in Canada. My hope and goal is that, for generations to come, people will look at what was done in this case as a turning point that led to meaningful change for First Nations children and families in this country. We, the Panel and parties, are in a privileged position to continue to contribute to this change in a substantial way.

[41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the *Decision* are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change. The time is now.**

[42] Finally, in keeping with the spirit of reconciliation and expediency in this matter, the Panel had hoped the parties would have met a few times by now and discussed remedies. Each party has information and/or expertise that would assist those discussions and be of benefit in resolving this matter more expeditiously. While the Panel was required to issue this ruling, it continues to encourage the parties to meet and discuss the resolution of this matter. As always, the Panel is available to assist and remains committed to overseeing the implementation of its orders in the short and the long term.

Signed by

Sophie Marchildon
Panel Chairperson

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
April 26, 2016

Glenda Doucet-Boudreau, Alice Boudreau, Jocelyn Bourbeau, Bernadette Cormier-Marchand, Yolande Levert and Cyrille Leblanc, in their name and in the name of all Nova Scotia parents who are entitled to the right, under Section 23 of the *Canadian Charter of Rights and Freedoms*, to have their children educated in the language of the minority, namely the French language, in publicly funded French-language school facilities, and Fédération des parents acadiens de la Nouvelle-Écosse Inc. *Appellants*

v.

Attorney General of Nova Scotia *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Newfoundland and Labrador, Commissioner of Official Languages for Canada, Fédération nationale des conseillères et conseillers scolaires francophones, Fédération des associations de juristes d'expression française de Common Law Inc. (FAJEFCL) and Conseil scolaire acadien provincial (CSAP) *Interveners*

Glenda Doucet-Boudreau, Alice Boudreau, Jocelyn Bourbeau, Bernadette Cormier-Marchand, Yolande Levert et Cyrille Leblanc, en leur propre nom et en celui de tous les parents de la Nouvelle-Écosse qui, en vertu de l'article 23 de la *Charte canadienne des droits et libertés*, ont le droit de faire instruire leurs enfants dans la langue de la minorité, à savoir le français, dans des écoles francophones financées sur les fonds publics, et la Fédération des parents acadiens de la Nouvelle-Écosse Inc. *Appelants*

c.

Procureur général de la Nouvelle-Écosse *Intimé*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Nouveau-Brunswick, procureur général de Terre-Neuve-et-Labrador, Commissaire aux langues officielles du Canada, Fédération nationale des conseillères et conseillers scolaires francophones, Fédération des associations de juristes d'expression française de Common Law Inc. (FAJEFCL) et Conseil scolaire acadien provincial (CSAP) *Intervenants*

INDEXED AS: DOUCET-BOUDREAU *v.* NOVA SCOTIA (MINISTER OF EDUCATION)

RÉPERTORIÉ : DOUCET-BOUDREAU *c.* NOUVELLE-ÉCOSSE (MINISTRE DE L'ÉDUCATION)

Neutral citation: 2003 SCC 62.

Référence neutre : 2003 CSC 62.

File No.: 28807.

N° du greffe : 28807.

2002: October 4; 2003: November 6.

2002 : 4 octobre; 2003 : 6 novembre.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Constitutional law — Charter of Rights — Enforcement — Remedy available for realization of minority language education rights — Trial judge ordering province to make best efforts to provide homogeneous French-language facilities and programs by particular dates — Order further requiring parties to appear before same judge periodically to report on status of those efforts — Whether trial judge had authority to retain jurisdiction to hear reports from Province on the status of those efforts as part of his remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Whether reporting order was "appropriate and just in the circumstances" — Canadian Charter of Rights and Freedoms, ss. 23, 24(1).

Droit constitutionnel — Charte des droits — Recours — Réparation pouvant être accordée pour assurer le respect des droits à l'instruction dans la langue de la minorité — Juge de première instance ordonnant à la province de faire de son mieux pour fournir des établissements et des programmes d'enseignement homogènes de langue française dans des délais déterminés — Ordonnance enjoignant également aux parties de se présenter périodiquement devant le même juge pour rendre compte des efforts déployés en ce sens — Le juge de première instance avait-il le pouvoir de se déclarer compétent pour entendre les comptes rendus de la province sur les efforts déployés pour mettre à exécution la réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés? — L'ordonnance enjoignant de rendre compte était-elle « convenable et juste eu égard aux circonstances »? — Charte canadienne des droits et libertés, art. 23, 24(1).

Appeals — Mootness — Appropriate and just remedy — Minority language education rights — Appeal raising important question about jurisdiction of superior courts to order what may be an effective remedy in some classes of cases — Moot appeal should be heard to provide guidance in similar cases.

Appels — Caractère théorique — Réparation convenable et juste — Droits à l'instruction dans la langue de la minorité — Pourvoi soulevant une question importante au sujet du pouvoir des cours supérieures d'ordonner des mesures susceptibles de constituer une réparation efficace dans certaines catégories de cas — Appel théorique devant être entendu afin de fournir des repères dans des affaires similaires.

The appellants are Francophone parents living in five school districts in Nova Scotia. They applied for an order directing the Province and the Conseil scolaire acadien provincial to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level. The trial judge noted that the government did not deny the existence or content of the parents' rights under s. 23 of the *Canadian Charter of Rights and Freedoms* but rather failed to prioritize those rights and delayed fulfilling its obligations, despite clear reports showing that assimilation was "reaching critical levels". He found a s. 23 violation and ordered the Province and the Conseil to use their "best efforts" to provide school facilities and programs by particular dates. He retained jurisdiction to hear reports on the status of the efforts. The Province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The majority of the Court of Appeal allowed the appeal and struck down the impugned portion of the order. On the basis of the common law principle of *functus officio*, the majority held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. They also held that, while

Les appelants sont des parents francophones provenant de cinq districts scolaires de la Nouvelle-Écosse. Ils ont sollicité une ordonnance enjoignant à la province et au Conseil scolaire acadien provincial de fournir, sur les fonds publics, des programmes et des écoles homogènes de langue française au niveau secondaire. Le juge de première instance a souligné que le gouvernement n'avait pas nié l'existence ou le contenu des droits garantis aux parents par l'art. 23 de la *Charte canadienne des droits et libertés*, mais qu'il avait plutôt omis de leur donner la priorité et tardé à remplir ses obligations, en dépit de l'existence de rapports démontrant que le taux d'assimilation « atteignait un seuil critique ». Il a conclu à l'existence d'une violation de l'art. 23 et a ordonné à la province et au Conseil de « faire de leur mieux » pour fournir des établissements et des programmes d'enseignement homogènes de langue française dans des délais déterminés. Il s'est déclaré compétent pour entendre des comptes rendus sur les efforts déployés en ce sens. La province a interjeté appel contre la partie de l'ordonnance dans laquelle le juge de première instance se déclarait compétent pour entendre des comptes rendus. Dans un arrêt majoritaire, la Cour d'appel a accueilli l'appel et

courts have broad ranging powers under s. 24(1) of the *Charter* to fashion remedies, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies.

Held (Major, Binnie, LeBel and Deschamps JJ. dissenting): The appeal should be allowed and the trial judge's order restored.

Per McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ.: This appeal involves the nature of remedies available under s. 24(1) of the *Charter* for the realization of the minority language education rights protected by s. 23. A purposive approach to remedies in a *Charter* context requires that both the purpose of the right being protected and the purpose of the remedies provision be promoted. To do so, courts must issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms.

Section 23 of the *Charter* is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing. While the rights are granted to individuals, they apply only if the "numbers warrant". For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant". If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23. The affirmative promise contained in s. 23 and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected.

Under s. 24(1) of the *Charter*, a superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, it must exercise a discretion based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. The court must also be sensitive to its role as judicial arbiter and not fashion remedies which usurp the role of the other

invalidé la partie contestée de l'ordonnance rendue. Se fondant sur la règle de common law du *functus officio*, les juges majoritaires ont conclu que le juge de première instance ne pouvait pas rester saisi de l'affaire après avoir tranché la question en litige entre les parties. Ils ont également statué que, même s'il est vrai que les tribunaux disposent, en vertu du par. 24(1) de la *Charte*, d'un vaste éventail de pouvoirs en matière de réparations, la *Charte* n'élargit pas leur compétence de manière à leur permettre de mettre à exécution les réparations qu'ils accordent.

Arrêt (les juges Major, Binnie, LeBel et Deschamps sont dissidents) : Le pourvoi est accueilli et l'ordonnance du juge de première instance est rétablie.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache et Arbour : Le pourvoi porte sur la nature des réparations qui, en vertu du par. 24(1) de la *Charte*, peuvent être accordés afin d'assurer le respect des droits à l'instruction dans la langue de la minorité garantis par l'art. 23. L'interprétation téléologique des réparations dans le contexte de la *Charte* exige de favoriser la réalisation de l'objet du droit garanti et de l'objet des dispositions réparatrices. À cette fin, les tribunaux doivent accorder des réparations efficaces et adaptées qui protègent pleinement et utilement les droits et libertés garantis par la *Charte*.

L'article 23 de la *Charte* vise à réparer des injustices passées non seulement en mettant fin à l'érosion progressive des cultures des minorités de langue officielle au pays, mais aussi en favorisant activement leur épanouissement. Bien que les droits soient conférés aux individus, ils ne peuvent être exercés que si « le nombre le justifie ». Le risque d'assimilation et, par conséquent, le risque que le nombre cesse de « justifier » la prestation des services augmentent avec les années scolaires qui s'écoulent sans que les gouvernements exécutent les obligations que leur impose l'art. 23. Si les atermoiements sont tolérés, les gouvernements pourront éventuellement se soustraire aux obligations que leur impose l'art. 23. La promesse concrète contenue à l'art. 23 et la nécessité cruciale qu'elle soit tenue à temps obligent parfois les tribunaux à ordonner des mesures réparatrices concrètes destinées à garantir aux droits linguistiques une protection réelle et donc nécessairement diligente.

Aux termes du par. 24(1) de la *Charte*, une cour supérieure peut accorder toute réparation qu'elle estime convenable et juste eu égard aux circonstances. Ce faisant, elle doit exercer son pouvoir discrétionnaire en se fondant sur son appréciation prudente de la nature du droit et de la violation en cause, sur les faits et sur l'application des principes juridiques pertinents. La cour doit également être consciente de son rôle d'arbitre

branches of governance. The boundaries of the courts' proper role will vary according to the right at issue and the context of each case.

The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. While it would be unwise at this point to attempt to define the expression "appropriate and just", there are some broad considerations that judges should bear in mind in evaluating the appropriateness and justice of a potential remedy. An appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. Since s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*, the judicial approach to remedies must remain flexible and responsive to the needs of a given case. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may thus in some cases require the introduction of novel remedies. Lastly, the remedial power in s. 24(1) cannot be strictly limited by statutes or rules of the common law. However, insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances", they may be helpful to a court choosing a remedy under s. 24(1).

Here, the remedy ordered by the trial judge was appropriate and just in the circumstances. He exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education. The order is a creative blending of remedies and processes already known to the courts in order to give life to the rights in s. 23. Given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. The remedy took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. The remedy vindicated the rights of the parents while leaving the detailed choices of means largely to the executive. The reporting order was judicial in the sense that it called on the functions and powers

judiciaire et s'abstenir d'usurper les fonctions des autres branches du gouvernement. Le rôle des tribunaux varie en fonction du droit en cause et du contexte de chaque affaire.

C'est le texte même du par. 24(1) qui limite la nature et la portée des réparations pouvant être accordées, et ce texte doit recevoir une interprétation qui s'accorde avec le reste de notre Constitution. Bien qu'il ne soit pas sage, à ce stade, de tenter de définir l'expression « convenable et juste », il existe néanmoins des facteurs généraux dont les juges devraient tenir compte en évaluant le caractère convenable et juste d'une réparation potentielle. La réparation convenable et juste eu égard aux circonstances d'une demande fondée sur la *Charte* est celle qui permet de défendre utilement les droits et libertés du demandeur et qui fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle. C'est une réparation judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d'un tribunal. La réparation convenable et juste est également équitable pour la partie visée par l'ordonnance. Étant donné que l'art. 24 fait partie d'un régime constitutionnel de défense des droits et libertés fondamentaux consacrés dans la *Charte*, l'approche judiciaire en matière de réparation doit être souple et tenir compte des besoins en cause. Il peut donc parfois arriver que la protection utile des droits garantis par la *Charte* et, en particulier l'application de l'art. 23, commandent des réparations d'un genre nouveau. Enfin, le pouvoir que le par. 24(1) confère en matière de réparation ne peut pas être strictement limité par des dispositions législatives ou des règles de common law. Cependant, les lois ou les règles de common law peuvent aider les tribunaux à choisir les réparations à accorder sous le régime du par. 24(1) dans la mesure où elles énoncent des principes utiles pour déterminer ce qui est « convenable et juste eu égard aux circonstances ».

En l'espèce, la réparation accordée par le juge de première instance était convenable et juste eu égard aux circonstances. Le juge a exercé son pouvoir discrétionnaire de choisir une réparation efficace qui permettrait de défendre utilement les droits garantis aux appelants par l'art. 23, dans le contexte d'un taux d'assimilation élevé et du fait qu'on tarde depuis des années à offrir l'enseignement en français. L'ordonnance accordée est un mélange créatif de réparations et de procédures déjà connues des tribunaux, destiné à donner vie aux droits garantis par l'art. 23. En raison du taux élevé d'assimilation qu'il a constaté, il convenait que le juge de première instance accorde une réparation qui, selon lui, pourrait être mise à exécution promptement. En accordant la mesure réparatrice en question, le juge a tenu compte du rôle des tribunaux dans notre démocratie constitutionnelle et ne s'en est pas écarté indûment ou inutilement.

known to courts. The range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts. Further, although the common law doctrine of *functus officio* cannot strictly pre-empt the remedial discretion in s. 24(1), an examination of the *functus* question indicates that the trial judge issued an order that is appropriately judicial. The retention of jurisdiction did not include any power to alter the disposition of the case and did nothing to undermine the provision of a stable basis for launching an appeal. Finally, in the context, the reporting order was not unfair to the government. While, in retrospect, it would certainly have been advisable for the trial judge to provide more guidance to the parties as to what they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. It was not vaguely worded so as to render it invalid.

Per Major, Binnie, LeBel and Deschamps JJ. (dissenting): While superior courts' powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice and by constitutional boundaries. Such remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels: (1) by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle; (2) by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine.

La réparation permettait de défendre les droits des parents tout en laissant largement au pouvoir exécutif le soin de choisir les moyens précis d'y parvenir. L'ordonnance enjoignant de rendre compte est judiciaire en ce sens qu'elle fait appel à des fonctions et à des pouvoirs connus des tribunaux. L'éventail des réparations que les tribunaux peuvent accorder en matière civile démontre que les réparations fondées sur la Constitution qui nécessitent l'exercice d'une certaine surveillance ne représentent pas une rupture radicale avec la pratique judiciaire antérieure. De plus, bien que la règle de common law du *functus officio* ne puisse, à strictement parler, court-circuiter le pouvoir discrétionnaire que le par. 24(1) confère en matière de réparation, l'examen de la question du *functus officio* indique que le juge de première instance a rendu une ordonnance judiciaire comme il se doit. La déclaration de compétence n'incluait aucun pouvoir de modifier le dispositif de l'affaire et n'empêchait pas de disposer d'une assise stable pour interjeter appel. Enfin, dans les circonstances, l'ordonnance enjoignant de rendre compte n'était pas inéquitable pour le gouvernement. L'ordonnance du juge de première instance n'était ni incompréhensible ni impossible à respecter, même si l'on constate, avec le recul, qu'il aurait sûrement été souhaitable que le juge éclaire davantage les parties sur ce qu'elles pouvaient attendre des auditions de comptes rendus. Le libellé de l'ordonnance n'était pas vague au point de la rendre invalide.

Les juges Major, Binnie, LeBel et Deschamps (dissidents) : Bien qu'il ne puisse pas être limité par une disposition législative ou une règle de common law, l'exercice par les cours supérieures de leur pouvoir d'accorder des réparations fondées sur la *Charte* doit respecter les règles de justice fondamentale et certaines limites imposées par la Constitution. L'ordonnance qui accorde ce type de réparation doit respecter les règles élémentaires de rédaction juridique et tenir compte de l'importance fondamentale de l'équité procédurale et du rôle des tribunaux dans notre régime politique démocratique. En matière de réparations fondées sur la Constitution, les tribunaux ne remplissent correctement leur fonction que s'ils rendent des ordonnances assez précises pour que les parties sachent ce qu'on attend d'elles et soient ainsi en mesure d'exécuter ces ordonnances. Ces ordonnances sont définitives. Un tribunal qui, après avoir rendu une ordonnance définitive, prétend se déclarer compétent pour surveiller la mise en œuvre de la réparation ordonnée est susceptible d'errer sur deux plans. Premièrement, en essayant d'élargir son champ de compétence au-delà du rôle qu'il doit jouer, il contrevient au principe de la séparation des pouvoirs. Deuxièmement, en continuant d'agir après avoir épuisé sa compétence, il enfreint la règle du *functus officio*.

Here, the drafting of the reporting order was anything but clear. The order gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. The uncertainty engendered by the order amounted to a breach of procedural fairness. For this reason alone, the order can be found to be inappropriate under s. 24(1) and therefore void. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized. As a general rule, courts should avoid interfering in the management of public administration. Once they have rendered judgment, they should resist the temptation to directly oversee or supervise the administration of their orders and operate under a presumption that judgments of courts will be executed with reasonable diligence and good faith. In this case, the trial judge assumed jurisdiction over a sphere traditionally outside the province of the judiciary, and also acted beyond the jurisdiction with which he was legitimately charged as a trial judge, thereby breaching the constitutional principle of separation of powers and the *functus officio* doctrine. His remedy undermined the proper role of the judiciary within our constitutional order and unnecessarily upset the balance between the three branches of government. Since no part of the Constitution can conflict with another, the trial judge's order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. The intrusiveness of the trial judge's order was in no way necessary to secure the appellants' s. 23 *Charter* interests. In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy and, more importantly, to that which they are guaranteed by s. 23 — namely, the timely provision of minority language instruction facilities. If, as suggested by the appellants, the reporting hearings were an incentive for the government to comply with the best efforts order, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. Moreover, at the level of constitutional principles, because this incentive is legal in nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive. While a trial judge's decisions with respect to remedies are owed deference, this must be tempered when, as here, fundamental

En l'espèce, l'ordonnance enjoignant de rendre compte est loin d'être claire. Elle n'indique pas clairement aux parties la nature de leurs obligations, la nature des comptes rendus à présenter ni même l'objet des auditions de comptes rendus. L'incertitude créée par l'ordonnance constituait une atteinte à l'équité procédurale. Il est possible, pour cette seule raison, de considérer que l'ordonnance n'est pas convenable au sens du par. 24(1) et qu'elle est donc nulle et sans effet. En outre, elle tient pour acquis que le juge pouvait à loisir se déclarer compétent pour agir, après avoir tranché définitivement l'affaire dont il était saisi. En général, les tribunaux judiciaires doivent éviter de s'immiscer dans la gestion de l'administration publique. Les tribunaux qui ont rendu jugement doivent résister à la tentation de superviser ou surveiller directement l'exécution de leurs ordonnances et présumer que leurs jugements seront exécutés avec diligence raisonnable et de bonne foi. Dans la présente affaire, le juge de première instance s'est déclaré compétent dans un domaine qui, traditionnellement, ne relève pas des tribunaux et a aussi outrepassé la compétence légitime dont il est investi en tant que juge de première instance, violant par le fait même le principe constitutionnel de la séparation des pouvoirs et la règle du *functus officio*. La réparation qu'il a accordée mine le rôle que les tribunaux doivent jouer dans notre ordre constitutionnel et perturbe inutilement l'équilibre entre les trois branches du gouvernement. Puisqu'il ne peut y avoir incompatibilité entre les différents principes constitutionnels, l'ordonnance dans laquelle le juge de première instance enjoint de rendre compte ne peut pas être qualifiée de convenable et juste au sens du par. 24(1).

L'évolution harmonieuse du droit en matière de réparation fondée sur la Constitution exige que les tribunaux concilient leur obligation d'agir conformément à leur compétence juridictionnelle avec la nécessité d'assurer complètement le respect des droits du demandeur. Le juge de première instance n'avait pas à rendre une telle ordonnance attentatoire pour faire respecter les droits garantis aux appelants par l'art. 23 de la *Charte*. En l'espèce, le refus de reconnaître aux cours supérieures le pouvoir d'ordonner la tenue d'auditions de comptes rendus n'empêcherait sûrement pas les demandeurs d'obtenir une réparation reconnue fondée sur la *Charte* ni de se prévaloir de ce que leur garantit l'art. 23, à savoir la fourniture en temps utile d'établissements d'enseignement dans la langue de la minorité. Si, comme le laissent entendre les appelants, les auditions de comptes rendus avaient pour effet d'inciter le gouvernement à se conformer à l'ordonnance l'enjoignant de faire de son mieux, on voit difficilement comment ces auditions auraient pu être plus efficaces qu'un délai de construction assorti de la possibilité d'une ordonnance pour outrage au tribunal. En outre, sur le plan des

legal principles are threatened. Proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

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By Iacobucci and Arbour JJ.

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principes constitutionnels, cette mesure incitative n'aurait pas, en raison de sa nature légale, politisé indûment les rapports entre les pouvoirs judiciaire et exécutif. Quoiqu'il soit nécessaire de faire montre de déférence à l'égard des décisions que les juges de première instance rendent en matière de réparation, l'application de cette règle doit être tempérée lorsque, comme c'est le cas en l'espèce, des principes de droit fondamentaux sont menacés. Pour respecter les exigences de légitimité et de certitude auxquelles est assujettie une réparation convenable et juste au sens du par. 24(1) de la *Charte*, il faut dûment prendre en considération les principes d'équité procédurale et de la séparation des pouvoirs.

Jurisprudence

Citée par les juges Iacobucci et Arbour

Arrêts mentionnés : *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342; *International Brotherhood of Electrical Workers, Local Union 2085 c. Winnipeg Builders' Exchange*, [1967] R.C.S. 628; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Renvoi : Circ. électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *R. c. Gamble*, [1988] 2 R.C.S. 595; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81; *Mahe c. Alberta*, [1990] 1 R.C.S. 342; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839; *Arsenault-Cameron c. Île-du-Prince-Édouard*, [2000] 1 R.C.S. 3, 2000 CSC 1; *R. c. Beaulac*, [1999] 1 R.C.S. 768; *Marchand c. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596; *Marchand c. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171; *Lavoie c. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586; *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel c. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704, conf. par (1996), 30 O.R. (3d) 681; *Conseil Scolaire Fransaskois de Zenon Park c. Saskatchewan*, [1999] 3 W.W.R. 743, conf. par [1999] 12 W.W.R. 742; *Assoc. Française des Conseils Scolaires de l'Ontario c. Ontario* (1988), 66 O.R. (2d) 599; *Assn. des parents francophones de la Colombie-Britannique c. British Columbia* (1998), 167 D.L.R. (4th) 534; *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Fraser c. Commission des relations*

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APPEAL from a judgment of the Nova Scotia Court of Appeal (2001), 203 D.L.R. (4th) 128, 194 N.S.R. (2d) 323, 85 C.R.R. (2d) 189, [2001] N.S.J. No. 240 (QL), 2001 NSCA 104, setting aside a decision of the Nova Scotia Supreme Court (2000), 185 N.S.R. (2d) 246, 575 A.P.R. 246, [2000] N.S.J. No. 191 (QL). Appeal allowed, Major, Binnie, LeBel and Deschamps JJ. dissenting.

Joel E. Fichaud, *Q.C.*, and *Melanie S. Comstock*, for the appellants.

Alexander M. Cameron, for the respondent.

Bernard Laprade and *Christopher Rupar*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Vanessa Yolles*, for the intervener the Attorney General of Ontario.

McLachlin, Beverley M. « The Charter : A New Role for the Judiciary? » (1991), 29 *Alta. L. Rev.* 540.
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POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (2001), 203 D.L.R. (4th) 128, 194 N.S.R. (2d) 323, 85 C.R.R. (2d) 189, [2001] N.S.J. No. 240 (QL), 2001 NSCA 104, qui a infirmé une décision de la Cour suprême de la Nouvelle-Écosse (2000), 185 N.S.R. (2d) 246, 575 A.P.R. 246, [2000] N.S.J. No. 191 (QL). Pourvoi accueilli, les juges Major, Binnie, LeBel et Deschamps sont dissidents.

Joel E. Fichaud, *c.r.*, et *Melanie S. Comstock*, pour les appelants.

Alexander M. Cameron, pour l'intimé.

Bernard Laprade et *Christopher Rupar*, pour l'intervenant le procureur général du Canada.

Janet E. Minor et *Vanessa Yolles*, pour l'intervenant le procureur général de l'Ontario.

Gabriel Bourgeois, *Q.C.*, for the intervener the Attorney General of New Brunswick.

Written submissions only by *Deborah Paquette*, for the intervener the Attorney General of Newfoundland and Labrador.

Laura C. Snowball and *Subrata Bhattacharjee*, for the intervener the Commissioner of Official Languages for Canada.

Michel Doucet and *Christian E. Michaud*, for the intervener Fédération nationale des conseillères et conseillers scolaires francophones.

Roger J. F. Lepage and *Peter T. Bergbusch*, for the intervener Fédération des associations de juristes d'expression française de Common Law Inc.

Noella Martin and *Janet M. Stevenson*, for the intervener Conseil scolaire acadien provincial.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ. was delivered by

IACOBUCCI AND ARBOUR JJ. — This appeal involves the nature of remedies available under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for the realization of the minority language education rights protected by s. 23 of the *Charter*. The specific issue is whether a trial judge may, after ordering that a provincial government use its best efforts to build French-language school facilities by given dates, retain jurisdiction to hear reports on the progress of those efforts. The issue of broader and ongoing judicial involvement in the administration of public institutions is not before the Court in this case.

I. Background and Judicial History

The appellants are Francophone parents living in five school districts in Nova Scotia (Kingston/Greenwood, Chéticamp, Île Madame-Arichat (Petit-de-Grat), Argyle, and Clare) and Fédération des parents acadiens de la Nouvelle-Écosse Inc., a non-

Gabriel Bourgeois, *c.r.*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Argumentation écrite seulement par *Deborah Paquette*, pour l'intervenant le procureur général de Terre-Neuve-et-Labrador.

Laura C. Snowball et *Subrata Bhattacharjee*, pour l'intervenant le Commissaire aux langues officielles du Canada.

Michel Doucet et *Christian E. Michaud*, pour l'intervenante la Fédération nationale des conseillères et conseillers scolaires francophones.

Roger J. F. Lepage et *Peter T. Bergbusch*, pour l'intervenante la Fédération des associations de juristes d'expression française de Common Law Inc.

Noella Martin et *Janet M. Stevenson*, pour l'intervenant le Conseil scolaire acadien provincial.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Bastarache et Arbour rendu par

LES JUGES IACOBUCCI ET ARBOUR — Le pourvoi porte sur la nature des réparations qui, en vertu du par. 24(1) de la *Charte canadienne des droits et libertés*, peuvent être accordés afin d'assurer le respect des droits à l'instruction dans la langue de la minorité garantis par l'art. 23 de la *Charte*. Il s'agit plus précisément de savoir si, après avoir ordonné à un gouvernement provincial de faire de son mieux pour construire des écoles francophones dans des délais déterminés, le juge de première instance peut se déclarer compétent pour entendre des comptes rendus sur les efforts déployés à cet égard. La Cour n'est pas saisie de la question de la participation élargie et continue des tribunaux à l'administration d'institutions publiques. 1

I. Les faits et les jugements antérieurs

Les appelants sont des parents francophones provenant de cinq districts scolaires de la Nouvelle-Écosse (Kingston/Greenwood, Chéticamp, Île Madame-Arichat (Petit-de-Grat), Argyle et Clare), ainsi que la Fédération des parents acadiens de 2

profit organization that monitors the advancement of educational rights of the Acadian and Francophone minority in Nova Scotia. The Attorney General of Nova Scotia is the respondent, acting on behalf of the Department of Education of Nova Scotia.

3 Apart from the specific facts of the case, it is most important to note the historical context on which this dispute is centred. As we will discuss below, French-language education in Nova Scotia has not had an enviable record of success. While the situation improved over the rather dismal record of the previous centuries, the twentieth century left much to be achieved. Section 23 of the *Charter* has been the hope of the French-speaking minority of Nova Scotia to redress the linguistic failings and inequality of history.

4 It is conceded in this appeal that s. 23 of the *Charter* entitles the appellant parents to publicly funded French-language educational facilities for their children. For some time, Francophone parents in these five school districts of Nova Scotia had been urging their provincial government to provide homogeneous French-language schools at the secondary level in addition to the existing primary level facilities. The government of Nova Scotia, for its part, agreed: it did not dispute that the number of students warranted the facilities demanded. The government amended the *Education Act*, S.N.S. 1995-96, c. 1, ss. 11-16, in 1996 to create the Conseil scolaire acadien provincial (the "Conseil"), a province-wide French-language school board, with a view to realizing the *Charter*'s minority language education rights. However, while s. 11(1) empowered the Conseil to deliver and administer all French-language programs, only the Minister, with the approval of the Governor in Council, could construct, furnish and equip schools (see s. 88(1)). Although the government eventually announced the construction of the new French-language school facilities, construction of the promised schools never began. So in 1998, 16 years after the right was entrenched in the Constitution, the appellant parents applied to the Supreme Court of Nova Scotia for an order directing the Province and the Conseil to provide, out of public funds, homogeneous

la Nouvelle-Écosse Inc., un organisme sans but lucratif voué à la défense des droits à l'instruction que possède la minorité acadienne et francophone de la province. L'intimé est le procureur général de la province, qui représente le ministère de l'Éducation.

Indépendamment des faits particuliers de la présente affaire, le contexte historique du litige revêt une grande importance. Comme nous le verrons plus loin, l'instruction en français en Nouvelle-Écosse n'a pas connu un succès enviable. Bien que la situation, lamentable aux siècles précédents, se soit améliorée, il restait encore beaucoup à accomplir au XX^{e} siècle. La minorité francophone de la province espérait que l'art. 23 de la *Charte* permettrait de corriger les lacunes et les inégalités historiques en matière de langue.

On reconnaît, en l'espèce, que l'art. 23 de la *Charte* donne aux parents appelants le droit de faire instruire leurs enfants dans des établissements d'enseignement francophones financés sur les fonds publics. Depuis un certain temps, les parents francophones de ces cinq districts scolaires réclamaient au gouvernement provincial des écoles secondaires francophones homogènes en plus des écoles primaires existantes. Le gouvernement a acquiescé à leurs demandes : il n'a pas contesté que le nombre d'élèves justifiait ce service. Afin de respecter les droits à l'instruction dans la langue de la minorité garantis par la *Charte*, il a modifié les art. 11 à 16 de l'*Education Act*, S.N.S. 1995-96, ch. 1, de manière à instituer le Conseil scolaire acadien provincial (le « Conseil »), conseil scolaire francophone ayant compétence dans toute la province. Toutefois, même si le par. 11(1) habilite le Conseil à fournir et à administrer tous les programmes de langue française, seul le ministre peut, avec l'agrément du gouverneur en conseil, construire et aménager des écoles (voir le par. 88(1)). Malgré l'annonce faite en ce sens par le gouvernement, la mise en chantier des nouvelles écoles francophones promises n'a jamais eu lieu. C'est pourquoi, en 1998, soit 16 ans après la constitutionnalisation de ces droits, les parents appelants ont demandé à la Cour suprême de la Nouvelle-Écosse de délivrer une ordonnance enjoignant à la province et au Conseil de fournir,

French-language facilities and programs at the secondary school level.

The application was heard before LeBlanc J. in October 1999. LeBlanc J. declared that the applicants were entitled parents under s. 23 of the *Charter* and that the number of students warranted the provision of French homogeneous secondary school facilities in Chéticamp, Île Madame-Arichat (Petit-de-Grat), Argyle, and Clare: (2000), 185 N.S.R. (2d) 246. He noted, however, that the real issue was not the existence and content of the applicants' s. 23 rights, but the date on which the programs and facilities would finally be made available.

LeBlanc J. found that the respondents had not given sufficient attention to the serious rate of assimilation among Acadians and Francophones in Nova Scotia. The Province treated s. 23 rights as if they were but one more demand for educational programs and facilities, and failed to accord them due priority as constitutional rights. Meanwhile, assimilation continued. LeBlanc J. stated that "[i]t is beyond any doubt that it is time that homogeneous programs and facilities be provided to s. 23 students" (para. 206).

LeBlanc J. considered the state of school programs and facilities, including the progress that had already been made toward complying with s. 23 of the *Charter*, in each of the five school districts at issue. He directed the Province, which, through the Department of Education, is responsible for providing school facilities, and the Conseil, which is responsible for program provision, to build schools and provide programs by more and less specific deadlines. LeBlanc J. required that the respondents use their "best efforts" to comply with his order. Finally, he retained jurisdiction to hear reports from the respondents on their

sur les fonds publics, des programmes et des écoles homogènes de langue française au niveau secondaire.

5 Après avoir entendu la demande des parents en octobre 1999, le juge LeBlanc rend un jugement déclarant que les parents jouissent des droits garantis à l'art. 23 de la *Charte* et que le nombre d'élèves justifie la fourniture d'établissements d'enseignement secondaire francophones homogènes à Chéticamp, Île Madame-Arichat (Petit-de-Grat), Argyle et Clare : (2000), 185 N.S.R. (2d) 246. Il indique toutefois que ce qui est véritablement en cause est non pas l'existence et le contenu des droits que l'art. 23 garantit aux appelants, mais plutôt la date à laquelle ils pourront finalement bénéficier des programmes et des écoles.

6 Le juge LeBlanc estime que les défendeurs n'ont pas attaché assez d'importance à l'inquiétant taux d'assimilation des Acadiens et des francophones de la Nouvelle-Écosse. Selon lui, la province a considéré que les droits garantis par l'art. 23 n'étaient rien de plus qu'une autre demande de programmes éducatifs et d'établissements d'enseignement, et elle ne leur a pas accordé la priorité qui leur est due en tant que droits conférés par la Constitution. Pendant ce temps, l'assimilation se poursuivait. Le juge LeBlanc affirme [TRADUCTION] « [qu']il ne fait pas l'ombre d'un doute qu'il est temps de fournir aux élèves visés par l'art. 23 des programmes et établissements homogènes » (par. 206).

7 Le juge LeBlanc examine la situation des programmes éducatifs et des établissements d'enseignement dans les cinq districts scolaires en cause, notamment les progrès accomplis en ce qui concerne le respect de l'art. 23 de la *Charte*. Il ordonne à la province — qui, par l'intermédiaire du ministère de l'Éducation, a la responsabilité de fournir les écoles — et au Conseil — à qui il incombe d'établir les programmes éducatifs — de construire des écoles et d'offrir des programmes dans des délais plus ou moins précis. Il enjoint aux défendeurs de faire [TRADUCTION] « de leur mieux » pour se conformer à son

compliance. The precise wording of the order was as follows:

1. In Kingston/Greenwood, the entitled parents under Section 23 have a right to a homogeneous French program from grades Primary to 12 and the entitled parents have a right to a homogeneous French facility for grades Primary to 12 by September 2000.

2. In Cheticamp, the entitled parents under Section 23 have a right to a homogeneous French secondary program in a homogeneous French facility by September 2000.

3. In Île Madame-Arichat (Petit-de-Grat), the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades 9 through 12 by September 2000 and the Respondent Department of Education shall use its best efforts (a) to provide a homogeneous French facility (on an interim basis) for grades 9 through 12 by September 2000 and (b) to provide a permanent homogeneous French facility by January 2001.

4. In Argyle, the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall provide a homogeneous French facility for grades Primary through 12 by September 2001.

5. In Clare, the Respondent CSAP shall provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall take immediate steps to provide homogeneous French facilities for grades Primary through 12 by September 2001.

6. The Respondents shall use their best efforts to comply with this Order.

7. The Court shall retain jurisdiction to hear reports from the Respondents respecting the Respondents' compliance with this Order. The Respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

ordonnance. Enfin, il se déclare compétent pour entendre les comptes rendus des défendeurs sur leur respect de l'ordonnance. Voici le texte précis de l'ordonnance :

[TRADUCTION]

1. À Kingston/Greenwood, les parents visés à l'art. 23 ont droit à un programme homogène en français pour les élèves de première à douzième année et à une école francophone homogène pour les élèves de première à douzième année, d'ici septembre 2000.

2. À Chéticamp, les parents visés à l'art. 23 ont droit à un programme secondaire homogène en français dans une école francophone homogène, d'ici septembre 2000.

3. À Île Madame-Arichat (Petit-de-Grat), le défendeur le Conseil scolaire acadien provincial (le « Conseil ») devra faire de son mieux pour offrir un programme homogène en français destiné aux élèves de neuvième à douzième année, d'ici septembre 2000, et le défendeur le ministère de l'Éducation devra faire de son mieux pour (a) fournir (provisoirement) une école francophone homogène destinée aux élèves de neuvième à douzième année, d'ici septembre 2000, et (b) fournir une école francophone homogène permanente, d'ici janvier 2001.

4. À Argyle, le défendeur le Conseil devra faire de son mieux pour offrir un programme homogène en français destiné aux élèves de première à douzième année, d'ici septembre 2000, et le défendeur le ministère de l'Éducation devra faire de son mieux pour fournir une école francophone homogène destinée aux élèves de première à douzième année, d'ici septembre 2001.

5. À Clare, le défendeur le Conseil doit offrir un programme homogène en français destiné aux élèves de première à douzième année, d'ici septembre 2000, et le défendeur le ministère de l'Éducation doit prendre des mesures immédiates pour fournir des écoles francophones homogènes destinées aux élèves de première à douzième année, d'ici septembre 2001.

6. Les défendeurs devront faire de leur mieux pour se conformer à la présente ordonnance.

7. La cour se déclare compétente pour entendre les comptes rendus des défendeurs sur leur respect de la présente ordonnance. Les défendeurs devront rendre compte à la cour, le 23 mars 2001 à 9 h 30, ou à toute autre date fixée par cette dernière.

The reference to "the Court" in the final paragraph was interpreted by LeBlanc J., and the parties, as a reference to himself sitting as a judge of the provincial supreme court, rather than to the Supreme Court of Nova Scotia generally, which, as a court of first instance, would be competent to hear applications relating to any failure by the respondents to comply with LeBlanc J.'s order and would require no express retention of jurisdiction. LeBlanc J. presided over several of these "reporting hearings" between July 27, 2000, and March 23, 2001. Prior to each reporting session the trial judge directed the Province to file an affidavit from the appropriate official at the Department of Education, setting out the Department's progress in complying with the trial judge's decision. The trial judge permitted the respondent and Conseil to adduce evidence, including rebuttal evidence on various matters relating to compliance with the best efforts order. The Attorney General of Nova Scotia, on behalf of the Department of Education, appealed the part of the order in which LeBlanc J. retained his jurisdiction to hear reports.

8 Les parties partagent l'avis du juge LeBlanc selon lequel le terme « cour » utilisé au dernier paragraphe le désigne lui-même en sa qualité de juge de la Cour suprême de la province, et ne désigne pas la Cour suprême de la Nouvelle-Écosse en général qui, en tant que tribunal de première instance, aurait compétence pour entendre les demandes relatives à toute omission de la part des défendeurs de se conformer à l'ordonnance du juge LeBlanc, sans qu'elle ait à se déclarer expressément compétente à cet égard. Le juge LeBlanc préside plusieurs de ces « auditions de comptes rendus » entre le 27 juillet 2000 et le 23 mars 2001. Avant chacune de ces auditions, il exige le dépôt par la province d'un affidavit dans lequel le fonctionnaire compétent du ministère de l'Éducation expose les progrès réalisés en matière de respect de la décision du tribunal. Le juge permet à l'intimé et au Conseil de présenter des éléments de preuve et de contre-preuve sur diverses questions concernant le respect de l'ordonnance « de faire de son mieux ». Au nom du ministère de l'Éducation, le procureur général de la Nouvelle-Écosse interjette appel contre la partie de l'ordonnance dans laquelle le juge LeBlanc se déclare compétent pour entendre des comptes rendus.

The majority at the Nova Scotia Court of Appeal allowed the appeal before the final scheduled reporting hearing took place ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104). Flinn J.A., writing for the majority, emphasized that the declaration of the parents' rights and the order to provide programs and facilities were not in issue in the appeal (para. 6). Only the trial judge's retention of jurisdiction to hear reports was challenged. Flinn J.A. held that the trial judge, having decided the issue between the parties, had no further jurisdiction to remain seized of the case. This opinion was based on the common law principle of *functus officio* and Flinn J.A.'s view that the *Judicature Act*, R.S.N.S. 1989, c. 240, not only fails explicitly to authorize the retention of jurisdiction by a trial court after it has decided the issues before it and provided a remedy, but also precludes a trial judge from retaining jurisdiction to determine whether there is compliance with the order. He cited this

9 Dans un arrêt majoritaire, la Cour d'appel de la Nouvelle-Écosse accueille l'appel avant la dernière audience prévue pour la présentation de comptes rendus ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104). Le juge Flinn souligne, au nom des juges majoritaires, que l'appel ne porte ni sur le jugement déclaratoire concernant les droits des parents ni sur l'ordonnance enjoignant de fournir des programmes et des établissements (par. 6). Il porte uniquement sur la déclaration par le juge de première instance qu'il a compétence pour entendre des comptes rendus. Le juge Flinn statue que le juge de première instance ne peut pas rester saisi de l'affaire après avoir tranché la question en litige entre les parties. Cette opinion du juge Flinn repose sur la règle de common law du *functus officio* et sur l'interprétation qu'il donne de la *Judicature Act*, R.S.N.S. 1989, ch. 240, selon laquelle non seulement cette loi n'autorise pas expressément le tribunal de première instance

Court's decision in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 952-53, for the principle that it is for Parliament, and not judges, to fix the jurisdiction of courts and that the *Charter* was intended to fit in, rather than to alter, the existing scheme of Canadian legal procedure. After reviewing the language rights jurisprudence, Flinn J.A. concluded that there was no authority or precedent supporting the trial judge's decision to order and conduct the reporting sessions. He concluded that, while it is true that courts have broad ranging powers under s. 24(1) to fashion remedies, and are encouraged to be creative in so doing, the *Charter* does not extend a court's jurisdiction to permit it to enforce its remedies. Finally, Flinn J.A. expressed a reluctance to open the door to American jurisprudence on the enforcement of mandatory injunctions and a fear that post-trial intervention by trial judges in the enforcement of remedies would undermine the tradition of co-operation between the judiciary and the other branches of government.

10 Freeman J.A. dissented. In his view, LeBlanc J.'s order was not final and the judge was not *functus officio* until the continuing supervision was completed; the trial judge was able to keep his decision from being final simply by declaring that he was doing so. Freeman J.A. referred to the order as a "creative blending of declaratory and injunctive relief with a means of mediation" and found it to be "of the very essence of the kind of remedy courts are encouraged to seek pursuant to s. 24(1) to give life to *Charter* rights" (para. 70). He noted that requiring fresh applications by the parties each time the Province or the Conseil appeared not to be using its best efforts could have dragged matters out interminably, and would have left the matter to a judge with less familiarity with the issues and legal principles involved.

à se déclarer compétent après avoir tranché les questions dont il est saisi et avoir accordé une réparation, mais encore elle empêche le juge de première instance de se déclarer compétent pour déterminer si l'ordonnance rendue a été respectée. Il a cité l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, p. 952-953, à l'appui du principe voulant qu'il appartienne au législateur, et non aux juges, de définir la compétence des tribunaux, et qu'on ait voulu que la *Charte* s'inscrive dans le régime procédural canadien et non qu'elle le modifie. Après avoir passé en revue la jurisprudence relative aux droits linguistiques, le juge Flinn conclut que ni la doctrine ni la jurisprudence n'étayent la décision du juge de première instance d'ordonner et de tenir des auditions de comptes rendus. Il a conclu que, même s'il est vrai que les tribunaux disposent, en vertu du par. 24(1), d'un vaste éventail de pouvoirs en matière de réparations et qu'ils sont encouragés à se montrer créatifs à cet égard, la *Charte* n'élargit pas leur compétence de manière à leur permettre de mettre à exécution les réparations qu'ils accordent. Enfin, le juge Flinn se montre hésitant à ouvrir la porte à la jurisprudence américaine sur l'exécution des injonctions, disant craindre que l'intervention du juge de première instance dans l'exécution d'une réparation, après le procès, porte atteinte à la tradition de coopération entre le pouvoir judiciaire et les autres branches du gouvernement.

Dans son opinion dissidente, le juge Freeman affirme que le juge LeBlanc n'a pas rendu une ordonnance définitive et que sa compétence n'a donc pris fin qu'une fois la surveillance terminée; pour empêcher que sa décision soit définitive, il suffisait que le juge le dise expressément. Le juge Freeman qualifie l'ordonnance de [TRADUCTION] « mélange créatif de jugement déclaratoire et d'injonction axée sur la médiation » et considère qu'elle participe de [TRADUCTION] « l'essence même des réparations que les tribunaux sont encouragés à appliquer sous le régime du par. 24(1) afin de donner vie aux droits garantis par la *Charte* » (par. 70). Selon lui, si les parties avaient été tenues de présenter de nouvelles demandes chaque fois que la province ou le Conseil semblait ne pas faire de son mieux, l'affaire aurait pu traîner indéfiniment et

Freeman J.A. concluded that the order, meant to "head off the potential for an enforcement nightmare", "got the job done, virtually on time, with a minimum of inconvenience or unnecessary cost" (para. 84).

II. Issues

A preliminary issue raised by the respondent is whether the Court should decline to hear this appeal because it is moot.

The main issue in the appeal is simply this: having found a violation of s. 23 of the *Charter* and having ordered that the Province make its best efforts to provide homogeneous French-language facilities and programs by particular dates, did the Nova Scotia Supreme Court have the authority to retain jurisdiction to hear reports from the Province on the status of those efforts as part of its remedy under s. 24(1) of the *Charter*?

Strictly speaking, only the retention of jurisdiction to hear reports, and not the "best efforts" order itself, is at issue in the present appeal. Nonetheless, the best efforts order and the retention of jurisdiction were conceived by the trial judge as two complementary parts of a whole. A full appreciation of the balance and moderation of the trial judge's approach to crafting this remedy requires that the reports respecting the respondents' compliance with the order be viewed and evaluated in the context of the remedy as a whole.

III. *Charter* Provisions

LeBlanc J.'s order was designed to remedy a breach of s. 23 of the *Charter* which provides:

> **23.** (1) Citizens of Canada
>
> (*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

être soumise à un juge moins au fait du dossier et des principes juridiques en cause. Le juge Freeman conclut que l'ordonnance, destinée à [TRADUCTION] « empêcher l'exécution de tourner au cauchemar », « a donné le résultat recherché, pratiquement en temps voulu, avec un minimum d'inconvénients et de dépenses inutiles » (par. 84).

II. Les questions en litige

11 L'intimé s'est demandé, à titre préliminaire, si la Cour ne devrait pas refuser d'entendre le pourvoi pour le motif qu'il est devenu théorique.

12 En l'espèce, la question principale est simplement de savoir si, après avoir conclu à la violation de l'art. 23 de la *Charte* et après avoir ordonné à la province de faire de son mieux pour fournir des établissements et des programmes d'enseignement homogènes de langue française dans des délais déterminés, la Cour suprême de la Nouvelle-Écosse a le pouvoir de se déclarer compétente pour entendre les comptes rendus de la province sur les efforts qu'elle a déployés pour mettre à exécution la réparation fondée sur le par. 24(1) de la *Charte*.

13 À proprement parler, le pourvoi ne porte que sur la déclaration de compétence pour entendre des comptes rendus et non sur l'ordonnance même « de faire de son mieux ». Toutefois, le juge de première instance considère que ces déclarations et ordonnance sont des éléments complémentaires d'un tout. Pour bien évaluer le caractère mesuré et modéré de l'approche que le juge a adoptée en accordant la réparation dont il est question en l'espèce, il faut interpréter et évaluer à la lumière de l'ensemble de cette réparation les comptes rendus concernant le respect de l'ordonnance par les intimés.

III. Les dispositions de la *Charte*

14 L'ordonnance du juge LeBlanc vise à réparer une violation de l'art. 23 de la *Charte*, lequel prévoit :

> **23.** (1) Les citoyens canadiens :
>
> *a*) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglophone de la province où ils résident,

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

15 LeBlanc J. ordered the remedy challenged in this case pursuant to s. 24(1) of the *Charter* which provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

IV. Analysis

A. *Mootness*

16 Before considering the main issue in this case, it is necessary to consider the respondent's argument that this appeal should not be heard because it is moot.

17 The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Le juge LeBlanc a accordé la réparation — contestée en l'espèce — conformément au par. 24(1) de la *Charte*, dont voici le texte :

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

IV. Analyse

A. *Le caractère théorique*

Avant d'aborder la principale question soulevée en l'espèce, il faut examiner l'argument de l'intimé que la Cour ne devrait pas entendre ce pourvoi pour le motif qu'il est théorique.

La règle du caractère théorique procède du principe voulant que les tribunaux n'instruisent que des affaires présentant un litige actuel à résoudre, où leur décision aura ou pourra avoir des conséquences

litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary.

sur les droits des parties, sauf s'ils décident, dans l'exercice de leur pouvoir discrétionnaire, qu'il est néanmoins dans l'intérêt de la justice d'entendre un appel (voir *Borowski c. Canada (Procureur général)*, [1989] 1 R.C.S. 342, p. 353). Nous sommes d'avis que le présent pourvoi est devenu théorique. Les parties ont comparu à plusieurs auditions de comptes rendus, fourni des éléments de preuve et permis le contre-interrogatoire des auteurs des affidavits. L'effet recherché a été obtenu : les écoles demandées ont été construites. Le rétablissement de la validité de l'ordonnance du juge de première instance n'entraînerait en l'espèce aucun effet pratique pour les parties, et aucune autre audition de comptes rendus ne s'impose.

Although this appeal is moot, the considerations in *Borowski*, *supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):

18 Les remarques dans *Borowski*, précité, nous incitent cependant à entendre le pourvoi malgré son caractère théorique. Le juge Sopinka a énuméré, au nom de la Cour, les critères régissant l'exercice du pouvoir discrétionnaire des tribunaux d'entendre des affaires théoriques (aux p. 358-363) :

(1) the presence of an adversarial context;

(2) the concern for judicial economy; and

(3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

(1) l'existence d'un débat contradictoire;

(2) le souci d'économie des ressources judiciaires;

(3) la nécessité pour les tribunaux d'être conscients de leur fonction juridictionnelle dans notre structure politique.

In this case, the appropriate adversarial context persists. The litigants have continued to argue their respective sides vigorously.

19 Le nécessaire débat contradictoire existe toujours en l'espèce. Les parties ont en effet continué de défendre avec vigueur leurs points de vue respectifs.

As to the concern for conserving scarce judicial resources, this Court has many times noted that such an expenditure is warranted in cases that raise important issues but are evasive of review (*Borowski*, *supra*, at p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46). The present appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is

20 Quant au souci d'économiser des ressources judiciaires limitées, la Cour a maintes fois signalé que les affaires soulevant des questions importantes qui risquent d'échapper à l'examen judiciaire justifient de mettre ces ressources à contribution (*Borowski*, précité, p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 c. Winnipeg Builders' Exchange*, [1967] R.C.S. 628; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46). Le présent pourvoi soulève une question importante au sujet du pouvoir des cours supérieures d'ordonner des mesures susceptibles de constituer

effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.

21 Moreover, in deciding whether to hear a moot case, courts must weigh the expenditure of scarce judicial resources against "the social cost of continued uncertainty in the law" (*Borowski*, *supra*, at p. 361). The social cost of uncertainty as to the available *Charter* remedies is high. The *Charter* is designed to protect those who are most vulnerable to the dangers of majority rule; this aspect of the *Charter*'s purpose is evident in the provisions protecting official minority language education rights. If the Court leaves this matter undecided and courts are left under a misapprehension as to the tools available to ensure that government behaviour conforms with the *Charter*, the obvious danger is less than full protection of *Charter* rights. Thus, the expenditure of judicial resources is warranted in the present case despite the fact that the appeal may be moot. The decision of this Court will provide guidance on the important question of the nature and extent of remedies under s. 24 of the *Charter* in similar cases.

22 Finally, the Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this case (*Borowski*, *supra*, at p. 362). The question of what remedies are available under the *Charter* falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement. Furthermore, unlike in *Borowski*, *supra*, at p. 365, the appellants are not seeking an answer to an abstract question on the interpretation of the *Charter*; they are not "turn[ing] this appeal into a private reference". The Attorney General of Nova Scotia appealed successfully against an order made against it by a superior court. Although the immediate grievances of the appellants have now been addressed, deciding in this case will assist the

une réparation efficace dans certaines catégories de cas. Dans la mesure où elles s'avèrent efficaces, les ordonnances enjoignant de rendre compte tendent à échapper à l'examen judiciaire puisque les parties peuvent s'y conformer rapidement avant l'audition de l'appel.

De plus, pour décider s'il convient d'entendre une affaire théorique, les tribunaux doivent soupeser les ressources judiciaires limitées en fonction du « coût social de l'incertitude du droit » (*Borowski*, précité, p. 361). Or, l'incertitude quant aux réparations permises par la *Charte* entraîne un coût social élevé. La *Charte* vise à protéger ceux qui sont le plus exposés aux dangers de la règle de la majorité; cet aspect des objectifs de la *Charte* ressort clairement des dispositions protégeant les droits à l'instruction dans la langue officielle parlée par la minorité. Si la Cour ne tranche pas cette question et que, de ce fait, les tribunaux ne comprennent pas bien les moyens dont ils disposent pour garantir que le comportement du gouvernement respecte la *Charte*, il est évident que la protection des droits garantis par la *Charte* risque d'être incomplète. C'est pourquoi il est justifié d'affecter des ressources judiciaires à l'examen de la présente affaire malgré la possibilité qu'elle soit devenue théorique. La décision de la Cour fournira des repères pour l'analyse de l'importante question de la nature et de l'étendue des réparations fondées sur l'art. 24 de la *Charte* qui doivent être accordées dans des affaires similaires.

Enfin, en décidant d'entendre le présent pourvoi, la Cour ne s'écarte pas de sa fonction juridictionnelle traditionnelle pas plus qu'elle n'empiète sur les fonctions législative ou exécutive (*Borowski*, précité, p. 362). La question des réparations pouvant être accordées en vertu de la *Charte* relève tout à fait du champ d'expertise de la Cour et ne peut pas faire l'objet d'une décision du législateur ou du pouvoir exécutif. En outre, contrairement à la situation dans l'affaire *Borowski*, les appelants en l'espèce ne demandent pas de répondre à une question abstraite d'interprétation de la *Charte*; ils ne « transforme[nt] [pas] le pourvoi en renvoi d'initiative privée » (*Borowski*, précité, p. 365). Le procureur général de la Nouvelle-Écosse a obtenu l'annulation en appel d'une ordonnance rendue contre lui par une cour

parties to this action, and others in similar circumstances, in their ongoing relationships.

B. *The Retention of Jurisdiction*

(1) The Importance of Context: Sections 23 and 24 of the *Charter*

It is well accepted that the *Charter* should be given a generous and expansive interpretation and not a narrow, technical, or legalistic one (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Vriend v. Alberta*, [1998] 1 S.C.R. 493). The need for a generous interpretation flows from the principle that the *Charter* ought to be interpreted purposively. While courts must be careful not to overshoot the actual purposes of the *Charter*'s guarantees, they must avoid a narrow, technical approach to *Charter* interpretation which could subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*. In our view, the approach taken by our colleagues LeBel and Deschamps JJ. which appears to contemplate that special remedies might be available in some circumstances, but not in this case, severely undervalues the importance and the urgency of the language rights in the context facing LeBlanc J.

The requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights (*R. v. Gamble*, [1988] 2 S.C.R. 595; *R. v. Sarson*, [1996] 2 S.C.R. 223; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*")). In *Dunedin*, McLachlin C.J., writing for the Court, explained why this is so. She stated, at para. 18:

[Section] 24(1), like all *Charter* provisions, commands a broad and purposive interpretation. This section forms a vital part of the *Charter*, and must be construed generously, in a manner that best ensures

supérieure. Même s'il est maintenant satisfait aux revendications immédiates des appelants, une décision en l'espèce contribuera à faciliter les rapports entre les parties à la présente affaire et ceux d'autres parties se trouvant dans une situation similaire.

B. *La déclaration de compétence*

(1) L'importance du contexte : les art. 23 et 24 de la *Charte*

23 Il est bien reconnu qu'il faut donner à la *Charte* une interprétation large et libérale et non étroite ou formaliste (*Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Renvoi : Circ. électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *Vriend c. Alberta*, [1998] 1 R.C.S. 493). La nécessité de l'interprétation libérale découle du principe d'interprétation téléologique de la *Charte*. Bien qu'ils doivent prendre soin de ne pas outrepasser les objets véritables des garanties qu'elle accorde, les tribunaux n'en doivent pas moins éviter de donner à la *Charte* une interprétation étroite et formaliste susceptible de contrecarrer l'objectif qui est d'assurer aux titulaires de droits l'entier bénéfice et la pleine protection de la *Charte*. À notre avis, l'approche adoptée par nos collègues les juges LeBel et Deschamps, qui paraît reconnaître la possibilité d'obtenir des réparations particulières dans certaines circonstances, mais non en l'espèce, sous-estime grandement l'importance des droits linguistiques et la nécessité pressante d'en assurer le respect dans le contexte de l'affaire dont le juge LeBlanc était saisi.

24 L'exigence d'une interprétation large et libérale vaut autant pour les réparations fondées sur la *Charte* que pour les droits qui y sont garantis (*R. c. Gamble*, [1988] 2 R.C.S. 595; *R. c. Sarson*, [1996] 2 R.C.S. 223; *R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81 (« *Dunedin* »)). Dans l'arrêt *Dunedin*, précité, par. 18, la juge en chef McLachlin en explique la raison, au nom de la Cour :

. . . comme toutes les autres dispositions de la *Charte*, le par. 24(1) commande une interprétation large et téléologique. Il constitue une partie essentielle de la *Charte* et doit être interprété de la manière la plus généreuse qui

the attainment of its objects . . . . Moreover, it is remedial, and hence benefits from the general rule of statutory interpretation that accords remedial statutes a "large and liberal" interpretation . . . . Finally, and most importantly, the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights. In *Mills*, McIntyre J. observed at p. 965 that "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion". This broad remedial mandate for s. 24(1) should not be frustrated by a "(n)arrow and technical" reading of the provision . . . . [Reference omitted.]

25 Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (*Dunedin*, *supra*, at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.

26 The purpose of s. 23 of the *Charter* is "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population" (*Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 362). Minority language education rights are the means by which the goals of linguistic and cultural preservation are achieved (see *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839, at p. 849-50 ("*Schools Reference*")). This Court has, on a number of occasions, observed the close link between

soit compatible avec la réalisation de son objet [. . .] Il s'agit en outre d'une disposition réparatrice qui, de ce fait, bénéficie de la règle générale d'interprétation législative selon laquelle les lois réparatrices reçoivent une interprétation « large et libérale » [. . .] Dernière considération et élément le plus important : le texte de cette disposition paraît accorder au tribunal le plus vaste pouvoir discrétionnaire possible aux fins d'élaboration des réparations applicables en cas de violations des droits garantis par la *Charte*. Dans l'arrêt *Mills*, précité, le juge McIntyre a fait remarquer qu'« [i]l est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu » (p. 965). Il ne faut pas que ce large mandat réparateur du par. 24(1) soit mis en échec par une interprétation « étroite et formaliste » de la disposition . . . [Renvoi omis.]

Selon le principe de l'interprétation téléologique, les dispositions réparatrices doivent être interprétées de manière à assurer « une réparation complète, efficace et utile à l'égard des violations de la *Charte* », « puisqu'un droit, aussi étendu soit-il en théorie, est aussi efficace que la réparation prévue en cas de violation, sans plus » (*Dunedin*, précité, par. 19-20). L'interprétation téléologique des réparations dans le contexte de la *Charte* actualise l'ancienne maxime *ubi jus, ibi remedium*, là où il y a un droit, il y a un recours. Plus particulièrement, cette interprétation comporte au moins deux exigences, à savoir, premièrement, favoriser la réalisation de l'objet du droit garanti (les tribunaux sont tenus d'accorder des réparations adaptées à la situation), et deuxièmement, favoriser la réalisation de l'objet des dispositions réparatrices (les tribunaux sont tenus d'accorder des réparations efficaces).

L'article 23 de la *Charte* a pour objet de « maintenir les deux langues officielles du Canada ainsi que les cultures qu'elles représentent et [de] favoriser l'épanouissement de chacune de ces langues, dans la mesure du possible, dans les provinces où elle n'est pas parlée par la majorité » (*Mahe c. Alberta*, [1990] 1 R.C.S. 342, p. 362). Les droits à l'instruction dans la langue de la minorité permettent d'atteindre les objectifs de préservation de la langue et de la culture (voir *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839, p. 849-850 (« *Renvoi sur les écoles* »)). La Cour a affirmé, à maintes

language and culture. In *Mahe*, at p. 362, Dickson C.J. stated:

> . . . any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

A further aspect of s. 23 of the *Charter* is its remedial nature (see, for example, *Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3, 2000 SCC 1, at para. 26). The section is designed to correct past injustices not only by halting the progressive erosion of minority official language cultures across Canada, but also by actively promoting their flourishing (*Mahe*, *supra*, at p. 363; *Schools Reference*, *supra*, at p. 850). Section 23 must therefore be construed "in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection of minority language rights" (*Schools Reference*, at p. 850; see also *Arsenault-Cameron*, *supra*, at para. 27). This Court has made it clear that the fact that language rights arose from political compromise does not alter their nature and importance; consequently, s. 23 must be given the same large and liberal interpretation as all *Charter* rights (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25; *Arsenault-Cameron*, *supra*, at para. 27).

The minority language education rights protected under s. 23 of the *Charter* are unique. They are distinctively Canadian, representing "a linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe*, *supra*, at p. 350). Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures (*Mahe*, at p. 389). While the rights are granted to individuals (*Schools Reference*, at p. 865), they apply only if the "numbers warrant", and the specific programs or facilities that the government is

reprises, qu'il existait un lien étroit entre la langue et la culture. Dans l'arrêt *Mahe*, précité, p. 362, le juge en chef Dickson écrit :

> . . . toute garantie générale de droits linguistiques, surtout dans le domaine de l'éducation, est indissociable d'une préoccupation à l'égard de la culture véhiculée par la langue en question. Une langue est plus qu'un simple moyen de communication; elle fait partie intégrante de l'identité et de la culture du peuple qui la parle. C'est le moyen par lequel les individus se comprennent eux-mêmes et comprennent le milieu dans lequel ils vivent.

27 L'article 23 de la *Charte* a également un caractère réparateur (voir, par exemple, *Mahe*, précité, p. 363; *Renvoi sur les écoles*, précité, p. 850; *Arsenault-Cameron c. Île-du-Prince-Édouard*, [2000] 1 R.C.S. 3, 2000 CSC 1, par. 26). Il vise à réparer des injustices passées non seulement en mettant fin à l'érosion progressive des cultures des minorités de langue officielle au pays, mais aussi en favorisant activement leur épanouissement (*Mahe*, précité, p. 363; *Renvoi sur les écoles*, précité, p. 850). C'est pourquoi il faut l'interpréter « compte tenu des injustices passées qui n'ont pas été redressées et qui ont nécessité l'enchâssement de la protection des droits linguistiques de la minorité » (*Renvoi sur les écoles*, p. 850-851; voir aussi *Arsenault-Cameron*, précité, par. 27). La Cour a mentionné clairement que le fait que les droits linguistiques découlent d'un compromis politique n'a aucune incidence sur leur nature ou leur importance; l'art. 23 doit donc recevoir la même interprétation large et libérale que les autres droits garantis par la *Charte* (*R. c. Beaulac*, [1999] 1 R.C.S. 768, par. 25; *Arsenault-Cameron*, précité, par. 27).

28 Les droits à l'instruction dans la langue de la minorité, que garantit l'art. 23, ont un caractère unique. Ils sont typiquement canadiens en ce qu'ils constituent « la clef de voûte de l'engagement du Canada envers le bilinguisme et le biculturalisme » (*Mahe*, précité, p. 350). L'article 23 impose aux gouvernements l'obligation absolue de mobiliser des ressources et d'édicter des lois pour l'établissement de structures institutionnelles capitales (*Mahe*, p. 389). Bien que les droits soient conférés aux individus (*Renvoi sur les écoles*, p. 865), ils ne peuvent être exercés que si « le nombre le justifie », et la

required to provide varies depending on the number of students who can potentially be expected to participate (*Mahe*, *supra*, at p. 366; *Schools Reference*, *supra*, at p. 850; *Arsenault-Cameron*, *supra*, at para. 38). This requirement gives the exercise of minority language education rights a unique collective aspect even though the rights are granted to individuals.

29 Another distinctive feature of the right in s. 23 is that the "numbers warrant" requirement leaves minority language education rights particularly vulnerable to government delay or inaction. For every school year that governments do not meet their obligations under s. 23, there is an increased likelihood of assimilation which carries the risk that numbers might cease to "warrant". Thus, particular entitlements afforded under s. 23 can be suspended, for so long as the numbers cease to warrant, by the very cultural erosion against which s. 23 was designed to guard. In practical, though not legal, terms, such suspensions may well be permanent. If delay is tolerated, governments could potentially avoid the duties imposed upon them by s. 23 through their own failure to implement the rights vigilantly. The affirmative promise contained in s. 23 of the *Charter* and the critical need for timely compliance will sometimes require courts to order affirmative remedies to guarantee that language rights are meaningfully, and therefore necessarily promptly, protected (see, for example, *Marchand v. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (Ont. H.C.); *Marchand v. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171 (Ont. H.C.); *Lavoie v. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586 (N.S.S.C.T.D.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel v. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704 (Ont. Ct. (Gen. Div.)), aff'd (1996), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park v. Saskatchewan*, [1999] 3 W.W.R. 743 (Sask. Q.B.), aff'd [1999] 12 W.W.R. 742 (Sask. C.A.); *Assoc. Française des Conseils Scolaires de l'Ontario v. Ontario* (1988), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de*

nature de l'obligation des gouvernements de fournir des établissements et des programmes varie en fonction du nombre d'élèves susceptibles de se prévaloir des services (*Mahe*, précité, p. 366; *Renvoi sur les écoles*, précité, p. 850; *Arsenault-Cameron*, précité, par. 38). Cette exigence donne à l'exercice de ces droits individuels une dimension collective particulière.

Les droits garantis par l'art. 23 présentent une autre caractéristique : en raison de l'exigence du « nombre justificatif », ils sont particulièrement vulnérables à l'inaction ou aux atermoiements des gouvernements. Le risque d'assimilation et, par conséquent, le risque que le nombre cesse de « justifier » la prestation des services augmentent avec les années scolaires qui s'écoulent sans que les gouvernements exécutent les obligations que leur impose l'art. 23. Ainsi, l'érosion culturelle que l'art. 23 visait justement à enrayer peut provoquer la suspension des services fournis en application de cette disposition tant que le nombre cessera de justifier la prestation de ces services. De telles suspensions peuvent fort bien devenir permanentes en pratique, mais non du point de vue juridique. Si les atermoiements sont tolérés, l'omission des gouvernements d'appliquer avec vigilance les droits garantis par l'art. 23 leur permettra éventuellement de se soustraire aux obligations que leur impose cet article. La promesse concrète contenue à l'art. 23 de la *Charte* et la nécessité cruciale qu'elle soit tenue à temps obligent parfois les tribunaux à ordonner des mesures réparatrices concrètes destinées à garantir aux droits linguistiques une protection réelle et donc nécessairement diligente (voir, par exemple, *Marchand c. Simcoe County Board of Education* (1986), 29 D.L.R. (4th) 596 (H.C. Ont.); *Marchand c. Simcoe County Board of Education (No. 2)* (1987), 44 D.L.R. (4th) 171 (H.C. Ont.); *Lavoie c. Nova Scotia (Attorney-General)* (1988), 47 D.L.R. (4th) 586 (C.S.N.-É. 1re inst.); *Conseil des Écoles Séparées Catholiques Romaines de Dufferin et Peel c. Ontario (Ministre de l'Éducation et de la Formation)* (1996), 136 D.L.R. (4th) 704 (C. Ont. (Div. gén.)), conf. par (1996), 30 O.R. (3d) 681 (C.A.); *Conseil Scolaire Fransaskois de Zenon Park c. Saskatchewan*, [1999] 3 W.W.R. 743 (B.R. Sask.), conf. par [1999] 12 W.W.R. 742 (C.A. Sask.); *Assoc.*

la Colombie-Britannique v. British Columbia (1998), 167 D.L.R. (4th) 534 (B.C.S.C.)).

To put the matter of judicial remedies in greater context, it is useful to reflect briefly on the role of courts in the enforcement of our laws.

Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement. In this respect, courts play an essential role since they are the central institutions to deal with legal disputes through the rendering of judgments and decisions. But courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments.

Fortunately, Canada has had a remarkable history of compliance with court decisions by private parties and by all institutions of government. That history of compliance has become a fundamentally cherished value of our constitutional democracy; we must never take it for granted but always be careful to respect and protect its importance, otherwise the seeds of tyranny can take root.

This tradition of compliance takes on a particular significance in the constitutional law context, where courts must ensure that government behaviour conforms with constitutional norms but in doing so must also be sensitive to the separation of function among the legislative, judicial and executive branches. While our Constitution does not expressly provide for the separation of powers (see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, at p. 601; *Reference re Secession of Quebec*, [1998]

Française des Conseils Scolaires de l'Ontario c. Ontario (1988), 66 O.R. (2d) 599 (C.A.); *Assn. des parents francophones de la Colombie-Britannique c. British Columbia* (1998), 167 D.L.R. (4th) 534 (C.S.C.-B.)).

30 Afin de situer la question des réparations judiciaires dans un contexte plus général, il est utile d'examiner brièvement le rôle que les tribunaux jouent en matière d'application des lois.

31 Le Canada s'est gagné reconnaissance et admiration en faisant de la primauté du droit une caractéristique majeure de sa démocratie. Toutefois, la primauté du droit non assortie des mécanismes propres à en assurer le respect risque de demeurer un principe superficiel. Les tribunaux jouent un rôle essentiel à cet égard puisque c'est à eux, en tant qu'institutions centrales, qu'il revient de résoudre les différends juridiques en rendant des jugements et des décisions. Cependant, ils ne disposent pas des ressources matérielles ou financières requises pour assurer l'exécution de leurs jugements. En fin de compte, ils s'en remettent à l'exécutif et aux citoyens pour ce qui est de reconnaître et de respecter leurs jugements.

32 Heureusement, au Canada, il existe une tradition de respect remarquable des décisions judiciaires de la part des parties privées et des institutions gouvernementales. Cette tradition s'est transformée en une précieuse valeur fondamentale de notre démocratie constitutionnelle. Il faut se garder de la tenir pour acquise, et toujours prendre soin d'en honorer et d'en protéger l'importance, afin d'éviter que les germes de la tyrannie s'enracinent.

33 Cette tradition de respect prend une dimension particulière dans le contexte du droit constitutionnel, où les tribunaux doivent veiller à ce que l'action du gouvernement soit conforme aux normes constitutionnelles tout en ne perdant pas de vue la séparation des fonctions entre les pouvoirs législatif, judiciaire et exécutif. Bien que la Constitution ne prévoie pas expressément la séparation des pouvoirs (voir *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714, p. 728; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, p. 601; *Renvoi relatif à la sécession du*

2 S.C.R. 217, at para. 15), the functional separation among the executive, legislative and judicial branches of governance has frequently been noted. (See, for example, *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70.) In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. (as she then was) stated, at p. 389:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other.

34 In other words, in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

35 In addition, it is unsurprising, given how the *Charter* changed the nature of our constitutional structure by requiring that all laws and government action conform to the *Charter*, that concerns about the limits of the judicial role have animated much of the *Charter* jurisprudence and commentary surrounding it (see, for example, K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (2000); A. Petter, "The Politics of

Québec, [1998] 2 R.C.S. 217, par. 15), les tribunaux ont fréquemment signalé l'existence d'une séparation fonctionnelle entre les branches exécutive, législative et judiciaire de l'État. (Voir, par exemple, *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470.) Dans l'arrêt *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, la juge McLachlin (maintenant Juge en chef) affirme à la p. 389 :

> Notre gouvernement démocratique comporte plusieurs branches : la Couronne représentée par le gouverneur général et ses homologues provinciaux, l'organisme législatif, l'exécutif et les tribunaux. Pour assurer le fonctionnement de l'ensemble du gouvernement, il est essentiel que toutes ces composantes jouent le rôle qui leur est propre. Il est également essentiel qu'aucune de ces branches n'outrepasse ses limites et que chacune respecte de façon appropriée le domaine légitime de compétence de l'autre.

Autrement dit, lorsqu'ils accordent des réparations constitutionnelles, les tribunaux doivent être conscients de leur rôle d'arbitre judiciaire et s'abstenir d'usurper les fonctions des autres branches du gouvernement en s'arrogeant des tâches pour lesquelles d'autres personnes ou organismes sont mieux qualifiés. Le souci des limites du rôle judiciaire est omniprésent en droit. L'établissement de la règle de la justiciabilité et, dans une large mesure, de celles du caractère théorique, de la qualité pour agir et de la question mûre pour décision découle de la crainte que les tribunaux outrepassent leur fonction judiciaire et empiètent sur le rôle des autres branches du gouvernement.

En outre, compte tenu des changements que la *Charte* a apportés à la nature de notre structure constitutionnelle en exigeant la conformité de toute loi et de toute action gouvernementale à ses dispositions, il n'est pas étonnant que la jurisprudence relative à la *Charte* et les commentaires des auteurs à son sujet aient fait tant de cas de la question des limites du rôle judiciaire (voir, par exemple, K. Roach, *The Supreme Court on Trial : Judicial Activism or Democratic Dialogue* (2001); C. P. Manfredi, *Judicial Power and the Charter : Canada and the Paradox of Liberal Constitutionalism* (1993); F. L. Morton et R. Knopff, *The Charter Revolution and*

the Charter" (1986), 8 *Supreme Court L.R.* 473). Thus, in *Vriend*, *supra*, this Court stated, at para. 136:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

Deference ends, however, where the constitutional rights that the courts are charged with protecting begin. As McLachlin J. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament.

Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case.

Returning to this appeal, we believe that LeBlanc J. was duly guided by historical and contextual factors in crafting a remedy that would meaningfully protect, indeed implement, the applicants' rights to minority official language education for their children while maintaining appropriate respect for the proper roles of the executive and legislative branches.

As indicated earlier, the history of French-language education in Nova Scotia has been disappointing, resulting in high rates of assimilation

the Court Party (2000); A. Petter, « The Politics of the Charter » (1986), 8 *Supreme Court L.R.* 473). Ainsi, la Cour a statué dans *Vriend*, précité, par. 136 :

> Les tribunaux n'ont pas, pour accomplir leurs fonctions, à se substituer après coup aux législatures ou aux gouvernements; ils ne doivent pas passer de jugement de valeur sur ce qu'ils considèrent comme les politiques à adopter; cette tâche appartient aux autres organes de gouvernement. Il incombe plutôt aux tribunaux de faire respecter la Constitution, et c'est la Constitution elle-même qui leur confère expressément ce rôle. Toutefois, il est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l'exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux.

36 Cependant, la déférence s'arrête là où commencent les droits constitutionnels que les tribunaux sont chargés de protéger. Comme le déclare la juge McLachlin dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 136 :

> Le Parlement a son rôle : choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle : déterminer de façon objective et impartiale si le choix du Parlement s'inscrit dans les limites prévues par la Constitution. Les tribunaux n'ont pas plus le droit que le Parlement d'abdiquer leur responsabilité.

La délimitation du rôle que les tribunaux ont à jouer ne saurait toutefois se réduire à un simple critère ou une simple formule; leur rôle varie en fonction du droit en cause et du contexte de chaque affaire.

37 En ce qui concerne le présent pourvoi, nous croyons que le juge LeBlanc s'est à bon droit appuyé sur des facteurs historiques et contextuels pour concevoir une réparation qui protégerait utilement et, en fait, mettrait en application les droits des appelants de faire instruire leurs enfants dans la langue officielle parlée par la minorité, tout en respectant comme il se doit les rôles respectifs de l'exécutif et du législatif.

38 Là encore, l'histoire de l'instruction en français en Nouvelle-Écosse est décevante; on a abouti à un taux d'assimilation élevé qui se poursuivait toujours

that have continued well into the period when this litigation began. While the situation is not what it was in the eighteenth and nineteenth centuries when French-language education in Acadia was for the most part either expressly prohibited or unavailable, the promise of s. 23 had yet to be fulfilled in the five school districts at issue in this appeal when the appellants brought their application demanding homogeneous French-language facilities before the Supreme Court of Nova Scotia in 1998. Through the mid-1990s, s. 23 parents had pressured the government to provide homogeneous French-language facilities in presentations to Legislative Committees and in written and oral submissions to Ministers of Education. They had submitted petitions, letters, and expert analyses on assimilation to the Province. In 1996, amendments to the *Education Act* provided for a French-language school board, the Conseil scolaire acadien provincial, geared toward the fulfilment of the Province's s. 23 obligations. The school board then decided to provide the facilities at issue in this appeal. From 1997 to 1999, the provincial government announced the construction of homogeneous French-language schools in Petit-de-Grat, Clare, and Argyle. The schools were never built, and the construction projects were officially put on hold in September 1999.

39 The reason for the delay, broadly speaking, was the government's failure to give due priority to s. 23 rights in educational policy setting. Indeed, LeBlanc J. observed that the real issue between the parties by the time of trial was the date on which the programs ought to be implemented, rather than any question as to whether they were required in the first place. The government cited a lack of consensus in the community, a consequent fear that enrollment would drop, and lack of funds as reasons for its decision to place the previously announced school construction projects on hold pending cost-benefit reviews. LeBlanc J. rightly concluded that none of these reasons justified the government's failure to fulfill its obligations under s. 23. He found that the government had been treating the provision of s. 23 schools no differently from programs or facilities

au moment où a commencé le présent litige. La situation n'est certes plus ce qu'elle était aux XVIII[e] et XIX[e] siècles, alors que l'instruction en français en Acadie était le plus souvent inexistante ou expressément interdite, mais dans les cinq districts scolaires en cause, la promesse contenue à l'art. 23 n'était toujours pas réalisée, en 1998, au moment où les appelants ont présenté à la Cour suprême de la province une demande visant à obtenir des établissements d'enseignement francophones homogènes. Jusqu'au milieu des années 90, les parents visés par l'art. 23 avaient exercé des pressions sur le gouvernement pour qu'il fournisse des établissements francophones homogènes, en comparaissant devant des comités législatifs et en présentant des mémoires ou des observations orales au ministre de l'Éducation. Ils avaient soumis des pétitions, envoyé des lettres et présenté des analyses d'experts sur l'assimilation dans la province. En 1996, l'*Education Act* a été modifiée de manière à créer un conseil scolaire francophone, le Conseil scolaire acadien provincial, qui serait chargé de remplir les obligations imposées à la province par l'art. 23. Le Conseil a alors décidé de fournir les établissements en cause dans le présent pourvoi. De 1997 à 1999, le gouvernement provincial a annoncé la construction d'écoles francophones homogènes à Petit-de-Grat, Clare et Argyle. La mise en chantier des écoles n'a jamais eu lieu et les projets de construction ont été officiellement suspendus en septembre 1999.

De façon générale, ces atermoiements s'expliquent par le défaut du gouvernement d'accorder aux droits protégés par l'art. 23 la priorité qui leur revient en matière de politique d'enseignement. En fait, le juge LeBlanc a souligné qu'au moment de l'instruction de l'affaire la véritable question en litige entre les parties était la date de mise en œuvre des programmes plutôt que leur nécessité au départ. Pour justifier sa décision de suspendre les projets de construction déjà annoncés en attendant les conclusions d'analyses coûts-avantages, le gouvernement a mentionné l'absence de consensus dans la collectivité — d'où la crainte d'une baisse des inscriptions — et le manque de fonds. Le juge LeBlanc a eu raison de conclure qu'aucun de ces motifs ne justifiait le défaut du gouvernement de s'acquitter des obligations que lui impose l'art. 23. Selon lui,

generally, without attention to purposes of s. 23 of the *Charter* and the role that homogeneous schools play in French linguistic and cultural preservation and flourishing (para. 205). Meanwhile, assimilation continued (para. 210) and enrollment in the Conseil's schools was dropping. Programs were in jeopardy (paras. 229-30).

It is in this urgent context of ongoing cultural erosion that LeBlanc J. crafted his remedy. He was sensitive to the need for timely execution, the limits of the judicial role, and the desirability of allowing the government flexibility in the manner of fulfilling its constitutional obligations when he ordered the government to make best efforts to provide facilities by particular dates and retained jurisdiction to hear progress reports. However, the urgency of the context does not by itself create jurisdiction in a superior court to issue a remedy of unlimited scope under s. 24(1) of the *Charter*. We now turn to the question of whether LeBlanc J.'s order was within the jurisdiction of a superior court.

(2) The Jurisdiction of a Superior Court to Issue a Remedy Under Section 24(1) of the *Charter*

Section 24(1) entrenches in the Constitution a remedial jurisdiction for infringements or denials of *Charter* rights and freedoms. The respondent makes various arguments suggesting that LeBlanc J. exceeded his jurisdiction by violating constitutional norms, statutory provisions, and common law rules. We will first deal with the extent of the remedial jurisdiction in s. 24(1) and the constitutional limits to that jurisdiction proposed by the respondent. Later we will discuss how statutes and common law rules might be relevant to the choice of remedy under s. 24(1).

le gouvernement avait traité les écoles requises en vertu de l'art. 23 de la *Charte* de la même manière que les autres établissements ou programmes en général, sans s'attarder à l'objet de cet article et au rôle des écoles homogènes en ce qui concerne la préservation et l'épanouissement de la langue et de la culture françaises (par. 205). Pendant ce temps, l'assimilation se poursuivait (par. 210) et les inscriptions aux écoles du Conseil chutaient. Les programmes étaient en péril (par. 229-230).

40 C'est dans ce contexte urgent d'érosion culturelle que le juge LeBlanc a conçu la réparation en cause. En ordonnant au gouvernement de faire de son mieux pour fournir des établissements dans des délais déterminés et en se déclarant compétent pour entendre les comptes rendus sur les efforts déployés à cet égard, le juge a tenu compte de la nécessité d'une exécution diligente, des limites du rôle des tribunaux et de l'opportunité de laisser au gouvernement une certaine latitude dans la façon de remplir les obligations que lui impose la Constitution. Toutefois l'urgence du contexte n'habilite pas en soi une cour supérieure à accorder une réparation d'une portée illimitée sous le régime du par. 24(1) de la *Charte*. Nous abordons maintenant la question de savoir si l'ordonnance du juge LeBlanc ressortissait à la compétence d'une cour supérieure.

(2) La compétence des cours supérieures en matière de réparation fondée sur le par. 24(1) de la *Charte*

41 Le paragraphe 24(1) constitutionnalise le pouvoir des tribunaux de réparer des négations ou violations de droits et libertés garantis par la *Charte*. L'intimé avance divers arguments selon lesquels le juge LeBlanc aurait outrepassé sa compétence en contrevenant à des normes constitutionnelles, à des dispositions législatives et à des règles de common law. Nous examinerons d'abord la portée de la compétence que le par. 24(1) confère en matière de réparation, ainsi que les limites auxquelles la Constitution assujettit cette compétence selon l'intimé. Nous analyserons ensuite l'utilité des textes de loi et des règles de common law dans le choix des réparations visées au par. 24(1).

42 Clearly, if there is some constitutional limit to the remedial power either in s. 24(1) or in some other part of the Constitution, the judge ordering a remedy must respect this boundary. As a basic rule, no part of the Constitution can abrogate or diminish another part of the Constitution (*New Brunswick Broadcasting*, *supra*, at p. 373, McLachlin J. citing *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148). For example, a court could not compel a provincial government to do something pursuant to s. 24(1) which would exceed the jurisdiction of the province under s. 92 of the *Constitution Act, 1867*.

Il est incontestable que, si le pouvoir de réparation comporte certaines limites en vertu du par. 24(1) ou d'autres parties de la Constitution, le juge doit agir en conséquence au moment d'accorder une réparation. Selon une règle fondamentale, une partie de la Constitution ne peut être abrogée ou atténuée par une autre partie de la Constitution (*New Brunswick Broadcasting*, précité, p. 373, la juge McLachlin, citant le *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148). Par exemple, un tribunal ne saurait forcer un gouvernement provincial à prendre, en vertu du par. 24(1), une mesure qui excéderait la compétence conférée à la province par l'art. 92 de la *Loi constitutionnelle de 1867*.

43 A remedy under s. 24(1) is available where there is some government action, beyond the enactment of an unconstitutional statute or provision, that infringes a person's *Charter* rights (see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 719-20). In the present appeal, the difficulty does not lie with the legislation: no provision or omission in the *Education Act* prevented the government from providing minority language education as required by the *Constitution Act, 1982*. On the contrary, the *Education Act*, as amended in 1996, establishes a French-language school board to provide homogeneous French-language education to children of s. 23 entitled parents. Neither is the problem rooted in any particular government action; rather, the problem was inaction on the part of the provincial government, particularly its failure to mobilize resources to provide school facilities in a timely fashion, as required by s. 23 of the *Charter*. Section 24(1) is available to remedy this failure.

Il peut y avoir lieu à réparation sous le régime du par. 24(1) lorsqu'une action du gouvernement, autre que l'adoption d'une loi ou d'une disposition législative inconstitutionnelle, porte atteinte aux droits que la *Charte* garantit à une personne (voir *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 719-720). En l'espèce, ce n'est pas la loi qui fait problème : l'*Education Act* ne comporte ni disposition ni omission empêchant le gouvernement de dispenser l'instruction dans la langue de la minorité conformément à la *Loi constitutionnelle de 1982*. Au contraire, cette loi, dans sa version modifiée de 1996, établit un conseil scolaire francophone chargé d'offrir un enseignement homogène en français aux enfants des parents visés à l'art. 23. De même, le problème découle non pas d'une action gouvernementale quelconque, mais plutôt de l'inaction du gouvernement provincial et, en particulier, de son défaut de mobiliser des ressources pour fournir sans délai des établissements d'enseignement, conformément à l'art. 23 de la *Charte*. On peut se prévaloir du par. 24(1) pour remédier à ce défaut.

44 To repeat its text, s. 24(1) of the *Charter* provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Voici, encore une fois, le texte du par. 24(1) de la *Charte* :

> Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

The purposive reading of s. 24(1) and also the ordinary meaning of the drafter's language make it clear that s. 24(1) guarantees that there must always be a court of competent jurisdiction to hear anyone whose rights or freedoms have been infringed or denied (see *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196, and *Mills*, *supra*, at p. 881). The default court of competent jurisdiction is a superior court established under s. 96 of the *Constitution Act, 1867*. It is also plainly contemplated in s. 24(1) that a court of competent jurisdiction will have the authority to grant a remedy that it considers appropriate and just in the circumstances.

The respondent Attorney General of Nova Scotia suggested that *Re Residential Tenancies Act, 1979*, *supra*, and other cases which describe the functions of courts in the context of s. 96 should be read as setting limits on superior courts' remedial power. With respect, that submission must fail. It is true that in *Re Residential Tenancies Act, 1979*, at pp. 734-35, Dickson J. (as he then was) discussed the nature of the "judicial function" of s. 96 courts. But this discussion occured in the context of a s. 96 challenge to the validity of a statute conferring jurisdiction on an administrative tribunal. Section 96 protects a "core" of superior courts' jurisdiction from being transferred exclusively to provincial inferior courts or administrative tribunals (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15, *per* Lamer C.J.). These cases safeguarding a core do not trace the limits of superior courts' jurisdiction. There is nothing in s. 96 to limit the inherent jurisdiction of the superior courts or the jurisdiction that can be conferred on them by statute (*Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at p. 274) and, *a fortiori*, nothing to limit the jurisdiction of a superior court under s. 24(1) of the *Charter*.

In a similar vein, the respondent Attorney General suggests that this Court's decisions in *Mills* and *Dunedin*, both *supra*, which set out a

45 L'interprétation téléologique de ce texte et le sens ordinaire des mots utilisés par son rédacteur montrent clairement qu'il garantit qu'il y aura toujours un tribunal compétent pour entendre les personnes victimes de violation ou de négation de leurs droits ou libertés (voir *Nelles c. Ontario*, [1989] 2 R.C.S. 170, p. 196, et *Mills*, précité, p. 881). Les tribunaux compétents sont *ipso facto* les cours supérieures établies en vertu de l'art. 96 de la *Loi constitutionnelle de 1867*. Le paragraphe 24(1) prévoit, en outre, clairement que les tribunaux compétents peuvent accorder la réparation qu'ils estiment convenable et juste eu égard aux circonstances.

46 L'intimé, le procureur général de la Nouvelle-Écosse, laisse entendre que le *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, précité, et d'autres décisions décrivant les fonctions judiciaires dans le contexte de l'art. 96 doivent être interprétés comme fixant des limites au pouvoir de réparation des cours supérieures. Cet argument ne peut être retenu. Certes, dans le *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, le juge Dickson (plus tard Juge en chef) a examiné la nature de la « fonction judiciaire » des tribunaux visés à l'art. 96 (p. 734-735). Cependant, il l'a fait dans le cadre d'une contestation, fondée sur l'art. 96, de la validité d'une loi attribuant compétence à un tribunal administratif. L'article 96 empêche qu'un « élément fondamental » de la compétence des cours supérieures soit transféré exclusivement à des tribunaux de juridiction inférieure ou à des tribunaux administratifs provinciaux (*MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 15, le juge en chef Lamer). Cette jurisprudence qui préserve un élément fondamental de la compétence des cours supérieures ne fixe pas les limites de cette compétence. Rien dans l'art. 96 n'a pour effet de limiter la compétence inhérente des cours supérieures ou les pouvoirs qui peuvent leur être conférés par voie législative (*Renvoi relatif à la Loi sur les jeunes contrevenants (Î.-P.-É.)*, [1991] 1 R.C.S. 252, p. 274) et, encore moins, la compétence dont le par. 24(1) de la *Charte* investit les cours supérieures.

47 Dans la même veine, l'intimé le procureur général laisse entendre que les arrêts *Mills* et *Dunedin*, précités, de la Cour, qui établissent un système

framework for determining when a court or tribunal is competent to grant remedies under s. 24(1) of the *Charter*, deny the availability of the remedy ordered in this case. In our opinion, this submission rests on a mistaken view of the source of superior courts' power to grant *Charter* remedies.

48 In *Mills*, the Court considered whether a preliminary hearing magistrate given jurisdiction by particular provisions of the *Criminal Code* was a court of competent jurisdiction for the purposes of entering a stay of proceedings under s. 24(1) of the *Charter*. The unanimous conclusion of the Court was that a magistrate sitting at preliminary hearing was not competent to provide that remedy. McIntyre J., speaking for the majority on this point, emphasized the limited function of a court sitting in preliminary inquiry, which is to commit the accused to trial where there is sufficient evidence, or discharge the accused where there is not. The role does not include entering acquittals or convictions, imposing penalties, or giving remedies. As such, remedies under s. 24(1) could not be granted by that tribunal. Subsequent cases applying *Mills*, including *Dunedin*, *supra*, *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, and *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, considered whether administrative tribunals or judges acting under statutory authority had the power to issue particular *Charter* remedies under s. 24(1). In each case, the analysis was directed at discerning what kinds of powers the legislator intended the tribunal to exercise in light of the purposes of the *Charter* as well as the tribunal's function and the practical limits imposed by its structure. This analysis has no application to s. 96 courts which are, of course, not creatures of statute but courts of general inherent jurisdiction.

49 Thus, when McIntyre J. wrote in *Mills*, *supra*, at p. 953, that "the *Charter* was not intended to turn the Canadian legal system upside down", he meant that s. 24(1) did not confer new jurisdiction on statutory and inferior tribunals beyond that which

permettant de déterminer quand un tribunal judiciaire ou administratif a compétence pour accorder une réparation fondée sur le par. 24(1) de la *Charte*, empêchent d'accorder le type de réparation en cause dans la présente affaire. À notre avis, cet argument procède d'une conception erronée de la source du pouvoir des cours supérieures d'accorder des réparations fondées sur la *Charte*.

Dans l'arrêt *Mills*, la Cour s'est demandé si le magistrat habilité par des dispositions du *Code criminel* à présider une enquête préliminaire était un tribunal compétent pour ordonner la suspension de procédures au sens du par. 24(1) de la *Charte*. Elle a conclu à l'unanimité que le magistrat n'avait pas cette compétence. S'exprimant au nom des juges majoritaires sur ce point, le juge McIntyre a insisté sur la fonction limitée du magistrat à l'enquête préliminaire, qui consiste à renvoyer l'accusé à procès lorsque la preuve est suffisante ou à le libérer si elle ne l'est pas. Il n'entre pas dans ses attributions de prononcer un verdict d'acquittement ou de culpabilité, d'imposer une peine ou encore d'accorder une réparation. Cela explique pourquoi il ne peut donc accorder une réparation fondée sur le par. 24(1). Dans la jurisprudence subséquente où elle a appliqué l'arrêt *Mills*, notamment *Dunedin*, précité, *Mooring c. Canada (Commission nationale des libérations conditionnelles)*, [1996] 1 R.C.S. 75, et *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929, la Cour s'est demandé si les tribunaux administratifs ou les juges habilités par la loi avaient le pouvoir d'accorder certaines réparations fondées sur le par. 24(1) de la *Charte*. Dans chaque cas, l'analyse avait pour but de déterminer le genre de pouvoirs que le législateur avait voulu que le tribunal en cause exerce à la lumière des objets de la *Charte*, ainsi que la fonction du tribunal et les limites pratiques imposées par sa structure. Cette analyse ne s'applique pas aux tribunaux visés par l'art. 96, qui, bien sûr, ne doivent pas leur existence à une loi et qui possèdent une compétence générale inhérente.

Ainsi, lorsqu'il écrit, dans l'arrêt *Mills*, précité, p. 953, que la *Charte* « n'était pas censée provoquer le bouleversement du système judiciaire canadien », le juge McIntyre veut dire que le par. 24(1) ne confère pas aux tribunaux d'origine législative et

was intended by the legislator as reflected in the tribunal's function and the practical limits imposed by its structure. The test set out in *Mills* does not apply to superior courts since, as McIntyre J. pointed out, a superior court will always be a court of competent jurisdiction under s. 24(1) of the *Charter* (*Mills*, *supra*, at p. 956). Superior courts retain "constant, complete and concurrent jurisdiction" to issue remedies under s. 24(1) (see *R. v. Rahey*, [1987] 1 S.C.R. 588, at pp. 603-4, citing *Mills*, *supra*, at p. 892, and *R. v. Smith*, [1989] 2 S.C.R. 1120, at pp. 1129-30).

aux tribunaux inférieurs une nouvelle compétence s'ajoutant à celle que le législateur a voulu leur conférer, comme en témoignent leur fonction et les limites pratiques imposées par leur structure. Le critère de l'arrêt *Mills* ne s'applique pas aux cours supérieures, puisqu'elles sont toujours des tribunaux compétents au sens du par. 24(1) de la *Charte*, comme l'a fait remarquer le juge McIntyre (*Mills*, précité, p. 956). Les cours supérieures possèdent une « compétence concurrente, permanente et complète » pour accorder des réparations fondées sur le par. 24(1) (voir *R. c. Rahey*, [1987] 1 R.C.S. 588, p. 603-604, citant *Mills*, précité, p. 892, et voir aussi *R. c. Smith*, [1989] 2 R.C.S. 1120, p. 1129-1130).

The foregoing analysis does not preclude review on appeal of a superior court's choice of remedy under s. 24(1). Rather, it simply forecloses the argument that a given remedy under s. 24 is unavailable in a superior court because of the constitutional limitations on its jurisdiction as proposed by the respondent. The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself and must be read in harmony with the rest of our Constitution. As McIntyre J. wrote in *Mills*, *supra*, at p. 965:

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

McLachlin C.J. recently endorsed this passage in *Dunedin*, *supra*, at para. 18. Consequently, a party seeking to challenge a *Charter* remedy ordered by a s. 96 court must show that the order is not "appropriate and just in the circumstances".

L'analyse qui précède n'interdit pas l'examen en appel de la réparation qu'une cour supérieure a choisi d'accorder en vertu du par. 24(1). Elle empêche simplement de prétendre, comme le fait l'intimé, qu'une cour supérieure ne peut pas accorder une certaine mesure réparatrice fondée sur l'art. 24 en raison des limites que la Constitution impose à sa compétence. C'est le texte même du par. 24(1) qui limite la nature et la portée des réparations pouvant être accordées, et ce texte doit recevoir une interprétation qui s'accorde avec le reste de notre Constitution. Comme le juge McIntyre l'écrit dans *Mills*, précité, p. 965-966 :

> Quelle réparation peut-on obtenir lorsqu'il est fait droit à une demande fondée sur le par. 24(1) de la *Charte*? Là encore le par. 24(1) n'apporte pas de réponse. Il ne fait que prévoir que l'appelant peut obtenir la réparation que le tribunal estime « convenable et juste eu égard aux circonstances ». Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu. Ce large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée.

La juge en chef McLachlin a récemment souscrit à ce passage dans l'arrêt *Dunedin*, précité, par. 18. Par conséquent, la partie qui veut contester une réparation accordée en vertu de la *Charte* par un tribunal visé à l'art. 96 doit démontrer que cette réparation n'est pas « convenable et juste eu égard aux circonstances ».

51 The power of the superior courts under s. 24(1) to make appropriate and just orders to remedy infringements or denials of *Charter* rights is part of the supreme law of Canada. It follows that this remedial power cannot be strictly limited by statutes or rules of the common law. We note, however, that statutes and common law rules may be helpful to a court choosing a remedy under s. 24(1) insofar as the statutory provisions or common law rules express principles that are relevant to determining what is "appropriate and just in the circumstances".

(3) The Meaning of "Appropriate and Just in the Circumstances"

52 What, then, is meant in s. 24(1) by the words "appropriate and just in the circumstances"? Clearly, the task of giving these words meaning in particular cases will fall to the courts ordering the remedies since s. 24(1) specifies that the remedy should be such as the court considers appropriate and just. Deciding on an appropriate and just remedy in particular circumstances calls on the judge to exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles. Once again, we emphasize McIntyre J.'s words in *Mills*, *supra*, at p. 965:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.

53 With respect, the approach to s. 24 reflected in the reasons of LeBel and Deschamps JJ. would tend to pre-empt and reduce this wide discretion. Their approach would also, in this case, pre-empt and devalue the constitutional promise respecting language rights in s. 23. In our view, judicial restraint and metaphors such as "dialogue" must not be elevated to the level of strict constitutional rules to which the words of s. 24 can be subordinated. The

Le pouvoir que le par. 24(1) confère aux cours supérieures de rendre des ordonnances convenables et justes afin de remédier à des violations ou négations de droits garantis par la *Charte* fait partie de la loi suprême du Canada. Il s'ensuit qu'il ne peut être strictement limité par des dispositions législatives ou des règles de common law. Toutefois, nous constatons que les lois ou les règles de common law peuvent aider les tribunaux à choisir les réparations à accorder sous le régime du par. 24(1) dans la mesure où elles énoncent des principes utiles pour déterminer ce qui est « convenable et juste eu égard aux circonstances ».

(3) La signification de « convenable et juste eu égard aux circonstances »

Que signifie alors l'expression « convenable et juste eu égard aux circonstances » utilisée au par. 24(1)? Dans certains cas, il appartient nettement au tribunal qui accorde la réparation de donner un sens à cette expression, étant donné que le par. 24(1) précise que la réparation accordée doit être celle que le tribunal estime convenable et juste. Pour décider quelle réparation est convenable et juste dans une situation donnée, le juge doit exercer son pouvoir discrétionnaire en se fondant sur son appréciation prudente de la nature du droit et de la violation en cause, sur les faits et sur l'application des principes juridiques pertinents. Il y a lieu de répéter le passage suivant des motifs du juge McIntyre dans *Mills*, précité, p. 965-966 :

> Il est difficile de concevoir comment on pourrait donner au tribunal un pouvoir discrétionnaire plus large et plus absolu. Ce large pouvoir discrétionnaire n'est tout simplement pas réductible à une espèce de formule obligatoire d'application générale à tous les cas, et les tribunaux d'appel ne sont nullement autorisés à s'approprier ce large pouvoir discrétionnaire ni à en restreindre la portée.

En toute déférence, l'interprétation de l'art. 24 qui se dégage des motifs des juges LeBel et Deschamps tendrait à court-circuiter et à réduire ce large pouvoir discrétionnaire. Elle tendrait également, en l'espèce, à court-circuiter et à dévaloriser la promesse constitutionnelle relative aux droits linguistiques contenue à l'art. 23. À notre avis, la retenue judiciaire et les métaphores comme celle du « dialogue » ne doivent pas être érigées en règles constitutionnelles strictes

same may be said of common law procedural principles such as *functus officio* which may to some extent be incorporated in statutes. Rather, as LeBel and Deschamps JJ. appear to recognize at paras. 135 and following, there are situations in which our Constitution requires special remedies to secure the very order it envisages.

auxquelles peuvent être assujettis les termes de l'art. 24. Le même raisonnement s'applique aux règles procédurales de common law, comme celle du *functus officio*, qui, dans une certaine mesure, peuvent être incorporées dans des lois. Comme les juges LeBel et Deschamps semblent le reconnaître aux par. 135 et suivants, il faut plutôt considérer qu'il existe des situations où notre Constitution requiert des réparations particulières afin d'assurer le maintien de l'ordre qu'elle vise à établir.

While it would be unwise at this point to attempt to define, in detail, the words "appropriate and just" or to draw a rigid distinction between the two terms, there are some broad considerations that judges should bear in mind when evaluating the appropriateness and justice of a potential remedy. These general principles may be informed by jurisprudence relating to remedies outside the *Charter* context, such as cases discussing the doctrine of *functus* and overly vague remedies, although, as we have said, that jurisprudence does not apply strictly to orders made under s. 24(1).

54 Bien qu'il ne soit pas sage, à ce stade, de tenter de donner une définition détaillée de l'expression « convenable et juste » ou d'établir une distinction rigoureuse entre les deux mots, il existe néanmoins des facteurs généraux dont les juges devraient tenir compte en évaluant le caractère convenable et juste d'une réparation potentielle. Ces principes généraux peuvent s'inspirer de la jurisprudence relative aux réparations accordées hors du contexte de la *Charte*, notamment celle où la règle du *functus officio* et les réparations trop vagues sont analysées, même si, comme nous l'avons dit, cette jurisprudence est strictement inapplicable aux ordonnances fondées sur le par. 24(1).

First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, or one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore not appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he then was)).

55 Premièrement, la réparation convenable et juste eu égard aux circonstances d'une demande fondée sur la *Charte* est celle qui permet de défendre utilement les droits et libertés du demandeur. Il va sans dire qu'elle tient compte de la nature du droit violé et de la situation du demandeur. Une réparation utile doit être adaptée à l'expérience vécue par le demandeur et tenir compte des circonstances de la violation ou de la négation du droit en cause. Une réparation inefficace ou « étouffé[e] dans les délais et les difficultés de procédure » ne permet pas de défendre utilement le droit violé, et ne saurait donc être convenable et juste (voir *Dunedin*, précité, par. 20, la juge en chef McLachlin, citant *Mills*, précité, p. 882, le juge Lamer (plus tard Juge en chef)).

Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the

56 Deuxièmement, la réparation convenable et juste fait appel à des moyens légitimes dans le cadre de notre démocratie constitutionnelle. Comme nous l'avons vu, le tribunal qui accorde une réparation fondée sur la *Charte* doit s'efforcer de respecter la séparation des fonctions entre le législatif, l'exécutif

executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.

et le judiciaire et les rapports qui existent entre ces trois pouvoirs. Cela ne signifie pas que la ligne de démarcation entre ces fonctions est très nette dans tous les cas. Une réparation peut être convenable et juste même si elle peut toucher à des fonctions ressortissant principalement au pouvoir exécutif. L'essentiel est que, lorsqu'ils rendent des ordonnances fondées sur le par. 24(1), les tribunaux ne s'écartent pas indûment ou inutilement de leur rôle consistant à trancher des différends et à accorder des réparations qui règlent la question sur laquelle portent ces différends.

57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.

Troisièmement, la réparation convenable et juste est une réparation judiciaire qui défend le droit en cause tout en mettant à contribution le rôle et les pouvoirs d'un tribunal. Il ne convient pas qu'un tribunal se lance dans des types de décision ou de fonction pour lesquels il n'est manifestement pas conçu ou n'a pas l'expertise requise. Les capacités et la compétence des tribunaux peuvent s'inférer, en partie, de leurs tâches normales pour lesquelles ils ont établi des règles de procédure et des précédents.

58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.

Quatrièmement, la réparation convenable et juste est celle qui, en plus d'assurer pleinement la défense du droit du demandeur, est équitable pour la partie visée par l'ordonnance. La réparation ne doit pas causer de grandes difficultés sans rapport avec la défense du droit.

59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

Enfin, il faut se rappeler que l'art. 24 fait partie d'un régime constitutionnel de défense des droits et libertés fondamentaux consacrés dans la *Charte*. C'est ce qui explique pourquoi, en raison de son libellé large et de la multitude de rôles qu'il peut jouer dans différentes affaires, l'art. 24 doit pouvoir évoluer de manière à relever les défis et à tenir compte des circonstances de chaque cas. Cette évolution peut forcer à innover et à créer au lieu de s'en tenir à la pratique traditionnelle et historique en matière de réparation, étant donné que la tradition et l'histoire ne peuvent faire obstacle aux exigences d'une notion réfléchie et péremptoire de réparation convenable et juste. Bref, l'approche judiciaire en matière de réparation doit être souple et tenir compte des besoins en cause.

(4) Application to this Case: the Remedy Ordered by the Trial Judge Was Appropriate and Just in the Circumstances

(a) *The Reporting Order Effectively Vindicated the Rights of the Parents*

LeBlanc J. exercised his discretion to select an effective remedy that meaningfully vindicated the s. 23 rights of the appellants in the context of serious rates of assimilation and a history of delay in the provision of French-language education in Kingston (Greenwood, Chéticamp, Île Madame-Arichat (Petit-de-Grat), Argyle, and Clare). The facts as found by LeBlanc J. disclosed that continued delay could imperil the already vulnerable s. 23 rights, their exercise depending as it does on the numbers of potential students. As Freeman J.A. noted in dissent in the Court of Appeal, the reporting hearings were aimed at identifying difficulties with the timely implementation of the trial judge's order as they arose, instead of requiring fresh applications by the appellants every time it appeared that a party was not using its best efforts to comply with the judge's order.

In the absence of reporting hearings, the appellant parents would have been forced to respond to any new delay by amassing a factual record by traditional means disclosing whether the parties were nonetheless using their best efforts. A new proceeding would be required and this might be heard by another judge less familiar with the case than LeBlanc J. All of this would have taken significant time and resources from parents who had already waited too long and dedicated much energy to the cause of realizing their s. 23 rights. The order of reporting hearings was, as Freeman J.A. wrote "a pragmatic approach to getting the job done expeditiously" (para. 74). LeBlanc J.'s order is a creative blending of remedies and processes already known

(4) Application à la présente affaire : la réparation accordée par le juge de première instance était convenable et juste eu égard aux circonstances

a) *L'ordonnance enjoignant de rendre compte assurait efficacement la défense des droits des parents*

60 Le juge LeBlanc a exercé son pouvoir discrétionnaire de choisir une réparation efficace qui permettrait de défendre utilement les droits garantis aux appelants par l'art. 23, dans le contexte d'un taux d'assimilation élevé et du fait qu'on tarde depuis des années à offrir l'enseignement en français à Kingston/Greenwood, à Chéticamp, à Île Madame-Arichat (Petit-de-Grat), à Argyle et à Clare. Selon le juge, les faits révélaient que le retard mis à agir risquait de compromettre des droits déjà fragiles garantis par l'art. 23, dont l'exercice est tributaire du nombre d'élèves potentiels. Comme le juge Freeman, de la Cour d'appel, l'a fait remarquer dans son opinion dissidente, les auditions de comptes rendus visaient à déceler, dès qu'elles surgiraient, les difficultés qui empêcheraient l'exécution, en temps utile, de l'ordonnance du juge de première instance, évitant ainsi aux appelants d'avoir à présenter une nouvelle demande chaque fois qu'une partie ne semblerait pas faire de son mieux pour se conformer à cette ordonnance.

61 Sans les auditions de comptes rendus, les parents appelants auraient été forcés, à chaque nouveau retard, de s'en remettre aux modes traditionnels de constitution d'un dossier factuel permettant de constater si, malgré tout, les parties faisaient de leur mieux pour se conformer à l'ordonnance. Il aurait fallu entamer de nouvelles procédures susceptibles d'être instruites par un juge ayant une moins bonne connaissance de l'affaire que le juge LeBlanc. Tout cela aurait demandé énormément de temps et de ressources aux parents qui, déjà, attendaient depuis trop longtemps et avaient consacré beaucoup d'énergie à la réalisation de leurs droits garantis par l'art. 23. Comme l'a écrit le juge Freeman, l'ordonnance enjoignant de rendre compte était [TRADUCTION] « une façon

to the courts in order to give life to the right in s. 23.

62 In assessing the extent to which LeBlanc J.'s remedy was appropriate and just in the circumstances, it is useful to examine the options before the trial judge. In doing so we are not intending to usurp the role and discretion of the trial judge but only to gain a fuller understanding of the situation he faced. LeBlanc J. could have limited the remedy to a declaration of the rights of the parties, as the Court considered prudent in *Mahe*, *supra*, at pp. 392-93. In *Mahe*, however, the primary issues before the Court concerned the scope and content of s. 23 of the *Charter*, including the degree of management of control of schools to be accorded to s. 23 parents, and the determination of when the numbers are sufficient to warrant given programs and facilities. After clarifying the content and scope of the s. 23 rights at issue, the Court chose the remedy of ordering a declaration of those rights. It did so to allow the government the greatest flexibility to fashion a response suited to the circumstances (p. 393). The assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully.

63 After *Mahe*, litigation to vindicate minority language education rights has entered a new phase. The general content of s. 23 in many cases is now largely settled (*Mahe*, *Schools Reference*, *Arsenault-Cameron*, all *supra*). In the present case, for example, it was clear to and accepted by the parties from the start that the government was required to provide the homogeneous French-language facilities at issue. The entitled parents sought the assistance of the court in enforcing the full and prompt vindication of their rights after a lengthy history of government inaction.

pragmatique d'obtenir rapidement le résultat recherché » (par. 74). Il s'agit d'un mélange créatif de réparations et de procédures déjà connues des tribunaux, destiné à donner vie aux droits garantis par l'art. 23.

Pour déterminer si la réparation accordée par le juge LeBlanc était convenable et juste eu égard aux circonstances, il est utile d'examiner quelles étaient ses options. Nous examinerons cette question non pas dans le but de nous approprier le rôle et le pouvoir discrétionnaire du juge de première instance, mais uniquement afin de mieux comprendre la situation à laquelle il devait faire face. Le juge LeBlanc aurait pu se contenter de rendre un jugement déclaratoire concernant les droits des parties, mesure que la Cour a jugée prudente dans l'arrêt *Mahe*, précité, p. 392-393. Toutefois, les principales questions en cause dans l'affaire *Mahe* concernaient la portée et le contenu de l'art. 23 de la *Charte*, notamment le niveau de gestion et de contrôle des écoles qui doit être accordé aux parents visés par l'art. 23, et la question du nombre d'élèves suffisant pour justifier certains programmes et établissements. Après avoir précisé le contenu et la portée des droits en cause qui étaient garantis par l'art. 23, la Cour a choisi, comme mesure réparatrice, de rendre un jugement déclaratoire relatif à ces droits. Elle voulait par là donner au gouvernement le plus de souplesse possible pour trouver une solution adaptée aux circonstances (p. 393). En choisissant ce type de réparation, on tient pour acquis que le gouvernement en question se conformera rapidement et entièrement au jugement rendu.

Après l'arrêt *Mahe*, les litiges visant à défendre les droits à l'instruction dans la langue de la minorité sont entrés dans une nouvelle phase. Dans bien des cas, le contenu général de l'art. 23 est désormais établi en grande partie (*Mahe*, *Renvoi sur les écoles* et *Arsenault-Cameron*, précités). En l'espèce, par exemple, les parties ont reconnu, au départ, que le gouvernement avait clairement l'obligation de fournir les établissements francophones homogènes en cause. Les parents visés ont demandé aux tribunaux d'assurer rapidement et pleinement la défense de leurs droits après de longues années d'inertie gouvernementale.

Our colleagues LeBel and Deschamps JJ. state at para. 140 of their reasons that the trial judge was not faced with a government which had understood its obligations but refused to comply with them. Our colleagues suggest that there was some issue as to what s. 23 demanded in the situation. With respect, this portrayal is directly at odds with the findings of fact made by the trial judge. At para. 198 of his reasons, the trial judge wrote:

> It is apparent that the real issue between the parties is the date on which these programs and facilities are to be implemented. The Department, in its submissions, does not challenge the applicants' right and entitlement to these programs and facilities but point [*sic*] to a number of factors which ought to satisfy the applicants. The Conseil opposes the applicants' claim for an earlier implementation of the transition plan but supports the applicants in its [*sic*] demand for declaration that the Department ought to be directed to provide homogeneous facilities.

LeBlanc J. further noted that the Department of Education did not provide either statistical or financial evidence with respect to the "numbers warrant" test and that, in any case, the number of children of s. 23 parents were greater than the number in the case of *Mahe*, *supra*, decided by this Court (paras. 200-201). Instead, the government argued at trial that it should be allowed to delay its obligations because of a lack of consensus in the Acadian and Francophone communities (para. 202) and because the political compromise in s. 23 required a "go-slowly approach" (para. 214). According to the trial judge, the government did not deny the existence or content of the s. 23 rights of the parents but rather failed to prioritize those rights and delayed fulfilling its obligations. The government "did not give sufficient priority to the serious rate of assimilation occurring among Acadians and Francophones in Nova Scotia and the fact that rights established in s. 23 are individual rights" (para. 204) despite clear reports showing that assimilation was "reaching critical levels" (para. 215). These are the findings of fact which can only be made by a judge who has heard all the evidence at trial. These findings are not on appeal and it is not open for appellate judges to reverse these findings without proper justification. LeBlanc J. properly took account of the factual

64 Au paragraphe 140, les juges LeBel et Deschamps écrivent que le juge de première instance n'avait pas affaire à un gouvernement qui avait compris ses obligations, mais qui refusait de s'en acquitter. Selon eux, il était permis de s'interroger sur ce que l'art. 23 commandait dans les circonstances. En toute déférence, nous estimons que cette description entre directement en conflit avec les conclusions de fait du juge de première instance, qui a indiqué, au par. 198 de ses motifs :

> [TRADUCTION] Il est manifeste que le véritable litige entre les parties porte sur la date de mise en place des programmes et des écoles. Dans son argumentation, le ministère ne conteste pas le droit des demandeurs d'obtenir ces programmes et ces écoles, mais il signale certains facteurs qui devraient satisfaire les demandeurs. Le Conseil s'oppose au devancement, réclamé par les demandeurs, de la mise en œuvre du plan de transition, mais il appuie ces derniers dans leur demande de jugement déclarant qu'il y a lieu d'ordonner au ministère de fournir des écoles homogènes.

65 Le juge LeBlanc a ajouté que le ministère de l'Éducation n'avait fourni aucun élément de preuve statistique ou financier relativement au critère du « nombre justificatif » et que, de toute manière, le nombre d'enfants de parents visés par l'art. 23 était supérieur à celui dont il était question dans l'arrêt *Mahe*, précité, de notre Cour (par. 200-201). Le gouvernement avait plutôt fait valoir, au procès, qu'il devait être autorisé à retarder l'exécution de son obligation en raison de l'absence de consensus au sein des collectivités acadiennes et francophones (par. 202), et parce que le compromis politique reflété à l'art. 23 exigeait [TRADUCTION] « d'aller doucement » (par. 214). Selon le juge de première instance, le gouvernement n'a pas nié l'existence ou le contenu des droits garantis aux parents par l'art. 23, mais il a plutôt omis de leur donner la priorité et a tardé à remplir ses obligations. En dépit de l'existence de rapports démontrant clairement que le taux d'assimilation [TRADUCTION] « atteignait un seuil critique » (par. 215), le gouvernement « n'a pas attaché assez d'importance à l'inquiétant taux d'assimilation des Acadiens et des francophones de la Nouvelle-Écosse et au fait que les droits établis à l'art. 23 sont des droits individuels » (par. 204). Ce sont là des conclusions de fait qui ne peuvent être tirées que par un juge ayant entendu la totalité

circumstances within which he exercised his discretion to select a remedy which was appropriate and just.

66 LeBlanc J. obviously considered that, given the Province's failure to give due priority to the s. 23 rights of its minority Francophone populations in the five districts despite being well aware of them, there was a significant risk that such a declaration would be an ineffective remedy. Parents such as the appellants should not be forced continually to seek declarations that are essentially restatements of the declaration in *Mahe*. Where governments have failed to comply with their well-understood constitutional obligations to take positive action in support of the right in s. 23, the assumption underlying a preference for declarations may be undermined. In *Mahe*, *supra*, at p. 393, Dickson C.J. recognized this possibility:

> As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the Court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under s. 23. [Emphasis added.]

This Court's judgment in *Mahe* speaks to all provincial and territorial governments. LeBlanc J. was entitled to conclude that he was not limited to declaring the appellant parents' rights and could take into consideration that the case before him was different from those in which declarations had been considered appropriate and just.

de la preuve au procès. Ces conclusions ne font pas l'objet d'un appel et il n'appartient pas à des juges de tribunal d'appel de les infirmer sans raison valable. Le juge LeBlanc a dûment tenu compte des faits en exerçant son pouvoir discrétionnaire de choisir une réparation convenable et juste.

Il est évident que le juge LeBlanc a considéré qu'un jugement déclaratoire risquait énormément d'être inefficace du fait que la province n'avait pas donné la priorité voulue aux droits que l'art. 23 garantissait à sa minorité francophone des cinq districts en question, alors qu'elle était parfaitement consciente de l'existence de ces droits. Des parents comme les appelants ne devraient pas avoir à solliciter continuellement des jugements déclaratoires réitérant, pour l'essentiel, celui rendu dans l'arrêt *Mahe*. La présomption qui favorise le choix du jugement déclaratoire peut être minée lorsque les gouvernements ne s'acquittent pas des obligations — qui leur incombent en vertu de la Constitution et qu'ils saisissent bien — de prendre des mesures concrètes pour assurer le respect des droits garantis par l'art. 23. Le juge en chef Dickson a reconnu cette possibilité dans l'arrêt *Mahe*, précité, p. 393 :

> Comme l'a observé le procureur général de l'Ontario, le gouvernement devrait disposer du pouvoir discrétionnaire le plus vaste possible dans le choix des moyens institutionnels dont il usera pour remplir ses obligations en vertu de l'art. 23. Les tribunaux devraient se garder d'intervenir et d'imposer des normes qui seraient au mieux dignes de Procuste, sauf dans les cas où le pouvoir discrétionnaire n'est pas exercé du tout, ou l'est de façon à nier un droit constitutionnel. Dès lors que la Cour s'est prononcée sur ce qui est requis à Edmonton, le gouvernement peut et doit prendre les mesures nécessaires pour assurer aux appelants et aux autres parents dans leur situation ce qui leur est dû en vertu de l'art. 23. [Nous soulignons.]

L'arrêt *Mahe* s'adresse à tous les gouvernements provinciaux et territoriaux. Le juge LeBlanc pouvait, d'une part, conclure que son rôle ne se limitait pas à rendre un jugement déclaratoire sur les droits des parents appelants et, d'autre part, tenir compte du fait que l'affaire dont il était saisi différait de celles où l'on avait estimé que le jugement déclaratoire était convenable et juste.

Our colleagues LeBel and Deschamps JJ. suggest that the reporting order in this case was not called for since any violation of a simple declaratory remedy could be dealt with in contempt proceedings against the Crown. We do not doubt that contempt proceedings may be available in appropriate cases. The threat of contempt proceedings is not, in our view, inherently more respectful of the executive than simple reporting hearings in which a linguistic minority could discover in a timely way what progress was being made towards the fulfilment of their s. 23 rights. More importantly, given the critical rate of assimilation found by the trial judge, it was appropriate for him to grant a remedy that would in his view lead to prompt compliance. Viewed in this light, LeBlanc J. selected a remedy that reduced the risk that the minority language education rights would be smothered in additional procedural delay.

67 Nos collègues, les juges LeBel et Deschamps, sont d'avis qu'une ordonnance enjoignant de rendre compte n'était pas nécessaire puisque toute violation d'un simple jugement déclaratoire par l'État pouvait donner lieu à des poursuites pour outrage. Nous ne doutons pas que des poursuites pour outrage peuvent convenir dans certains cas. Toutefois, nous estimons que la menace de poursuites pour outrage ne témoigne pas en soi de plus de respect à l'égard du pouvoir exécutif que de simples auditions de comptes rendus qui permettent à une minorité linguistique de prendre rapidement connaissance des progrès réalisés en vue de respecter les droits que leur garantit l'art. 23. Qui plus est, en raison du taux élevé d'assimilation qu'il a constaté, il convenait que le juge accorde une réparation qui, selon lui, pourrait être mise à exécution promptement. Dans cette optique, le juge LeBlanc a choisi une réparation qui réduisait le risque que des délais procéduraux supplémentaires viennent étouffer les droits à l'instruction dans la langue de la minorité.

(b) *The Reporting Order Respected the Framework of our Constitutional Democracy*

b) *L'ordonnance enjoignant de rendre compte respectait le cadre de notre démocratie constitutionnelle*

The remedy granted by LeBlanc J. took into account, and did not depart unduly or unnecessarily from, the role of the courts in our constitutional democracy. LeBlanc J. considered the government's progress toward providing the required schools and services (see, e.g., paras. 233-34). Some flexibility was built into the "best efforts" order to allow for unforeseen difficulties. It was appropriate for LeBlanc J. to preserve and reinforce the Department of Education's role in providing school facilities as mandated by s. 88 of the *Education Act*, as this could be done without compromising the entitled parents' rights to the prompt provision of school facilities.

68 En accordant la mesure réparatrice en question, le juge LeBlanc a tenu compte du rôle des tribunaux dans notre démocratie constitutionnelle et ne s'en est pas écarté indûment ou inutilement. Il a pris en considération les progrès réalisés par le gouvernement en vue de fournir les écoles et services requis (voir, par exemple, les par. 233-234). L'ordonnance « de faire de son mieux » accordait une certaine souplesse destinée à parer aux difficultés imprévues. Il convenait que le juge LeBlanc préserve et renforce le rôle du ministère de l'Éducation consistant à fournir les écoles, dont l'investit l'art. 88 de l'*Education Act*, étant donné qu'il était possible de le faire sans compromettre le droit des parents visés à ce qu'elles soient fournies promptement.

To some extent, the legitimate role of the court *vis-à-vis* various institutions of government will depend on the circumstances. In these circumstances, it was appropriate for LeBlanc J. to craft the remedy so that it vindicated the rights of the parents

69 Le rôle légitime que les tribunaux jouent par rapport à diverses institutions gouvernementales dépend, jusqu'à un certain point, des circonstances. En l'espèce, le juge LeBlanc a eu raison d'accorder une réparation permettant de défendre les droits des

while leaving the detailed choices of means largely to the executive.

70 Our colleagues LeBel and Deschamps JJ. appear to consider that the issuance of an injunction against the government under s. 24(1) is constitutionally suspect and represents a departure from a consensus about *Charter* remedies (see para. 134 of the dissent). With respect, it is clear that a court may issue an injunction under s. 24(1) of the *Charter*. The power of courts to issue injunctions against the executive is central to s. 24(1) of the *Charter* which envisions more than declarations of rights. Courts do take actions to ensure that rights are enforced, and not merely declared. Contempt proceedings in the face of defiance of court orders, as well as coercive measures such as garnishments, writs of seizure and sale and the like are all known to courts. In this case, it was open to the trial judge in all the circumstances to choose the injunctive remedy on the terms and conditions that he prescribed.

(c) *The Reporting Order Called on the Function and Powers of a Court*

71 Although it may not be common in the context of *Charter* remedies, the reporting order issued by LeBlanc J. was judicial in the sense that it called on the functions and powers known to courts. In several different contexts, courts order remedies that involve their continuing involvement in the relations between the parties (see R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490). Superior courts, which under the Judicature Acts possess the powers of common law courts and courts of equity, have "assumed active and even managerial roles in the exercise of their traditional equitable powers" (K. Roach, *Constitutional Remedies in Canada* (loose-leaf), at para. 13.60). A panoply of equitable remedies are now available to courts in support of the litigation process and the final adjudication of disputes. For example, prejudgment remedies

parents tout en laissant largement au pouvoir exécutif le soin de choisir les moyens précis d'y parvenir.

Nos collègues, les juges LeBel et Deschamps, semblent douter de la constitutionnalité d'une injonction accordée contre le gouvernement en vertu du par. 24(1), et considérer qu'une telle mesure déroge au consensus qui existe au sujet des réparations fondées sur la *Charte* (voir le par. 134 de l'opinion dissidente). En toute déférence, il est clair qu'un tribunal peut accorder une injonction en vertu du par. 24(1) de la *Charte*. Le pouvoir des tribunaux d'accorder des injonctions contre le pouvoir exécutif est au cœur de ce paragraphe qui envisage plus que de simples déclarations de droits. Les tribunaux prennent des mesures pour que les droits soient respectés et non simplement déclarés. Les poursuites pour outrage auxquelles s'expose la personne ou l'entité qui passe outre à une ordonnance judiciaire, de même que les mesures coercitives telles la saisie-arrêt, la saisie-exécution et ainsi de suite sont autant de mesures connues des tribunaux. En l'espèce, le juge de première instance pouvait, eu égard aux circonstances, prescrire les modalités de l'injonction accordée.

c) *L'ordonnance enjoignant de rendre compte faisait appel à la fonction et aux pouvoirs des tribunaux*

Bien qu'elle ne soit peut-être pas courante en matière de réparation fondée sur la *Charte*, l'ordonnance enjoignant de rendre compte rendue par le juge LeBlanc est judiciaire en ce sens qu'elle fait appel à des fonctions et à des pouvoirs connus des tribunaux. Dans plusieurs contextes différents, les tribunaux accordent des réparations nécessitant leur intervention continue dans les relations entre les parties (voir R. J. Sharpe, *Injunctions and Specific Performance* (2e éd. (feuilles mobiles)), par. 1.260-1.490). Les cours supérieures qui, en vertu des lois sur l'organisation judiciaire, possèdent les pouvoirs des tribunaux de common law et d'equity [TRADUCTION] « jouent un rôle actif et même un rôle de gestion dans l'exercice de leurs pouvoirs d'equity traditionnels » (K. Roach, *Constitutional Remedies in Canada* (feuilles mobiles), par. 13.60). Les tribunaux disposent maintenant d'une panoplie

developed in such cases as *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.), and *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), involve the court in the preservation of evidence and the management of parties' assets prior to trial. In bankruptcy and receivership matters, courts may be called on to supervise fairly complex and ongoing commercial transactions relating to debtors' assets. Court-appointed receivers may report to and seek guidance from the courts and in some cases must seek the permission of the courts before disposing of property (see *Bennett on Receiverships* (2nd ed. 1999), at pp. 21-37, 443-45). Similarly, the courts' jurisdiction in respect of trusts and estates may sometimes entail detailed and continuing supervision and support of their administration (see D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 904-9; *Oosterhoff on Wills and Succession* (5th ed. 2001), at pp. 27-28). Courts may also retain an ongoing jurisdiction in family law cases to order alterations in maintenance payments or parenting arrangements as circumstances change. Finally, this Court has in the past remained seized of a matter so as to facilitate the implementation of constitutional language rights: see *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re Manitoba Language Rights Order*, [1985] 2 S.C.R. 347; *Re Manitoba Language Rights Order*, [1990] 3 S.C.R. 1417; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212. Lower courts have also retained jurisdiction in s. 23 cases: *British Columbia (Association des parents francophones) v. British Columbia* (1996), 139 D.L.R. (4th) 356 (B.C.S.C.), at p. 380; *Lavoie*, *supra*, at pp. 593-95; *Société des Acadiens du Nouveau-Brunswick Inc. v. Minority Language School Board No. 50* (1983), 48 N.B.R. (2d) 361 (Q.B.), at para. 109.

de redressements fondés sur l'equity qu'ils peuvent accorder en cours d'instance et lors du règlement final des différends. Par exemple, dans les redressements accordés avant le jugement dans des affaires comme *Mareva Compania Naviera S.A. c. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.), et *Anton Piller KG c. Manufacturing Processes Ltd.*, [1976] 1 Ch. 55 (C.A.), les tribunaux sont appelés à jouer un rôle dans la conservation de la preuve et la gestion de l'actif des parties avant la tenue du procès. En matière de faillite et de séquestre, les tribunaux peuvent être appelés à superviser des opérations commerciales assez complexes portant sur les éléments d'actif des débiteurs. Les séquestres nommés par un tribunal peuvent lui rendre compte et lui demander conseil et sont tenus, dans certains cas, de lui demander l'autorisation d'aliéner des biens (voir *Bennett on Receiverships* (2e éd. 1999), p. 21-37 et 443-445). De la même façon, la compétence que les tribunaux possèdent en matière de fiducie et de succession peut parfois les obliger à surveiller de près et à appuyer l'administration d'une fiducie ou d'une succession (voir D. W. M. Waters, *Law of Trusts in Canada* (2e éd. 1984), p. 904-909; *Oosterhoff on Wills and Succession* (5e éd. 2001), p. 27-28). Dans le domaine du droit de la famille, les tribunaux peuvent également se déclarer compétents pour rendre des ordonnances modifiant les pensions alimentaires ou les conventions de garde au fur et à mesure que la situation évolue. Enfin, il est déjà arrivé que la Cour demeure saisie d'une affaire afin de favoriser le respect de droits linguistiques garantis par la Constitution (voir *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Ordonnance relative aux droits linguistiques au Manitoba*, [1985] 2 R.C.S. 347; *Ordonnance relative aux droits linguistiques au Manitoba)*, [1990] 3 R.C.S. 1417; *Renvoi relatif aux droits linguistiques au Manitoba*, [1992] 1 R.C.S. 212). Des tribunaux inférieurs ont également conservé compétence dans des affaires relatives à l'art. 23 : *British Columbia (Association des parents francophones) c. British Columbia* (1996), 139 D.L.R. (4th) 356 (C.S.C.-B.), p. 380; *Lavoie*, précité, p. 593-595; *Société des Acadiens du Nouveau-Brunswick Inc. c. Minority Language School Board No. 50* (1983), 48 R.N.-B. (2e) 361 (B.R.), par. 109.

72 The difficulties of ongoing supervision of parties by the courts have sometimes been advanced as a reason that orders for specific performance and mandatory injunctions should not be awarded. Nonetheless, courts of equity have long accepted and overcome this difficulty of supervision where the situations demanded such remedies (see Sharpe, *supra*, at paras. 1.260-1.380; *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), aff'd [1912] A.C. 788 (H.L.); *Kennard v. Cory Brothers and Co*., [1922] 1 Ch. 265, aff'd [1922] 2 Ch. 1 (C.A.)).

73 As academic commentators have pointed out, the range of remedial orders available to courts in civil proceedings demonstrates that constitutional remedies involving some degree of ongoing supervision do not represent a radical break with the past practices of courts (see W. A. Bogart, "'Appropriate and Just': Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy" (1986), 10 *Dalhousie L.J.* 81, at pp. 92-94; N. Gillespie, "Charter Remedies: The Structural Injunction" (1989-90), 11 *Advocates' Q.* 190, at pp. 217-18; Roach, *Constitutional Remedies in Canada*, *supra*, at paras. 13.50-13.80; Sharpe, *supra*, at paras. 1.260-1.490). The change announced by s. 24 of the *Charter* is that the flexibility inherent in an equitable remedial jurisdiction may be applied to orders addressed to government to vindicate constitutionally entrenched rights.

74 The order in this case was in no way inconsistent with the judicial function. There was never any suggestion in this case that the court would, for example, improperly take over the detailed management and co-ordination of the construction projects. Hearing evidence and supervising cross-examinations on progress reports about the construction of schools are not beyond the normal capacities of courts.

75 The respondent argues that the reporting order issued by LeBlanc J. violated the common law

On a parfois affirmé que les difficultés liées à la surveillance continue des parties par les tribunaux justifient le refus d'accorder des ordonnances d'exécution en nature et des injonctions de faire. Toutefois, les tribunaux d'equity reconnaissent et surmontent depuis longtemps ces difficultés lorsque la situation commande une telle réparation (voir Sharpe, *op. cit*., par. 1.260-1.380; *Attorney-General c. Birmingham, Tame, and Rea District Drainage Board*, [1910] 1 Ch. 48 (C.A.), conf. par [1912] A.C. 788 (H.L.); *Kennard c. Cory Brothers and Co*., [1922] 1 Ch. 265, conf. par [1922] 2 Ch. 1 (C.A.)).

Comme les auteurs l'ont souligné, l'éventail des réparations que les tribunaux peuvent accorder en matière civile démontre que les réparations fondées sur la Constitution qui nécessitent l'exercice d'une certaine surveillance ne représentent pas une rupture radicale avec la pratique judiciaire antérieure (voir W. A. Bogart, « "Appropriate and Just" : Section 24 of the Canadian Charter of Rights and Freedoms and the Question of Judicial Legitimacy » (1986), 10 *Dalhousie L.J.* 81, p. 92-94; N. Gillespie, « Charter Remedies : The Structural Injunction » (1989-90), 11 *Advocates' Q.* 190, p. 217-218; Roach, *Constitutional Remedies in Canada*, *op. cit.*, par. 13.50-13.80; Sharpe, *op. cit.*, par. 1.260-1.490). Le changement annoncé par l'art. 24 de la *Charte* est la possibilité d'appliquer la souplesse inhérente de la compétence d'equity en matière de réparation aux ordonnances enjoignant à un gouvernement de défendre des droits consacrés dans la Constitution.

L'ordonnance rendue dans la présente affaire n'est nullement incompatible avec la fonction judiciaire. On n'a jamais laissé entendre en l'espèce que, par exemple, le tribunal s'approprierait irrégulièrement la gestion et la coordination complètes des projets de construction. L'audition d'éléments de preuve et la surveillance des contre-interrogatoires sur les comptes rendus concernant l'avancement des travaux de construction d'écoles n'excèdent pas les attributions normales des tribunaux.

L'intimé prétend que l'ordonnance enjoignant de rendre compte, rendue par le juge LeBlanc,

doctrine of *functus officio*. As we have said, statutes or common law rules cannot strictly pre-empt the remedial discretion in s. 24(1). Nonetheless, the doctrine of *functus officio* properly speaks to the functions and powers of courts. Therefore, an examination of the *functus* question is useful in deciding whether LeBlanc J. issued an order that is appropriately judicial.

enfreint la règle de common law du *functus officio*. Comme nous l'avons vu, ni les dispositions législatives ni les règles de common law ne peuvent, à strictement parler, court-circuiter le pouvoir discrétionnaire que le par. 24(1) confère en matière de réparation. Toutefois, la règle du *functus officio* témoigne des fonctions et des pouvoirs des tribunaux. L'examen de la question du *functus officio* est donc utile pour décider si le juge LeBlanc a rendu une ordonnance judiciaire comme il se doit.

Flinn J.A. for the majority in the Court of Appeal decided that the trial judge, having issued the best efforts order, had no further jurisdiction with respect to the parties and was therefore precluded from retaining jurisdiction to hear reports on its implementation (para. 21). This view is based on a mis-characterization of the reporting portion of the order as somehow separate from and additional to the best efforts injunctions. On the contrary, in our view, the reporting sessions formed an integral part of the remedy fashioned by LeBlanc J. Moreover, the *functus* doctrine has no application where the trial judge does not purport to alter a final judgment. There was no indication that the retention of jurisdiction included any power to alter the disposition of the case.

76 Le juge Flinn a décidé, au nom des juges majoritaires de la Cour d'appel, qu'après avoir rendu l'ordonnance « de faire de son mieux » le juge de première instance n'avait plus compétence à l'égard des parties et ne pouvait donc pas se déclarer compétent pour entendre les comptes rendus sur l'exécution de l'ordonnance (par. 21). Cette opinion repose sur le point de vue erroné selon lequel la partie de l'ordonnance qui enjoint de rendre compte est, d'une façon ou d'une autre, distincte des injonctions « de faire de son mieux » et s'ajoute à celles-ci. Au contraire, nous sommes d'avis que les auditions de comptes rendus font partie intégrante de la réparation accordée par le juge LeBlanc. De plus la règle du *functus officio* ne s'applique pas lorsque le juge de première instance n'entend pas modifier un jugement définitif. Rien n'indiquait que la déclaration de compétence incluait un pouvoir de modifier le dispositif de l'affaire.

A closer examination of the doctrine is helpful. The *Oxford Companion to Law* (1980), at p. 508, provides the following definition:

> *Functus officio* (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator or judge to whom further resort is incompetent, his function being exhausted.

77 Il est utile d'examiner plus attentivement cette règle. Le *Dictionnaire de droit québécois et canadien* (2001), p. 253, donne la définition suivante :

> ***Functus officio*** Locution latine signifiant « s'étant acquitté de sa fonction ». Se dit d'un tribunal, d'un organisme public ou d'un fonctionnaire qui est dessaisi d'une affaire parce qu'il a cessé l'exercice de sa fonction. Ex. Le juge qui a prononcé un jugement final est *functus officio*.

But how can we know when a judge's function is exhausted? Sopinka J., writing for the majority in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860, described the purpose and origin of the doctrine in the following words:

78 Comment peut-on savoir si un juge a épuisé sa fonction? S'exprimant au nom des juges majoritaires dans l'arrêt *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848, p. 860, le juge Sopinka décrit ainsi l'objet et l'origine de la règle :

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division.

79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. Applying that aspect of the *functus* doctrine to s. 23(1), we face the question of whether the ordering of progress reports denied the respondents a stable basis from which to appeal.

80 In our view, LeBlanc J.'s retention of jurisdiction to hear reports did nothing to undermine the provision of a stable basis for launching an appeal. He did not purport to retain a power to change the decision as to the scope of the s. 23 rights in question, to alter the finding as to their violation, or to modify the original injunctions. The decision, including the best efforts order and the order to appear at reporting sessions, was final and appealable.

81 In any case, the rules of practice in Nova Scotia and other provinces allow courts to vary or add to their orders so as to carry them into operation or even to provide other or further relief than originally granted (Nova Scotia *Civil Procedure Rules*, Rule 15.08(d) and (e); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 59.06(2)(c) and (d); *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 390(1)). This shows that the practice of providing further direction on remedies in support of a decision is known to our courts, and does not undermine the availability of appeal. Moreover, the possibility of such proceedings may facilitate the process of putting

La règle générale portant qu'on ne saurait revenir sur une décision judiciaire définitive découle de la décision de la Cour d'appel d'Angleterre dans *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. La cour y avait conclu que le pouvoir d'entendre à nouveau une affaire avait été transféré à la division d'appel en vertu des *Judicature Acts*.

Il est clair que la règle du *functus officio* a pour but d'assurer le caractère définitif des jugements des tribunaux visés par un appel (voir aussi *Reekie c. Messervey*, [1990] 1 R.C.S. 219, p. 222-223). Cela est logique : s'il pouvait continuellement entendre des demandes de modification de ses décisions, un tribunal jouerait le rôle d'une cour d'appel et priverait les parties d'une assise stable pour interjeter appel. L'application de cet aspect de la règle du *functus officio* au par. 23(1) oblige à se demander si l'ordre de rendre compte des efforts déployés a eu pour effet de priver les intimés d'une assise stable pour interjeter appel.

À notre avis, le fait que le juge LeBlanc se soit déclaré compétent pour entendre des comptes rendus n'empêchait pas de disposer d'une assise stable pour interjeter appel. Il n'était pas censé se déclarer compétent pour modifier sa décision sur la portée des droits en cause qui sont garantis par l'art. 23, pour modifier sa conclusion quant à leur violation ou pour modifier les injonctions initiales. Sa décision, y compris l'ordonnance enjoignant de faire de son mieux et de comparaître à des auditions de comptes rendus, était définitive et susceptible d'appel.

De toute manière, les règles de pratique en vigueur en Nouvelle-Écosse et dans d'autres provinces autorisent les tribunaux à modifier leurs ordonnances ou à y faire des ajouts en vue d'en assurer l'exécution, ou même à modifier la réparation accordée au départ ou à en ajouter une autre (*Civil Procedure Rules* de la Nouvelle-Écosse, al. 15.08d) et e); *Règles de procédure civile de l'Ontario*, R.R.O. 1990, Règl. 194, al. 59.06(2)c) et d); *Alberta Rules of Court*, Alta. Reg. 390/68, par. 390(1)). Cela démontre que nos tribunaux connaissent la pratique consistant à donner d'autres directives sur les réparations accordées à l'appui d'une décision, et que cette pratique ne

orders into operation without requiring resort to contempt proceedings.

The respondent relies on the Nova Scotia's *Judicature Act* to support its argument that the ordered reporting hearings were improper. However, even if that Act could have the effect of limiting the jurisdiction granted by s. 24(1) of the *Charter*, nothing in the *Judicature Act* appears to remove from a trial judge the power to hear reports on the implementation of his or her order. Section 33 of the *Judicature Act* provides that proceedings in the Supreme Court of Nova Scotia shall be "heard, determined and disposed of" by a single judge, but this does not limit the powers of the court to order reporting hearings. Section 34(d) of the *Judicature Act* allows a presiding judge to reserve judgment for a maximum of six months, but in our view, judgment was not reserved in this case since LeBlanc J. delivered his judgment within the six-month period. Section 38 of the *Judicature Act* provides that "an appeal lies to the Court of Appeal from any decision, verdict, judgment or order" of a judge of the Supreme Court of Nova Scotia. LeBlanc J. did nothing that would preclude the appeal of his decision or choice of remedy.

(d) *The Reporting Order Vindicated the Right by Means that Were Fair*

In the context, the reporting order was one which, after vindicating the entitled parents' rights, was not unfair to the respondent government. The respondent argues that it was subject to an overly vague remedy. In our opinion, the reporting order was not vaguely worded so as to render it invalid. While, in retrospect, it would certainly have been advisable for LeBlanc J. to provide more guidance to the parties as to what

compromet pas la possibilité d'interjeter appel. De plus, la possibilité de procéder ainsi peut faciliter l'exécution des ordonnances sans qu'il soit nécessaire de recourir à des poursuites pour outrage.

82 L'intimé invoque la *Judicature Act* de la Nouvelle-Écosse à l'appui de son argument de l'irrégularité des auditions de comptes rendus ordonnées. Toutefois, même si la *Judicature Act* avait pour effet de limiter la compétence conférée par le par. 24(1) de la *Charte*, aucune de ses dispositions ne semble retirer au juge de première instance le pouvoir d'entendre des comptes rendus sur l'exécution de son ordonnance. L'article 33 de la *Judicature Act* prévoit que les instances devant la Cour suprême de la Nouvelle-Écosse sont [TRADUCTION] « instruites et tranchées » par un juge seul, mais cela n'a pas pour effet de limiter le pouvoir de la cour d'ordonner la tenue d'auditions de comptes rendus. Quoique l'al. 34d) de cette même loi autorise le juge qui préside une instance à mettre son jugement en délibéré pour une période maximale de six mois, nous sommes d'avis qu'il n'y a pas eu de mise en délibéré en l'espèce puisque le juge LeBlanc a rendu jugement dans le délai de six mois. L'article 38 de la *Judicature Act* prévoit [TRADUCTION] « [qu']il peut être interjeté appel devant la Cour d'appel contre toute décision, tout verdict, tout jugement ou toute ordonnance » d'un juge de la Cour suprême de Nouvelle-Écosse. Le juge LeBlanc n'a rien fait qui puisse empêcher d'interjeter appel contre sa décision ou la réparation qu'il a choisi d'accorder.

d) *L'ordonnance enjoignant de rendre compte faisait appel à des moyens équitables pour assurer la défense des droits en cause*

83 Dans les circonstances, l'ordonnance enjoignant de rendre compte assurait la défense des droits des parents visés sans être inéquitable pour le gouvernement intimé. L'intimé prétend qu'il a été assujetti à une réparation trop vague. Nous sommes d'avis que le libellé de l'ordonnance enjoignant de rendre compte n'était pas vague au point de la rendre invalide. L'ordonnance du juge LeBlanc n'était ni incompréhensible ni impossible

they could expect from the reporting sessions, his order was not incomprehensible or impossible to follow. In our view, the "reporting" element of LeBlanc J. remedy was not unclear in a way that would render it invalid.

à respecter, même si l'on constate, avec le recul, qu'il aurait sûrement été souhaitable que le juge éclaire davantage les parties sur ce qu'elles pouvaient attendre des auditions de comptes rendus. Selon nous, l'ordonnance enjoignant de rendre compte, contenue dans la réparation accordée par le juge LeBlanc, n'était pas obscure au point d'invalider cette réparation.

84 Doubtless, as LeBel and Deschamps JJ. point out, the initial retention of jurisdiction by LeBlanc J. could have been more specific in its terms so as to give parties a precise understanding of the procedure at reporting sessions. Nonetheless, the respondent knew it was required to present itself to the court to report on the status of its efforts to provide the facilities as ordered by LeBlanc J. LeBlanc J.'s written order is satisfactory and clearly communicates that the obligation on government was simply to report. The fact that this was the subject of questions later in the process suggests that future orders of this type could be more explicit and detailed with respect to the jurisdiction retained and the procedure at reporting hearings.

Comme le font remarquer les juges LeBel et Deschamps, il n'y a pas de doute que le juge LeBlanc aurait pu être plus précis dans sa déclaration initiale de compétence, afin de permettre aux parties de bien saisir la procédure applicable aux auditions de comptes rendus. Néanmoins, l'intimé savait qu'il devait se présenter devant le tribunal pour rendre compte des efforts déployés pour fournir les établissements ordonnés par le juge LeBlanc. L'ordonnance écrite du juge LeBlanc est satisfaisante et indique clairement que le gouvernement était simplement tenu de rendre compte. Le fait qu'elle ait, par la suite, donné lieu à des questions indique qu'à l'avenir les ordonnances de cette nature pourraient être plus précises et détaillées en ce qui concerne la déclaration de compétence et la procédure applicable aux auditions de comptes rendus.

85 It should be remembered that LeBlanc J. was crafting a fairly original remedy in order to provide flexibility to the executive while vindicating the s. 23 right. It may be expected that in future cases judges will be in a better position to ensure that the contents of their orders are clearer. In addition, the reporting order chosen by LeBlanc J. is not the only tool of its kind. It may be more helpful in some cases for the trial judge to seek submissions on whether to specify a timetable with a right of the government to seek variation where just and appropriate to do so.

Il faut se rappeler que la réparation conçue par le juge LeBlanc était assez inédite et visait à laisser une certaine latitude au pouvoir exécutif tout en défendant les droits garantis par l'art. 23. On peut s'attendre à ce qu'à l'avenir les juges soient mieux placés pour veiller à ce que le contenu de leurs ordonnances soit plus clair. En outre, l'ordonnance enjoignant de rendre compte retenue par le juge LeBlanc n'est pas le seul outil du genre. Il peut parfois se révéler plus utile que le juge demande des observations sur l'opportunité d'établir un échéancier assorti du droit pour le gouvernement de demander des modifications, lorsqu'il est juste et convenable de le faire.

86 Once again, we emphasize that s. 24(1) gives a court the discretion to fashion the remedy that it considers just and appropriate in the circumstances. The trial judge is not required to identify the single best remedy, even if that were possible. In our view,

Encore une fois, nous tenons à souligner que le par. 24(1) confère au tribunal le pouvoir discrétionnaire d'accorder la réparation qu'il estime convenable et juste eu égard aux circonstances. Le juge de première instance n'est pas tenu de trouver la

the trial judge's remedy was clearly appropriate and just in the circumstances.

(5) Conclusion

Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

The remedy crafted by LeBlanc J. meaningfully vindicated the rights of the appellant parents by encouraging the Province's prompt construction of school facilities, without drawing the court outside its proper role. The Court of Appeal erred in wrongfully interfering with and striking down the portion of LeBlanc J.'s order in which he retained jurisdiction to hear progress reports on the status of the Province's efforts in providing school facilities by the required dates.

V. Disposition

In the result, we would allow the appeal, set aside the judgment of the Court of Appeal, and restore the order of the trial judge.

We would award full costs to the appellants on a solicitor-client basis throughout, including the costs for the reporting hearings. The appellants are parents who have, despite their numerous efforts, been

meilleure réparation, même dans le cas où il serait possible de le faire. À notre avis, la réparation accordée par le juge de première instance était nettement convenable et juste eu égard aux circonstances.

(5) Conclusion

87 Le paragraphe 24(1) de la *Charte* exige que les tribunaux accordent des réparations efficaces et adaptées qui protègent pleinement et utilement les droits et libertés garantis par la *Charte*. Il peut parfois arriver que la protection utile des droits garantis par la *Charte* et, en particulier l'application de l'art. 23, commandent des réparations d'un genre nouveau. Une cour supérieure peut accorder toute réparation qu'elle estime convenable et juste eu égard aux circonstances. Ce faisant, elle doit être consciente de son rôle d'arbitre de la Constitution et des limites de ses capacités institutionnelles. Les tribunaux qui procèdent à un contrôle doivent, pour leur part, faire montre d'une grande déférence à l'égard de la réparation choisie par un juge de première instance et se garder de les parfaire après coup; ils ne doivent intervenir qu'en cas d'erreur commise sur le plan du droit ou des principes par le juge de première instance.

88 La réparation conçue par le juge LeBlanc défendait utilement les droits des parents appelants en encourageant la province à construire promptement des écoles, sans faire dévier la cour du rôle qui lui revient. La Cour d'appel a eu tort d'intervenir et d'annuler la partie de l'ordonnance du juge LeBlanc dans laquelle il se déclarait compétent pour entendre des comptes rendus sur les efforts déployés par la province en vue de fournir des écoles dans les délais impartis.

V. Dispositif

89 En définitive, nous sommes d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel et de rétablir l'ordonnance du juge de première instance.

90 Les appelants ont droit à leurs dépens devant toutes les cours, sur la base procureur-client, y compris les dépens relatifs aux auditions de comptes rendus. Les appelants sont des parents qui, malgré

consistently denied their *Charter* rights. The Province failed to meet its corresponding obligations to the appellant parents despite its clear awareness of the appellants' rights. Accordingly, in looking at all the circumstances, our view is that solicitor-client costs should be awarded.

The reasons of Major, Binnie, LeBel and Deschamps JJ. were delivered by

LeBel and Deschamps JJ. (dissenting) —

I. Introduction

91 The devil is in the details. Awareness of the critical importance of effectively enforcing constitutional rights should not lead to forgetfulness about the need to draft pleadings, orders and judgments in a sound manner, consonant with the basic rules of legal writing, and with an understanding of the proper role of courts and of the organizing principles of the legal and political order of our country. Court orders should be written in such a way that parties are put on notice of what is expected of them. Courts should not unduly encroach on areas which should remain the responsibility of public administration and should avoid turning themselves into managers of the public service. Judicial interventions should end when and where the case of which a judge is seized is brought to a close.

92 In our respectful view, without putting in any doubt the desire of the trial judge to fashion an effective remedy to address the consequences of a long history of neglect of the rights of the Francophone minority in Nova Scotia, the drafting of his so-called reporting order was seriously flawed. It gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. In addition, the reporting order assumed that the judge could retain jurisdiction at will, after he had finally disposed of the matter of which he had been seized, thereby breaching the constitutional principle of separation of powers. The order did so

leurs nombreux efforts, ont constamment été victimes d'une négation des droits que leur garantit la *Charte*. La province n'a pas respecté les obligations correspondantes qu'elle avait envers des parents appelants, même si elle était nettement au courant de leurs droits. Nous estimons donc, compte tenu de toutes les circonstances, qu'il y a lieu d'accorder des dépens sur la base procureur-client.

Version française des motifs des juges Major, Binnie, LeBel et Deschamps rendus par

Les juges LeBel et Deschamps (dissidents) —

I. Introduction

Tout est dans les détails. L'importance cruciale de prendre des mesures efficaces visant à assurer le respect des droits garantis par la Constitution ne doit pas éclipser la nécessité que les actes de procédure, ordonnances et jugements respectent les règles élémentaires de rédaction juridique et reflètent une bonne compréhension du rôle que doivent jouer les tribunaux et les principes qui sous-tendent l'ordre juridique et politique de notre pays. Les ordonnances judiciaires doivent indiquer clairement aux parties ce qu'on attend d'elles. Les tribunaux doivent s'abstenir d'empiéter indûment sur des domaines qui doivent continuer de relever de l'administration publique, et éviter de se transformer en gestionnaires de la fonction publique. L'intervention judiciaire doit cesser dès que le juge rend un jugement final dans l'affaire dont il est saisi.

Bien qu'il ne soit pas question de mettre en doute la volonté du juge de première instance de remédier efficacement à de longues années d'inertie en matière de protection des droits de la minorité francophone de la Nouvelle-Écosse, nous considérons que de graves vices de rédaction entachent l'ordonnance enjoignant de rendre compte qu'il a prononcée. Celle-ci n'indique pas clairement aux parties la nature de leurs obligations, la nature des comptes rendus à présenter ni même l'objet des auditions de comptes rendus. En outre, contrairement au principe constitutionnel de la séparation des pouvoirs, elle tient pour acquis que le juge pouvait à loisir se

by reason of the way it was framed and the manner in which it was implemented. In our opinion, the reporting order was void, as the Court of Appeal of Nova Scotia found, and the appeal should be dismissed.

II. The Nature of the Issues

This appeal raises the sole question of the validity of the reporting order made by LeBlanc J. ((2000), 185 N.S.R. (2d) 246). In this context, we do not intend to engage in a full review of the factual background and of the judicial history of this case. For the purposes of our reasons, we are content to rely on their extensive review in the reasons of our colleagues. We will only add such details about the reporting order and its implementation as might be of assistance to our analysis of the legal questions at stake in this appeal.

At the outset, we wish to emphasize that we fully agree with our colleagues in their analysis of the nature and fundamental importance of language rights in the Canadian Constitution, as well as on the need for efficacy and imagination in the development of constitutional remedies. Indeed, we dissent because we believe that constitutional remedies should be designed keeping in mind the canons of good legal drafting, the fundamental importance of procedural fairness, and a proper awareness of the nature of the role of courts in our democratic political regime, a key principle of which remains the separation of powers. This principle protects the independence of courts. It also flexibly delineates the domain of court action, particularly in the relationship of courts not only with legislatures but also with the executive branch of government or public administration.

As to the other issues such as mootness, immunities and mandatory injunctions, we are in broad agreement with our colleagues and do not intend to comment any further on them. We turn now to an

déclarer compétent pour agir, après avoir tranché définitivement l'affaire dont il était saisi. Elle contrevient à ce principe en raison de sa formulation et de la façon dont elle a été exécutée. Nous estimons que cette ordonnance est nulle et sans effet, comme l'a décidé la Cour d'appel de la Nouvelle-Écosse, et que le pourvoi devrait être rejeté.

II. La nature des questions

93 La seule question soulevée en l'espèce est celle de la validité de l'ordonnance enjoignant de rendre compte prononcée par le juge LeBlanc ((2000), 185 N.S.R. (2d) 246). Pour cette raison, nous n'entendons pas nous livrer à un examen complet des faits et de l'historique judiciaire de l'affaire. Pour les besoins des présents motifs, nous nous en tiendrons à l'examen approfondi qu'en font nos collègues dans leurs propres motifs, en nous contentant d'ajouter, à propos de l'ordonnance et de son exécution, les détails susceptibles d'éclairer notre analyse des questions de droit qui se posent en l'espèce.

94 Au départ, nous tenons à préciser que nous souscrivons entièrement à l'analyse que nos collègues font de la nature et de l'importance fondamentale des droits linguistiques consacrés dans notre Constitution, de même qu'à leur avis que l'efficacité et la créativité sont des attributs nécessaires en matière de réparation fondée sur la Constitution. En réalité, nous sommes en désaccord avec nos collègues parce que nous croyons que l'ordonnance qui accorde ce type de réparation doit aussi respecter les règles élémentaires de rédaction juridique et tenir compte de l'importance fondamentale de l'équité procédurale et du rôle des tribunaux dans notre régime politique démocratique, qui repose notamment sur le principe de la séparation des pouvoirs. Ce principe protège l'indépendance judiciaire. Il délimite également avec souplesse le champ d'action judiciaire, en particulier les rapports des tribunaux non seulement avec le législateur, mais également avec la branche exécutive du gouvernement, c'est-à-dire l'administration publique.

95 En ce qui concerne les autres questions, tels le caractère théorique, l'immunité et l'injonction de faire, nous partageons généralement l'opinion de nos collègues et n'avons rien à ajouter à ce sujet.

analysis of the issues which lie at the root of our disagreement with the majority as to the final disposition of this appeal.

96 In this analysis, we will first review the nature of the reporting order and we will determine whether it can be considered consistent with the principle of procedural fairness. We will then discuss the principles of separation of powers and *functus officio*; we will demonstrate that the question of whether the trial judge had jurisdiction to issue the order is germane to the determination of whether the trial judge breached the separation of powers. In both discussions, the appropriateness of the remedy will be called into question. In the former, we will assess the appropriateness of the order for reporting hearings from the perspective of the parties subject to it, while in the latter, we will analyse the appropriateness of the order, by taking into consideration the proper role of courts within our constitutional order.

III. The Drafting of the Order and the Principle of Procedural Fairness

97 The drafting of applications asking for injunctive relief, or of orders granting such remedies, can be a serious challenge for counsel and judges. The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment (R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at p. 6-7). Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided (*Sonoco Ltd. v. Local 433* (1970), 13 D.L.R. (3d) 617 (B.C.C.A.), at p. 621; *Sporting Club du Sanctuaire Inc. v. 2320-4365 Québec Inc.*, [1989] R.D.J. 596 (Que. C.A.)).

98 Unfortunately, the drafting of the present reporting order was anything but clear. Its brevity and

Nous passons donc à l'analyse des points à l'origine de notre désaccord avec la façon dont les juges majoritaires tranchent le pourvoi.

Nous allons d'abord examiner la nature de l'ordonnance enjoignant de rendre compte, afin de déterminer si elle est conforme au principe de l'équité procédurale. Nous analyserons ensuite le principe de la séparation des pouvoirs et la règle du *functus officio*, et démontrerons que la question de savoir si le juge avait compétence pour rendre l'ordonnance en cause se rattache à celle de savoir s'il a contrevenu au principe de la séparation des pouvoirs. Dans les deux cas, nous nous interrogerons sur le caractère convenable de la réparation accordée. Dans le premier cas, nous évaluerons, du point de vue des parties visées, le caractère convenable de l'ordonnance enjoignant de rendre compte, alors que, dans le deuxième cas, nous analyserons ce caractère convenable à la lumière du rôle que les tribunaux doivent jouer dans notre ordre constitutionnel.

III. La rédaction de l'ordonnance et le principe de l'équité procédurale

La rédaction d'une demande de réparation par voie d'injonction ou d'une ordonnance de cette nature peut constituer un grand défi pour les avocats et les juges. Il peut parfois arriver que les tribunaux aient à prendre des mesures draconiennes, tel l'exercice du pouvoir d'infliger des sanctions civiles ou criminelles, y compris une peine d'emprisonnement, pour contraindre les parties à respecter une injonction qu'ils ont accordée (R. J. Sharpe, *Injunctions and Specific Performance* (2e éd. (feuilles mobiles)), p. 6-7). En conséquence, pour que les tribunaux puissent intervenir, il est indispensable de bien informer les parties des obligations qui leur sont imposées et de définir clairement la norme de conformité qu'ils devront respecter. Les expressions vagues ou ambiguës n'ont pas leur place (*Sonoco Ltd. c. Local 433* (1970), 13 D.L.R. (3d) 617 (C.A.C.-B.), p. 621; *Sporting Club du Sanctuaire Inc. c. 2320-4365 Québec Inc.*, [1989] R.D.J. 596 (C.A. Qué.)).

Malheureusement, l'ordonnance enjoignant de rendre compte est loin d'être claire. Sa concision

apparent simplicity belie its actual complexity and the state of confusion and uncertainty in which it left not only all of the parties, but the trial judge himself at times. This order was final, not interim, and it was tied to the "best efforts order", which was not couched in terms liable to shed much light on the nature of the obligations of the respondents. Given that this part of the order was not challenged on appeal, we will not discuss it at length, but instead, will focus exclusively on the reporting order which is the object of this appeal.

et sa simplicité apparente témoignent mal de sa véritable complexité ainsi que de la confusion et de l'incertitude qu'elle a engendré non seulement dans l'esprit de toutes les parties, mais parfois également dans celui du juge lui-même. Cette ordonnance a un caractère définitif et non provisoire, et se trouve liée à l'ordonnance « de faire de son mieux » qui ne renseigne pas beaucoup sur la nature des obligations de l'intimé. Nous n'examinerons pas en détail cette partie de l'ordonnance étant donné qu'elle n'a pas été portée en appel. Nous nous concentrerons plutôt exclusivement sur l'ordonnance enjoignant de rendre compte qui fait l'objet du présent pourvoi.

99 At first, when judgment was rendered, the reporting order read, at para. 245:

> The applicants have requested that I should maintain jurisdiction. I agree to do so. I am scheduling a further appearance for Thursday, July 27, 2000 at 1:30 p.m., and at that time the respondents will report on the status of their efforts. I am requesting the respondents to utilize their best efforts to comply with this decision.

99 L'ordonnance enjoignant de rendre compte était ainsi libellée lors du jugement (au par. 245) :

> [TRADUCTION] Les demandeurs ont sollicité une déclaration de compétence de ma part. J'acquiesce à leur demande. Les défendeurs devront comparaître de nouveau le jeudi 27 juillet 2000, à 13 h 30, afin de rendre compte des efforts qu'ils auront déployés. Je leur demande de faire de leur mieux pour se conformer à la présente décision.

This drafting was slightly modified in the final order, dated December 14, 2000:

> The Court shall retain jurisdiction to hear reports from the respondents respecting the respondents' compliance with this Order. The respondents shall report to this Court on March 23, 2001 at 9:30 a.m., or on such other date as the Court may determine.

Le texte de l'ordonnance définitive du 14 décembre 2000 diffère légèrement :

> [TRADUCTION] La cour se déclare compétente pour entendre les comptes rendus des défendeurs sur leur respect de la présente ordonnance. Les défendeurs devront rendre compte à la cour, le 23 mars 2001 à 9 h 30, ou à toute autre date fixée par cette dernière.

100 As Flinn J.A. observed in his reasons in the Court of Appeal ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104), nobody knew the exact nature of these reports. Their form and content were undefined. There was no indication as to whether they should be delivered orally or in writing or both nor as to how detailed they should be and what kind of supporting documents, if any, would be needed. The order also provided for hearings, but again, it left the parties in the dark as to the procedure, purpose or nature of these sessions of the court. The parties learned only shortly before these hearings that affidavits needed to be filed and deponents made available for cross-examination. Further, there seemed to be little direction, if any at all, as to what sort of evidence was required to be included for the purpose of the hearings. The nature of these hearings, as the process

100 Comme le juge Flinn de la Cour d'appel l'a fait observer dans ses motifs ((2001), 194 N.S.R. (2d) 323, 2001 NSCA 104), personne ne connaissait exactement la nature de ces comptes rendus. Leur forme et leur contenu n'étaient pas précisés. Rien n'indiquait s'ils devraient être présentés de vive voix ou par écrit ou encore des deux manières, ni à quel point ils devraient être détaillés ou encore quelles pièces justificatives devaient être fournies. L'ordonnance prévoyait aussi la tenue d'auditions, mais là encore, sans préciser leur objet, leur nature ou encore la procédure qui leur serait applicable. Ce n'est que peu avant ces auditions que les parties ont appris qu'il serait nécessaire de déposer des affidavits et que leurs auteurs pourraient subir un contre-interrogatoire. De plus, il ne semblait guère y avoir de directives quant au genre de preuve requise pour

developed, appeared to become a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session, for the purpose of monitoring the execution of the school-building program for Francophone students.

101 The trial judge himself seemed unsure about the nature of the hearings he had ordered and of the process he had initiated. At first, he appeared to lean towards the view that those hearings were regular sessions of the court, that he had not issued a final order and that additional relief could be requested. For example, in the July 27, 2000 hearing, the trial judge stated that in the hearings, he "would have the opportunity to determine if the Respondents were indeed making every or best efforts to comply" (appellants' record, at p. 762). This was a reiteration of a claim made earlier in that hearing (appellants' record, at p. 720). Similarly, in the August 9, 2000 hearing, the trial judge stated: "the amount of room I have with respect to a decision or direction or comment is very limited" (appellants' record, at pp. 997-98); this statement implies that the trial judge had the power, albeit limited, to make orders. However, after the setting down of his formal order, at the last hearing in March 2001, he commented that he could not grant further relief, that he had fully disposed of the matter in his order and accompanying reasons, which were released the previous summer. He added that the sessions had a solely informational purpose.

102 In the meantime, schools were built or renovated and made available to Francophone students. It is difficult to determine whether those sessions accomplished anything in this respect. What these sessions certainly did was sow confusion, doubt and uncertainty about the obligations of the respondents and about the nature of a process that went on over several months. The trial judge appeared to view this process as open ended and indeterminate, with more sessions

les besoins de ces auditions. Au fur et à mesure qu'elles se déroulaient, les auditions ont paru tenir à la fois du mini-procès, de la rencontre informelle avec le juge et d'une sorte de séance de médiation, dont le but était de surveiller l'exécution du programme de construction d'écoles destinées aux élèves francophones.

Le juge de première instance lui-même semblait incertain de la nature des auditions qu'il avait ordonnées et du processus qu'il avait enclenché. Il a d'abord paru enclin à considérer qu'elles constituaient des audiences régulières de la cour, qu'il n'avait pas rendu une ordonnance définitive et qu'il serait possible de demander une réparation supplémentaire. Il a notamment déclaré, lors de l'audition du 27 juillet 2000, que ces auditions lui permettraient [TRADUCTION] « de déterminer si les intimés faisaient vraiment de leur mieux pour se conformer à l'ordonnance » (dossier des appelants, p. 762). Il ne faisait alors que réitérer une affirmation déjà faite au cours de cette audition (dossier des appelants, p. 720). De même, pendant l'audition du 9 août 2000, il a déclaré : [TRADUCTION] « je ne dispose que d'une latitude très mince en matière de décisions, de directives ou de commentaires » (dossier des appelants, p. 997-998); cette déclaration laisse entendre que le juge de première instance était habilité, quoique de façon limitée, à rendre des ordonnances. Toutefois, après avoir énoncé son ordonnance formelle lors de la dernière audition, en mars 2001, il a expliqué qu'il ne pouvait pas accorder une réparation supplémentaire, qu'il avait complètement tranché l'affaire dans son ordonnance et les motifs connexes déposés l'été précédent. Il a ajouté que les auditions avaient seulement pour but d'informer.

Pendant ce temps, des écoles étaient construites ou rénovées et mises à la disposition des élèves francophones. Il est difficile de savoir si ces auditions y étaient pour quelque chose. Toutefois, il est certain qu'elles ont semé la confusion, le doute et l'incertitude au sujet des obligations des intimés et de la nature d'un processus qui s'est étalé sur plusieurs mois. Le juge de première instance a paru considérer qu'il s'agissait d'un processus souple dont la durée était indéterminée, et qu'il pourrait à

being scheduled as he wished. Nobody really knew when it all would come to an end.

The uncertainty engendered by the reporting order was not merely inconvenient for the parties. In our view it amounted to a breach of the parties' interest in procedural fairness. One essential feature of a fair procedural rule is that its contents are clearly defined, and known in advance by the parties subject to it (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at pp. 233-36; see also: D. J. Mullan, *Administrative Law* (2001), at p. 233; R. Dussault and L. Borgeat, *Administrative Law: A Treatise* (2nd ed. 1990), vol. 4, at pp. 279-82; S. A. de Smith, H. Woolf and J. L. Jowell, *Judicial Review of Administrative Action* (5th ed. 1995 & Cum. Supp. 1998), at pp. 432-36).

Moreover, as we noted above, the trial judge in his initial characterization of the order seemed to believe, and certainly gave the impression, that he had the power to make further orders based on what was presented to him at the reporting sessions. In other words, he purported to have available the coercive power of the state to compel the parties to act, and suggested that he could do so based on conclusions that he would draw from the evidence placed before him. In the result, the parties found themselves before a trial judge who purported to exercise judicial functions and powers, and who provided almost nothing by way of procedural guidelines. The parties were denied notice which, as L'Heureux-Dubé J. has noted, is a rule "so fundamental in our legal system that I do not think there is any necessity to discuss it at length" (*Supermarchés Jean Labrecque*, *supra*, at p. 233). For this reason alone, the trial judge's order can be found to be inappropriate under s. 24(1) of the *Canadian Charter of Rights and Freedoms* and therefore void. Nonetheless, we turn now to a discussion of the principles of separation of powers and *functus officio*. Consideration of these principles will aid in assessing the appropriateness of the remedy, in light of the judiciary's proper role within our constitutional order.

loisir fixer d'autres dates d'audition. Personne ne savait exactement quand tout cela se terminerait.

103 L'incertitude créée par l'ordonnance enjoignant de rendre compte n'était pas une simple source d'ennui pour les parties. Nous estimons qu'elle constituait également une atteinte à leur droit à l'équité procédurale. Une règle de procédure ne peut être considérée comme juste et équitable que si son contenu est clairement défini et connu des parties auxquelles elle s'applique (*Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219, p. 233-236; voir également D. J. Mullan, *Administrative Law* (2001), p. 233; R. Dussault et L. Borgeat, *Traité de droit administratif* (2e éd. 1989), t. III, p. 393-398; S. A. de Smith, H. Woolf et J. L. Jowell, *Judicial Review of Administrative Action* (5e éd. 1995 & suppl. 1998), p. 432-436).

104 En outre, comme nous l'avons vu, lorsqu'il a caractérisé l'ordonnance au départ, le juge de première instance a semblé croire et a sûrement donné l'impression qu'il avait le pouvoir de rendre des ordonnances supplémentaires en fonction de ce qui lui serait présenté lors des auditions. En d'autres termes, il se prétendait habilité à exercer le pouvoir de l'État de contraindre les parties à agir, et laissait entendre qu'il pourrait le faire selon les conclusions qu'il tirerait de la preuve qui lui serait soumise. En définitive, les parties se sont trouvées devant un juge qui prétendait exercer des fonctions et pouvoirs judiciaires, et qui ne leur a fourni presque aucune directive en matière de procédure. Il n'a pas donné aux parties un avis suffisant, contrevenant ainsi à ce que la juge L'Heureux-Dubé a qualifié de règle « si fondamentale dans notre droit que je ne crois pas nécessaire d'en faire une longue démonstration » (*Supermarchés Jean Labrecque*, précité, p. 233). Il est possible, pour cette seule raison, de considérer que l'ordonnance du juge de première instance n'est pas convenable au sens du par. 24(1) de la *Charte canadienne des droits et libertés* et qu'elle est donc nulle et sans effet. Nous allons néanmoins analyser le principe de la séparation des pouvoirs et la règle du *functus officio*, ce qui nous aidera à déterminer si la réparation est convenable compte tenu du rôle que les tribunaux doivent jouer dans notre ordre constitutionnel.

IV. The Appropriate Role of the Judiciary

105 While superior courts' powers to craft *Charter* remedies may not be constrained by statutory or common law limits, they are nonetheless bound by rules of fundamental justice, as we have shown above, and by constitutional boundaries, as we shall see below. In the context of constitutional remedies, courts fulfill their proper function by issuing orders precise enough for the parties to know what is expected of them, and by permitting the parties to execute those orders. Such orders are final. A court purporting to retain jurisdiction to oversee the implementation of a remedy, after a final order has been issued, will likely be acting inappropriately on two levels. First, by attempting to extend the court's jurisdiction beyond its proper role, it will breach the separation of powers principle. Second, by acting after exhausting its jurisdiction, it will breach the *functus officio* doctrine. We will look at each of these breaches in turn.

1. *The Separation of Powers*

106 Courts are called upon to play a fundamental role in the Canadian constitutional regime. When needed, they must be assertive in enforcing constitutional rights. At times, they have to grant such relief as will be required to safeguard basic constitutional rights and the rule of law, despite the sensitivity of certain issues or circumstances and the reverberations of their decisions in their societal environment. Despite — or, perhaps, because of — the critical importance of their functions, courts should be wary of going beyond the proper scope of the role assigned to them in the public law of Canada. In essence, this role is to declare what the law is, contribute to its development and to give claimants such relief in the form of declarations, interpretation and orders as will be needed to remedy infringements of constitutional and legal rights by public authorities.

IV. Le rôle que doivent jouer les tribunaux

Bien qu'il ne puisse pas être limité par une disposition législative ou une règle de common law, l'exercice par les cours supérieures de leur pouvoir d'accorder des réparations fondées sur la *Charte* doit respecter, comme nous l'avons vu, les règles de justice fondamentale et, comme nous le verrons plus loin, certaines limites imposées par la Constitution. En matière de réparations fondées sur la Constitution, les tribunaux ne remplissent correctement leur fonction que s'ils rendent des ordonnances assez précises pour que les parties sachent ce qu'on attend d'elles et soient ainsi en mesure d'exécuter ces ordonnances. Ces ordonnances sont définitives. Un tribunal qui, après avoir rendu une ordonnance définitive, prétend se déclarer compétent pour surveiller la mise en œuvre de la réparation ordonnée est susceptible d'errer sur deux plans. Premièrement, en essayant d'élargir son champ de compétence au-delà du rôle qu'il doit jouer, il contrevient au principe de la séparation des pouvoirs. Deuxièmement, en continuant d'agir après avoir épuisé sa compétence, il enfreint la règle du *functus officio*. Nous allons examiner successivement ces deux violations.

1. *La séparation des pouvoirs*

Les tribunaux sont appelés à jouer un rôle fondamental dans le régime constitutionnel canadien. Ils doivent, au besoin, assurer avec fermeté le respect des droits constitutionnels. Malgré la nature délicate de certaines questions ou circonstances et les répercussions sociales de leurs décisions, les tribunaux doivent parfois accorder la réparation nécessaire pour préserver des droits fondamentaux garantis par la Constitution et pour maintenir la primauté du droit. En dépit — ou peut-être à cause — de l'importance cruciale de leurs fonctions, les tribunaux doivent prendre garde de ne pas outrepasser le rôle qui leur est assigné en droit public canadien. Ce rôle consiste essentiellement à dire le droit, à contribuer à son évolution et à accorder à des demandeurs les réparations sous forme de jugement déclaratoire, d'interprétation ou d'ordonnance qui sont

Beyond these functions, an attitude of restraint remains all the more justified, given that, as the majority reasons acknowledge, Canada has maintained a tradition of compliance by governments and public servants with judicial interpretations of the law and court orders.

Given the nature of the Canadian parliamentary system, the existence of a true doctrine of separation of powers in Canada was sometimes put in doubt (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), at p. 7-24; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 52). It is true that Canadians have never adopted a watertight system of separation of judicial, legislative and executive functions. In the discharge of their functions, courts have had to strike down laws, regulations or administrative decisions. They have imposed liability on the Crown or public bodies and have awarded damages against them. Forms of administrative justice or adjudication have grown out of the development of executive functions (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, 2003 SCC 36). Such developments may be said to have blurred theoretical distinctions between government functions. Nevertheless, in a broad sense, a separation of powers is now entrenched as a cornerstone of our constitutional regime.

More particularly, the distinction clearly stands out in respect of the relationship of courts on one side and of the legislatures and executive or public administration on the other (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at pp. 756-57). Our Court has acknowledged the fundamental nature of the separation

nécessaires pour remédier aux atteintes à des droits conférés par la Constitution ou par la loi, dont sont responsables les autorités publiques. Au-delà de ces fonctions, une attitude de retenue est d'autant plus justifiée qu'il existe au Canada — comme le reconnaissent les juges majoritaires en l'espèce — une tradition de respect des interprétations et des ordonnances judiciaires de la part des gouvernements et des fonctionnaires.

107 La nature du régime parlementaire canadien a parfois eu pour effet de jeter le doute sur l'existence d'un véritable principe de séparation des pouvoirs au Canada (voir P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), p. 7-24; *MacMillan Bloedel Ltd. c. Simpson*, [1995] 4 R.C.S. 725, par. 52). Il est vrai que les Canadiens n'ont jamais adopté un système étanche de séparation des fonctions judiciaire, législative et exécutive. Dans l'exercice de leurs fonctions, les tribunaux ont parfois été appelés à invalider des lois, des règlements ou encore des décisions administratives. Il leur est arrivé de conclure à la responsabilité de l'État ou d'organismes publics et de leur ordonner de verser des dommages-intérêts. L'évolution de la fonction exécutive a engendré de nouveaux types de justice administrative et de fonctions juridictionnelles (*Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 R.C.S. 781, 2001 CSC 52; *Bell Canada c. Association canadienne des employés de téléphone*, [2003] 1 R.C.S. 884, 2003 CSC 36). On peut dire que les distinctions théoriques entre les fonctions gouvernementales s'en sont trouvées estompées. Malgré tout, il reste que, généralement parlant, la séparation des pouvoirs est maintenant consacrée en tant que pierre d'assise de notre régime constitutionnel.

108 En particulier, la distinction ressort clairement en ce qui a trait à la relation qui existe entre les tribunaux, d'une part, et le législateur et l'exécutif ou encore l'administration publique, d'autre part (H. Brun et G. Tremblay, *Droit constitutionnel* (4e éd. 2002), p. 756-757). La Cour a reconnu le caractère fondamental de la séparation

of powers, although some of its pronouncements emphasize its functional nature (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319). Indeed, our Court has recently characterized this principle as a defining feature of the Canadian Constitution (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"); see also *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70).

des pouvoirs même si, dans certains arrêts, elle met l'accent sur la nature fonctionnelle de cette séparation (*New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319). D'ailleurs, elle qualifiait récemment ce principe de caractéristique fondamentale de la Constitution canadienne (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi sur les juges de la Cour provinciale* »); voir aussi *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, p. 469-470).

109 Our Court has strongly emphasized and vigorously applied the principle of separation of powers in order to uphold the independence of the judiciary (see for example: *Provincial Court Judges Reference*, *supra*; see also *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13). In that context, the principle was viewed as a shield designed to protect the judiciary in order to allow it to discharge its duties under the Constitution with complete independence and impartiality. Nothing less was required to maintain the normative ordering of the Canadian legal system.

La Cour a fait une large place au principe de la séparation des pouvoirs qu'elle s'est employée vigoureusement à appliquer pour préserver l'indépendance des tribunaux (voir notamment le *Renvoi sur les juges de la Cour provinciale*, précité; voir aussi l'arrêt *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13). Dans ce contexte, le principe était perçu comme un rempart destiné à permettre aux tribunaux de s'acquitter, d'une manière complètement indépendante et impartiale, des obligations que leur impose la Constitution. Le maintien de l'ordre normatif du système juridique canadien ne commandait rien de moins.

110 However, the principle of separation of powers has an obverse side as well, which equally reflects the appropriate position of the judiciary within the Canadian legal system. Aside from their duties to supervise administrative tribunals created by the executive and to act as vigilant guardians of constitutional rights and the rule of law, courts should, as a general rule, avoid interfering in the management of public administration.

Dans son application, le principe de la séparation des pouvoirs comporte toutefois un autre aspect, lequel reflète également la place qui revient au pouvoir judiciaire à l'intérieur du système juridique canadien. En plus d'être tenus d'exercer les fonctions de surveillance des tribunaux administratifs que leur confie l'exécutif et de veiller attentivement au respect des droits garantis par la Constitution et au maintien de la primauté du droit, les tribunaux judiciaires doivent, en général, éviter de s'immiscer dans la gestion de l'administration publique.

111 More specifically, once they have rendered judgment, courts should resist the temptation to directly oversee or supervise the administration of their orders. They should generally operate under

Plus particulièrement, les tribunaux qui ont rendu jugement doivent résister à la tentation de superviser ou surveiller directement l'exécution de leurs ordonnances. Ils doivent généralement présumer que leurs

a presumption that judgments of courts will be executed with reasonable diligence and good faith. Once they have declared what the law is, issued their orders and granted such relief as they think is warranted by circumstances and relevant legal rules, courts should take care not to unnecessarily invade the province of public administration. To do otherwise could upset the balance that has been struck between our three branches of government.

This is what occurred in the present case. When the trial judge attempted to oversee the implementation of his order, he not only assumed jurisdiction over a sphere traditionally outside the province of the judiciary, but also acted beyond the jurisdiction with which he was legitimately charged as a trial judge. In other words, he was *functus officio* and breached an important principle which reflects the nature and function of the judiciary in the Canadian constitutional order, as we shall see now.

2. *Functus Officio*

Canadian doctrinal and judicial writing on *functus officio* is sparse, even though the rule itself derives from an old case of the English Court of Appeal (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). Essentially, the rule is that the court has no jurisdiction to reopen or amend a final decision, except in two cases: (1) where there has been a slip in drawing up the judgment, or (2) where there has been error in expressing the manifest intention of the court (see *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186). More recently, this Court affirmed that this rule need not always be rigidly applied to tribunals in the administrative law context when the policy reasons for it are not present (*Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R 848).

The existence and scope of a right of appeal has often been made the focus of analytical attention in applying the *functus* doctrine. Such was the case when the power of the Court of Chancery to

jugements seront exécutés avec diligence raisonnable et de bonne foi. Après avoir dit le droit, rendu leurs ordonnances et accordé les réparations qu'ils estiment justifiées compte tenu des circonstances et des règles de droit applicables, les tribunaux doivent prendre soin de ne pas s'immiscer inutilement dans l'administration publique, sinon l'équilibre entre les trois branches du gouvernement risque d'être perturbé.

112 C'est ce qui s'est produit en l'espèce. Lorsqu'il a tenté de superviser l'exécution de son ordonnance, le juge de première instance s'est non seulement déclaré compétent dans un domaine qui, traditionnellement, ne relève pas des tribunaux, mais il a également outrepassé la compétence légitime dont il est investi en tant que juge de première instance. Autrement dit, il était dessaisi de l'affaire et, comme nous allons le voir, a, de ce fait, contrevenu à un principe important qui reflète la nature et la fonction des tribunaux dans l'ordre constitutionnel canadien.

2. *Le functus officio*

113 Au Canada, la jurisprudence et la doctrine relatives au *functus officio* est peu abondante, bien que cette règle émane d'un arrêt ancien de la Cour d'appel d'Angleterre (*In re St. Nazaire Co.* (1879), 12 Ch. D. 88). La règle du *functus officio* veut essentiellement que les tribunaux n'aient pas compétence pour rouvrir ou modifier une décision définitive, sauf dans deux cas : (1) en cas d'emploi involontaire d'un mot pour un autre dans le texte du jugement, ou (2) en cas d'erreur dans l'expression de l'intention manifeste de la cour (voir *In re Swire* (1885), 30 Ch. D. 239 (C.A.); *Paper Machinery Ltd. c. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186). Plus récemment, la Cour affirmait qu'il n'est pas toujours nécessaire d'appliquer rigoureusement cette règle aux tribunaux administratifs, lorsque les raisons de principe de l'appliquer ne sont pas réunies (*Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848).

114 L'existence et la portée d'un droit d'appel ont souvent été au centre de l'analyse visant à déterminer s'il y avait lieu d'appliquer la règle du *functus officio*. Il en était ainsi au moment où, en 1873,

rehear cases was extinguished by the *Judicature Acts* in 1873 by fusing common law and equity jurisdictions into one court and providing for a single appeal to a newly created Court of Appeal (*In re St. Nazaire*, *supra*). Originally, this was also the focus of the *functus* analysis for administrative tribunals that had rights of appeal tightly constrained by statute (see *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577). However, the underlying rationale for the doctrine is clearly more fundamental: that for the due and proper administration of justice, there must be finality to a proceeding to ensure procedural fairness and the integrity of the judicial system. The point is plainly made by Sopinka J. in *Chandler*, *supra*, at pp. 861-62:

> As a general rule, once . . . a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. . . .
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal.

115 If a court is permitted to continually revisit or reconsider final orders simply because it has changed its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceeding, or, as G. Pépin and Y. Ouellette have perceptively termed it, the providing of [TRANSLATION] "legal security" for the parties (*Principes de contentieux administratif* (2nd ed. 1982), at p. 221). This concern for finality is evident in the definition of *functus officio*:

> [TRANSLATION] Qualifies a court or tribunal, a public body or an official that is no longer seized of a matter

les *Judicature Acts* ont mis fin au pouvoir de la Cour de Chancellerie de réentendre une affaire, par le regroupement des juridictions de common law et d'equity en une seule cour et par la création d'un droit d'appel unique devant une nouvelle cour d'appel (*In re St. Nazaire*, précité). À l'origine, ces questions étaient également au centre de l'analyse visant à déterminer si la règle du *functus officio* s'appliquait aux tribunaux administratifs où le droit d'appel était rigoureusement limité par la loi (voir *Grillas c. Ministre de la Main-d'Œuvre et de l'Immigration*, [1972] R.C.S. 577). Toutefois, ce principe repose manifestement sur un raisonnement plus fondamental, à savoir que la bonne administration de la justice exige que les procédures aient un caractère définitif de façon à maintenir l'équité procédurale et l'intégrité du système judiciaire. Le juge Sopinka s'est clairement exprimé sur ce point dans *Chandler*, précité, p. 861-862 :

> En règle générale, lorsqu'un [. . .] tribunal a statué définitivement sur une question dont il était saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé . . .
>
> Le principe du *functus officio* s'applique dans cette mesure. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel en bonne et due forme.

Si les tribunaux pouvaient continuellement revoir ou réexaminer des ordonnances définitives simplement parce qu'ils changent d'idée ou qu'ils souhaitent continuer d'exercer leur compétence à l'égard d'une affaire, les procédures n'auraient jamais de caractère définitif ou, comme l'ont affirmé avec perspicacité G. Pépin et Y. Ouellette, il n'y aurait aucune « sécurité juridique » pour les parties (*Principes de contentieux administratif* (2e éd. 1982), p. 221). Ce souci du caractère définitif ressort clairement de la définition de l'expression *functus officio* :

> Se dit d'un tribunal, d'un organisme public ou d'un fonctionnaire qui est dessaisi d'une affaire parce qu'il a cessé

because it or he or she has discharged the office. E.g. A judge who has pronounced a final judgment is *functus officio*.

(H. Reid, *Dictionnaire de droit québécois et canadien* (2001), at p. 253)

The principle ensures that subject to an appeal, parties are secure in their reliance on the finality of superior court decisions.

This common law rule is further reflected in modern rules of civil procedure (see, e.g., Nova Scotia *Civil Procedure Rules*, Rule 15.07) and the interpretation of criminal appeal provisions (see *R. v. H. (E.F.)* (1997), 115 C.C.C. (3d) 89 (Ont. C.A.), considering s. 675 of the *Criminal Code*). Whether in its common law or statutory form, the doctrine of *functus officio* provides that only in strictly limited circumstances can a court revisit an order or judgment (see Nova Scotia *Civil Procedure Rules*, Rule 15.08). If it were otherwise, there would be, to paraphrase Charron J.A. in *H. (E.F.)*, *supra*, at p. 101, the recurring danger of the trial process becoming or appearing to become a "never closing revolving door" through which litigants could come and go as they pleased.

In addition to this concern with finality, the question of whether a court is clothed with the requisite authority to act raises concerns related to the separation of powers, a principle that transcends procedural and common law rules. In our view, if a court intervenes, as here, in matters of administration properly entrusted to the executive, it exceeds its proper sphere and thereby breaches the separation of powers. By crossing the boundary between judicial acts and administrative oversight, it acts illegitimately and without jurisdiction. Such a crossing of the boundary cannot be characterized as relief that is "appropriate and just in the circumstances" within the meaning of s. 24(1) of the *Charter.*

l'exercice de sa fonction. Ex. Le juge qui a prononcé un jugement final est *functus officio.*

(H. Reid, *Dictionnaire de droit québécois et canadien* (2001), p. 253)

Ce principe garantit que, sous réserve d'un appel, les parties peuvent compter sur le caractère définitif des décisions des cours supérieures.

116 Cette règle de common law se reflète également dans les règles de procédure civile contemporaines (voir, par exemple, les *Civil Procedure Rules* de la Nouvelle-Écosse, art. 15.07), ainsi que dans l'interprétation des dispositions relatives aux appels en matière criminelle (voir l'arrêt *R. c. H. (E.F.)* (1997), 115 C.C.C. (3d) 89 (C.A. Ont.), qui porte sur l'art. 675 du *Code criminel*). Que ce soit sous forme de règle de common law ou de disposition législative, la règle du *functus officio* veut qu'un tribunal ne puisse revenir sur une ordonnance ou un jugement que dans des circonstances très limitées (voir les *Civil Procedure Rules* de la Nouvelle-Écosse, art. 15.08). S'il en était autrement, il y aurait, pour paraphraser le juge Charron dans l'arrêt *H. (E.F.)*, précité, p. 101, un risque constant que le procès devienne ou paraisse devenir un exercice interminable auquel les justiciables peuvent décider, à leur gré, de se prêter ou de ne plus se prêter.

117 Outre ce souci du caractère définitif, la question de savoir si un tribunal a la compétence voulue pour agir suscite des inquiétudes liées à l'application du principe de la séparation des pouvoirs qui transcende les règles de procédure et de common law. Nous sommes d'avis que, lorsque, comme cela a été fait en l'espèce, un tribunal intervient dans des questions d'administration relevant à juste titre de l'exécutif, ce tribunal sort de son propre champ de compétence et contrevient, de ce fait, au principe de la séparation des pouvoirs. En franchissant la ligne qui sépare les mesures judiciaires et les mesures de surveillance administrative, le tribunal agit de manière illégitime et sans posséder la compétence voulue. Un tel geste ne saurait être qualifié de réparation « convenable et juste eu égard aux circonstances », au sens du par. 24(1) de la *Charte*.

V. Application of the Relevant Principles to the Present Case

118 When the above principles are applied to the present facts, it is evident that McIntyre J.'s admonition in *Mills v. The Queen*, [1986] 1 S.C.R. 863, that s. 24(1) "was not intended to turn the Canadian legal system upside down" is apropos (p. 953). In our view, the trial judge's remedy undermined the proper role of the judiciary within our constitutional order, and unnecessarily upset the balance between the three branches of government. As a result, the trial judge in the present circumstances acted inappropriately, and contrary to s. 24(1).

119 As we noted above, the trial judge equivocated on the question of whether his purported retention of jurisdiction empowered him to make further orders. Regardless of which position is taken, the separation of powers was still breached. On the one hand, if he did purport to be able to make further orders, based on the evidence presented at the reporting hearings, he was *functus officio*. We find it difficult to imagine how any subsequent order would not have resulted in a change to the original final order. This necessarily falls outside the narrow exceptions provided by *functus officio*, and breaches that rule.

120 Such a breach would also have resulted in a violation of the separation of powers principle. By purporting to be able to make subsequent orders, the trial judge would have assumed a supervisory role which included administrative functions that properly lie in the sphere of the executive. These functions are beyond the capacities of courts. The judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration. In

V. L'application des principes pertinents à la présente affaire

L'application des principes susmentionnés aux faits de la présente affaire permet de constater la pertinence de la mise en garde du juge McIntyre dans l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, p. 953, selon laquelle le par. 24(1) « n'était pas cens[é] provoquer le bouleversement du système judiciaire canadien ». À notre avis, la réparation accordée par le juge de première instance mine le rôle que les tribunaux doivent jouer dans notre ordre constitutionnel et perturbe inutilement l'équilibre entre les trois branches du gouvernement. Par conséquent, eu égard aux circonstances de la présente affaire, le juge de première instance a agi d'une façon inappropriée et contraire au par. 24(1).

Comme nous l'avons vu, il n'a pas expliqué clairement si la déclaration de compétence qu'il prétendait faire l'habilitait à rendre des ordonnances supplémentaires. Quel que soit le point de vue choisi, il reste que le principe de la séparation des pouvoirs n'est pas respecté. À supposer qu'il a effectivement prétendu qu'il aurait compétence pour rendre des ordonnances supplémentaires en se fondant sur la preuve qui serait soumise aux auditions de comptes rendus, le juge de première instance a eu tort car il était dessaisi de l'affaire. Nous voyons mal comment une ordonnance subséquente n'aurait pas opéré de modification à l'ordonnance initiale définitive. Une telle mesure outrepasse nécessairement le champ des exceptions bien précises que prévoit la règle du *functus officio* et contrevient donc à cette règle.

Cette mesure aura également entraîné une violation du principe de la séparation des pouvoirs. En prétendant être en mesure de rendre des ordonnances subséquentes, le juge de première instance s'attribuait un rôle de surveillance comportant des fonctions administratives qui relèvent, à juste titre, de l'exécutif. Ces fonctions excèdent la compétence des tribunaux. Les tribunaux ne sont pas en mesure de faire des choix polycentriques ou d'évaluer toute la gamme des conséquences de la mise en œuvre d'une politique générale. Notre Cour a reconnu que les tribunaux judiciaires ne possèdent ni l'expertise

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at para. 96, it was held that in light of the "myriad options" available to the government to rectify the unconstitutionality of the impugned system, it was "not this Court's role to dictate how this is to be accomplished".

In addition, if he purported to adopt a managerial role, the trial judge undermined the norm of cooperation and mutual respect that not only describes the relationship between the various actors in the constitutional order, but defines its particularly Canadian nature, and invests each branch with legitimacy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, Iacobucci J. noted that "respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts" (para. 136). He discussed the wording of provisions of the *Charter* that expressed this norm of mutual respect (para. 137), and remarked that this norm has "the effect of enhancing the democratic process" (para. 139).

Similarly, McLachlin J. (as she then was) in the 1990 Weir Memorial Lecture reviewed the elements of our legal culture — including our political climate, our tradition of judicial restraint, and the system of references — that have contributed to a spirit of co-operation, rather than confrontation among the branches of government (B. M. McLachlin, "The Charter: A New Role for the Judiciary?" (1991), 29 *Alta. L. Rev*. 540, at pp. 554-56). Moreover, referring to her reasons in *Dixon v. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (B.C.S.C.), she spoke to the importance of considerations of institutional legitimacy for a court crafting a remedy (at p. 557):

It was not for me, I felt, to dictate to the Legislature what sort of law they should enact; that was the responsibility of the elected representatives. But, again following a time-honoured judicial tradition, I offered advice

ni les ressources nécessaires pour prendre en charge l'administration publique. Dans l'arrêt *Eldridge c. Colombie-Britannique (Procureur général)*, [1997] 3 R.C.S. 624, par. 96, elle a conclu que, devant la « myriade de solutions » dont disposait le gouvernement pour remédier à l'inconstitutionnalité du système en cause, il n'appartenait pas à la Cour « de lui dicter le moyen à prendre ».

121 En outre, s'il prétendait adopter un rôle de gestion, le juge de première instance remettait en question la norme de coopération et de respect mutuel qui, en plus de caractériser la relation entre les divers acteurs de l'ordre constitutionnel, en définit le contenu particulier dans le contexte canadien et contribue à la légitimité de chaque branche du gouvernement. Dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 136, le juge Iacobucci souligne qu'il « est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l'exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux ». Analysant le libellé des dispositions de la *Charte* qui établissent la norme de respect mutuel (par. 137), il fait remarquer que cette norme enrichit le processus démocratique (par. 139).

122 De même, dans son allocution Weir Memorial Lecture en 1990, la juge McLachlin (plus tard Juge en chef) a passé en revue les éléments de notre culture juridique — dont notre climat politique, notre tradition de déférence judiciaire et le système de renvoi — qui ont contribué à développer un esprit de coopération, plutôt que de confrontation, entre les branches du gouvernement (B. M. McLachlin, « The Charter : A New Role for the Judiciary? » (1991), 29 *Alta. L. Rev.* 540, p. 554-556). De plus, évoquant ses motifs dans l'affaire *Dixon c. British Columbia (Attorney-General)* (1989), 59 D.L.R. (4th) 247 (C.S.C.-B.), elle a parlé de l'importance que les tribunaux tiennent compte de la légitimité institutionnelle en concevant une réparation (à la p. 557) :

[TRADUCTION] J'estimais qu'il appartenait aux représentants élus, et non pas à moi, de dicter à la législature la sorte de loi qu'elle devait adopter. Mais, là encore, conformément à une longue tradition judiciaire, j'ai

on what limits on the principle of one person-one vote, might be acceptable.

123 McLachlin J. expressed this concern for the principle of democratic legitimacy in respect of the relationship between the judiciary and the legislature, but the principle extends to that between the judiciary and the executive. This Court has recognized that in the Canadian parliamentary system, the executive is inextricably tied to the legislative branch. The Court in *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312, at p. 320, observed that "[t]here is thus a considerable degree of integration between the Legislature and the Government". In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 53, the Court held: "On a practical level, it is recognized that the same individuals control both the executive and legislative branches of government."

124 Therefore, just as the legislature should, after a judicial finding of a *Charter* breach retain independence in writing its legislative response, the executive should after a judicial finding of a breach, retain autonomy in administering government policy that conforms with the *Charter*. In our constitutional order, the legislature and the executive are intimately interrelated and are the principal *loci* of democratic will. Judicial respect for that will should extend to both branches.

125 Thus, if the trial judge's initial suggestion that he could continue to make orders, and thereby effectively engage in administrative supervision and decision making accurately characterizes the nature of the reporting sessions, the order for reporting sessions breached the constitutional principle of separation of powers. Since no part of the Constitution can be interpreted to conflict with another, that order cannot be considered appropriate and just in the circumstances, under s. 24(1). The trial judge's order for reporting sessions should also be considered inappropriate because it put into question the Canadian tradition of mutual respect between the judiciary and the institutions that are the repository of democratic will.

prodigué des conseils sur la limitation du principe « une personne-un vote » qui pourrait être acceptable.

La juge McLachlin défendait alors le principe de la légitimité démocratique dans son application à la relation entre les tribunaux et le législateur, mais ce principe s'applique également à la relation entre les tribunaux et le pouvoir exécutif. Notre Cour a reconnu que, dans le régime parlementaire canadien, l'exécutif est inextricablement lié à la branche législative. Dans l'arrêt *Procureur général du Québec c. Blaikie*, [1981] 1 R.C.S. 312, p. 320, elle a fait observer qu'il existe « une [large mesure d']intégration du gouvernement à la Législature ». Dans l'arrêt *Wells c. Terre-Neuve*, [1999] 3 R.C.S. 199, par. 53, la Cour a statué qu'« [e]n pratique, il est admis que les mêmes personnes contrôlent à la fois les organes exécutif et législatif du gouvernement ».

Par conséquent, tout comme le législateur doit faire preuve d'indépendance en légiférant à la suite de la conclusion d'un tribunal qu'il y a eu violation de la *Charte*, l'exécutif doit agir de manière autonome par rapport au judiciaire en appliquant une politique gouvernementale conforme à la *Charte.* Dans notre ordre constitutionnel, les pouvoirs législatif et exécutif sont étroitement liés et constituent les principaux sièges de la volonté démocratique. Les tribunaux doivent respecter cette volonté dans les deux cas.

Donc, si l'idée initiale du juge de première instance selon laquelle il pouvait continuer à rendre des ordonnances et exercer ainsi, en réalité, une surveillance et une fonction décisionnelle administratives témoigne exactement de la nature des auditions de comptes rendus, l'ordonnance qui prescrit ces auditions viole alors le principe constitutionnel de la séparation des pouvoirs. En raison de l'impossibilité de considérer qu'il y a incompatibilité entre les différents principes constitutionnels, cette ordonnance ne saurait être qualifiée de convenable et juste eu égard aux circonstances, au sens du par. 24(1). De même, elle ne saurait être qualifiée de convenable étant donné qu'elle rompt avec la tradition de respect mutuel qui existe, au Canada, entre les tribunaux et les institutions dépositaires de la volonté démocratique.

If, however, the trial judge's statement in the last session that he could not make further orders correctly characterized his remedial order, then he breached the separation of powers in another way. When considered in light of this constitutional principle and applied to the present facts, McLachlin C.J.'s proposition that "s. 24 should not be read so broadly that it endows courts and tribunals with powers that they were never intended to exercise" (*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*"), at para. 22) leads to the conclusion that the trial judge's remedy was not appropriate and just in the circumstances.

126 Toutefois, si l'ordonnance réparatrice qu'il a accordée se définit plutôt par son affirmation, lors de la dernière audition, qu'il ne pouvait pas rendre des ordonnances supplémentaires, le juge de première instance a alors violé d'une autre façon le principe de la séparation des pouvoirs. Interprétée à la lumière de ce principe constitutionnel et appliquée aux faits de la présente affaire, la proposition de la juge en chef McLachlin, selon laquelle « l'art. 24 ne doit pas être interprété de façon si large qu'il aurait pour effet d'investir les tribunaux judiciaires et administratifs de pouvoirs qu'ils n'ont jamais été censés exercer » (*R. c. 974649 Ontario Inc.*, [2001] 3 R.C.S. 575, 2001 CSC 81 (« *Dunedin* »), par. 22), amène à conclure que la réparation accordée par le juge de première instance n'était pas convenable et juste eu égard aux circonstances.

The appellants argued that the trial judge retained jurisdiction only to hear reports, and that these hearings had purely "suasive" value. They also argued that the hearings were designed to hold "the Province's feet to the fire" (SCC hearing transcripts). They further suggested that the threat of having to report to the trial judge functioned as an incentive for the government to comply with the best efforts order. In the words of the appellants:

127 Les appelants ont soutenu que le juge de première instance s'est déclaré compétent uniquement pour entendre des comptes rendus et que ces auditions n'avaient qu'une valeur « persuasive ». Ils ont également fait valoir que le but des auditions était [TRADUCTION] « [d']exercer une pression sur la province » (transcription de l'audience devant notre Cour). Ils ont ajouté que le fait d'être menacé de rendre compte au juge de première instance a incité le gouvernement à se conformer à l'ordonnance l'enjoignant de faire de son mieux. D'affirmer les appelants :

> Is it a coincidence that, after a nine month delay (October 1999 to July 2000) the Province called for tenders eight days before the reporting hearing and "fast tracked" the school? The Province knew that it would have to report on July 27. The Province ensured that a call for tenders and a construction schedule were in place for July 27.

> [TRADUCTION] Est-ce le fruit du hasard si, après neuf mois d'inertie (octobre 1999 à juillet 2000), la province a lancé des appels d'offres huit jours avant la tenue de l'audition de comptes rendus et a accéléré le projet des écoles? La province savait qu'elle devrait présenter un compte rendu le 27 juillet. Elle a veillé à ce que l'échéancier des travaux de construction soit établi et que l'appel d'offres soit déjà lancé à cette date.

If this characterization of the trial judge's activity is accurate, then the order for reporting sessions did not result in the exercise of adjudicative, or any other, functions that traditionally define the ambit of a court's proper sphere. Moreover, it resulted in activity that can be characterized as political. According to the appellants' characterization, a primary purpose of the hearings was to put public

128 Si cette description de l'action du juge de première instance est exacte, alors l'ordonnance enjoignant de rendre compte ne correspondait pas à l'exercice de la fonction juridictionnelle ou de toute autre fonction qui relève traditionnellement de la compétence des tribunaux. De plus, elle s'est soldée par une action susceptible d'être qualifiée de politique. Selon les appelants, les auditions avaient

pressure on the government to act. This kind of pressure is paradigmatically associated with political actors. Indeed, the practice of publicly questioning a government on its performance, without having any legal power to compel it to alter its behaviour, is precisely that undertaken by an opposition party in the legislature during question period.

129 In the above, we reasoned that the trial judge, by breaching the separation of powers, would have put in question the norm of co-operation that defines the relationship between the branches of government in Canada. We will presently demonstrate how the trial judge, by improperly altering the relationship between the judiciary and the executive, would have breached the separation of powers.

130 In *Provincial Court Judges Reference*, *supra*, Lamer C.J. described the separation of powers as providing that "the relationships between the different branches of government should have a particular character" (para. 139 (emphasis in original)). In particular, according to him, the separation of powers doctrine requires that these relationships be depoliticized (para. 140 (emphasis in original)).

131 In that case, Lamer C.J. remarked that the legislature and the executive cannot exert, and cannot appear to exert political pressure on the judiciary (para. 140). The reciprocal proposition applies to the immediate case. With the reporting hearings, the trial judge may have sought to exert political or public pressure on the executive, and at least appeared to do so. In our view, such action would tend to politicize the relationship between the executive and the judiciary.

132 If the reporting hearings were intended to hold "the Province's feet to the fire", the character of the relationship between the judiciary and the executive was improperly altered and, as per the *Provincial Court Judges Reference*, the constitutional principle of separation of powers

principalement pour but de presser ouvertement le gouvernement d'agir. Ce genre de pression est traditionnellement associé à l'action des intervenants politiques. En fait, l'opposition agit exactement de cette manière lorsqu'elle interpelle publiquement le gouvernement sur son action, bien qu'elle ne puisse pas légalement le contraindre à modifier sa conduite.

Nous avons affirmé, plus haut, que la violation du principe de la séparation des pouvoirs par le juge de première instance aura remis en question la norme de coopération qui définit la relation entre les branches du gouvernement au Canada. Nous allons maintenant démontrer comment cette modification irrégulière de la relation entre les tribunaux et le pouvoir exécutif aura violé le principe de la séparation des pouvoirs.

Dans le *Renvoi sur les juges de la Cour provinciale*, précité, le juge en chef Lamer affirme que, selon le principe de la séparation des pouvoirs, « les rapports [que les trois branches du gouvernement] entretiennent devraient revêtir un caractère particulier » (par. 139 (souligné dans l'original)). Il estime, en particulier, que la séparation des pouvoirs exige que ces rapports soient dépolitisés (par. 140 (souligné dans l'original)).

Dans cet arrêt, le juge en chef Lamer fait observer que les pouvoirs législatif et exécutif ne peuvent pas et ne doivent pas exercer des pressions politiques sur le pouvoir judiciaire, ni être perçus comme le faisant (par. 140). L'inverse s'applique en l'espèce. En ordonnant la tenue d'auditions de comptes rendus, le juge de première instance peut avoir voulu exercer des pressions politiques ou publiques sur l'exécutif, ou avoir tout au moins donné cette impression. Ce genre de méthode tend, selon nous, à politiser les rapports entre l'exécutif et le judiciaire.

En supposant que les auditions de comptes rendus avaient pour but d'« exercer une pression sur la province », il y a alors eu altération irrégulière de la nature des rapports entre le judiciaire et l'exécutif et, selon le *Renvoi sur les juges de la Cour provinciale*, il y a eu violation

was breached. Once again, since no part of the Constitution can conflict with another, the trial judge's order for reporting hearings cannot be interpreted as appropriate and just under s. 24(1).

We would reiterate, at this point, the importance of clarity and certainty in the provisions of a court order. If the trial judge had precisely defined the terms of the remedy, in advance, then the ensuing confusion surrounding his role may not have occurred. Moreover, by complying with this essential element of fair procedure, he may have been able to avoid the constitutional breach of the separation of powers that followed.

VI. Neither a Breach of Procedural Fairness nor of the Separation of Powers Was Appropriate

We noted above that this Court in *Eldridge* recognized the appropriateness of judicial restraint in issuing a remedy under s. 24(1), given the variety of choices open to the executive in administering policy. Implicit in the declaratory remedy ordered in that case was the presumption that the government will act in good faith in rectifying *Charter* wrongs and the recognition that legislatures and executives, not the courts, are in the best position to decide exactly how this should be done. Turning to the present case then, the trial judge's decision to provide injunctive relief already represented a departure from the cooperative norm that defines and shapes the relationships among the branches of the Canadian constitutional order. We do not deny that in the appropriate factual circumstances, injunctive relief may become necessary. However, the trial judge's order for reporting sessions then purported to go even further, and breached both a fundamental principle of procedural fairness and the constitutional principle of separation of powers.

One might argue that such a breach is appropriate where it is the only way that a claimant's rights

du principe constitutionnel de la séparation des pouvoirs. Là encore, puisqu'il ne peut y avoir incompatibilité entre les différents principes constitutionnels, l'ordonnance dans laquelle le juge de première instance enjoint de rendre compte ne peut pas être qualifiée de convenable et juste au sens du par. 24(1).

133 À ce stade, nous tenons à revenir sur l'importance de rendre des ordonnances claires et dénuées de toute ambiguïté. Si le juge de première instance avait précisé d'avance les modalités de la réparation, il n'y aurait peut-être pas eu de confusion au sujet de son rôle. De plus, le respect de cette condition essentielle de l'équité procédurale aurait pu lui permettre d'éviter la violation subséquente du principe constitutionnel de la séparation des pouvoirs.

VI. Aucun manquement à l'équité procédurale ni aucune violation du principe de la séparation des pouvoirs n'étaient convenables

134 Nous avons souligné plus haut que la Cour a reconnu, dans l'arrêt *Eldridge*, qu'en accordant une réparation fondée sur le par. 24(1) il convient de faire preuve de retenue en raison de l'éventail de choix dont l'exécutif dispose en matière d'application de politiques. Le jugement déclaratoire accordé en l'espèce reposait implicitement sur la présomption que le gouvernement agit de bonne foi lorsqu'il est appelé à corriger des entorses à la *Charte* et sur la reconnaissance que ce sont les pouvoirs législatif et exécutif, et non les tribunaux, qui sont davantage en mesure de choisir la façon de le faire. Dès qu'il a décidé, en l'espèce, d'accorder une réparation sous forme d'injonction, le juge de première instance s'est écarté de la norme de coopération qui définit et façonne les rapports entre les branches de l'ordre constitutionnel canadien. Nous ne nions pas que, lorsque les faits le justifient, la réparation sous forme d'injonction puisse être nécessaire. Toutefois, l'ordonnance dans laquelle le juge de première instance a enjoint de rendre compte paraissait aller encore plus loin et violait à la fois un principe fondamental d'équité procédurale et le principe constitutionnel de la séparation des pouvoirs.

135 On pourrait soutenir qu'une telle violation se justifie lorsque c'est le seul moyen de défendre

can be vindicated. Alternatively, one might suggest that if a government has ignored previous, less intrusive judicial measures, and thereby put into question their efficacy, a court might be justified in abandoning the presumption of governmental good will that we referred to above. In our view, the present case gave rise to neither of these arguments.

136 Turning to the first argument, if the hearings were aimed at ensuring the vindication of the claimants' rights by providing them with the opportunity to enforce or alter the remedy, there were alternatives available. If the claimants felt that the government was not complying with any part of the order, then they could have brought an application for contempt. The majority seems to suggest that contempt proceedings would have been less effective in this case in ensuring timely performance of the order, without being any more respectful of the separation of powers. However, we would note that expedited applications are possible in Nova Scotia and other jurisdictions to deal with cases quickly and efficiently. In addition, the reporting order at issue in this case precluded applying to any other judge for relief and was, in this way, even more limiting than a contempt proceeding. Most importantly, contempt proceedings are more consistent with our adversarial system, which is based on the common law norm of giving the parties primary control over the proceedings (see J. I. H. Jacob, *The Fabric of English Civil Justice* (1987), at p. 13). In contrast, the present order for reporting sessions placed the trial judge in an inappropriate, ongoing supervisory and investigative role despite the availability of the equally effective, well-established, and minimally intrusive alternative of contempt relief.

137 Consequently, it is clear that the order for reporting hearings was not the only means of vindicating the claimants' rights, and that recourse to

les droits du demandeur. On pourrait également affirmer qu'un tribunal serait éventuellement justifié d'abandonner la présomption susmentionnée de bonne volonté de la part du gouvernement, dans le cas où un gouvernement n'aurait pas tenu compte de mesures judiciaires antérieures moins attentatoires et aurait, de ce fait, compromis leur efficacité. À notre avis, aucun de ces arguments ne pouvait être invoqué en l'espèce.

En ce qui concerne le premier argument, si les auditions avaient pour but de défendre les droits des demandeurs en donnant à ces derniers la possibilité de faire exécuter ou modifier la réparation, d'autres solutions existaient. Si les demandeurs avaient eu l'impression que le gouvernement ne se conformait pas à une partie quelconque de l'ordonnance, ils auraient pu déposer une requête pour outrage. Les juges majoritaires semblent affirmer qu'en l'espèce des poursuites pour outrage auraient encore moins permis d'assurer l'exécution diligente de l'ordonnance, sans pour autant respecter davantage le principe de la séparation des pouvoirs. Toutefois, nous tenons à souligner qu'il existe, en Nouvelle-Écosse et dans d'autres ressorts, des procédures accélérées qui permettent de régler rapidement et efficacement les litiges. De plus, l'ordonnance enjoignant de rendre compte, dont il est question en l'espèce, interdisait de s'adresser à un autre juge pour obtenir réparation et était donc encore plus restrictive que des poursuites pour outrage. Qui plus est, les poursuites pour outrage respectent davantage la nature de notre système accusatoire, qui repose sur la règle de common law voulant que la gestion des litiges relève d'abord et avant tout des parties (voir J. I. H. Jacob, *The Fabric of English Civil Justice* (1987), p. 13). Par contre, la présente ordonnance enjoignant de rendre compte investit le juge de première instance d'un rôle continu et inapproprié de surveillance et d'enquête, et ce, malgré la possibilité de recourir à l'autre solution bien établie, aussi efficace et peu attentatoire que sont les poursuites pour outrage.

Il est donc clair que l'ordonnance enjoignant de rendre compte ne représentait pas le seul moyen de défendre les droits des demandeurs et que le

a readily available alternative would have been consistent with a defining feature of our legal system. Recourse to this alternative would not have resulted in an interpretation of the court's remedial powers that was so broad as to purport to endow the court with powers that it was "never intended to exercise" (*Dunedin*, *supra*, at para. 22). It is important to stress that in the present case, it is not clear that actual recourse to a contempt application would have been necessary. The point is simply that if judicial enforcement of the deadlines in question were necessary, recourse to this alternative would not have overextended the court's powers.

On a last note, we find it difficult to imagine circumstances where a breach of one party's fundamental right to notice would aid in the vindication of another's *Charter* rights. In any event, the present facts do not present such a case. The intrusiveness of the trial judge's order was in no way necessary to secure the claimants' s. 23 interests. Given the absence of any causal connection between the breach of the parties' right to notice and the effectiveness of the purported remedy, we would conclude that the breach cannot be considered appropriate for the purposes of s. 24(1).

The second argument is simply not applicable in this case. The facts here do not require us to decide whether previous government noncompliance can ever justify remedial orders that breach principles of procedural fairness and the separation of powers. The Government of Nova Scotia did not refuse to comply with either a prior remedial order or a declaration with respect to its particular obligations in the fact-situation at hand. No such order was made and it is impossible to determine whether the government would have responded in the present case to either a declaration of rights, or the injunction to meet the deadline as these measures were combined with the order purporting to retain jurisdiction to oversee

recours à une autre solution aisément accessible aurait été conforme à une caractéristique fondamentale de notre système juridique. Si cette autre solution avait été utilisée, la compétence que les tribunaux possèdent en matière de réparation n'aurait pas reçu une interprétation large au point d'investir les tribunaux judiciaires et administratifs de pouvoirs qu'ils n'ont « jamais été censés exercer » (*Dunedin*, précité, par. 22). D'ailleurs, il importe de souligner qu'il n'est pas clair que des poursuites pour outrage auraient été nécessaires en l'espèce. Nous voulons simplement indiquer que si une intervention judiciaire s'était révélée nécessaire pour assurer le respect des délais en cause, le recours à cette autre solution n'aurait pas eu pour effet d'élargir démesurément les pouvoirs du tribunal.

138 Enfin, il nous est difficile d'imaginer une situation où l'atteinte au droit fondamental d'une partie d'être informée serait utile pour défendre les droits que la *Charte* garantit à une autre partie. De toute façon, la question ne se pose pas en l'espèce. Le juge de première instance n'avait pas à rendre une telle ordonnance attentatoire pour faire respecter les droits garantis aux demandeurs par l'art. 23. Compte tenu de l'absence de lien causal entre l'atteinte au droit des parties d'être informées et l'efficacité de la réparation censée être accordée, nous sommes d'avis de conclure que cette atteinte ne peut pas être qualifiée de convenable au sens du par. 24(1).

139 Le second argument ne s'applique tout simplement pas en l'espèce. À la lumière des faits, nous n'avons pas à déterminer si l'omission antérieure du gouvernement de respecter les droits en cause peut vraiment justifier la délivrance d'ordonnances réparatrices qui violent les principes de l'équité procédurale et de la séparation des pouvoirs. Le gouvernement de la Nouvelle-Écosse n'a pas refusé de se conformer à une ordonnance réparatrice ou à un jugement déclaratoire antérieurs portant sur les obligations particulières qui lui incombent dans le cas qui nous occupe. En l'absence d'une ordonnance de cette nature, il est impossible de déterminer si, en l'espèce, le gouvernement aurait réagi à un simple jugement déclaratoire ou à une simple

the reporting sessions. Therefore, it cannot be asserted that the trial judge's order has succeeded where less intrusive remedial measures failed.

140 Moreover, what was required by the Government of Nova Scotia to comply with its obligations pursuant to s. 23 was not self-evident at trial. The trial judge was not faced with a government which was cognizant of how it should fulfill its obligations, but refused to do so. Indeed, at issue before the trial judge was precisely the question of what compliance with s. 23 involved. The present order, therefore, did not overcome governmental recalcitrance in the face of a clear understanding of what s. 23 required in the circumstances of the case. Remedies must be chosen in light of the nature and structure of the Canadian constitutional order, an important feature of which is the presumption of co-operation between the branches of government. Therefore, unless it is established that this constitutional balance has been upset by the executive's clear defiance of a directly applicable judicial order, increased judicial intervention in public administration will rarely be appropriate.

141 In choosing and reviewing s. 24(1) remedies, it is important to remember that the inquiry into the appropriateness of a remedy should be undertaken from an *ex ante* perspective. The simple fact that a desired result occurs after a remedial order is issued is not relevant to determining the question of the order's appropriateness. In our view, an adequate *ex ante* assessment must consider the risks that attend a given remedy. In the present case, as Freeman J.A. noted in dissent, if the trial judge "misread the degree of co-operation he could expect from the players, there was a risk of failure" (para. 84). That the present remedy's susceptibility to failure was tied to the capacities of a particular judge should in itself give pause. In our view, whether a remedy is appropriate should be assessed with

injonction de respecter des délais, étant donné que ces mesures sont incorporées à l'ordonnance dans laquelle le juge prétend se déclarer compétent pour superviser des auditions de comptes rendus. On ne peut donc pas affirmer que l'ordonnance du juge de première instance a réussi là où des mesures réparatrices moins attentatoires ont échoué.

En outre, ce que le gouvernement de la Nouvelle-Écosse devait faire pour s'acquitter de ses obligations conformément à l'art. 23 n'était pas clair au procès. Le juge de première instance n'avait pas devant lui un gouvernement qui savait comment remplir ses obligations, mais refusait de le faire. En réalité, la question à laquelle le juge devait répondre était justement de savoir ce qu'il fallait faire pour se conformer à l'art. 23. Par conséquent, l'ordonnance rendue en l'espèce n'était pas justifiée par le besoin de vaincre la réticence d'un gouvernement bien au fait de ce que l'art. 23 commandait dans les circonstances. Le choix d'une réparation doit tenir compte de la nature et de la structure de l'ordre constitutionnel canadien, dont l'une des caractéristiques importantes demeure la présomption de collaboration entre les branches du gouvernement. Par conséquent, à moins de démontrer que cet équilibre constitutionnel a été rompu en raison de la réticence manifeste de l'exécutif à se conformer à une ordonnance du tribunal qui le visait directement, une intervention accrue des tribunaux dans l'administration publique est rarement appropriée.

Lors du choix et de l'examen des réparations visées au par. 24(1), il importe de se rappeler que le caractère convenable d'une réparation doit faire l'objet d'une analyse *ex ante*. Le simple fait qu'une ordonnance réparatrice ait eu l'effet souhaité n'est pas pertinent pour en déterminer le caractère convenable. Nous estimons que l'évaluation *ex ante* doit tenir compte des risques inhérents à une réparation donnée. Comme le juge Freeman l'a fait remarquer dans ses motifs dissidents en l'espèce, si le juge de première instance [TRADUCTION] « se méprenait sur le degré de coopération qu'il pouvait attendre des parties, il risquait l'échec » (par. 84). Le fait que la réussite ou l'échec de la réparation ait été tributaire des capacités d'un juge donne à réfléchir en soi. Selon nous, pour décider si une réparation est

reference to the remedy itself and not the particular capacities of a given judge to manage that remedy. More importantly, where a thorough *ex ante* assessment of a remedy reveals that it will certainly be inconsistent with basic legal principles and constitutional doctrines, such a remedy should not be considered appropriate. Available remedies that do not result in such breaches should, *a contrario*, be considered to be more appropriate.

The question of the relevant time frame for the inquiry into a remedy's appropriateness is tied to the more general question of remedial effectiveness. It is important to remember the context in which this Court considered the issue of effectiveness in *Dunedin*, *supra*. The issue was whether a justice of the peace acting as a trial justice under the Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, was a court of competent jurisdiction to direct an order for costs against the Crown for a *Charter* breach. The Court held that if provincial offences courts were deprived of this remedy, an accused may be denied access to a recognized means of remedying a *Charter* breach (para. 82).

In the present case, refusing superior courts the power to order reporting hearings clearly would not deny claimants' access to a recognized *Charter* remedy, as such an order is entirely idiosyncratic. More importantly, refusing superior courts this power would not deprive claimants of access to that which they are guaranteed by s. 23, namely, the timely provision of minority language instruction facilities. Indeed, if the appellants' characterization of the reporting hearings' purpose is correct, it is difficult to see how they could have been more effective than the construction deadline coupled with the possibility of a contempt order. In our view, the availability of this legal sanction for non-compliance with the order to meet the construction deadline would have provided at least as much incentive for the government to remedy the s. 23 breach as would have reporting hearings, in which the presiding judge was without the power to make further orders. Moreover, at the level of constitutional principle, because this incentive is legal in

convenable, il faut prendre en considération la réparation elle-même et non la capacité particulière d'un juge de la gérer. Qui plus est, une réparation ne doit pas être jugée convenable lorsqu'une évaluation *ex ante* approfondie permet de constater qu'elle violera sûrement des principes juridiques et constitutionnels fondamentaux. Par contre, les réparations possibles qui ne causent pas de telles violations doivent être jugées plus convenables.

142 Dans l'examen du caractère convenable d'une réparation, la question du délai requis pour la mise à exécution est liée à celle plus générale de l'efficacité de la mesure. Il importe de rappeler le contexte dans lequel notre Cour a examiné la question de l'efficacité dans l'arrêt *Dunedin*, précité. Il s'agissait de savoir si un juge de paix agissant en tant que juge du procès en vertu de la *Loi sur les infractions provinciales* de l'Ontario, L.R.O. 1990, ch. P.33, était un tribunal compétent pour condamner la Couronne aux dépens en cas de violation de la *Charte*. La Cour a alors statué que, si le tribunal des infractions provinciales était privé de ce pouvoir, un accusé pourrait se voir refuser l'accès à un moyen reconnu de remédier à une violation de la *Charte* (par. 82).

143 En l'espèce, le refus de reconnaître aux cours supérieures le pouvoir d'ordonner la tenue d'auditions de comptes rendus n'empêcherait sûrement pas les demandeurs d'obtenir une réparation reconnue fondée sur la *Charte*, vu qu'une telle ordonnance est toujours taillée sur mesure. Qui plus est, nier ce pouvoir aux cours supérieures n'empêcherait pas pour autant les demandeurs de se prévaloir de ce que leur garantit l'art. 23, à savoir la fourniture en temps utile d'établissements d'enseignement dans la langue de la minorité. D'ailleurs, si la description que les appelants donnent de l'objet des auditions de comptes rendus est exacte, on voit difficilement comment ces auditions auraient pu être plus efficaces qu'un délai de construction assorti de la possibilité d'une ordonnance pour outrage au tribunal. À notre avis, la possibilité de se voir infliger cette sanction prévue par la loi en cas de non-respect de l'ordonnance enjoignant de respecter certains délais de construction aurait incité le gouvernement à remédier à la violation de l'art. 23 tout autant que des auditions de comptes

nature, it would not have led to the improper politicization of the relationship between the judiciary and the executive.

144 Also, it should be noted that the trial judge's order was not consistent with this Court's retention of jurisdiction in the *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. Far from purporting to supervise compliance with a remedy, the Court in that case retained jurisdiction to ask for the government's assistance in fashioning it. The Court did not thereby exceed its constitutional role by purporting to oversee administrative action. The Court was ultimately respectful of the executive's capacity to make the policy choices necessary to comply with constitutional requirements.

VII. Conclusion

145 In the result, the trial judge breached both a principle of procedural fairness and the constitutional principle of separation of powers, and it is not clear that alternative, less-intrusive remedial measures, would not have achieved the ends sought. While a trial judge's decisions with respect to remedies are owed deference, we believe that this must be tempered when fundamental legal principles are threatened. In light of these principles, and in the presence of untested alternative remedies, we would find that the present trial judge's retention of jurisdiction was not appropriate and just under s. 24(1). The Court of Appeal was correct in declaring that the order to retain jurisdiction for the purposes of reporting sessions was of no force and effect.

rendus dans le cadre desquelles le juge n'était pas habilité à rendre des ordonnances supplémentaires. En outre, sur le plan des principes constitutionnels, cette mesure incitative n'aurait pas, en raison de sa nature légale, politisé indûment les rapports entre les pouvoirs judiciaire et exécutif.

Il y a également lieu de souligner que l'ordonnance du juge de première instance n'est pas compatible avec la déclaration de compétence de notre Cour dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721. Dans cette affaire, loin de prétendre superviser l'exécution d'une réparation, la Cour s'est déclarée compétente pour demander au gouvernement de l'aider à concevoir la réparation à accorder. Elle n'a donc pas outrepassé son rôle constitutionnel en prétendant superviser une action administrative. En fin de compte, la Cour a respecté la capacité de l'exécutif de faire les choix nécessaires pour se conformer aux exigences de la Constitution.

VII. Conclusion

En définitive, le juge de première instance a violé à la fois un principe d'équité procédurale et le principe constitutionnel de la séparation des pouvoirs, et il n'est pas évident que d'autres mesures réparatrices moins attentatoires auraient donné le résultat souhaité. Quoiqu'il soit nécessaire de faire montre de déférence à l'égard des décisions que les juges de première instance rendent en matière de réparation, nous croyons que l'application de cette règle doit être tempérée lorsque des principes de droit fondamentaux sont menacés. Compte tenu de ces principes et de l'existence d'autres réparations que le juge n'avait pas préalablement testées, nous estimons qu'en l'espèce la déclaration de compétence du juge de première instance n'était pas convenable et juste au sens du par. 24(1). La Cour d'appel a donc eu raison de juger inopérante l'ordonnance dans laquelle le juge de première instance s'est déclaré compétent pour procéder à des auditions de comptes rendus.

In closing, we recur to the underlying purpose of s. 24(1), by referring to a passage in *Mills*, *supra*, at pp. 952-53, in which McIntyre J. wrote:

> To begin with, it must be recognized that the jurisdiction of the various courts of Canada is fixed by the Legislatures of the various provinces and by the Parliament of Canada. It is not for the judge to assign jurisdiction in respect of any matters to one court or another. This is wholly beyond the judicial reach. . . .
>
> . . . The absence of jurisdictional provisions and directions in the *Charter* confirms the view that the *Charter* was not intended to turn the Canadian legal system upside down. What is required rather is that it be fitted into the existing scheme of Canadian legal procedure.

The proper development of the law of constitutional remedies requires that courts reconcile their duty to act within proper jurisdictional limits with the need to give full effect to the rights of a claimant. To read into s. 24(1) a judicial *carte blanche* would not only "turn the Canadian legal system upside down", but would also be an injustice to the parties who come before the court to have their disputes resolved in accordance with basic legal principles. In our view, proper consideration of the principles of procedural fairness and the separation of powers is required to establish the requisite legitimacy and certainty essential to an appropriate and just remedy under s. 24(1) of the *Charter*.

Appeal allowed with costs, MAJOR, BINNIE, LEBEL *and* DESCHAMPS JJ. *dissenting.*

Solicitors for the appellants: Patterson Palmer, Halifax.

Solicitor for the respondent: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

146 En conclusion, nous revenons à l'objet sous-jacent du par. 24(1) en mentionnant un passage de l'arrêt *Mills*, précité, p. 952-953, où le juge McIntyre tient les propos suivants :

> En premier lieu, on doit reconnaître que la compétence des différentes juridictions canadiennes est fixée par les législatures des provinces et par le Parlement du Canada. Il n'appartient nullement aux juges d'attribuer à tel ou tel tribunal compétence relativement à certaines questions. Cette fonction se trouve complètement en dehors du ressort des tribunaux . . .
>
> . . . L'absence dans la *Charte* de dispositions et de directives touchant la compétence confirme le point de vue selon lequel celle-ci n'était pas censée provoquer le bouleversement du système judiciaire canadien. Au contraire, elle doit s'insérer dans le système actuel de la procédure judiciaire canadienne.

147 L'évolution harmonieuse du droit en matière de réparation fondée sur la Constitution exige que les tribunaux concilient leur obligation d'agir conformément à leur compétence juridictionnelle avec la nécessité d'assurer complètement le respect des droits du demandeur. Considérer que le par. 24(1) donne carte blanche aux tribunaux non seulement « provoquer[ait] le bouleversement du système judiciaire canadien », mais encore serait injuste pour les parties qui demandent aux tribunaux de régler leurs différends conformément à des principes de droit fondamentaux. À notre avis, pour respecter les exigences de légitimité et de certitude auxquelles est assujettie une réparation convenable et juste au sens du par. 24(1) de la *Charte*, il faut dûment prendre en considération les principes d'équité procédurale et de la séparation des pouvoirs.

Pourvoi accueilli avec dépens, les juges MAJOR, BINNIE, LEBEL *et* DESCHAMPS *sont dissidents.*

Procureurs des appelants : Patterson Palmer, Halifax.

Procureur de l'intimé : Procureur général de la Nouvelle-Écosse, Halifax.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitor for the intervener the Commissioner of Official Languages for Canada: Office of the Commissioner of Official Languages, Ottawa.

Solicitors for the intervener the Fédération nationale des conseillères et conseillers scolaires francophones: Patterson Palmer, Moncton.

Solicitors for the intervener Fédération des associations de juristes d'expression française de Common Law Inc.: Balfour Moss, Regina.

Solicitors for the intervener Conseil scolaire acadien provincial: Merrick Holm, Halifax.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de Terre-Neuve-et-Labrador : Procureur général de Terre-Neuve-et-Labrador, St. John's.

Procureur de l'intervenant le Commissaire aux langues officielles du Canada : Commissariat aux langues officielles, Ottawa.

Procureurs de l'intervenante la Fédération nationale des conseillères et conseillers scolaires francophones : Patterson Palmer, Moncton.

Procureurs de l'intervenante la Fédération des associations de juristes d'expression française de Common Law Inc. : Balfour Moss, Regina.

Procureurs de l'intervenant le Conseil scolaire acadien provincial : Merrick Holm, Halifax.

Federal Court Cour fédérale

Date: 20130404

Docket: T-1045-11

Citation: 2013 FC 342

Toronto, Ontario, April 4, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Pictou Landing Band Council and Ms. Maurina Beadle apply for judicial review of the decision of Ms. Barbara Robinson, Manager, Social Programs, Aboriginal Affairs and Northern Development Canada (AANDC), not to reimburse the Pictou Landing Band Council (PLBC) for in-home health care to one of its members beyond a normative standard of care identified by Ms. Robinson.

[2] The Applicants also request that the Court make an order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], directing the Respondent to reimburse the PLBC for exceptional costs incurred providing home care to Jeremy Meawasige and his mother, Ms. Beadle, from May 27, 2010 to the present.

[3] I have decided to grant the application for judicial review because I have determined Jordan's Principle is applicable in this case. Having decided as I have, I need not consider the application for an order for reimbursement pursuant to section 24(1) of the *Charter*.

[4] My reasons follow.

Background

[5] The Pictou Landing Band Council is the elected government of the Pictou Landing First Nation and makes governance decisions concerning its members, including the allocation of funding received from the federal government through block contribution agreements. This includes funding from AANDC and Health Canada to deliver continuing care services to members in need on the Pictou Landing Reserve.

[6] The other Applicant is Ms. Maurina Beadle, a 55 year-old member of the Pictou Landing First Nation. Her son, Jeremy Meawasige, is a teenager with multiple disabilities and high care needs. He has been diagnosed with hydrocephalus, cerebral palsy, spinal curvature and autism.

Jeremy can only speak a few words and cannot walk unassisted. He is incontinent and needs total personal care including showering, diapering, dressing, spoon feeding, and all personal hygiene needs. He can become self-abusive at times, and needs to be restrained for his own safety.

[7] Jeremy lives on the Pictou Landing Indian Reserve. Ms. Beadle, his mother, is Jeremy's primary caregiver and she was able to care for her son in the family home without government support or assistance until Ms. Beadle suffered a stroke in May 2010.

[8] After her stroke, Ms. Beadle was unable to continue to care for Jeremy without assistance. She was hospitalized for several weeks, and when she was released, required a wheelchair and assistance with her own personal care. The PLBC immediately started providing 24 hour care for both Ms. Beadle and Jeremy in their home. Between May 27, 2010 and March 31, 2011, the PLBC spent $82,164.00 on in-home care services for Ms. Beadle and Jeremy.

[9] The PLBC continued to provide home care support to Ms. Beadle and Jeremy. In October 2010, the Pictou Landing Health Centre arranged for an assessment of the family's needs. Since that time, the Health Centre has provided the family with in-home services as recommended by the assessment. From Monday to Friday, a personal care worker is present from 8:30 a.m. to 11:30 p.m. Over the weekends, there is 24 hour care. This level of care meets Jeremy's need for 24-hour care, less what his family can provide. The family providers are Ms. Beadle, to the degree she has recovered from her stroke and Jeremy's older brother, Jonavan, who attends to assist.

[10] Ms. Beadle and her son Jeremy have a deep bond with each other. His mother is often the only person who can understand his communication and needs. She spent many hours training him to walk and helping him with special exercises. She discovered his love of music and sings to him when he is upset or does not want to cooperate. Her voice calms him and can make him desist in self-abusive behaviour. She takes him on the pow-wow trail, travelling to communities where pow-wows are held. She says Jeremy is happiest when he is dancing with other First Nations people and singing to traditional music. Jeremy has never engaged in self-abusive behaviour on those occasions.

[11] By February 2011, the costs associated with caring for the family were approximately $8,200 per month. This represented nearly 80% of the PLBC's total monthly budget for personal and home care services funded by AANDC under the Assisted Living Program (ALP) and by Health Canada under the Home and Community Care Program (HCCP).

The Assisted Living Program and the Home and Community Care Program

[12] The ALP is administered by the PLBC and has both an institutional and in-home care component. The ALP provides funding for non-medical, social support services to seniors, adults with chronic illness, and children and adults with disabilities (mental and physical) living on reserve and includes such things as attendant care, housekeeping, laundry, meal preparation, and non-medical transportation.

[13] The Home and Community Care Program is also administered by the PLBC. Under the HCCP, the PLBC is required to prioritize and fund essential services before support services and Health Canada spells out what falls under each of these headings. The HCCP provides funding to assist with delivery of basic in-home health care services which require a licensed/certified health practitioner or the supervision of such a person. The PLBC determines how the contribution agreement dollars for the HCCP are spent in the provision of basic in-home health care services.

[14] The ALP and the HCCP are programs designed to complement each other, but not to provide duplicate funding for the same service. If a type of care, such as respite care, is already being paid for by one of the programs, it will not be an eligible expense under the other.

[15] Under the current block contribution agreement between the PLBC and Aboriginal Affairs and Northern Development Canada [AANDC] the PLBC receives $55,552.00 for funding eligible ALP services. Under the block contribution agreement between PLBC and Health Canada, the PLBC receives $75,364.00.

Request for Funding

[16] On February 16, 2011, Ms. Philippa Pictou, the Health Director at the Pictou Landing First Nation Health Centre contacted Ms. Susan Ross, the Atlantic Regional Home and Community Care Coordinator at Health Canada. Ms. Pictou expressed her opinion that Jeremy's case met the definition of Jordan's Principle and asked Ms. Ross to participate in case conferencing regarding his needs.

[17] Jordan's Principle was developed in response to a sad case involving a severely disabled First Nation child who remained in a hospital for over two years due to jurisdictional disputes between different levels of government over payment of home care on his First Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[18] Jordan's Principle is a child-first principle that says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. Jordan's Principle is a mechanism to prevent First Nations children from being denied equal access to benefits or protections available to other Canadians as a result of Aboriginal status.

[19] On February 28, 2011, a case conference was held regarding Jeremy's needs. In attendance were provincial care assessors from the Nova Scotia Department of Health and Wellness, the Pictou Landing Community Health Nurse, representatives of the PLBC, and Ms. Ross and Ms. Deborah Churchill on behalf of Canada.

[20] On April 19, 2011, a second case conference took place to discuss Jeremy's needs. Because Ms. Pictou had earlier requested that Jeremy's situation be considered a Jordan's Principle case, Ms. Barbara Robinson, the Jordan's Principal focal point for AANDC, was asked to participate. Both Ms. Ross and Ms. Robinson attended the second case conference, as did Mr. Troy Lees, a civil servant with the Nova Scotia provincial Department of Community Services.

[21] At the second case conference, Mr. Lees explained what the province would provide to a child with similar needs and circumstances off reserve. He explained there was a departmental directive that a family living off reserve could receive up to a maximum of $2,200 per month in respite services. Mr. Lees also stated that the province would not provide 24-hour care in the home by funding the equivalent to the costs of institutional care.

[22] On May 12, 2011, Ms. Pictou wrote to Health Canada and AANDC officials to formally request additional funding so that the PLBC could continue to provide home care services to Ms. Beadle and Jeremy. Attached to the request was a briefing note describing Ms. Beadle's and Jeremy's situation and their home care needs. Also attached was a copy of the Nova Scotia Supreme Court's March 29, 2011 decision in *Nova Scotia (Department of Community Services) v Boudreau*, 2011 NSSC 126, 302 NSR (2d) 50 [*Boudreau*].

[23] On May 27, 2011, Ms. Robinson, the Manager for Social Programs and the Jordan's Principle focal point for AANDC, emailed her decision to Ms. Pictou. The decision was delivered on behalf of both AANDC and Health Canada. In her decision, Ms. Robinson concluded there was no jurisdictional dispute in this matter as both levels of government agreed that the funding requested was above what would be provided to a child living on or off reserve. Ms. Robinson determined that Jeremy's case did not meet the federal definition of a Jordan's Principle case.

Decision Under Review

[24] Ms. Robinson [the Manager] informed Ms. Pictou of her decision to refuse the PLBC's request for additional funding for Jeremy's case by an extensive email dated May 27, 2011. She advised that she had an opportunity to confer with provincial health authorities and verified that the request for the provision of 24-hour home care for Jeremy would exceed the normative standard of care.

[25] The Manager recognized the First Nation's right to enhance the services that are provided to this family through own source revenues, but emphasized that services that exceed the normative standard of care and which are outside of the federal funding authorities would not be reimbursed through the AANDC Assisted Living or Health Canada Home and Community Care Programs.

[26] The Manager went on to state that provincial officials had confirmed that Jeremy's care needs would meet the placement criteria for long term institutional care, and that depending upon the classification of the long term care facility, the expenses associated with Jeremy's care would be fully funded by the AANDC Assisted Living, Institutional Care Program and/or the Province of Nova Scotia. However, she recognized this was a personal decision and that Jeremy's mother did not wish to place her child in a long term care facility.

[27] The Manager concluded by noting that although the case did not meet the federal definition of a Jordan's Principle case, AANDC and Health Canada would continue to work with stakeholders and to participate in case conferencing as required.

Relevant Legislation

[28] The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[29] The *Social Assistance Act*, RSNS 1989, c 432 [*SAA*] provides:

> 9 (1) Subject to this Act and the regulations the social services committee shall furnish assistance to all persons in need, as defined by the social services committee, who reside in the municipal unit.
>
> [Emphasis added]

[30] The *Municipal Assistance Regulations*, NS Reg 76-81 provides:

> 1. In these regulations
>
> (e) "assistance" means the provision of money, goods or services to a person in need, including
>
> (i) items of basic requirement: food, clothing, shelter, fuel, utilities, household supplies and personal requirements,

> (ii) items of special requirement: furniture, living allowances, moving allowances, special transportation, training allowances, special school requirements, special employment requirements, funeral and burial expenses and comforts allowances. The Director may approve other items of special requirement he deems essential to the well being of the recipient,
>
> (iii) health care services: reasonable medical, surgical, obstetrical, dental, optical and nursing services which are not covered under the Hospital Insurance Plan or under the Medical Services Insurance Plan,
>
> (iv) care in homes for special care,
>
> (v) social services, including family counselling, homemakers, home care and home nursing services,
>
> (vi) rehabilitation services;
>
> [Emphasis added]

Arguments of the Parties

Applicants' Submissions

[31] The Applicants organized their submissions according to the issues they identified.

What is the appropriate standard of review?

[32] The Applicants submit the central issue raised in this judicial review is whether the decision-maker ought to have exercised her discretion to provide additional funding to the PLBC for continuing care services. The Applicants submit that in the particular circumstances of this case, a positive decision was necessary to ensure Jeremy and Ms. Beadle continue to receive equal benefit

under the law as guaranteed by section 15 of the *Charter*. The Applicants submit the appropriate standard of review for issues involving the *Charter* is invariably one of correctness.

[33] The Applicants also submit that the Respondent erred in law by failing to properly interpret and apply the Nova Scotia *SAA* in accordance with the jurisprudence of the Nova Scotia Supreme Court. As an error of law, the Applicants submit the standard of review on this issue must also be correctness.

[34] Finally, the Applicants allege that the impugned decision was based on a serious misapprehension of the evidence following a gravely flawed fact-finding process. The Applicants submit this Court has held that the Government of Canada may be held to a reasonableness standard when exercising discretionary power pursuant to contribution funding agreements with First Nations Bands.

Did the decision-maker err in law in interpreting and applying the Nova Scotia Social Assistance Act?

[35] The Applicants submit the ALP Manual and the relevant funding agreement with the PLBC both state that funding is provided to bands to ensure individuals living on reserve receive services "reasonably comparable" to those provided by the province. The Applicants submit the Respondent denied additional funding to the PLBC on the grounds that Jeremy and Ms. Beadle would only be entitled to home-care services to a maximum of $2,200 per month if they lived off reserve. The Applicants argue that in reaching this decision, the Respondent committed an error of law.

[36] In Nova Scotia, social services and assistance for people with disabilities are provided under the *SAA*. Section 9 of the *SAA* states that, subject to regulations, the government "shall furnish assistance to all persons in need". Section 18 of the *SAA* provides the Governor in Council to make regulations pursuant to the *SAA*. Under s 1(e)(iv) of the *Municipal Assistance Regulations*, NS Reg 76-81 "assistance" is defined to include "home care".

[37] Nova Scotia's Direct Family Support Policy from 2006 states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". The Applicants submit Ms. Robinson conceded in cross-examination that Jeremy and Ms. Beadle met much of the criteria under the "exceptional circumstances" portion of the policy. However, the Applicants submit Ms. Robinson concluded this Policy did not reflect Nova Scotia's normative standard of care because a provincial official had issued a separate directive that stated that no funding in excess of $2,200 would ever be provided.

[38] The Applicants submit that in cross-examination Ms. Robinson also indicated that she had read the judgment in *Boudreau*, where the Nova Scotia Supreme Court concluded that the $2,200 monthly cap was not lawful or binding in any way.

[39] The Applicants cited from the Court decision in *Boudreau* at paras 61 & 62 stating:

> What does the SAA obligate the Department to do in the case at Bar? I note s. 27 of the SAA permits regulations "prescribing the maximum amount of assistance that may be granted" but no regulations relevant to the case at Bar are in place.

> …
>
> How much "assistance" as defined in the Municipal Assistance Regulations, is the "care" obligation *vis-à-vis* Brian Boudreau? In my view, the obligations of the Department pursuant to the SAA and Regulations are met when the "assistance" reasonably meets the "need" in each specific case.
>
> [Emphasis added]

[40] The Applicants submit that Ms. Robinson stated in cross-examination that the *Boudreau* judgment was "not relevant" to her decision. They submit this is an error of law and that the decision must be quashed for this reason alone.

Was the decision based on a serious misunderstanding of the evidence?

[41] The Applicants submit that even if the refusal to provide additional funding to the PLBC is not found to be discriminatory, the decision remains unreasonable as it was based on a serious misapprehension of evidence and on a gravely flawed fact finding process.

[42] The Applicants argue that the decision is unreasonable because it was based on an erroneous understanding of what was actually being requested by the PLBC. The Applicants point to Ms. Robinson's decision of May 27, 2011 to illustrate that Ms. Robinson denied the PLBC's request on the basis that 24 hour care was not available off reserve. However, the Applicants submit this was not what was requested by the PLBC.

[43] The Applicants point to a particular paragraph in Ms. Pictou's Briefing Note which was attached to the request for additional funding which states:

> Jeremy Meawasige's reasonable "need" for "homecare" is 24 hours a day, 7 days a week (less the time his family can reasonably attend to his care), but which department is obliged to meet his care needs?

The Applicants submit that this demonstrates that Ms. Robinson erred by characterizing the PLBC's request as funding for 24-hour services as well as additional assistance for meal preparation and light housekeeping.

[44] The Applicants argue that since Ms. Robinson failed to understand what was requested by the PLBC, it cannot be said that the request for additional funding was properly or fairly considered. The Applicants submit that Courts have held that a decision-maker's misapprehension of facts or evidence constitutes a palpable and overriding error. *Crane v Ontario (Director, Disability Support Program)*, (2006), 83 OR (3d) 321 (ON CA) at paras 35-36. The Applicants submit that in this case, Ms. Robinson's misapprehension of the PLBC's request not only affected the fact-finding process, but it formed the very basis for the denial of the request. The Applicants submit this amounts to an unreasonable error.

[45] The Applicants submit Ms. Robinson also ignored relevant information before her. The Applicants argue the provincial Home Care Policy confers up to $6,600 per month in home care services to people with disabilities, and is not capped at $2,200. The Applicants argue that presented

with this evidence, Ms. Robinson's assertion that the normative standard of care off reserve is invariably limited to $2,200 per month is untenable and that this amounts to an error in law.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[46] The Applicants claim that the decision to deny additional funding to the PLBC so that it could continue providing Jeremy and Ms. Beadle with home care was discriminatory and contrary to s. 15(1) of the *Charter*. The Applicants submit that while the federal government may enter into contribution agreements with Band Councils to provide services, such agreements cannot supersede its obligations under the *Charter*. The Applicants also submit that the government's exercise of discretionary powers must conform to the *Charter*. The Applicants argue that Ms. Robinson had a duty to consider the requests for additional funding under the relevant agreements in a manner that respects the Beadles' rights to receive equal benefits compared to those residing off reserve in their province of residence.

[47] The Applicants submit that for First Nations people living on reserve, Jordan's Principle is a means by which the fundamental objectives of s. 15(1) can be achieved.

[48] The Applicants argue that the exceptional and unanticipated health needs of the Beadle family jeopardize the PLBC's ability to provide the services the family reasonably requires and would likely be entitled to off reserve. The Applicants submit that Ms. Robinson had a duty to exercise her discretion under the relevant funding agreements in a manner that conforms to s. 15(1) of the *Charter*.

[49] The Applicant also argues that infringement under s. 15(1) cannot be justified under s. 1 of the *Charter*.

Respondent's Submissions

[50] The Respondent's submissions are similarly organized according to the issues identified by the Respondent.

The standard of review is reasonableness

[51] The Respondent submits the question of whether the service provided by the PLBC exceeded the provincial normative standard of care is a question of fact and requires a decision maker to gather facts about the assistance needs of the claimant, the treatments required, and the nature of the disabilities at issue. The Respondent asserts that it also requires fact gathering about the services that are currently available to similar people living off reserve and gathering factual information from provincial authorities and the federal program requirements. The Respondent submits the decision maker is entitled to give significant weight to the definition of the normative standard of care provided by the provincial authorities.

With respect to the assessment of the request made by the Applicants, the Respondent submits the determination of what was actually requested is a question of fact. Ms. Robinson was required to review Jeremy's situation and determine what their request constituted based on all of the material submitted. The Respondent submits that the Supreme Court of Canada in *Dunsmuir v New*

Brunswick, 2008 SCC 9 [*Dunsmuir*] has determined that where a question is a factual determination which depends purely on the weighing of evidence, the applicable standard of review is reasonableness. The Respondent submits that where, as here, the underlying factual and legal issues cannot be separated, the appropriate standard of review is still reasonableness. *Dunsmuir* at paras 53-54.

[52] The Respondent submits that the standard of reasonableness in the present case is particularly appropriate because the decision maker was asked to make a determination of eligibility under a federal policy for which she was the expert designated authority in a discrete and special administrative regime, with particular expertise, and with the unique ability to interact with provincial authorities whose cooperation is required to make the necessary determination. The Respondent submits that the reasonableness standard is the most reflective of the nature of the inquiry and the context in which it takes place.

[53] Regarding the *Charter* issue, the Respondent submits there is no standard of review of this issue in this Court. The Respondent argues that the *Charter* issue is a matter of constitutional law and not administrative law. This is the first time that the s. 15 argument has been raised in this matter. The Respondent submits this is the Court of first instance for the determination of the constitutional question.

Jordan's Principle was not engaged in this case

[54] The Respondent submits that in order to determine whether Jordan's Principle was engaged, Ms. Robinson had to determine if there was a jurisdictional dispute between Canada and Nova Scotia regarding the provision of funding for Jeremy's care and if the funding provided by Canada met the normative standard of care in Nova Scotia.

[55] The Respondent submits there was no jurisdictional dispute. Both Canada and Nova Scotia agreed that Jeremy's situation entitled him to receive institutional care and the Province acknowledged it would pay for those services over and above federal authority.

[56] The Respondent argues that Ms. Robinson determined the normative standard of care for in-home services in Nova Scotia was $2,200 per month as a result of her consultation with provincial officials from multiple departments, and after raising with them the applicability of the *SAA*, the Direct Family Support Policy, the Health and Wellness Program, and the recent decision of the Nova Scotia Supreme Court in *Boudreau*. The Respondent submits Ms. Robinson brought all of the Applicants' concerns and arguments before the provincial officials who informed her that the amount Jeremy would receive if he lived off reserve would be no more than $2,200.

[57] The Respondent asserts that Ms. Robinson's approach to determining the normative standard of care was correct and her conclusion that the request was beyond the normative standard of care was reasonable. The Respondent submits the provincial officials were in the best position to

say what services are available to residents of the province living off reserve and thus using this information as a basis for her decision was reasonable.

[58] Regarding the Applicants' submissions on the applicability of the *Boudreau* case, the Respondent submits *Boudreau* is a case about exceptional circumstances to the provincial standard of care but does not purport to change the standard of care itself. The provincial authority had already determined that Boudreau required in-home care in an amount less than what the PLBC has provided here. Also, the $2,200 limit had not previously been applied in Boudreau's case because he had been "grandfathered".

[59] The Respondent submits that the situation in *Boudreau* is quite different from Jeremy's because Boudreau was receiving exceptional circumstances funding prior to the October 2006 Directive from the Department of Community Services that indicated the maximum for respite in-home care was $2,200 per month, with no exceptions. Moreover, the Respondent submits Canada and Nova Scotia have already determined that the applicable standard for Jeremy is institutional, not respite care. The Respondent submits the Applicants are trying to use the *Boudreau* case to create a new standard of care that neither the Province nor Canada recognizes.

The request for additional funding was properly assessed

[60] The Respondent submits the evidence is clear that the Applicants requested the equivalent of 24-hour per day care, and only for Jeremy, contrary to the Applicants' arguments that Ms. Robinson misapprehended the request for additional funding.

[61] The Respondent submits the Applicants allege that they requested only funding for in-home care 24 hours per day, 7 days per week, less what Jeremy's own family could provide. For this proposition, the Respondent notes the Applicants rely on a specific sentence in the Briefing Note Ms. Pictou prepared on Jeremy's case which was sent to Health Canada and AANDC.

[62] The Respondent submits that in the immediately preceding paragraph in the Briefing Note, Ms. Pictou refers to 24 hour per day, 7 days a week care without any limitation regarding family assistance. Further, the Respondent argues that in the email with the formal request for additional funding (to which the Briefing Note was attached), Ms. Pictou stated:

> Even if it is not a Jordan's Principle case, I would like either the Federal or Provincial Government to reimburse us up to the level that he would qualify for if institutionalized (estimated by Community Services to be $350 per day).

[63] The Respondent submits it was reasonable for Ms. Robinson to conclude that the Applicants had requested the funding equivalent of 24 hour per day in-home care, and to verify whether that need was beyond the normative standard of care that the province would provide for in-home care for any Nova Scotian.

[64] Even if the Applicants' request could be interpreted as 24 hours minus what family members could provide (which is not admitted), the Respondent submits Ms. Robinson's factual finding that the Applicants' funding request exceeded the provincial standard for in-home care is reasonable given the evidence.

The decision does not violate section 15(1) of the Charter.

[65] The Respondent submits the decision not to grant the request for additional funding up to the daily rate of institutional care does not discriminate against Jeremy or any other First Nations child. First, the Respondent submits the benefit the Applicants requested is not a benefit provided by law. Under the ALP and HCCP, the PLBC has funding to provide their community with reasonably comparable services to those that would be available to the off reserve population. The Respondent submits funding for those benefits was and is available to Jeremy, and he is treated no differently from any other Nova Scotian with similar needs. There is no distinction on which a discrimination claim can rest.

[66] The Respondent submits that Jordan's Principle clearly is not engaged in this case. Jordan's Principle was adopted to ensure that no First Nations child would be denied services while governments debated over the jurisdictional responsibility to provide an eligible service. The Respondent argues that what is at stake in this case is not a jurisdictional dispute at all, but a claim that the PLBC's decision to provide in-home care to one of its members beyond the normative provincial standard of care legally obliges Canada to fund such services.

[67] The Respondent submits that the evidence clearly indicates that Jeremy's needs well exceed the levels of in-home care that would be available to anyone living off reserve in Nova Scotia. This was confirmed by the provincial officials who indicated that this level of in-home care would not be available and institutionalization would be the supported option. The Respondent submits this is not a case where the application of federal programs or policies denies a benefit that would otherwise be

available to someone else. The Respondent argues that the Applicants are attempting to create a benefit out of the ALP and HCCP that simply does not exist at law.

[68] The Respondent submits that neither Ms. Robinson's decision, nor the structure of the ALP and HCCP funding itself creates any distinction between Jeremy and a person with similar disabilities and care needs that is not living on a reserve. The Respondent notes that under the ALP and the HCCP, Canada has elected to provide funding for services that are reasonably comparable with people living off reserve so that no such distinction will be created. In this regard, the Respondent submits Ms. Robinson was required to verify the provincial normative standard of care, and did so by specifically enquiring with the provincial authorities whether, if Jeremy was living off reserve, funding for his care needs could be provided in-home. The Respondent submits that the information provided to Ms. Robinson from the provincial authorities was clear that if Jeremy lived off reserve, the supported option would be institutionalization, and that the maximum funding he could receive for in-home care if he remained in the home was $2,200 per month.

Issues

[69] In my view the following issues arise in this case:

1. Was Jordan's Principle engaged in this case?
2. Did the Manager properly assess the request for funding?
3. Did the Manager exercise her discretion in a manner that violated section 15(1) of the *Charter*?

Standard of Review

[70] The Supreme Court of Canada held in *Dunsmuir* that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53.

[71] The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[72] I have been unable to find any previous jurisprudence in which Jordan's Principle and the appropriate standard of review in determining the "normative standard of care off reserve" has been considered.

[73] I note that this matter involves questions of fact, and questions of mixed law and fact as they relate to a question of policy, that of Jordan's Principle. There is no privative provision and the matters are determined by an official designated as an AANDC departmental "focal point for Jordan's Principle" which is suggestive of expertise.

[74] The Manager was required to determine what it was that the PLBC was requesting. This was a factual determination based on the submissions of Ms. Philippa Pictou and information provided in case assessments. The Manager was also charged with determining whether this case met the criteria for a Jordan's Principle case. As the Jordan's Principle focal point for AANDC the Manager had a specialized expertise in this matter.

[75] Finally, the Manager was required to determine the normative standard of care that would be available from provincial health authorities to individuals living off reserve in the same circumstances as Jeremy. There appears to be no specific procedure for her to follow to determine what the normative standard of care is. The Manager was not specifically tasked with interpreting and applying the *SAA* or any jurisprudence. Essentially, it was a fact-finding exercise which would attract a reasonableness standard of review.

[76] In *Dunsmuir* questions of mixed fact and law and fact give rise to a standard of reasonableness. *Dunsmuir* at paras 50 and 53. Accordingly, I agree with the Respondent that the appropriate standard of review for the Manager's decision with respect to Jordan's Principle is reasonableness.

Analysis

[77] The issues in this case revolve around the question of on-reserve, in-home support for Jeremy, a First Nation child with multiple handicaps who was cared for by his mother until the time of her stroke.

[78] The Applicants submit Canadian children with disabilities and their families rely on continuing care generally provided by provincial governments according to provincial legislation. Provincial governments do not provide the same services to First Nations children who live on reserves. The federal government assumed responsibility for funding delivery of continuing care programs and services on reserve at levels reasonably comparable to those offered in the province of

residence. Such services have been historically funded and provided by the federal government through AANDC and Health Canada as a matter of policy.

[79] AANDC and Health Canada entered into a funding agreement with the PLBC to deliver services offered under the ALP and HCCP. The PLBC is required to administer the programs "according to provincial legislation and standards." The ALP funding agreement states the PLBC can seek additional funding in "exceptional circumstances" which are not "reasonably foreseen" at the time the agreement was entered into. The HCCP agreement has a similar clause which refers to necessary increases due to "unforeseen circumstances".

[80] Personal home care services off reserve for people with disabilities in Nova Scotia are governed by the *Social Assistance Act*. Section 9(1) of the *SAA* provides persons in need shall be provided with assistance, including home care and home nursing services. The Nova Scotia Department of Community Services implements the *SAA* and funds home care for people with disabilities through the Direct Family Support Policy. The policy provides that funding for home care shall not normally exceed $2,200 per month but states additional funding may be granted in exceptional circumstances.

Was Jordan's Principle engaged in this case?

[81] As stated above, Jordan's Principle was developed in response to a case involving a severely disabled First Nation child who remained in a hospital due to jurisdictional disputes between the federal and provincial governments over payment of home care services for Jordan in his First

Nation community. The child never had the opportunity to live in a family environment because he died before the dispute could be resolved. Jordan's Principle aims to prevent First Nations children from being denied prompt access to services because of jurisdiction disputes between different levels of government.

[82] Jordan's Principle says the government department first contacted for a service readily available off reserve must pay for it while pursuing repayment of expenses. While Jordan's Principle is not enacted by legislation, it has been approved by a unanimous vote of the House of Commons. Such a motion is not binding on the government.

[83] In order to understand the status of Jordan's Principle, it is helpful to have regard to the Hansard reports of the debate in the House of Commons. The private member's motion of May 18, 2007 reads:

> That, in the opinion of the House, the government should immediately adopt a child first principle, based on Jordan's Principle, to resolve jurisdictional disputes involving the care of First Nations children.

The motion was further debated on October 31, 2007 and again on December 5, 2007. At that time, a member of the governing party stated:

> I support this motion, as does the government. I am pleased to report the Minister of Indian Affairs and Northern Development and officials in his department are working diligently with their partners in other federal departments, provincial and territorial governments, and first nations organizations on child and family services initiatives that will transform the commitment we make here today into a fact of daily life for first nations parents and their children.

> That is not all. In addition to implementing immediate, concrete measures to apply Jordan's principle in aboriginal communities, I would like to inform the House and my colleague that the government is also implementing other measures to improve the well-being of first nations children…

The vote in the House of Commons on December 12, 2007 was unanimous, recording Yeas: 262, Nays: 0.

[84] Clearly, Jordan's principle was implemented by AANDC. Ms. Barbara Robinson, Manager – Social Programs, was designated the Jordan's Principle focal point for AANDC in Atlantic Canada. She described AANDC's implementation of Jordan's Principle in the following terms:

> Jordan's Principle is a child-first principle which exists to resolve jurisdictional disputes between the federal and provincial governments regarding health and social services for on-reserve First Nations children. It ensures that a child will continue to receive care while the jurisdictional dispute between the provincial and federal government is resolved but does not create a right to funding that is beyond the normative standard of care in the child's geographic location.
>
> Jordan's Principle applies when:
>
> a) The First Nations child is living on reserve (or ordinarily resident on reserve); and
>
> b) A First Nations child who has been assessed by health and social service professionals and has been found to have multiple disabilities requiring services from multiple service providers; and
>
> c) The case involves a jurisdictional dispute between a provincial government and the federal government; and
>
> d) Continuity of care – care for the child will continue even if there is a dispute about responsibility. The current service provider that is caring for the child will continue to pay for the necessary services until there is a resolution; and

> e) Services to the child are comparable to the standard of care set by the province – a child living on reserve (or ordinarily resident on reserve) should receive the same level of care as a child with similar needs living off-reserve in similar geographic locations.
>
> [Emphasis added]

[85] The Respondent submits there is no evidence that a jurisdictional dispute exists between the Province of Nova Scotia and the federal government for the provision of in-home care services. Both provincial health authorities and AANDC and Health Canada agree that the maximum Jeremy would receive if he lived on or off the reserve is $2,200 for home care services.

[86] I do not think the principle in a Jordan's Principle case is to be read narrowly. The absence of a monetary dispute cannot be determinative where officials of both levels of government maintain an erroneous position on what is available to persons in need of such services in the province and both then assert there is no jurisdictional dispute.

[87] I would observe that the normative standard of care in this case encompasses the provincial rules for the range of services available to persons in Nova Scotia residing off reserve. Jordan's Principle would have been meant to include services for exceptional cases where allowed for in the province where the child is geographically located.

[88] While there is an administratively prescribed maximum level of $2,200 per month for in-home services in Nova Scotia, the statutorily mandated policy has been found to encompass exceptional cases that may exceed that maximum.

[89] In *Boudreau*, a Nova Scotia Court heard an application for a *certiorari* order by the Department of Community Services of the Assistance Appeal Board decision holding that Boudreau, a 34-year old adult off reserve with multiple handicaps, was entitled to receive increased home care services under the exceptional circumstances provision of the Direct Family Services Policy and also under section 9 of the *SSA*.

[90] The Court found the application for *certiorari* to be valid because the Appeal Board erred in referring to *Employment Support and Income Assistance Act* instead of the *SAA*. However, the Court declined to make a *certiorari* order because it found the Department of Family Community Services had a clear obligation to provide "assistance" to Boudreau as required by section 9 of the *SSA*. In the alternative, the Court found even if the respite decision by the Department was discretionary, the facts accepted established the assistance was essential and the Department's obligations included the additional funding requested.

[91] The effective result in *Boudreau* is that a person with multiple handicaps residing off reserve was entitled to receive home services assistance over the $2,200 maximum limit which the Court observed "cannot override the legislation and regulations".

[92] In the case at hand, the Manager stated in cross-examination that her legal authority to fund is rooted under the Treasury Board authority referencing the applicable provincial policy. She acknowledged she was told by provincial officials that the provincial policy provides they can fund above the $2,200 level but they can't because of the directive. She acknowledged she was informed the Department of Family Services provincial policy says there may be exceptional circumstances

but provincial officials told her there would be no exceptional circumstances recognized. Ms. Robinson stated she needed to ensure she was following the provincial policy as it is being implemented.

[93] The Manager does not need to interpret the *SAA* and *Regulations*. She was clearly informed by provincial officials of the legislatively mandated policy. She knew the legislated provincial policy provided for exceptional circumstances. She knew the provincial officials were administratively disregarding the Department of Social Services legislated policy obligations. She also was put on notice by the PLBC of this issue as they had provided her with a copy the *Boudreau* decision. Ms. Robinson's mandate from Treasury Board does not extend to disregarding legislated provincial policy.

[94] Nova Scotia's Direct Family Support Policy states that the funding for respite to people with disabilities "shall not normally exceed" $2,200 per month. The Policy also states that additional funding may be granted in "exceptional circumstances". Finally, the Direct Family Support Policy explicitly states that First Nations children living on reserves are not eligible to services from the Province.

[95] As I stated, Jordan's principle is not to be narrowly interpreted.

[96] In this case, there is a legislatively mandated provincial assistance policy regarding provision of home care services for exceptional cases concerning persons with multiple handicaps which is not available on reserve.

[97] The Nova Scotia Court held an off reserve person with multiple handicaps is entitled to receive home care services according to his needs. His needs were exceptional and the *SAA* and its *Regulations* provide for exceptional cases. Yet a severely handicapped teenager on a First Nation reserve is not eligible, under express provincial policy, to be considered despite being in similar dire straits. This, in my view, engages consideration under Jordan's Principle which exists precisely to address situations such as Jeremy's.

[98] I find the Manager's finding that Jordan's Principle was not engaged is unreasonable.

Did the decision-maker properly assess the request for funding?

[99] The Manager took part in case conferences in which provincial health officials, First Nation officials and other AANDC and Health Canada officials took part. As a result of taking part in these case conferences, she had a full understanding of the issues and care needs Jeremy required. She was able to obtain opinions from the health assessors as to what was needed in Jeremy's case.

[100] I begin by addressing the factual issue in the PLBC request for funding. The monetary amount is necessarily linked to the extent of care home care support required for Jeremy although not for Ms. Beadle's personal needs who, presumably is within the normal scope of the ALP and HCCP funded home care services.

[101] The Applicants have stated that the request for additional funding was for "Jeremy Meawasige's reasonable 'need' for 'homecare' [as] 24 hours a day, 7 days a week, less the time his

family can reasonable attend to his care." [Emphasis added] This paragraph is found in the briefing note attached to the request for additional funding. On the other hand, the Respondent submits that the paragraph preceding the paragraph cited by the Applicants indicates that the request is for 24 hour care, 7 days a week.

[102] It is clear from the PLBC's submissions that at the time of the Manager's decision, the Pictou Landing Health Centre provided the family with a personal care worker from 8:30 am to 11:30 pm from Monday to Friday, and 24 hour care over the weekends by an off reserve agency. As I understand it, the 24 hour care on the weekends was in response to the Pictou Landing Health Centre being closed over the weekend rather than the need for 24-hour home care. On the evidence, the request for in home support did not cover the overnight period during weekdays.

[103] Moreover, one has to have regard for the extent of family support. It must be remembered that, before her stroke, Ms. Beadle provided for all of Jeremy's needs without government assistance. Ms. Beadle has recovered to some extent from her stroke and helps Jeremy as she can. Jeremy's older brother stays overnight to also assist. When one considers the importance of Ms. Beadle to Jeremy's communicative and personal needs, it seems to me that the family support is not inconsequential. I find the request for Jeremy's in home support was not for 24 hours a day, 7 days a week.

[104] It is not entirely clear exactly what amount is being requested. I do note, as the Respondent pointed out, the PLBC requested it would like to be reimbursed up to the level that Jeremy would qualify for if institutionalized. This amount, as estimated by the Department of Community

Services, was $350 per day. The $350 per day represents the equivalent expense to have Jeremy live in an institution. However, it is clear the PLBC was not asking to institutionalize Jeremy; rather, it was proposing that as a means of quantifying the request for funding.

[105] The Manager was required to assess the factual circumstances, the submissions made and the recommendations and information provided by the in-home assessors. I conclude that the Manager erred in determining that what was being requested was 24 hour in home care. This was an unreasonable finding based on all the information provided.

Application of Jordan's Principle

[106] Issues involving Jordan's Principle are new. The principle requires the first agency contacted respond with child-first decisions leaving jurisdictional and funding decisions to be sorted out later. Parliament has unanimously endorsed Jordan's Principle and the government, while not bound by the House of Commons resolution, has undertaken to implement this important principle.

[107] The PLBC is required by its contributions agreements with AANDC and Health Canada to administer the programs and services "according to provincial legislation and standards". When Ms. Beadle suffered her stroke, the PLBC responded and provided the needed services for her and Jeremy.

[108] The PLBC is a small First Nation with some 600 members. The exceptional circumstances here have required nearly 80% of the costs of the PLBC total monthly ALP and HCCP budget for personal and home care services. In short, this is not a cost that the PLBC can sustain.

[109] Jordan's Principle applies between the two levels of government. In this case the PLBC was delivering program and services as required by AANDC and Health Canada in accordance with provincial legislative standards. The PLBC is entitled to turn to the federal government and seek reimbursement for exceptional costs incurred because Jeremy's caregiver, his mother, can no longer care for him as she did before.

[110] I also note that the only other option for Jeremy would be institutionalization and separation from his mother and his community. His mother is the only person who, at times, is able to understand and communicate with him. Jeremy would be disconnected from his community and his culture. He, like sad little Jordan, would be institutionalized, removed from family and the only home he has known. He would be placed in the same situation as was little Jordan.

[111] I am satisfied that the federal government took on the obligation espoused in Jordan's Principle. As result, I come to much the same conclusions as the Court in *Boudreau*. The federal government contribution agreements required the PLBC to deliver programs and services in accordance with the same standards of provincial legislation and policy. The *SAA* and *Regulations* require the providing provincial department to provide assistance, home services, in accordance with the needs of the person who requires those services. PLBC did. Jeremy does. As a consequence, I conclude AANDC and Health Canada must provide reimbursement to the PLBC.

[112] It is to be observed that AANDC does not deny that home services be provided for Jeremy; rather it denies funding home services above the $2,200 administratively imposed provincial maximum which the Court found in *Boudreau* cannot override provincial legislation and regulation.

[113] The PLBC has met its obligations under its funding agreement with AANDC and Health Canada. The participating federal departments, particularly AANDC, have adopted Jordan's Principle. In my view, they are now required by their adoption of Jordan's Principle to fulfil this assumed obligation and adequately reimburse the PLBC for carrying out the terms of the funding agreements and in accordance with Jordan's Principle.

[114] In the alternative, much as in *Boudreau*, if the implementation of Jordan's Principle is discretionary, the federal government undertook to apply Jordan's Principle when exceptional circumstances arose. The facts of Jeremy's situation clearly establish the exceptional circumstances necessary to meet this requirement. The federal government cannot deny is obligation to provide additional funding not requested by PLBC for Jeremy.

[115] In either situation, the PLBC is, in my view, due reimbursement and additional funding from AANDC and Health Canada for Jeremy's needs. I note both AANC and Health Canada have expressed willingness to continue to work with PLBC to resolve the situation.

[116] Jordan's Principle is not an open ended principle. It requires complimentary social or health services be legally available to persons off reserve. It also requires assessment of the services and

costs that meet the needs of the on reserve First Nation child. The funding amount is not definitively determined in accordance with these requirements, in that the needs of Jeremy and Ms. Beadle are somewhat mixed, the case conferences did not appear to quantify the costs involved, and alternative reimbursement amounts were proposed. In result, the amount remains to be addressed by the parties.

[117] I conclude the decision-maker did not properly assess the PLBC request for funding to meet Jeremy's needs. The request for judicial review succeeds and the Manager's decision is quashed.

[118] There remains the question of whether or not, in the circumstances, reconsideration should be ordered. Clearly, deference is due to the administrative entity that makes decisions within the realm of its expertise.

[119] In *Stetler v the Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234 at paragraph 42, the Ontario Court of Appeal stated:

> While "[a] court may not substitute its decision for that of an administrative decision-maker lightly or arbitrarily", exceptional circumstances may warrant the court rendering a final decision on the merits. Such circumstances include situations where remitting a final decision would be "pointless", where the tribunal is no longer "fit to act", and cases where, "in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable": *Giguère v. Chambre des notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3 at para. 66.

[120] When one considers Jordan's Principle calls for an immediate timely response regardless of jurisdictional questions and the exceptional circumstances that arise here in Jeremy's case, I am of the view this constitutes an exceptional circumstance warranting this Court to not remit the matter back for reconsideration but to direct the that the PLBC is entitled to reimbursement beyond the $2,200 maximum as it relates to Jeremy's needs for assistance. The remaining question is the amount of reimbursement which I consider must be left to the parties.

Did the decision-maker exercise her discretion in a manner that violated section 15(1) of the Charter?

[121] Having decided as I did, I need not consider the *Charter* submissions by the Applicant and Respondent.

Costs

[122] In oral submissions, the Respondent did not oppose the Applicants' submission for costs, should the latter be successful, acknowledging the matter to be complex but suggesting the middle range of Column 3.

[123] I thank both parties for their able submissions in addressing this complex but important matter.

Conclusion

[124] I conclude the Manager failed to consider the application of Jordan's Principle in Jeremy's case as required.

[125] I also find the Manager's refusal of the PLBC reimbursement request was unreasonable.

[126] The application for judicial review is granted and I hereby quash the impugned decision.

[127] I do not remit the matter back for reconsideration but direct that the PLBC is entitled to reimbursement by the Respondent beyond the $2,200 maximum as it relates to Jeremy's needs for assistance.

[128] I would award costs to the Applicants for two counsel at the middle range of Column 3.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The May 27, 2011 decision of the Manager is quashed.

3. I direct that Applicant PLBC is entitled to reimbursement beyond the $2,200 maximum by the Respondent as it relates to Jeremy's needs for assistance.

4. Costs for the Applicants for two counsel at the middle range of Column 3.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1045-11
STYLE OF CAUSE:	PICTOU LANDING BAND COUNCIL AND MAURINA BEADLE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	APRIL 4, 2013

APPEARANCES:

Paul Champ Anne Levesque	FOR THE APPLICANTS
Jonathan D.N. Tarlton Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Champ & Associates Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

CITATION: Fontaine v. Canada (Attorney General), 2014 ONSC 4585
COURT FILE NO.: 00-CV-192059
DATE: 20140806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, MICHELLINE AMMAQ, PERCY ARCHIE, CHARLES BAXTER SR., ELIJAH BAXTER, EVELYN BAXTER, DONALD BELCOURT, NORA BERNARD, JOHN BOSUM, JANET BREWSTER, RHONDA BUFFALO, ERNESTINE CAIBAIOSAI-GIDMARK, MICHAEL CARPAN, BRENDA CYR, DEANNA CYR, MALCOLM DAWSON, ANN DENE, BENNY DOCTOR, LUCY DOCTOR, JAMES FONTAINE in his personal capacity and in his capacity as the Executor of the Estate of Agnes Mary Fontaine, deceased, VINCENT BRADLEY FONTAINE, DANA EVA MARIE FRANCEY, PEGGY GOOD, FRED KELLY, ROSEMARIE KUPTANA, ELIZABETH KUSIAK, THERESA LAROCQUE, JANE McCULLUM, CORNELIUS McCOMBER, VERONICA MARTEN, STANLEY THOMAS NEPETAYPO, FLORA NORTHWEST, NORMAN PAUCHEY, CAMBLE QUATELL, ALVIN BARNEY SAULTEAUX, CHRISTINE SEMPLE, DENNIS SMOKEYDAY, KENNETH SPARVIER, EDWARD TAPIATIC, HELEN WINDERMAN and ADRIAN YELLOWKNEE

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, THE PRESBYTERIAN CHURCH IN CANADA, THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH, THE BAPTIST CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN BAY, THE CANADA IMPACT NORTH MINISTRIES OF THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE DIOCESE OF SASKATCHEWAN, THE DIOCESE OF THE SYNOD OF CARIBOO, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (ALSO KNOWN AS THE METHODIST MISSIONARY SOCIETY OF CANADA), THE INCORPORATED SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE ANGLICAN CHURCH OF THE DIOCESE OF QUEBEC, THE SYNOD OF THE DIOCESE OF ATHBASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE ANGLICAN SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE SYNOD OF THE DIOCESE OF NEW WESTMINISTER, THE SYNOD OF THE DIOCESE

OF YUKON, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE BOARD OF HOME MISSIONS AND SOCIAL SERVICE OF THE PRESBYTERIAN CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, SISTERS OF CHARITY, A BODY CORPORATE ALSO KNOWN AS SISTERS OF CHARITY OF ST. VINCENT DE PAUL, HALIFAX, ALSO KNOWN AS SISTERS OF CHARITY HALIFAX, ROMAN CATHOLIC EPISCOPAL CORPORATION OF HALIFAX, LES SOEURS DE NOTRE DAME-AUXILIATRICE, LES SOEURS DE ST. FRANCOIS D'ASSISE, INSITUT DES SOEURS DU BON CONSEIL, LES SOEURS DE SAINT-JOSEPH DE SAINT-HYANCITHE, LES SOEURS DE JESUS-MARIE, LES SOEURS DE L'ASSOMPTION DE LA SAINTE VIERGE, LES SOEURS DE L'ASSOMPTION DE LA SAINT VIERGE DE L'ALBERTA, LES SOEURS DE LA CHARITE DE ST.-HYACINTHE, LES OEUVRES OBLATES DE L'ONTARIO, LES RESIDENCES OBLATES DU QUEBEC, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE JAMES (THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF JAMES BAY), THE CATHOLIC DIOCESE OF MOOSONEE, SOEURS GRISES DE MONTREAL/GREY NUNS OF MONTREAL, SISTERS OF CHARITY (GREY NUNS) OF ALBERTA, LES SOEURS DE LA CHARITE DES T.N.O., HOTEL-DIEU DE NICOLET, THE GREY NUNS OF MANITOBA INC.-LES SOEURS GRISES DU MANITOBA INC., LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE LA BAIE D'HUDSON – THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF HUDSON'S BAY, MISSIONARY OBLATES – GRANDIN PROVINCE, LES OBLATS DE MARIE IMMACULEE DU MANITOBA, THE ARCHIEPISCOPAL CORPORATION OF REGINA, THE SISTERS OF THE PRESENTATION, THE SISTERS OF ST. JOSEPH OF SAULT ST. MARIE, SISTERS OF CHARITY OF OTTAWA, OBLATES OF MARY IMMACULATE –ST. PETER'S PROVINCE, THE SISTERS OF SAINT ANN, SISTERS OF INSTRUCTION OF THE CHILD JESUS, THE BENEDICTINE SISTERS OF MT. ANGEL OREGON, LES PERES MONTFORTAINS, THE ROMAN CATHOLIC BISHOP OF KAMLOOPS CORPORATION SOLE, THE BISHOP OF VICTORIA, CORPORATION SOLE, THE ROMAN CATHOLIC BISHOP OF NELSON, CORPORATION SOLE, ORDER OF THE OBLATES OF MARY IMMACULATE IN THE PROVINCE OF BRITISH COLUMBIA, THE SISTERS OF CHARITY OF PROVIDENCE OF WESTERN CANADA, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE GROUARD, ROMAN CATHOLIC EPISCOPAL CORPORATION OF KEEWATIN, LA CORPORATION ARCHIÉPISCOPALE CATHOLIQUE ROMAINE DE ST. BONIFACE, LES MISSIONNAIRES OBLATES SISTERS DE ST. BONIFACE-THE MISSIONARY OBLATES SISTERS OF ST. BONIFACE, ROMAN CATHOLIC ARCHIEPISCOPAL CORPORATION OF WINNIPEG, LA CORPORATION EPISCOPALE CATHOLIQUE ROMAINE DE PRINCE ALBERT, THE ROMAN CATHOLIC BISHOP OF THUNDER BAY, IMMACULATE HEART COMMUNITY OF LOS ANGELES CA, ARCHDIOCESE OF VANCOUVER – THE ROMAN CATHOLIC ARCHBISHOP OF VANCOUVER, ROMAN CATHOLIC DIOCESE OF WHITEHORSE, THE CATHOLIC EPISCOPALE CORPORATION OF MACKENZIE-FORT SMITH, THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF PRINCE RUPERT, EPISCOPAL CORPORATION OF SASKATOON, OMI LACOMBE CANADA INC. and MT. ANGEL ABBEY INC

Defendants

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- *Julian N. Falconer, Julian K. Roy,* and *Junaid K. Subhan*, for the Truth and Reconciliation Commission
- *Joanna Birenbaum*, for the National Centre for Truth and Reconciliation
- *William C. McDowell, Jonathan E. Laxer* and *Susan E. Ross*, for the Chief Adjudicator of the Indian Residential Schools Adjudication Secretariat (Canada)
- *Paul Vickery, Catherine Coughlan* and *Brent Thompson*, for the Attorney General of Canada
- *Charles M. Gibson* and *Ian Houle*, for the Sisters of St. Joseph of Sault Ste. Marie
- *Stuart Wuttke*, for the Assembly of First Nations (in writing)
- *W.R. Donlevy, Q.C.*, and *Janine L. Harding*, for Twenty-Four Catholic Entities
- *Pierre-L. Baribeau*, for Nine Catholic Entities
- *Peter R. Grant, Diane Soroka,* and *Sandra Staats*, for Independent Counsel

HEARING DATES: July 14-16, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Can and should this court order that documents that contain information about what happened at the Indian Residential Schools be destroyed?

[2] My answer to this question is: yes, destruction, but only after a 15-year retention period, during which the survivors of the Indian Residential Schools may choose to spare some of their documents from destruction and instead have the documents with redactions to protect the personal information of others transferred to the National Research Centre for Truth and Reconciliation ("NCTR").

[3] During the 15-year of the retention period, there shall be a court approved notice program to advise the survivors of their choice to transfer some of the documents instead of having the documents destroyed.

B. OVERVIEW

[4] Under the Indian Residential Schools Settlement Agreement ("IRSSA"), the parties agreed to establish an Independent Assessment Process ("IAP") to pay Claimants compensation for claims of sexual abuse, serious physical abuse, and other wrongful acts suffered by them when they were students at Indian Residential Schools.

[5] Under the IRSSA, the parties also agreed to establish a Truth and Reconciliation Commission ("TRC") to create a historical record of the residential school system and ensure its legacy is preserved and made accessible to the public for future study and use.

[6] The Chief Adjudicator of the IAP and the TRC each bring a Request for Directions ("RFD") about what is to happen to documents produced and prepared for the IAP ("IAP Documents"), which contain narratives about what happened at the schools.

[7] The Chief Adjudicator seeks an order that the IAP Documents be destroyed. In the other RFD, although it was not its initial request, the TRC seeks an order that the IAP Documents, which it regards as an irreplaceable historical record of the Indian Residential School experience, be archived at Library and Archives Canada ("LAC"), which is a part of the Government of Canada.

[8] The Chief Adjudicator and the TRC both seek a direction that a notice program be developed to inform Claimants that some of their IAP Documents, particularly redacted memorialization transcripts of the IAP hearing, may be archived at the National Research Centre for Truth and Reconciliation ("NCTR"), if the Claimant consents.

[9] The NCTR, another invention of the IRSSA, submitted that it is well-positioned to protect the privacy interests of all affected parties and able to ensure that the perspectives of Aboriginal peoples are brought to bear on the preservation of the documents.

[10] The Sisters of St. Joseph of Sault Ste. Marie (the "Sisters of St. Joseph") bring a motion to quash the RFDs on the grounds that the TRC and the Chief Adjudicator do not have standing to bring the RFDs.

[11] Further, the Sisters of St. Joseph submit that it is the responsibility of the National Administration Committee ("NAC"), another agency of the IRSSA, to determine disputes involving document production, disposal, and archiving, and, thus, the RFDs are premature and the RFDs should be redirected to the NAC. The Chair of the NAC stated, however, that the court should decide the RFDs.

[12] The Assembly of First Nations ("AFN"), Twenty-Four Catholic entities (the "Twenty-Four Catholic Entities"), Nine Catholic Entities (the "Nine Catholic Entities"), the Sisters of St. Joseph, and "Independent Counsel," lawyers who acted for IAP Claimants, support a court order for destruction of the IAP Documents.

[13] The Government of Canada ("Canada"), which possesses a complete set of the IAP Documents, opposes the destruction of the IAP Documents which it says it possesses and, without interference, controls as government records.

[14] Canada's plan for the IAP Documents is to have Aboriginal Affairs and Northern Development Canada ("AANDC"), a government department, retain the documents for a retention period and then after the retention period, AANDC will transfer to LAC those IAP Documents identified as having "historical or archival value." The transfer will include the adjudicators' decisions and perhaps the transcripts of the IAP hearings. Under Canada's plan, the remaining IAP Documents will remain under the control of AANDC, but these documents eventually will be destroyed at a time of Canada's choosing.

[15] I pause here to note that it is a matter of concern raised by AFN and several others that pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Privacy Act*, R.S.C. 1985, c. P-21, LAC would be able to release information to third parties in specific circumstances, for example for research for statistical purposes, for native claims, or in the public interest. Further,

the regulations to the *Privacy Act* provide that an individual's personal information that is transferred to LAC by a government institution may be disclosed for research purposes 110 years after the birth of the individual. This concerns the AFN because many IAP Claimants are elderly and although personal information would not be disclosed while they are alive, personal information about them would be disclosed during the lifetimes of their children and grandchildren.

[16] Canada supports the idea that a notice program be developed to inform Claimants that their IAP Documents may be archived at the NCTR if the Claimant consents. To facilitate obtaining consents, Canada is prepared to undertake a court approved program. However, Canada says that the court has no jurisdiction to order a Notice Program. Canada's undertaking is entirely gratuitous.

[17] For the reasons that follow, I grant the Chief Adjudicator's request that the IAP Documents be destroyed. I make *in rem* - against the world - the following Order. It is ordered that: (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the Claimant, his or her IAP Application Form, hearing transcript, hearing audio recording, and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP Documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP Documents; (d) any other person or entity in possession of IAP Documents shall destroy them after the completion of the IAP hearings.

[18] Further, I direct that the TRC or the NCTR may give Claimants notice that with the Claimant's consent his or her IAP Application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged perpetrators or affected parties being redacted from the IAP Document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[19] By way of overview, my conclusions are as follows:

- The TRC and the Chief Adjudicator have standing, and the court has the jurisdiction to hear the two RFDs.
- The IAP Documents are governed by: the IRSSA, the *Class Proceedings Act, 1992*, S.O. 1992, the court's jurisdiction as a superior court to fashion remedies, the implied undertaking, and the common law and equity.
- The IAP Documents are neither court records nor government records.
- The court's jurisdiction extends over Canada's possession of the IAP Documents even if they are government records.
- The IAP Documents are confidential and private documents both as a matter of contract and as matter of the common law and equity.
- Although the court does not have the jurisdiction to determine how the IAP Documents may be used by the IAP adjudicators, the court has the *in rem* (against the world) jurisdiction to direct how the IAP Documents may be retained, archived, or destroyed after the IAP is completed. This jurisdiction exists regardless of whom has the custody or possession of the IAP Documents.
- The court's jurisdiction to control the disposition of the IAP Documents arises from three complementary sources; namely: (1) the court's jurisdiction to interpret, to enforce, and

to administer the IRSSA; (2) the court's jurisdiction with respect to the implied undertaking not to use documents produced in a litigious proceeding for a collateral purpose; and (3) the court's jurisdiction to remedy a breach of confidence.

- As a matter of contract interpretation, the IRSSA promises the destruction of the IAP Documents after a retention period during which the confidentiality of the documents can be abrogated only by court order for such matters as criminal proceedings or child protection proceedings. The court has the jurisdiction to determine a reasonable retention period which in this case would be 15 years.
- The court can and should exercise its jurisdiction to make a Destruction Order subject to a retention period of 15 years.
- Further, the court should order that a notice program be developed to notify Claimants that provided that the personal information about alleged perpetrators or affected parties is redacted, the Claimant's IAP Documents may be archived at the NCTR.
- The Destruction Order is not an amendment to the IRSSA and would safeguard against a breach of the agreement and against breaches of confidence.
- The Destruction Order is necessary: (a) to protect the confidentiality and privacy of the information contained in the IAP Documents; and (b) to prevent a serious risk to the administration of the IAP and the IRSSA.
- A notice plan to encourage voluntary delivery by Claimants of IAP Documents to the TRC and the NCTR with redactions to protect the personal information of others is an excellent idea, but involuntary disclosure of the IAP Documents would be a grievous betrayal of trust, a breach of the IRSSA, and it would foster enmity and new harms, not reconciliation.
- Destroying the IAP Documents is more likely to foster reconciliation, one of the goals of the IRSSA, but more to the point, destruction of the IAP Documents is what the parties contracted for under the IRSSA and destruction of the IAP Documents is what the common law and equity require.
- The destruction of the documents, however, should not come too soon because a survivor of the Indian Residential Schools may change his or her mind about the destruction of the IAP Documents. It is the survivor's story to tell or not tell and it is the survivor's individual decision that must be respected.

C. METHODOLOGY

[20] The two RFDS, the motion to quash, the competing plans and proposals for the IAP Documents raise a labyrinth of profound issues, some legal, some ethical, some political, some collective, and some intensely private and personal. The court's jurisdiction to respond to the RFDs is limited to its legal sphere. The court has no plenary jurisdiction to make a different settlement for the parties.

[21] By way of methodology, I will in these Reasons for Decision chart a route through the labyrinth of legal issues to the conclusion-exit that the court may and should direct the destruction of the IAP Documents, some immediately after the completion of the IAP, and the others after a 15-year retention period.

[22] It is in the nature of a labyrinth that its pathways meander, and it is in the nature of a labyrinth that it is difficult to find one's way out or to reach the exit. The route that I will chart has the following major guideposts or headings:

- Introduction
- Overview
- Methodology
- *Dramatis Personae*, the Infrastructure of the IRSSA and Canada's Roles
- The Arguments of the IRSSA Parties and Participants
- Evidentiary Background
- Principles of Contractual Interpretation Applicable to the IRSSA
- Factual Background
    - The IRSSA
    - The TRC
    - The NCTR
    - The IAP Procedure
    - Nature, Categorization, and the Confidentiality of the IAP Documents
    - Canada's Custody and Control of the IAP Documents and its Plan for Them
    - The Historical Value and Reliability of the IAP Documents
    - The History of the RFDs
- Discussion and Analysis
    - Introduction
    - The TRC's and the Chief Adjudicator's Standing
    - What Can and Should Happen to the IAP Documents?
- Conclusion

[23] Before getting underway, it is helpful to explain why several topics, some legal and some factual, must be explored in the discussion that follows, and it is helpful to say something about the reasons behind the ordering of the topic headings.

[24] In the case at bar, a better understanding of what is important in the factual account and to the eventual analysis is achieved by outlining the parties' legal arguments, the sources of their evidence, and the principles of contract interpretation before describing the facts and before undertaking the legal analysis.

[25] A fundamental component of the discussion and analysis will involve an interpretation of the IRSSA. As is normal in contract interpretation cases, it is necessary to understand the contractual nexus. It is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the contract: *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.).

[26] In the case at bar, the factual nexus involves understanding the circumstances that led to the signing of the IRSSA, and the factual nexus includes the purposes of the negotiations, the subjective aspirations and needs of the negotiating parties, and what they respectively had to sacrifice in order to achieve a settlement.

[27] All the parties to the RFDs, several of whom were not in existence at the time of the negotiations, led evidence about what the negotiators intended to achieve and what they had to sacrifice in signing the IRSSA. I have considered this evidence for the purpose of understanding the factual nexus of the IRSSA and also to understand the factual nexus of the various court orders that followed the parties' agreement. I have used the evidence solely for the purpose of understanding the surrounding circumstances and the goals to be achieved by the IRSSA.

[28] I do not use the evidence of the subjective intentions of the parties to supersede the language finally adopted by the parties.

[29] In these Reasons for Decision, before describing the complex factual background, it is necessary and helpful to identify and to describe the *dramatis personae* of the IRSSA, some of whom are creatures of the IRSSA itself, and to describe the elaborate infrastructure of the IRSSA.

[30] Particularly important to understanding these Reasons for Decision are the multifarious emanations of Canada and the different roles played by Canada. This is important because some of the parties' arguments focus or pivot on the nature of Canada's custody and control of the IAP Documents. For instance, Canada's argument relies on its own nature as a governing institution and on the nature of its possession of the IAP Documents. Metaphorically speaking, Canada views its handling of the IAP Documents as its right hand (AANDC) handing the documents to its left hand (LAC) and it says that it always has control over its government records.

[31] In a few instances, as I proceed through the sections of these Reasons for Decision, it shall be convenient to decide a legal issue before the analysis and discussion portion of these Reasons for Decision. For example, I shall discuss the principles of contract interpretation applicable to the IRSSA before I discuss the factual background and before I explain the analysis of the RFDs.

D. *DRAMATIS PERSONAE*, THE INFRASTRUCTURE OF THE IRSSA, AND CANADA'S ROLES

1. *Dramatis Personae* and the Infrastructure of the IRSSA

[32] There are four major components to the IRSSA. First, Canada placed $1.9 billion into a trust fund to fund payments of the "Common Experience Payment" ("CEP") to Class Members who resided at an Indian Residential School during the class period. Based on residence eligibility, a Class Member receives $10,000.00 for the first year and $3,000.00 for each additional year at any acknowledged Residential School. Second, the IRSSA established the Independent Assessment Process ("IAP") under which Class Members who suffered physical or sexual abuse at an Indian Residential School may claim compensation commensurate with the seriousness of their injuries. Third, the IRSSA established the Truth and Reconciliation Commission ("TRC") with a mandate to create an historical record of the residential school system to be preserved and made accessible to the public for future study. The fourth component is that the Class Members released their legal claims in exchange for the benefits of the IRSSA. The releases extended to Canada and the Church Entities who were the named Defendants. The releases also extended to the Defendants' employees, agents, officers, directors, shareholders,

partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns.

[33] Nine provincial and territorial superior courts certified the class action and approved the the IRSSA. The judges of the nine courts are designated as **Supervising Judges**. Supervising judges can hear applications to add institutions to the list of Indian Residential Schools for the purpose of CEP and IAP claims. Among other things, supervising judges hear appeals from decisions of the NAC with respect to eligibility for the CEP. Supervising judges hear RFDs, and the judges have administrative and supervisory jurisdiction over the IRSSA.

[34] Two of the Supervising Judges are **Administrative Judges**. Under the Court Administration Protocol the two Administrative Judges receive and evaluate RFDs and determine whether a hearing is necessary, and if so, in which jurisdiction.

[35] The judges, however, cannot amend the IRSSA in the guise of administrating it. See: *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283; *Lavier v. MyTravel Canada Holidays Inc.*, 2011 ONSC 3149.

[36] Pursuant to the Implementation Order, **Court Counsel** was appointed as legal counsel to assist the courts in their supervision over the implementation and administration of the Agreement. Court Counsel's duties are determined by the courts. A solicitor-client relationship exists between the Supervising Judges and Court Counsel.

[37] Pursuant to the IRSSA Implementation Order, Crawford Class Action Services was appointed **Monitor** of the IRSSA. The role of the Monitor is to receive, on behalf of the supervising courts, all information relating to the implementation or administration of the CEP and the IAP. The Monitor is required to take directions from and report to the supervising courts about the implementation and administration of the IRSSA, as directed by the courts.

[38] **The National Administration Committee** ("NAC") supervises the implementation of the IRSSA. The NAC is comprised of seven representative members, including Canada, the AFN, Inuit Entities, Church Entities, and three representatives of plaintiffs' counsel.

[39] The NAC prepares policy protocols and standard operating procedures. The NAC hears appeals with respect to CEP eligibility. It also determines references from the TRC. To be adopted, NAC decisions require five votes in favour. If five votes are not reached, four NAC members may refer the dispute to the court in the jurisdiction where the dispute arose by way of a reference. Subsection 4.11(14) of the IRSSA stipulates that the unanimous consent of the NAC is required for an amendment to the IRSSA to be considered by the court.

[40] The **Oversight Committee** ("OC") is responsible for supervising the IAP. It is comprised of an independent Chair (Professor Mayo Moran, who until recently was Dean of the University of Toronto's Faculty of Law) and eight other members consisting of: two former students, two Class Counsel representatives, two Church representatives, and two representatives for Canada. OC decisions require seven votes in favour (with the Chair voting) to be adopted. The OC is responsible for the recruitment and oversight of the Chief Adjudicator, recruitment and appointment of adjudicators, approval of adjudicator training programs, recruitment and appointment of experts for psychological assessments, instructions about the interpretation and application of the IAP, monitoring the implementation of the IAP and making recommendations to the NAC on changes to the IAP as necessary to ensure its effectiveness.

[41] **Canada**, which is defined in the IRSSA to mean the Government of Canada, was a party Defendant to the class actions and individual actions that were settled by the IRSSA. Canada signed the IRSSA. CEP Applications are administered and adjudicated at first instance by Canada, as are the applications for reconsideration of CEP eligibility determinations. Canada is a member of the NAC and a member of the OC. Canada is a party to applications to add to the list of Indian Residential Schools. Canada is the responding party to challenge the claims of IAP Claimants through the Settlement Agreement Operations branch ("SAO"), described below, which is another branch of AANDC. Canada through its department, the AANDC, provides the human resources for the Secretariat and the SAO. Canada includes LAC, which is a branch of Canada's public administration. Lawyers from Canada's Department of Justice are sometimes engaged as legal counsel for Canada's various roles under the IRSSA.

[42] **The Chief Adjudicator,** who is appointed pursuant to court Order under the IRSSA, supervises the IAP and the adjudicators that decide IAP Applications. The Chief Adjudicator's decisions are not subject to judicial review since he is an officer of the court and is not exercising a statutory power of decision: *Fontaine v. Duboff Edwards Haight & Schachter*, 2012 ONCA 417.

[43] The IAP is administered by the **Indian Residential Schools Adjudication Secretariat** (the "Secretariat"). The Secretariat provides secretarial and administrative support for the Chief Adjudicator. Its mandate is to implement and administer the IAP under the direction of the Chief Adjudicator.

[44] The Secretariat is a branch of AANDC, which is a department of Canada. However, save for specific financial, funding, auditing and human resource matters, the Secretariat is under the direction of the Chief Adjudicator and independent from the AANDC. The Secretariat's employees work in separate office space with separately keyed entrances. The Secretariat does utilize AANDC's electronic records system, but it maintains separate paper files from AANDC.

[45] The Secretariat began in 2007 as a branch of The Office of Indian Residential Schools Resolution Canada, a government department that in 2008 integrated with the Department of Indian Affairs and Northern Development which changed its name to AANDC in 2011.

[46] **Aboriginal Affairs and Northern Development Canada** ("AANDC") is a department of the federal government; i.e. of Canada. As a department of Canada, AANDC is subject to the *Library and Archives of Canada Act*, S.C. 2004, c. 11. As noted above, the Secretariat is a branch of AANDC but also autonomous with respect to its day to day administration of the IAP. As noted immediately below, "SAO" is another branch of AANDC.

[47] **The Settlement Agreement Operations Branch** ("SAO") is a branch of a section of the AANDC known as the **Resolution and Individual Affairs Section (**"RIAS"). SAO has possession and control of the IAP Documents. It has a complete set of IAP Documents. Its possession overlaps with the Secretariat's possession and control.

[48] SAO is responsible for representing Canada at IAP hearings, performing and providing Canada's document disclosure obligations to the TRC and in respect to individual IAP claims. RIAS is responsible for paying out compensation for settlements reached under the IAP.

[49] **Library and Archives Canada** ("LAC"). Under the *Library and Archives Canada Act*, S.C. 2004, c. 11, LAC is a branch of the federal public administration presided over by a

Minister and under the direction of the Librarian and Archivist. Under the *Act*, "government records" may only be destroyed with the written consent of the Librarian and Archivist. Government records with historical or archival value as determined by the Librarian and Archivist must be transferred to LAC.

[50] One of the non-compensatory aspects of the IRSSA was the creation of a **Truth and Reconciliation Commission** ("TRC"), whose mandate is, in part, to identify sources and create as complete an historical record as possible of the residential school system and its legacy to be preserved and made accessible to the public for future study and use.

[51] To assist the TRC in fulfilling its mandate, the IRSSA provides that Canada and the churches will provide all relevant documents in their possession or control to and for the use of the TRC.

[52] **The National Centre for Truth and Reconciliation** ("NCTR") was constituted pursuant to article 12 of Schedule "N" to the IRSSA. The NCTR is mandated to archive and store all records collected by the TRC and other records relating to Indian Residential Schools. The collections are to be accessible to former students, their families and communities, the general public, researchers, and educators.

[53] **The Assembly of First Nations** ("AFN") plays a political role in advocating on behalf of First Nations. It is a signatory of the IRSSA. It was largely responsible for the creation of the Alternative Dispute Resolution ("ADR"), which was a predecessor or model for the IAP. The AFN is member of the NAC. It has an on-going interest in protect the interests of all of the residential school survivors, especially to ensure that the overarching principles of healing and reconciliation are at the forefront of the IRSSA.

[54] **The Sisters of St. Joseph of Sault Ste. Marie** (the "Sisters of St. Joseph") is a party to the IRSSA. The Sisters of St. Joseph was formed in 1936, and its mission has been charitable works caring for women and children, the poor, the sick and the elderly, the disabled, and disadvantaged in Northern Ontario. From 1937 to 1968, the Sisters of St. Joseph owned and operated St. Joseph's Boarding School at Fort William, Ontario, which for a time was an Indian Residential School.

[55] **The Twenty-Four Catholic Entities,** who are parties to the IRSSA, are: Les Oeuvres Oblates de l' Ontario; Les Residences Oblates du Quebec; Soeurs Grises de Montreal /Grey Nuns of Montreal; Sisters of Charity (Grey Nuns) of Alberta; Les Soeurs de La Charite des T.N.O.; Hotel-Dieu de Nicolet; The Grey Nuns of Manitoba Inc.- Les Soeurs Grises du Manitoba Inc.; The Sisters of Saint Ann; Sisters of Instruction of the Child Jesus; The Sisters of Charity of Providence of Western Canada; Immaculate Heart Community of Los Angeles CA; Missionary Oblates- Grand in Province; Les Oblates de Marie Immaculee du Manitoba; Oblates of Mary Immaculate- St. Peter's Province; Order of the Oblates of Mary Immaculate in the Province of British Columbia; La Corporation Episcopale Catholique Romaine de Grouard; Roman Catholic Episcopal Corporation of Keewatin; The Catholic Episcopale Corporation of Mackenzie; Roman Catholic Episcopal Corporation of Prince Rupert; Sisters of Charity Halifax; The Roman Catholic Bishop of Kamloops Corporation Sole; Roman Catholic Episcopal Corporation of Halifax; Sisters of the Presentation; and Roman Catholic Archiepiscopal Corporation of Winnipeg.

[56] **The Nine Catholic Entities**, who are parties to the IRSSA, are: Les Sœurs de Notre-Dame Auxiliatrice, Les Sœurs de Saint-François d'Assise, L'Institut des Sœurs du Bon-Conseil also known as Les Sœurs de Notre-Dame du Bon-Conseil de Chicoutimi, Les Sœurs de Saint-Joseph de Saint-Hyacinthe, Les Sœurs de Jésus-Marie, Les Sœurs de l'Assomption de la Sainte-Vierge, Les Sœurs de l'Assomption de la Sainte-Vierge de l'Alberta, Les Sœurs Missionnaires du Christ-Roi and Les Sœurs de la Charité de Saint-Hyacinthe. The Nine Catholic Entities are all private corporations established by an act of the Québec National Assembly or, with the exception of the Defendant Les Sœurs de l'Assomption de la Sainte-Vierge de l'Alberta, which was established by an act adopted by the Legislative Assembly of Alberta.

[57] Under the IRSSA, **Independent Counsel** are Plaintiffs' lawyers who signed the IRSSA Agreement, excluding legal counsel who signed in their capacity as counsel for the AFN or for the Inuit Representatives or Counsel and excluding members of the Merchant Law Group or members of any of the firms of the National Consortium.

2. Canada's Roles under the IRRSA

[58] The parties to these RFDs have made the nature of Canada's possession of the IAP Documents a critical factor in their arguments, and it is, therefore, necessary to have an understanding of Canada's multifarious roles under the IRSSA and its position with respect to its custody and control of the IAP Documents.

[59] By way of analogy, Canada's role in the IAP seems to be that of some sort of trinity where there are three emanations from one omnipotent unity. In the context of the IAP, first, Canada has possession of the IAP Documents through SAO, which is the branch of AANDC that is defending its interests in the IAP and challenging the Claimants. Simultaneously, second and third, Canada has possession of the IAP Documents through the split personality of the Secretariat, another branch of AANDC but also autonomous of Canada for the purposes of the IAP's adjudication function, where the Secretariat is under the command of the Chief Adjudicator, who is a court appointed official recruited by the OC.

[60] Perhaps the kabbala, which has ten emanations of the godhead, is a better analogy than the trinity because Canada's emanations, sometimes conflicting emanations, are present throughout the IRSSA. As discussed further in the discussion of the facts below, it was a fact of life of the negotiations and of their outcome, the IRSSA, that Canada, which was providing billions of dollars of funding for the settlement, would have a role in administering the settlement funds and providing the infrastructure for the CEP and IAP while at the same time having a right to challenge entitlements.

[61] For example, Canada administers the CEP, but it is the first level of appeals for CEP claimants, and it is a member of the NAC, which hears the second level of appeals. The CEP and IAP payments depend upon a person attending an Indian Residential School, and Canada can oppose applications to have a school added to the list of Indian Residential Schools. Canada has an obligation to provide documents for IAP claims, but Canada has a right to challenge the Claimants. Canada has an obligation to provide documents for the TRC, but it has a right to challenge the scope of that obligation. Canada seeks to archive the IAP Documents at LAC, which is another emanation of Canada.

[62] I foreshadow here to say, as discussed again in the analysis and discussion part of these Reasons for Decision, in my opinion, the fact that Canada happens to have in its various emanations and for various purposes physical possession of the IAP Documents does not oust the court's jurisdiction over the IAP Documents.

[63] Justice Winkler made it clear that something special and unique was engaged by Canada's role under the IRSSA when he emphasized that ultimately the court would control the administration of the IAP and the IRSSA. In *Baxter v. Canada Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.), Justice Winkler stated at paragraphs 37 and 38 of his judgment, which approved the IRSSA:

> I preface my comments with a caution that the court has a general concern whenever a defendant proposes to change roles and become the administrator of a settlement. There must be a clear line of demarcation between the defendant as litigant and the defendant as neutral administrator. Further, there must be an express recognition by the defendant proposed as administrator that the settlement is being implemented and administered in a court supervised process and not subject to the direction of the defendant either directly or indirectly. The difficulty in drawing the distinction, and adhering to the underlying concept, is the reason why the court must be especially circumspect when considering the approval of a defendant as administrator. The line is even more blurred in this case where Canada, as defendant, will still be an instructing respondent in respect of individual claims made under the IAP.
>
> In order to satisfactorily achieve this requisite separation, the administrative function must be completely isolated from the litigation function with an autonomous supervisor or supervisory board reporting ultimately to the courts. This separation will serve to protect the interests of the class members and insulate the government from unfounded conflict of interest claims. … Rather, the requisite independence and neutrality can be achieved by ensuring that the person, or persons, appointed by Canada with authority over the administration of the settlement shall ultimately report to and take direction, where necessary, from the courts and not from the government.

[64] In *Fontaine v. Canada (A.G.)*, 2013 ONSC 684, a RFD brought by the TRC, Justice Goudge held that the TRC is a unique creation and while a federal government department with respect to the application of federal privacy legislation, it was not a federal department for all purposes.

[65] Canada is obviously not a creation of the IRSSA but, in my opinion, its role in the IRSSA and the IAP is a creation of the IRSSA and subject to the court's jurisdiction over the administration of a class action settlement. The court's jurisdiction extends to government records if that is what the IAP Documents also happen to be.

[66] I will return to these topics later in these Reasons for Decision.

E. PRINCIPLES OF CONTRACTUAL INTERPRETATION APPLICABLE TO THE IRSSA

[67] The IRSSA is a contract, and as a contract, its interpretation is subject to the norms of the law of contract interpretation.

[68] The primary goal of contract interpretation is to give effect to the intentions of the parties at the time the contract was made: *Skye Properties Ltd. v. Wu*, 2010 ONCA 499 at para. 79. The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement:

Consolidated-Bathurst Export Ltd. v. *Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[69] In searching for the intent of the parties at the time when they negotiated their contract, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms: *Frenette* v. *Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 64. Provisions should not be read in isolation but in harmony with the agreement as a whole: *McClelland and Stewart Ltd.* v. *Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Hillis Oil and Sales Limited* v. *Wynn's Canada*, [1986] 1 S.C.R. 57; *Scanlon* v. *Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.)

[70] Generally, words should be given their ordinary and literal meaning: *Indian Molybdenum Ltd.* v. *The King*, [1951] 3 D.L.R. 497 (S.C.C.). However, if there are alternatives, the court should reject an interpretation or a literal meaning that would make the provision or the agreement ineffective, superfluous, absurd, unjust, commercially unreasonable, or destructive of the commercial objective of the agreement: *Consolidated-Bathurst Export Ltd.* v. *Mutual Boiler & Machinery Insurance Co. supra, Scanlon* v. *Castlepoint Dev. Corp., supra*; *Aita* v. *Silverstone Towers Ltd.* (1978), 19 O.R. (2d) 681 (C.A.); *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para. 24.

[71] As noted earlier in these Reasons for Decision, it is a canon of contract interpretation that while evidence of negotiations and of the parties' subjective intent is not admissible to interpret the contract, in interpreting a contract, the court may have regard to the surrounding circumstances; that is, the factual background and the purpose of the contract: *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A); *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.).

[72] After a careful review of the background to the contract, a court will imply terms to a contract based on the presumed intention of the parties and to give the contract business efficacy: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Dynamic Transport. Ltd.* v. *O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072; *G. Ford Homes Ltd.* v. *Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (C.A.); *Pigott Const. Co.* v. *W.J. Crowe Ltd.*, [1961] O.R. 305 (C.A.); affd. [1963] S.C.R. 238; *Luxor, Ltd.* v. *Cooper*, [1941] 1 All E.R. 33 (H.L.).

[73] In *Canadian Pacific Hotels Ltd. v. Bank of Montreal, supra*, the Supreme Court identified three situations where terms will be implied. See also: *M.J.B. Enterprises Ltd. v. Defence Construction, supra*; *Lefebvre* v. *HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (S.C.C.) and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 137.

[74] In the first situation, which is not pertinent to the case at bar, a term is implied as a matter of an established custom or usage.

[75] In the second situation, which is pertinent, a term is implied as a matter of presumed intention; i.e., the court adds what the parties know and would, if asked, unhesitatingly agree to be part of the bargain. A term is implied as a matter of presumed intention because it is necessary to give business efficacy to a contract. The test of the implication is one of necessity. As to a test of necessity, Lord Wilberforce said in *Liverpool City Council* v. *Irwin*, [1977] A.C. 239 at p.

254: "such obligation should be read into the contract as the nature of the contract itself requires, no more, no less: a test, in other words, of necessity."

[76] In the third situation, which is not pertinent to the case at bar, a term is implied as an incident of particular class of relationship. The implication in this third situation does not depend upon any presumed intention, but the implication still must meet the test of necessity.

[77] In determining whether the parties would have intended an unexpressed term to be a part of their contract, the court must be careful not to impose its own view of what reasonable parties would or ought to have intended to give their contract business efficacy. In this regard, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, *supra*, at para. 29, Justice Iacobucci stated for the Supreme Court:

> A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[78] An important point that I take from this passage is that in the process of determining whether to imply a term to a contract, the court is involved in a process of interpreting the contract that the parties actually signed; it is not determining the presumed intent of what either party acting reasonably ought to have intended when he or she signed the contract. Thus, as Justice Iacobucci notes, if there is evidence of a contrary intention in the actual contract on the part of either party, an implied term may not be found.

[79] In deciding whether to imply a contract term, the court does not look for an objective intent of what a reasonable contracting party ought to have intended. The court is not engaged in an exercise of making a better contract for one or both of the parties. The court remains engaged in an exercise of interpreting the actual contract signed by the parties. As Lord Hoffman explained in *Attorney General of Belize & Ors. v. Belize Telecom Ltd. v. Amor*, [2009] UKPC 10 at para. 21: "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

[80] Earlier in his judgment, Lord Hoffman explained how the implication of terms can form part of the interpretative act of determining the meaning of the parties' contract. He stated at paras. 16-18:

> 16. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed …. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

> 17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

[81] The IRSSA itself contains two principles of construction and interpretation. Article 1.04 states that the *contra proferentem* rule does not apply, and Article 18.06 provides that the Settlement Agreement is the entire agreement between the parties. These articles provide as follows:

> *1.04 No Contra Proferentem*
>
> The parties acknowledge that they have reviewed and participated in settling the terms of this Agreement and they agree that any rule of construction to the effect that any ambiguity is to be resolved against the drafting parties is not applicable in interpreting this Agreement.
>
> *18.06 Entire Agreement*
>
> This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and cancels and supersedes any prior or other understandings and agreements between the Parties with respect thereto. There are no representations, warranties, terms, conditions, undertakings, covenants or collateral agreements, express, implied or statutory between the Parties with respect to the subject matter hereof other than as expressly set forth or referred to in this Agreement.

[82] In *Fontaine v. The Attorney General of Canada*, 2013 ONSC 684, Justice Goudge discussed the principles of interpretation applicable to the IRSSA. He stated at para. 68:

> The principles of interpretation applicable to the Settlement Agreement are straightforward. The text of the agreement must be read as a whole. The plain meaning of the words used will be important as will the context provided by the circumstances existing at the time the Settlement Agreement was created. A consideration of both is necessary to reach a proper conclusion about the meaning of the contested provisions.

[83] During the argument of the RFDs, the Chief Adjudicator submitted that the honour of the Crown was an interpretative principle in interpreting the IRSSA notwithstanding that the IRSSA was not a treaty between Canada and its Aboriginal peoples and notwithstanding that parties not bound by the honour of the Crown; i.e. the Church Entities, were signatories of the IRSSA.

[84] I agree with the Chief Adjudicator's submission, but it is necessary to make it very clear that the honour of the Crown, is only operative in the case at bar, as an interpretative principle; it is not operative as a source of obligations independent of the IRSSA. The honour of the Crown principle is helpful in interpreting the IRSSA, but it cannot add or subtract or change the promises made by the parties as expressed by the IRSSA.

[85] The honour of the Crown is a fundamental concept that exists as a source of obligations independent of fiduciary duties and treaty obligations: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 51. The honour of the Crown is a general principle that underlies all of the Crown's dealings with Aboriginal peoples, but it cannot be used to call into existence undertakings that were never given: *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para. 13.

[86] The honour of the Crown infuses the processes of treaty making and treaty interpretation, and in making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of sharp dealing: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 19, 35. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights are approached in a manner which maintains the integrity of the Crown, which is assumed to honour its promises without any sharp dealing: *Simon v. The Queen*, [1985] 2 S.C.R. 387 at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 49-51.

[87] In interpreting the terms of a treaty, the honour of the Crown is always at stake, and the court's approach is to assume that the Crown was acting honourably, and the court will imply terms to make honourable sense of the treaty arrangement to produce a result that accords with the intent of both parties although unexpressed: *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, *supra* at paras. 14, 43-44.

[88] The IRSSA is not a treaty between Canada and its Aboriginal peoples, but it is at least as important as a treaty.

[89] During argument, Canada submitted that the honour of the Crown had nothing to do with the negotiation and interpretation of the IRSSA. I agree that the honour of the Crown is not an operative principle in the IRSSA, but I disagree that it is not an interpretative principle for an agreement in which Canada makes an attempt to make peace with its Aboriginal peoples.

[90] If an honourable interpretation and a dishonourable interpretation are both available, obviously it would be wrong to interpret the IRSSA in a way that does dishonor to Canada. As an interpretative principle, the honour of the Crown would also apply as an interpretative principle to the other signatories of the IRSSA, who can be taken to have intended an honourable interpretation over a dishonourable one.

F. THE ARGUMENTS OF THE IRSSA PARTIES AND PARTICIPANTS

1. Introduction

[91] In this section of my Reasons for Decision, I shall summarize the arguments of the parties. As noted above in the methodology, I shall continue to postpone the description of the facts, to first describe the arguments of the parties that arise from those facts. I think this is helpful because it makes for a better understanding about what facts are important and why they are important.

[92] The essential subject of the two RFDs is the question of what is to happen to the IAP Documents. Although the positions morphed during the course of argument, generally speaking, the IRSSA parties and participants provide two answers to that question.

[93] One group answers that with some exceptions, the IAP Documents be destroyed. In this group are: the Chief Adjudicator, the AFN, the Twenty-Four Catholic Entities, the Nine Catholic Entities, the Sisters of St. Joseph, and Independent Counsel.

[94] A second group answers that the IAP Documents belong to Canada as government records and after a period of retention, some IAP Documents will be destroyed and some will be archived at LAC. In the second group are: Canada, the TRC, and the NCTR.

[95] In the sections that follow, I shall summarize the arguments that the parties rely on for their competing answers to the fundamental question of what is to happen to the IAP Documents.

2. Canada's Argument

[96] Canada submits that the IAP Documents are in its possession and control because the Secretariat and the SAO of RIAS are branches of AANDC and these branches have actual possession of the documents, which are government records. Canada submits that since the IAP Documents were collected and created by AANDC, they are government records and subject to government regulation. Canada submits that no provisions of the IRSSA entitle anybody else to decide the manner of the retention or disposition of its IAP Documents.

[97] More to the point, Canada submits that the plain meaning of the IRSSA is that Canada controls the disposition of the IAP Documents and that the parties knew at the time of negotiating and agreed and the Claimants were subsequently told (when they applied for IAP payments) that some of the IAP Documents would be archived at LAC.

[98] Canada says that the IAP Documents are "government records" and, as such, they are governed by the *Library and Archives Canada Act*, *supra*, which stipulates that government records cannot be destroyed without the consent of LAC. Canada notes that the Librarian and Archivist has identified certain IAP Documents as having historical or archival value and pursuant to the *Act*, these documents must be transferred to LAC.

3. The Argument of the Chief Adjudicator

[99] The Chief Adjudicator says that it has the standing to bring its RFD.

[100] Relying on *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 and *Andersen Consulting v. R.*, [2001] 2 F.C.J. No. 57, the Chief Adjudicator submits that the IAP Documents are not "government records."

[101] The Chief Adjudicator submits that the IAP Documents are court records and that the court has the jurisdiction to order how they should be dealt with after the completion of the IAP.

[102] The Chief Adjudicator submits that the IAP Documents are confidential and that the interpretation of the IRSSA is that after a retention period, the IAP Documents should be destroyed. The Chief Adjudicator also submits that the IAP Documents are subject to the implied undertaking and to the principles about breach of confidence that empower the court to order the destruction of the IAP Documents.

[103] The Chief Adjudicator argues that the redacted transcripts may be archived at the NCTR only with the Claimant's informed consent and otherwise the IAP Documents should be

destroyed. He submits that the IRSSA does not provide authority for either Canada or the TRC to archive the highly sensitive and confidential materials that were gathered in the IAP.

4. The Argument of the AFN

[104] The AFN argues that the IRSSA is more than a private agreement; it is a resolution of a complex political, cultural, and collective dispute and courts should not second-guess the accord reached by the parties. It submits that the IAP Documents are deemed to be in the custody of the court, although Canada also has possession and control of the IAP Documents.

[105] Relying on *Fontaine v. Canada (Attorney General)*, 2014 MBQB 113 at paras. 54-55, AFN submits that Canada's agreement with LAC pursuant to the *Library and Archives of Canada Act*, *supra*, which would see documents transferred to LAC, is not enforceable because the consent of Claimants was not obtained. AFN asserts that privacy legislation that would apply at LAC falls short of the promises of confidentiality made to Claimants and Persons of Interest under the IRSSA.

[106] AFN notes that to the extent that documents are not transferred to the LAC, then the standard practice is that the documents would be destroyed. The AFN argues that given the standard practice, the IRSSA would need to contain very clear language to authorize the archiving of IAP Documents at LAC.

5. The Argument of the Sisters of St. Joseph

[107] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the Chief Adjudicator on the grounds that both lack standing to bring the RFDs, or alternatively, the RFDs are premature because the TRC and the Chief Adjudicator have not exhausted the dispute resolution mechanisms mandated by the IRSSA.

[108] The Sisters of St. Joseph submit that the RFDs involve document production, disposal, and archiving and thus must be considered first by the NAC. The Sisters of St. Joseph request a declaration that any dispute regarding documents be referred to the NAC.

[109] The Sisters of St. Joseph submit that it was always the intention of the parties to the IRSSA that the IAP Documents be kept confidential and that it was the intention of the parties that the IAP Documents be destroyed upon the completion of the IAP and that under the IRSSA, the IAP Documents do not form part of TRC's mandate.

[110] The Sisters of St. Joseph submit that to change the rules at the end of the game would result in a breach of the IRSSA and the terms of the IAP, be a breach of trust and a breach of confidence and a violation of the procedural rights and natural justice of all parties to the IRSSA. It submits that if the IAP Documents were made available to the public, even in the future, great harm would be caused to the religious orders and to the Claimants, all of whom participated in or chose not to participate in the IAP on the basis of confidentiality.

6. The Argument of Twenty-Four Catholic Entities

[111] The Twenty-Four Catholic Entities submit that the IAP Documents are subject to the law of absolute privilege, the implied undertaking, and the law of confidential communications, all which should prevent disclosure of the documents.

[112] The Twenty-Four Catholic Entities submit that the proposed archiving of IAP Documents at LAC (or NCTR) would be a grave breach of confidence and a violation of quasi-constitutional privacy rights that would cause harm not only to the former students and the alleged perpetrators but also to the reputations of the organizations that negotiated the IRSSA and it would undermine the IAP.

[113] The Twenty-Four Catholic Entities submit that as a matter of contract interpretation, the IRSSA does not authorize the IAP Documents, which contain highly confidential and private information to be unilaterally distributed for archival. They submit that ordering the documents to the NCTR would require an amendment to the IRSSA. The Twenty-Four Catholic Entities oppose any notice plan to Claimants and assert that a notice plan is beyond what was contracted for in the IRSSA.

[114] Given the significance of the privacy considerations, the Twenty-Four Catholic Entities submit that the only way to ensure that there will be no privacy breaches is to destroy the entire collection of the IAP Documents in accordance with the IRSSA.

7. The Argument of Nine Catholic Entities

[115] The Nine Catholic Entities submit that they provided sensitive personal information believing that its confidentiality would be protected and that they never would have agreed to the IRSSA without the assurances of confidentially. The Nine Catholic Entities submit that the proper interpretation of the IRSSA is that IAP Documents be destroyed after the completion of the IAP.

[116] The Nine Catholic Entities submit that anything but the destruction of the IAP Documents would contravene the IRSSA and that the communication of any information about the Nine Catholic Entities' members or former members to the TRC would be a breach of contract, a breach of confidence, a breach of faith, and a violation of civil law and privacy legislation.

8. The Argument of Independent Counsel

[117] Independent Counsel submits that the IAP Documents are in the court's possession, but to the extent that the IAP Documents are in Canada's possession, Canada is bound by the IRSSA, confidentiality agreements, and the implied undertaking pursuant to which Canada may not use the IAP Documents for any purpose other than for the IAP.

[118] Independent Counsel submits that Canada's plans for the documents would be contrary to the IRSSA and the court cannot authorize those plans because to do so would be to amend the IRSSA which the court cannot do.

[119] Independent Counsel submits that the IRSSA was designed to assure Claimants that they controlled their own stories about their experiences at the Indian Residential Schools. The IRSSA protects the confidentiality of the IAP Documents and that confidentiality is essential, because without it, Claimants would not feel comfortable enough to make claims for the wrongs they suffered. The involuntary transfer of IAP Documents to any archive would be a gross betrayal of trust and devastatingly harmful to the Claimant, his or her family, his or her descendants, and his or her community.

9. The Argument of the TRC

[120] The TRC originally submitted that the IAP Documents are in the possession and control of Canada and Canada is obliged by the production provisions of the IRSSA to produce the IAP Documents, which are "relevant documents" to the TRC. It originally submitted that the production of the IAP Documents to the TRC is mandated by the IRSSA. The TRC abandoned this argument during the hearing of the RFDs.

[121] The TRC's argument, at the hearing of the RFDs, aimed at preserving some of the IAP Documents from destruction.

[122] The TRC was interested in the IAP Documents because it is charged with creating as complete an historical record as possible of the IRS system and legacy and the IAP Documents are allegedly the most complete and detailed set of documents in existence that describe the IRS system and legacy.

[123] The TRC submits that the IAP Documents are an essential resource to ensure that challenges to truth and memory can be met, and that the experiences of residential school survivors can never be denied or forgotten. It submits that it is only by preserving this history that Canadian society can ensure that the tragedy of the Indian Residential Schools will never be repeated.

[124] The TRC argued that the IAP Documents should be retained by Canada for a 30-year period and that a notice plan be developed to advise Claimants of their rights to preserve their stories at the NCTR.

10. The Argument of the NCTR

[125] The NCTR adopted the TRC's submissions and was both eager and anxious that a notice program be developed to preserve IAP Documents and the Claimants' stories.

[126] It was anxious to preserve IAP Documents because it regarded them as an invaluable and irreplaceable history of the Indian Residential Schools.

G. EVIDENTIARY BACKGROUND

[127] The evidentiary background to these RFDs was provided by the following affiants:

- Amy Abrahamson, a paralegal for Peter Grant who is counsel for Independent Counsel.

- Rev. Robert J. Britton, Chancellor for the Archdiocese of Halifax-Yarmouth.

- G.C., a former student of an Indian Residential School and an IAP Claimant.

- Peter Dinsdale, the Chief Executive Officer of the AFN.

- Jane Doe, a former student of an Indian Residential School and an ADR Claimant and then an IAP Claimant.

- Tim Eryou, the Chief Information Officer for AANDC and with a few intervals away has been at what is now AANDC in various capacities since 1990.

- David Flaherty, Professor Emeritus of History and Law at the University of Western Ontario and a privacy consultant. He is a member of the External Advisory Committee to the Privacy Commissioner of Canada and a member of the External Advisory Committee to the Information and Privacy Commissioner of British Columbia.

- Larry Phillip Fontaine, O.C., the primary named Representative Plaintiff in the class action that was settled by the IRSSA and who was instrumental in the negotiations of the settlement. He is a former National Chief of the AFN.

- Percy Gordon, a former student of an Indian Residential School who has received a CEP and an IAP payment.

- N.B.H., a former student of an Indian Residential School and an IAP Claimant.

- Daniel Ish, the former Chief Adjudicator of the IAP (September 2007-July 2013).

- Gregory Juliano, the General Counsel and Director of Fair Practices and Legal Affairs at the University of Manitoba with oversight of University's Access and Privacy Office. He was the University's chief negotiator of the agreements that established the NCTR.

- E.K., a former student of an Indian Residential School and an IAP Claimant.

- Fred Kelly, a former student of an Indian Residential School and an IAP Claimant.

- Sister Bonnie MacLellan, a member of the Sisters of St. Joseph and an eyewitness to the negotiations that led to the IRSSA. From 2002 to 2012, she was the General Superior of the Congregation.

- Tom McMahon, General Counsel to the TRC and formerly its Executive Director. Mr. McMahon was cross-examined.

- F. Mark Rowan, a lawyer who has acted for persons of interest or alleged perpetrators in connection with the IAP and the Dispute Resolution Process that the IAP replaced.

- David Russell, the Director of SAO (West) and former Director of the National Research and Analysis Directorate within RIAS of AANDC and before that he worked within Indian Residential Schools Resolution Canada.

- Daniel Shapiro, the current Chief Adjudicator of the IAP and a former Deputy Chief Adjudicator.

- John Trueman, the Senior Policy and Strategic Advisor of the Secretariat. Before joining the Secretariat, from 2003 to 2006, he worked on the Alternative Dispute Resolution that pre-dated the IAP. He reports to the Executive Director, who reports to the Chief Adjudicator. Mr. Trueman was cross-examined.

- D.W., a former student of an Indian Residential School and an IAP Claimant.

- Eric Wagner, a lawyer who represents Claimants.

H. FACTUAL BACKGROUND

1. The Indian Residential Schools Settlement Agreement ("IRSSA")

[128] Between the 1860s and 1990s more than 150,000 First Nations, Inuit, and Métis children were required to attend Indian Residential Schools operated by religious organizations with the funding of Canada. Approximately half of the students of the Indian Residential Schools are no longer living to tell their stories.

[129] In 1999, the Sisters of St. Joseph were given notice that approximately 110 former students at the St. Joseph's Boarding School alleged that they had been victims of psychological, physical, and sexual abuse while attending the school.

[130] In 2000, about 154 former students represented by one law firm filed civil claims in connection with their mistreatment at St. Anne's Indian Residential School against Canada and others.

[131] Following the launch of other individual and class actions across the country by former students of the Indian Residential Schools, in November 2003, Canada established a National Resolutions Framework, which included a compensation process called the Alternative Dispute Resolution ("ADR") Process. The ADR Process was the predecessor or the model for the IAP in the IRSSA.

[132] After the launch of the numerous court proceedings, there were extensive negotiations to settle the individual actions and the class actions.

[133] In November 2004, the AFN published a report entitled, *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*. In this report, it was stressed that compensation, alone, would not achieve the goals of reconciliation and healing. A two-pronged approach would be required: (1) compensation; and (2) truth-telling, healing, and public education.

[134] In May 2005, a Political Agreement was signed between Canada and AFN that a settlement would be negotiated that would include compensation, healing, and a truth and reconciliation process. A few months later, the AFN became a plaintiff by launching a class action against Canada, and Mr. Fontaine, a former National Chief was named as proposed Representative Plaintiff.

[135] For the Plaintiffs and Representative Plaintiffs, one of the purposes of the negotiations was to achieve compensation for the students of the Indian Residential Schools and their families. In this regard, it should not be lost sight of that the Plaintiffs and Representative Plaintiffs were advancing claims for compensation for wrongs beyond physical and psychological harms. Certain claims were being brought for the collective interests of the Aboriginal peoples, who alleged that they had lost language and cultural and spiritual identity.

[136] In achieving the goal of compensation, a problem for Plaintiffs and Representative Plaintiffs was that the claims were intensely private and difficult for the Claimants to describe in

public. Further, unfortunately some claimants had been victimized by other students at the Indian Residential Schools. Moreover, some claimants were both victims and perpetrators of child abuse in the toxic environment of the Indian Residential Schools. Thus, privacy and confidentiality concerns were an extremely important part of the factual nexus of the negotiations.

[137] Mr. Fontaine, who it may be noted has not himself publically described his personal experiences at the Indian Residential Schools, explained why confidentiality and privacy were essential elements in the IRSSA, especially in claims involving student-on-student abuse (32% of the claims). He deposed:

> During the course of those negotiations, I argued that the names of the children who abused other children should not be disclosed to the adjudicators in the IAP process. The reason I argued this was because I knew myself from my own community and other aboriginal communities across Canada that both abusers and abused lived in the same communities and that there would be ongoing trauma within an entire community if these individuals were identified by name.
>
> The solution to this and other problems was the confidentiality of the IAP process to ensure that no person could identify a perpetrator by name outside of the IAP process and everybody had to agree to that at the beginning of the IAP process. Furthermore, nobody except the survivor would have access to the story of the survivor. The IAP hearings were to be held in the strictest confidence.

[138] Privacy and confidentiality was also extremely important to the Defendants. If true, the allegations against the Church Entities that had managed the Indian Residential Schools for Canada would show their members and employees to be criminals, sinners, and moral degenerates, and if untrue, the allegations were grave slanders.

[139] Further, privacy and confidentiality were essential to the Defendants negotiating the IRSSA, because they were being asked to give up the right to test the allegations made against them in court. As explained in the affidavit of Sister MacLellan:

> When entering into the Settlement Agreement, the Congregation and its members gave up a number of their fundamental rights which would normally be used to test the veracity of abuse claims in a court of law. These rights included the right to face the accusers, the right to cross-examine the accusers and other witnesses, and the right to appeal.
>
> In consideration for the loss of said fundamental rights, the Settlement Agreement contemplates that the Independent Assessment Process…, and the documents arising from the IAP, will remain confidential, which confidentiality would only be breached with the consent of all interested parties/persons.

[140] Sister MacLellan deposed that because many of the persons who worked at the Indian Residential Schools were deceased, elderly, or sick, it would not be easy or possible for them to defend themselves. For this reason, the Sisters of St. Joseph and other religious entities were steadfast in ensuring that the terms of the IRSSA about the IAP provided for the confidentiality of all information.

[141] Sister MacLellan deposed that if the Sisters of St. Joseph, none of whose members had ever been charged criminally, had been told that there was any possibility that the information collected for the IAP would become available to the public, it would not have signed the IRSSA.

[142] The evidence of the Twenty-Four Catholic Entities was that they agreed that the IAP would be a private and confidential process in exchange for abandoning their ordinary

procedural rights to test the veracity of the abuse claims in a court of law. They said that they agreed to give up the rights to face their accuser, to challenge the allegations, to appeal, and to give full answer and defence to the serious allegations that besmirched the alleged perpetrator's reputation and the historical reputation of the Church group.

[143] In the bringing of individual court actions and in particular in the bringing of the class actions, there, however, was a countervailing and collective purpose that went against the goal of achieving privacy and confidentiality for individual Claimants and for Defendants.

[144] Mr. Dinsdale, the Chief Executive Officer of AFN, deposed:

> Further, a truth commission would address the fact that the Indian Residential School system was a systemic violation of human rights that had a significant impact on the collective rights of Aboriginal peoples. It was not a matter to be adjudicated through individual claims litigated on an individual basis or through an alternative dispute resolution process. No amount of money could compensate for the magnitude and systemic nature of the effects of the Residential School system. Truth telling was sought to be achieved through the TRC.

[145] As explained by Mr. Fontaine, the Plaintiffs, and particularly the Representative Plaintiffs, desired that the history of the Residential Schools tragedy be known and preserved for future generations and never repeated. Mr. Fontaine testified, however, that the negotiators understood that some balance needed to be achieved between individual privacy and public awareness. The balance would be achieved by making the disclosure of personal information consensual. Mr. Fontaine deposed:

> In negotiating the TRC it was always understood that the individual stories of survivors would only become part of that record if survivors themselves decided to speak to the TRC and advise that they wished their story to be made public.

[146] As noted above in the discussion of the infrastructure of the IRSSA, another and different factor in the negotiations was the reality that Canada wished to have a role in administering the billions of dollars of settlement funds it was contributing, but there was a need to establish an independent tribunal to adjudicate claims for compensation and to allow Canada to challenge Claimants. The outcome was that with certain safeguards, Canada was allowed both an administrative role and also and an adversarial one. There was an obvious conflict of interest that had to be managed.

[147] As deposed by the former Chief Adjudicator, Daniel Ish, to preserve the independence of adjudicators in their role as neutral administrators of the IAP and arbiters of compensation, it was important to establish the Secretariat as an autonomous branch, especially because Canada, represented by AANDC was a defendant in every IAP Claim.

[148] Thus, both the administrative and the adversarial roles were assumed by branches of Canada's AANDC, and as will have been apparent from the discussion above and as will be seen again in the discussion below, this situation was problematic from the outset and has continued to be problematic.

[149] With these various countervailing forces at work, the negotiations ultimately led to the multiple-court approved settlement of the individual and class actions known as the IRSSA. The IRSSA was signed on May 8, 2006.

[150] The signing parties to the IRSSA were: Canada, as represented by the Honourable Mr. Frank Iacobucci; various Plaintiffs, as represented by a National Consortium of lawyers, the Merchant Law Group, and Independent Counsel; the AFN; Inuit Representatives; the General Synod of the Anglican Church of Canada; the Presbyterian Church of Canada; the United Church of Canada; and 50 Roman Catholic Church entities, including the Sisters of St. Joseph, the Nine Catholic Entities, and the Twenty-Four Church Entities.

[151] Under the IRSSA, Canada and the other Defendants obtained releases. The IRSSA provides at Article 4.06 (g) as follows:

> [...] that the obligations assumed by the defendants under this Agreement are in full and final satisfaction of all claims arising from or in relation to an Indian Residential School or the operation of Indian Residential Schools of the Class Members and that the Approval Orders are the sole recourse on account of any and all claims referred to therein.

[152] The specification of those who were to be released was defined very broadly. Releasee was defined as follows:

> "Releasees" means, jointly and severally, individually and collectively, the defendants in the Class Actions and the defendants in the Cloud Class Action and each of their respective past and present parents, subsidiaries and related or affiliated entities and their respective employees, agents, officers, directors, shareholders, partners, principals, members, attorneys, insurers, subrogees, representatives, executors, administrators, predecessors, successors, heirs, transferees and assigns the definition and also the entities listed in Schedules "B", "C", "G" and "H" of this Agreement.

[153] The ambit of the release was also very broad. Article Eleven of the IRSSA stated as follows:

> ARTICLE ELEVEN
> RELEASES
>
> 11.01 Class Member and Cloud Class Member Releases
>
> (1) The Approval Orders will declare that in the case of Class Members and Cloud Class Members:
>
> (a) Each Class Member and Cloud Class Member has fully, finally and forever released each of the Releasees from any and all actions, causes of action, common law, Quebec civil law and statutory liabilities, contracts, claims and demands of every nature or kind available, asserted or which could have been asserted whether known or unknown including damages, contribution, indemnity, costs, expenses and interest which any such Class Member or Cloud Class Member ever had, now has, or may hereafter have, directly or indirectly arising from or in any way relating to or by way of any subrogated or assigned right or otherwise in relation to an Indian Residential School or the operation of Indian Residential Schools and this release includes any such claim made or that could have been made in any proceeding including the Class Actions or the Cloud Class Action whether asserted directly by the Class Member or Cloud Class Member or by any other person, group or legal entity on behalf of or as representative for the Class Member or Cloud Class Member.
>
> (b) …
>
> (c) Canada's, the Church Organizations' and the Other Released Church Organizations' obligations and liabilities under this Agreement constitute the consideration for the

> releases and other matters referred to in Section 11.01(a) and (b) inclusive and such consideration is in full and final settlement and satisfaction of any and all claims referred to therein and the Class Members or and Cloud Class Members are limited to the benefits provided and compensation payable pursuant to this Agreement, in whole or in part, as their only recourse on account of any and all such actions, causes of actions, liabilities, claims and demands. ….

[154] In their practical effect, the releases re-directed Plaintiffs and Class Members in actions against Canada and others to resort to the CEP and IAP as the recourse for their compensatory claims and it directed the survivors to the TRC and NCTR for their collective claims and grievances which would be memorialized in the historical account of their experiences.

[155] The Nine Catholic Entities state that they decided to sign the IRSSA for two reasons: (1) to obtain a release from civil liability; and (2) to protect the privacy of their members or former members.

[156] Between December 2006 and January 2007, each of nine courts, representing Class Members from across Canada issued judgments certifying the class actions and approving the terms of settlement as being fair, reasonable, and in the best interests of the Class Members. Justice Winkler, as he then was, certified the action in Ontario and approved the settlement in reasons reported as *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 (S.C.J.).

[157] The Approval Orders incorporate by reference all the terms of the IRSSA, and the Orders provide that the applicable class proceedings laws shall apply in their entirety to the supervision, operation, and implementation of the IRSSA. For present purposes, the following terms of the Approval Orders should be noted:

> 12. THIS COURT ORDERS that the Agreement, which is attached hereto as Schedule "A", and which is expressly incorporated by reference into this judgment, including the definitions included therein, is hereby approved and shall be implemented, in accordance with this judgment and any further order of this Court.
>
> 13. THIS COURT ORDERS AND DECLARES that this Court shall supervise the implementation of the Agreement and this judgment and, without limiting the generality of the foregoing, may issue such orders as are necessary to implement and enforce the provisions of the Agreement and this judgment.
>
> 30. THIS COURT ORDERS AND DECLARES that no person may bring any action or take any proceedings against the Trustee, the Chief Adjudicator, the IAP Oversight Committee, the National Certification Committee, the National Administration Committee, the Chief Adjudicator's Reference Group, the Regional Administration Committees, as defined in the Agreement, or the members of such bodies, the adjudicators, or any employees, agents, partners, associates, representatives, successors or assigns, of any of the aforementioned, for any matter in any way relating to the Agreement, the administration of the Agreement or the implementation of this judgment, except with leave of this court on notice to all affected parties.
>
> 31. THIS COURTS DECLARES that the Representative Plaintiffs, Defendants, Released Church Organizations, Class Counsel, the National Administration Committee, or the Trustee, or such other person or entity as this Court may allow, after fully exhausting the dispute resolution mechanisms contemplated in the Agreement, may apply to the Court for directions in respect of the implementation, administration or amendment of the Agreement or the implementation of this judgment on notice to all affected parties, all in conformity with the terms of the Agreement.

> 36. THIS COURT DECLARES that the provisions of the applicable class proceedings law shall apply in their entirety to the supervision, operation and implementation of the Agreement and this judgment.

[158] In March 2007, on consent of the parties, the nine courts issued identical Approval Orders and Implementation Orders. Both the judgments of the courts and the Approval Orders provide that that the respective courts shall supervise the implementation of the IRSSA and the judgment and may issue such orders as are necessary to implement and enforce the provisions of the agreement and the judgment.

[159] For present purposes, the following term of the Implementation Order should be noted:

> 23. THIS COURT ORDERS that the Courts shall supervise the implementation of the Agreement and this order and, without limiting the generality of the foregoing, may issue such further and ancillary orders, from time to time, as are necessary to implement and enforce the provisions of the Agreement, the judgment dated December 15, 2006 and this order.

[160] In a point that is relevant to the Sisters of St. Joseph's motion to quash the RFDs, the IRSSA provides for dispute resolution mechanisms, and under the IRSSA, the parties agreed to exhaust those mechanisms before making an application for a RFD. Section 18.04 of the IRSSA states:

> *Dispute Resolution*
>
> 18.04 The parties agree that they will fully exhaust the dispute resolution mechanism contemplated in the Agreement before making any application to the Courts for directions in respect of the implementation, administration or amendment of this Agreement or the implementation of the Approval Orders. Application to the Court will be made with leave of the Courts, on notice to all affected parties, or otherwise in conformity with the terms of the Agreement.

2. The TRC

[161] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand the role of the TRC and to understand its responsibilities with respect to gathering documents and its relationship with the IAP. As will become apparent, the IRSSA's provisions about the TRC are relevant to the interpretation problem of what should happen to the IAP Documents.

[162] An important aspect of the IRSSA was the establishment of the TRC. Article 7.01 of the IRSSA stated:

> *7.01 Truth and Reconciliation*
>
> (1) A Truth and Reconciliation process will be established as set out in Schedule "N" of this Agreement.
>
> (2) The Truth and Reconciliation Commission may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

> (3) Where the NAC makes a decision in respect of a dispute or disagreement that arises in respect of the Truth and Reconciliation Commission as contemplated in Section 7.01(2), either or both the Church Organization and Canada may apply to any one of the Courts for a hearing *de novo*.

[163] Thus, Article 7.01 of the IRSSA provided for the establishment of the TRC and specified that its process and mandate was set out in Schedule "N." For present purposes, the relevant provisions of Schedule "N" are set out in Schedule "A" to these Reasons for Decision. I have emphasized certain portions that are particularly relevant to resolving the interpretative issues.

3. The NCTR

[164] In order to resolve the arguments of the parties and the RFDs, it is also necessary to understand the role of the NCTR.

[165] The NCTR's mandate, pursuant to Schedule "N" of the IRSSA and the Trust and Administrative Agreements between the TRC and the University of Manitoba, commits the NCTR to continuing the spirit and work of truth and reconciliation.

[166] The NCTR came into being on National Aboriginal Day, June 21, 2013. The NCTR is hosted by the University of Manitoba in partnership with other entities across Canada, including Aboriginal organizations, universities and colleges.

[167] On June 21, 2013, there was a ceremony to mark the signing of the agreement to establish the NCTR. At that time the Honourable Justice Murray Sinclair, in his remarks, stated:

> The importance of the National Research Centre that is being established here today…is that it will be a constant reminder to all Canadians. … It will be a reminder to all future Canadians that indeed what we have heard from Survivors in the past ten years or so did happen. We are creating a national memory here. … Because we know, if we do not do that, then it will be just a matter of two or three generations from now that most Canadians will not only be able to forget that this occurred, but they will be able to deny that it occurred. And that can never happen, that must never happen, because this is part of what Canada is all about.

[168] Under the Administrative Agreement, the NCTR's governance structure includes a Governing Circle comprised of a majority of persons who identify as Aboriginal, with specified positions for First Nations, Inuit and Métis representation. The NCTR's governance structure includes a Survivor's Circle comprised of survivors of the residential school system, their families or their ancestors. The Survivor's Circle provides advice to the Governing Circle, University, and Partners.

[169] The NCTR is governed in accordance with national and international ethical research and archiving principles, protocols, guidelines, and best practices for Indigenous and human rights research and archiving, including Aboriginal principles of Ownership, Control, Access and Possession, Protocols for Native American Archival Materials, and the *Tri-Council Policy Statement: Ethical Conduct of Research Involving Humans* (particularly the chapter on First Nations, Inuit and Métis peoples of Canada).

[170] In its factum, the NCTR sought to show that it can and will honour and respect the sensitive and private nature of the IAP Documents and would protect their confidentiality. It submitted that it has the technological and administrative capacity and expertise to safeguard the IAP Documents in compliance with all applicable access and privacy legislation and University

of Manitoba standards and NCTR-specific privacy policies, procedures and protocols, as well as any Orders made by this court.

[171] The NCTR submitted that it was founded on Aboriginal control and governance and is the most culturally appropriate archive of the IAP Documents and its archiving of them would be consistent with the spirit and intent, as well as express terms, of the IRSSA and would ensure that these records were archived in accordance with best practices for Indigenous, human rights and truth and reconciliation archiving.

4. The IAP Procedure

[172] In order to resolve the arguments of the parties and the RFDs, it is necessary to understand in detail the operation of the IAP with particular attention on how the procedure addresses confidentiality and privacy concerns. Indeed, understanding the IAP process is fundamental to resolving the RFDs now before the court.

[173] The procedure for the IAP is set out in Schedule "D" of the IRSSA. In *Fontaine v. Canada (Attorney General)*, 2012 BCSC 839 at paras. 29-30, Justice Brown described the IAP as follows:

> The IAP begins with an application that appears to serve functions similar to a statement of claim. In the application form, the Claimant provides details of the wrongdoing with dates, places, times, and the Claimant provides information to identify the alleged perpetrator. In the application, the Claimant provides a Narrative in the first person and outlines his or her request for compensation in accordance with the IRSSA. Depending on the nature of the claim for compensation, certain documents must be provided by a Claimant with the application.

[174] The procedure begins with an Application. Appendix I of Schedule "D" explains the Application; the appendix states:

APPENDIX I: THE APPLICATION

(a) In applying to the IAP, the Claimant is asked to:

> i. List points of claim: indicate by reference to the standards for this IAP each alleged wrong with dates, places, times and information about the alleged perpetrator for each incident sufficient to identify the alleged perpetrator or in the case of adult employees permit the identification of the individual or their role at the school.
>
> ii. Provide a narrative as part of the application. The narrative must be in the first person and be signed by the Claimant and can be both a basis for and a subject of questioning at a hearing.
>
> iii. Indicate by reference to the Compensation Rules established for this IAP the categories under which compensation will be sought and, where appropriate, indicate that compensation will be sought for consequential harm and/or opportunity loss above level 3, or for actual income loss.
>
> iv. Include authorizations so that the defendants may produce their records as set out in Appendix VIII.

> v. Safety mechanisms will be provided in consultation with Health Canada. Where Claimants are proceeding as a group, they may negotiate to have the group administer the available safety resources.

[175] Schedule "D" of the IRSSA lists the mandatory documents that must be submitted by Claimants if they are claiming certain levels of consequential harm, loss of opportunity, or need for future care. Claimants may be required to submit records related to their treatment and health (medical), Workers' Compensation, correctional history, education, income tax, Canada Pension Plan, and employment insurance.

[176] As is readily apparent, for a Claimant to complete the Application Form, he or she will disclose the most private and most intimate personal information, including a first person narrative outlining his or her request for compensation. Express privacy and confidentiality assurances for this personal information are found in the Application Form, which comes with a Guide.

[177] Every page of the Application Form and Guide in its header states: "Protected B document when completed." Under the *Privacy Act*, *supra* and the *Access to Information Act*, *supra* this designation identifies the document as having information that if compromised "could result in grave injury, such as loss of reputation." Every page of the Application Form and Guide states in its footer: "24 hour IRS Crisis Line is available at 1-866-925-4419."

[178] Appendix II of Schedule "D" outlines the procedure for the acceptance and use of the Application Form. The relevant parts of Appendix II are set out below with some emphasis added:

APPENDIX II: ACCEPTANCE OF APPLICATION

> **i. The Secretariat will admit claims to the IAP as of right where the application is complete and sets out allegations which if proven would constitute one or more continuing claims, and where the Claimant has signed the Declaration set out in the Application Form, including the confidentiality provisions in the Declaration**.
>
> ….
>
> iii. On admitting the claim to the IAP, the Secretariat shall forward s copy of the application to the Government and to a church entity which is party to the Class Action Judgments and was involved in the IRS from which the claim arises.
>
> ….
>
> **iv. The following conditions apply to the provision of the application to the Government or a church entity:**
>
> - **The application will only be shared with those who need to see it to assist the Government with its defence, or to assist the church entities with their ability to defend the claim or in connection with their insurance coverage;**
>
> - **If information from the application is to be shared with an alleged perpetrator, only relevant information about allegations of abuse by that person will be shared, and the individual will not be provided with the Claimant's address or the address of any witness named in the Application Form, nor with any information from the**

form concerning the effects of the alleged abuse on the Claimant, unless the Claimant asks that this be provided to the alleged perpetrator;

- **Each person with whom the application is shared, including counsel for any party, must agree to respect its confidentiality. Church entities will use their best efforts to secure the same commitment from any insurer with whom it is obliged to share the application;**

- **Copies will be made only where absolutely necessary, and all copies other than those held by the Government will be destroyed on the conclusion of the matter, unless the Claimant asks that others retain a copy, or unless counsel for a party is required to retain such copy to comply with his or her professional obligations.**

[179] Appendix B to the Guide explains that the personal information being provided is protected information. Appendix B to the Guide states with some emphasis added:

APPENDIX B: PROTECTION OF YOUR PERSONAL INFORMATION

Definition of personal information

Personal information means information about an identifiable person that is recorded in some way. Some examples of personal information include name, age, income, medical records and school attendance.

How your personal information is treated:

Level of security

Your *Application Form* will be treated with care and confidentiality. This means that security rules are in place to make sure that your *Application Form* is protected. "Protected B" is the level of security used by government for sensitive and personal information. Once completed, your *Application Form* will be treated as a "Protected B" document.

Privacy and information laws

• The *Privacy Act* is the federal law that controls the way the government collects, uses, shares and keeps your personal information. The *Privacy Act* also allows individuals to access personal information about themselves.

• The *Access to Information Act* is the federal law that provides access to government information, but protects certain kinds of information, including personal information.

• **Subject to the *Access to Information Act*, the *Privacy Act* and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection. The government will also share this personal information with those involved in the resolution of your claim, as set out in the section "Sharing your personal information with others" on the next page.**

• You can find more information about these laws on the Internet at: **www.privcom.gc.ca and www.infocom.gc.ca.**

Collection of personal information

Personal information in your *Application Form*, and all documents gathered for your claim are collected only for the purpose of operating and administering this Independent Assessment Process, and for resolving your residential school claim.

Use of your personal information

The personal information you provide in your Application Form, and all documents gathered for your claim, will be reviewed to assess whether your claim can be processed in this Independent Assessment Process. If your application is accepted, the information will be used as the basis of research to check your attendance at the residential school(s) and to find documents relevant to you and your claim.

Sharing your personal information with others

If a church organization is participating in the resolution of your claim, some of your personal information will be shared with church representatives on a confidential basis.

If you decide to ask for counselling support and give your permission, Health Canada will be provided with information about your participation in this Independent Assessment Process so that you can receive counselling support.

If the person you claim abused you is found, some of the personal information you have provided will be shared with him or her, including details of any claims made against them.

This needs to be done so the person is given a chance to answer to your claim. Some of your personal information will also be shared with witnesses participating in the resolution of your claim. Only information needed to answer to your claim will be provided to witnesses or the person(s) you claim abused you, unless you ask that it be shared. Information that identifies your address will not be shared.

The decision-maker will be provided with your personal information before the hearing, so he or she can learn about your claim, question you and other witnesses, and decide whether to award you compensation and, if so, how much.

Keeping your records

The *Privacy Act* requires that the government keep your personal information for at least two years. Currently, government practice is to keep this information in the National Archives for 30 years, but this practice can change at any time. Only the National Archivist can destroy government records.

[180] The Application Form in Section 7 includes a Declaration to be signed by the Claimant: The Declaration states:

> I give my permission to Library and Archives of Canada, Indian and Northern Affairs Canada, and any other federal, provincial or territorial government having records relevant to my claim to share them with Indian Residential Schools Resolution Canada. This permission will allow the government to research my claim.
>
> I understand that my personal information, including the details of any claim of abuse, may be shared with the government, the decision-maker, any participating church organizations, person(s) I identify as having abused me, and witnesses. Information provided to the person(s) I identify as having abused me and witnesses will not include my contact details or other information not relevant to their role in the claim, unless I want it to be shared.

> I agree to respect the private nature of any hearing I may have in this process. I will not disclose any witness statement I receive or anything said at the hearing by any participant, except what I say myself.
>
> I confirm that the statements in this Application, whether made by me or on my behalf, are true. Where someone helped me with the Application, they have read to me everything they wrote and confirm that it is true. I know that signing this Application has the same effect as if I made it under oath in court.

[181] As noted above, to make an acceptable application, Claimants must sign the Declaration set out in the Application Form, including the confidentiality provisions in the Declaration. I will discuss again the confidentiality of the IAP process in the next section of these Reasons for Decision.

[182] As noted above, alleged perpetrators are provided only with extracts of the Application outlining the allegations made against them, and these extracts must be returned at the end of the process. The alleged perpetrator is not provided with the Claimant's contact information, or information regarding the impacts of the alleged abuse.

[183] If the Claimant's claim is not settled, there is a hearing before an adjudicator supervised by the Chief Adjudicator.

[184] The Secretariat's website promises confidentiality within the IAP. It reads:

> The hearing is held in private. The public and the media are not allowed to attend. Each person who attends the hearing must sign a confidentiality agreement. This means that what is said at the hearing stays private.

[185] As noted above, the participants at an IAP hearing must sign a confidentiality agreement. There is a standard form Confidentiality Agreement for Claimants and a standard form Confidentiality Agreement for Participants.

[186] The standard form Confidentiality Agreement for Claimants is set out below:

> INDIAN RESIDENTIAL SCHOOS ADJUDICATION SECRETARIAT
> INDEPENDENT ASSESSMENT PROCESS
> IN THE MATTER OF _____:
>
> CONFIDENTIALITY AGREEMENT
>
> I understand that:
>
> [*name*] has made a claim in the Independent Assessment Process, a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.
>
> - Hearings in the IAP Process are closed to the public
> - I am a claimant I this hearing and will observe or participate in all or part of the proceedings
>
> I_____, agree that I will keep confidential and not disclose to any person or entity, whether in writing or orally, any information that is presented in this hearing or disclosed in relation to this hearing, except my own evidence or as required within the IAP or otherwise by

law. I understand that I may discuss the outcome of the hearing, including the amount of any compensation awarded to me.

_____ _____

CLAIMANT WITNESS

DATED

[187] The standard form Confidentiality Agreement for other participants in the IAP hearing is set out below:

INDIAN RESIDENTIAL SCHOOS ADJUDICATION SECRETARIAT
INDEPENDENT ASSESSMENT PROCESS
IN THE MATTER OF _____:

CONFIDENTIALITY AGREEMENT

I understand that:

[*name*] has made a claim in the Independent Assessment Process (IAP), a process established , a process established to resolve claims of sexual abuse, serious physical abuse, and certain other wrongful acts which caused serious psychological consequences for the individual arising from the operation of Indian residential schools.

- Hearings into claims in the Independent Assessment Process are closed to the public;
- I will observe or participate in all or part of the proceedings.

I agree that

- I will keep confidential and not disclose to anyone, whether in writing or orally, any information that is presented in the hearing or disclosed in relation to this hearing, except my own evidence or as required with the Independent Assessment Process or otherwise by law.

This is the official record of attendance, so everyone present at all or part of the Hearing, except Legal Counsel, must sign this form. If your name does not appear, please add it.

Name of Attendee	Signature	Address (Town and Province Only
Support		
Claimant's Legal Counsel		
Adjudicator		
Canada's Representative		
Church Representative		

RHSW		
Other		

DATED:

[188] I note that the form has an inconsistency in that it indicates that Legal Counsel need not sign the form, which must be an error, because the form then has a place for counsel's signature. In any event, the evidence is that all participants sign a confidentiality agreement.

[189] The parties to an IAP hearing are the Claimant, Canada, and any Church Entity affiliated with the particular residential school where the assault occurred. The parties may have counsel. The IAP hearing serves two purposes: testing the credibility of the claimant, and assessing the harm suffered by him or her: *Fontaine v. Canada (Attorney General)*, 2012 BCSC 1671 at para. 38.

[190] Canada is required to search for and report the dates that the Claimant attended a residential school. Canada must also search for documents relating to the alleged perpetrators named in the Application Form, and is required to provide the Secretariat with the following documents: (a) documents confirming the Claimant's attendance at the school(s); (b) documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them; (c) a report about the residential school(s) in question and the background documents; and (d) any documents mentioning sexual abuse at the residential school(s) in question.

[191] The IRSSA does not preclude a Claimant from producing documents in support of his or her claim beyond those articulated as mandatory in the application process. The relevance and admissibility of documents is determined by the adjudicator on a case-by-case basis.

[192] As noted above, IAP hearings are closed to the public, and participants are required to agree to keep information confidential, except their own evidence or as required within the IAP or otherwise by law. At the hearings, the adjudicators assure the Claimants and Persons of Interest that the evidence will be treated as confidential. Section "o" of Schedule "D" of the IRSSA explains the privacy of the IAP hearings; it states:

> *o. Privacy*
>
> i. Hearings are closed to the public. Parties, an alleged perpetrator and other witnesses are required to sign agreements to keep information disclosed at a hearing confidential, except their own evidence, or as required within this process or otherwise by law. Claimants will receive a copy of the decision, redacted to remove identifying information about any alleged perpetrators, and are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.
>
> ii. Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a Claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

[193] For present purposes it is important to note that section "o" provides that a Claimant may request a copy of their own evidence for memorialization and that Claimants are given the option of having the transcript deposited in an archive developed for the purpose; i.e., at the NCTR.

[194] On April 5, 2012, Daniel Ish, then the Chief Adjudicator, sent a direction to all IAP adjudicators advising them that verbal assurances of confidentiality to IAP claimants must be revised. The direction stated:

> I think the best that can be done is rely on Paragraph III, o, I (at page 15) of the IAP [Schedule D to the Settlement Agreement] which essentially says that information will be kept confidential except "as required within this process or otherwise by law" … In short, I ask adjudicators not to give iron-clad assurances about confidentiality but to advise claimants and other participants that the information is protected by law, will be handled securely and seen by those who have a legitimate need to see it.

[195] At the IAP hearing, there is no questioning by counsel for Canada. The lawyers for Claimants and for Canada caucus with the adjudicator to propose questions or lines or inquiry and make brief oral submissions but counsel do not control the questioning, which is left to the adjudicator.

[196] Before the IAP hearing, Canada or the Defendant Church Entity must attempt to locate the alleged perpetrator and invite him or her to the hearing, but the alleged perpetrator is not a party and has no right of confrontation at the IAP hearing. The alleged perpetrator is not compelled to attend an IAP hearing, but he or she may give evidence as of right.

[197] If the alleged perpetrator does give evidence, he or she may be accompanied by counsel, but the alleged perpetrator cannot attend or be represented during the evidence of the Claimant without the advance consent of the parties. In contrast, the Claimant is entitled to attend to hear the evidence of the alleged perpetrator.

[198] An alleged perpetrator may provide a witness statement should he or she elect to participate in the hearing. If the alleged perpetrator refuses to provide such a statement, counsel for any party may interview the alleged perpetrator, but the alleged perpetrator will not be permitted to participate in the hearing if there is no witness statement or interview provided in advance.

[199] A medical assessment is required for an adjudicator to make a finding of a physical injury. Only the adjudicator may order that an expert conduct an assessment of the Claimant. Unless the parties consent, an expert assessment is required in order to make a finding that the Claimant has suffered the most severe levels of consequential harms or consequential loss of opportunity (levels 4 and 5).

[200] If the Claimant establishes that he or she was abused in a manner covered by Schedule "D" of the IRSSA, the adjudicator then determines whether the Claimant suffered consequential harm as a result. There are five gradations of consequential harm provided for in Schedule "D". At the lowest end is a "Modest Detrimental Impact", which is evidenced by:

> Occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem

[201] The most severe consequential harm is level 5, entitled "Continued harm resulting in serious dysfunction", which is evidenced by:

> Psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.

[202] The adjudicator is required to produce a decision outlining the key factual findings, and, except in cases resulting in a Short-Form Decision, the adjudicator must outline the rationale for finding or not finding that the claimant is entitled to compensation.

[203] Decisions are redacted to remove identifying information about Claimants and perpetrators. While the documentation and information provided to Claimants and adjudicators may include allegations of abuse by individuals other than those named in the complaint at issue, names of other students or persons are redacted.

[204] The IRSSA provides that the Claimants will receive a copy of the decision, "redacted to remove identifying information about any alleged perpetrators." The balance of the decision provided to Claimants is not redacted and contains extensive personal information. Claimants are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded. Alleged perpetrators are entitled to know the result of the hearings insofar as the allegations against them are concerned, but not the amount of compensation awarded.

[205] The IRA, thus produces, a large number of documents of different types. The documents generally fall into seven categories: (1) applications submitted by the Claimants; (2) mandatory documents containing private personal information; (3) witness statements; (4) documentary evidence produced by the parties; (5) transcripts and audio recordings of the hearings; (6) expert and medical reports; and (7) decisions of the adjudicators and any appeals.

[206] Subject to limited exceptions, the deadline for applying to the IAP was September 19, 2012.

[207] As of March 31, 2013, the Secretariat received 37,716 applications and has held 16,700 hearings.

[208] As of June 2014, 25,800 claims have been resolved.

5. Nature and the Confidentiality of the IAP Documents

[209] Crucial to resolving the competing RFDs is the nature of the IAP Documents. For the facts and reasons that follow, in my opinion, they are confidential and private documents subject to the law providing remedies for breach of confidence. See: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574*; Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (C.A.); *Seager v. Copydex Ltd.*, [1976] 2 All E.R. 415; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.); *Terrapon Ltd. v. Builders' Supply Co (Hayes) Ltd.*, [1960] R.P.C. 128.

[210] As explained later, I also agree with the arguments of the Chief Adjudicator and Independent Counsel that the IAP Documents are subject to the implied undertaking.

[211] As the above details reveal, under the IRSSA, the IAP is a private and confidential process. Claimants are assured of confidentiality expressly by various provisions and statements

in the IRSSA, by express assurances or promises of confidentiality in forms and documents prepared to implement the IAP, in website information and by oral assurances of confidentiality expressed by adjudicators at IAP hearings.

[212] Although there is some dispute about the truth and reliability of the information, there is no dispute between the parties that the IAP Documents capture very sensitive personal information about the Claimants and the alleged perpetrators of wrongdoing at the Indian Residential Schools. There are allegations of sexual abuse, serious physical abuse, and atrocious acts committed against children. There are accounts of the suffering and the harm inflicted on the children and the consequences to their physical, mental, and spiritual health.

[213] The details are found in IAP application forms, transcripts and audio recordings of hearings, and in the decisions of the adjudicators, and there is no doubt that atrocities occurred. As the Prime Minister acknowledged in Canada's apology on June 11, 2008:

> The government now recognizes that the consequences of the Indian Residential Schools policy were profoundly negative and that this policy has had a lasting and damaging impact on Aboriginal culture, heritage and language. While some former students have spoken positively about their experiences at residential schools, these stories are far overshadowed by tragic accounts of the emotional, physical and sexual abuse and neglect of helpless children, and their separation from powerless families and communities. …. It has taken extraordinary courage for the thousands of survivors that have come forward to speak publicly about the abuse they suffered. It is a testament to their resilience as individuals and to the strength of their cultures. Regrettably, many former students are not with us today and died never having received a full apology from the Government of Canada.

[214] The prospect that IAP Documents may be archived and potentially disclosed to the public has caused severe stress and anxiety to Claimants who fear identification and the revelation of intensely private experiences and their feelings to members of their family, community, and the public at large. The Claimants are distressed by this prospect, and having regard to the various assurances of confidentiality, they regard disclosure as a betrayal and an egregious breach of confidence and contrary to the IRSSA.

[215] Mr. Fontaine testified that the disclosure of the information would perpetuate the harm to the Aboriginal communities if the names of alleged perpetrators of student-on-student abuse ever became public knowledge. He stated:

> If any of this information is placed into an archive, even if it is sealed for ten years, fifty years, a hundred years or longer, the identities of these perpetrators and their victims will someday become available to their descendants or researchers who may publish information. Within our communities, such knowledge even in future generations would continue the legacy of dysfunction and trauma that was created by the Residential Schools.

[216] Fred Kelly and Percy Gordon, both of whom are former students at the Indian Residential Schools, strongly oppose the archiving of their IAP Documents. G.C., Jane Doe, Mr. Fontaine, N.B.H., E.K., and D.W., and other former students stated that they did not consent to the release of their personal information to anyone. Mr. Gordon deposed:

> I have a personal sense of the past and the future. Culturally, I believe that First Nations people have that similar sense. We continue to honour hereditary Chiefs in many First Nations. As National Chief Atleo puts it, this is "through the pride of our culture and the strength of our ancestors". I do not want my grandchildren or my grandchildren's grandchildren to be able to study and read about the wrongdoing done to me. Some within our community may take a

different view but that is their individual choice. But I rely on the promises that were made to me and believe a judge may not undo a promise made to me and reverse that promise.

[217] Jane Doe, another Claimant, deposed:

> What happened to me at the IRS is tragic and personal. I would never have entered into the IAP process if I thought that the abuse that I disclosed at my NSP [Negotiated Settlement Process] would ever have been revealed to anyone or any entity outside of the IAP process. If this information is ever disclosed outside of my IAP file, it would re-victimize and destroy me. I did not nor do I consent to my IAP NSP transcript, fee review, recording, documents, application or any other information disclosed by me or made available about me for the purpose of completing my IAP claim to be released to the TRC of NCTR for any purpose.

[218] D.W., another Claimant, deposed:

> I oppose that my file be provided to any organization regardless of the measures that could be taken to protect my identity. I did not give any consent to this effect and I always understood that my application, the mandatory documents, and the recording and transcripts of my testimony would not serve any purposes other than those of the IAP. I particularly fear the possibility of being identified by mistake, negligence or a leak of information and therefore permitting individuals to learn facts that concern only me. I am equally concerned by the fact that the family of the person who abused me could one day learn what I suffered at IRS. I still travel in certain native communities in Ontario where members of that family reside.

[219] E.K., another Claimant, deposed:

> Any other use or disclosure of IAP records about me further violates my dignity, integrity and autonomy and taken away my trust in the confidentiality of the IAP. The risk or prospect of any other use or disclosure, during my lifetime or even only to my descendants after my death, is deeply distressing for me and compounds my suffering from residential school. I want, and believe I should have the right, to live secure and at peace in the knowledge that IAP records about me will not be used or disclosed for other purposes, and they will be securely and permanently destroyed at the conclusion of the IAP.

[220] G.C., another Claimant deposed:

> I deliberately choose not to give a statement to the TRC or the NCTR. My story belongs to me. I was told on more than one occasion that the information I provided at my IAP hearing would be held in the strictest of confidentiality. Absolutely no one would have access to my IAP information. I was the only one who could tell my story. The information disclosed at my IAP belongs to me and it contains information that I have lived my entire life trying to forget.

[221] N.B.H, another Claimant, deposed:

> I deliberately did not attend any of the TRC's events because what happened to me at the IRS was so painful and devastating that I could not participate in any type of public gathering that focused on any aspect regarding an IRS. I deliberately chose not to provide a statement to the TRC. [...] I would be devastated if anyone else, other than those that were at my IAP hearing, ever learned of this information.

[222] The Merchant Law Group received 66 responses to a letter asking Claimants if they objected to the disclosure of their personal information to the TRC. Of the 66 responses, only nine Claimants stated that they did not object.

[223] Mr. Shapiro, the current Chief Adjudicator expressed serious concern about the consequences of any court Order that resulted in the unilateral archiving of IAP Documents. He deposed as follows:

> As Chief Adjudicator, I am greatly concerned that any direction issued by this Honourable Court regarding the disposition of IAP Records may result in deterring Claimants or alleged perpetrators from coming forwards to testify in the many cases remaining to be decided. The IAP provides rights of participation to Alleged Perpetrators, who have also expressed serious concern at their hearings about allegations made against them becoming known. Such allegations can be among the most serious possible, including pedophilia, sadism and racism. Again, adjudicators have provided assurances of confidentiality and explained the confidentiality agreements.

[224] Dr. Flaherty, a historian and consultant with respect to the regulation of privacy and access to information, who was a witness for the Chief Adjudicator, deposed that it would be inappropriate to archive IAP Documents. He deposed:

> The sensitivity of the contents of the IAP claimant files is so great that it would be completely inappropriate to collect, use, disclose, or retain them for archival purposes, or for any other administrative purposes affecting specific individuals, beyond the specific IAP process of determining results in individual cases. …. [The] notion of archiving all IAP claimant records contradicts at least five of the ten privacy commandments/fair information practices enshrined in Canadian federal, provincial, and territorial legislation during the past fifty years

[225] The evidence on these RFDs establishes that the negotiators of the IRSSA intended that the IAP be a confidential and private process. As I shall explain below, that subjective intent is manifested in the objective interpretation of the IRSSA.

[226] The evidence establishes that the Claimants and the alleged perpetrators relied on the confidentially assurances expressed in the IRSSA and that they relied on the reiteration and expressions of confidentiality and privacy made as the IAP applications got underway and that reliance on confidentiality and privacy continues to this day.

[227] The evidence also establishes that without assurances of confidentiality, the IAP would not have functioned and the IRSSA would not have achieved the goal of providing compensation to the victims of the Indian Residential Schools. To employ the idiom of class actions, the Class Members would not have taken up the benefits of the settlement of their claims without a confidential, private, and sensitive claims process.

[228] In my opinion, the IAP Documents are confidential documents as a matter of contract and as a matter of the law of confidentiality communications; i.e. they are subject to the law about breach of confidence. They are also subject to various statutory provisions about privacy, some of those provisions mentioned in the IRSSA.

[229] In this last regard, the Nine Catholic Entities rely on the right to privacy under the *Civil Code of Québec, supra* and the *Quebec Charter of Human Rights and Freedoms, supra*. The relevant sections of the *Code* are Articles 3, 35, and 36, which state:

> 3. Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy.
>
> These rights are inalienable.

> 35. Every person has a right to the respect of his reputation and privacy.
>
> No one may invade the privacy of a person without the consent of the person unless authorized by law.
>
> 36. No one may invade the privacy of a person without the consent of the person unless authorized by law.
>
> The following acts, in particular, may be considered as invasions of the privacy of a person: …
>
> (6) using his correspondence, manuscripts or other personal documents.

[230] The relevant sections of the *Quebec Charter of Human Rights and Freedoms* are sections 4 and 9, which state:

> 4. Every person has a right to the safeguard of his dignity, honour and reputation.
>
> 9. Every person has a right to non-disclosure of confidential information.
>
> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

[231] I will discuss the legal consequences of the above findings later in these Reasons for Decision.

6. The Historical Value and the Reliability of the IAP Documents

[232] There is a dispute about the historical value of the IAP Documents and their utility for the purposes of the mission of the TRC and the NCTR. This dispute is yet another factor in resolving the request that the IAP Documents be destroyed, but the dispute is also relevant to the issue of whether there should be a notice plan to inform Claimants of their option of providing personal information about their stories to the NCTR.

[233] The dispute is that the parties disagree about the value of the IAP Documents to composing an historical account of what occurred at the Indian Residential Schools.

[234] LAC performed a preliminary assessment of the records in the possession of the AANDC and determined that very few of the documents were of enduring value. LAC did assess some IAP material relating to strategy, policy, and adjudication and the overall management of the IAP and the ADR processes as of enduring value. LAC considered the recordings and transcripts of the IAP hearings to be of enduring historical value and it requested copies of each decision for the IAP and ADR.

[235] LAC advised that all other information resources related to the IAP are not to be transferred to the Library and Archives. The contents of the Single Access to Dispute Resolutions Enterprise ("SADRE") database will not be transferred.

[236] Canada submits that the IAP decisions have both legal and historical components that militate against their destruction and favour their preservation at LAC. Canada says that the IAP decisions form a record of Canada's fulfillment of its obligations under the IRSSA and establish issue estoppels confirming the releases provided by the IRSSA. Canada says that the decisions

contain information of historical significance memorializing the IRS system and its legacy. Conversely, Canada submits that holding the decisions at LAC, would be consistent with LAC's role as the national repository of records with historical or archival value.

[237] I pause here to say that Canada is simply wrong that it needs the IAP decisions to protect itself from re-litigation of released claims. The releases provided by the IRSSA operate whether or not a Claimant made an IAP claim, and it appears that with more than 150,000 First Nations, Inuit, and Métis children required to attend Indian Residential Schools, about 25% (37,716) made IAP claims. I also rather doubt that IAP Documents are the only way that Canada can document that it honoured its obligation to pay successful IAP Claimants.

[238] For its part, the TRC submits that the IAP Documents are the single-most comprehensive collection of documents that evidence the harms suffered by residential school survivors. The TRC submits that the IAP Documents contain a unique aggregation of items, which taken as a whole provide the most comprehensive understanding of the abuses that took place in the Indian Residential School system. The TRC and the NCTR submit that the IAP Documents are essential to the creation of "as complete an historical record as possible of the IRS system and legacy."

[239] In correspondence dated October 25, 2010 to Dean Moran, the Chair of OC, Justice Murray, the Chair of the TRC, expressed his opinion as to the importance of the IAP Documents; he wrote:

> The preservation of IAP records is fundamental to maintaining a full and complete record of Residential Schools. Future generations will never know what went on in the schools if the records are lost. It will be easy to dismiss second and third hand accounts of that history without the first-hand accounts to add their weight of truth.

[240] Dean Moran acknowledged the importance of the IAP Documents gathered with the consent of the Claimants. In her reply letter dated January 11, 2011, she wrote:

> The specific individual information gathered with claimants' consent, together with the systemic information provided by the Adjudication Secretariat, would provide the TRC with an excellent qualitative and quantitative research base. The ultimate product would be comprised of a rich foundation of firsthand accounts married with broad based information resulting in a detailed portrayal of the nature and extent of the deplorable abuse perpetrated upon the students of Canada's Indian Residential Schools.

[241] I observe that Dean Moran does not suggest that all of the IAP Documents are necessary for an excellent qualitative and quantitative research base.

[242] The TRC reports that as of November 6, 2013, the TRC had gathered approximately 6,200 oral statements from residential school survivors, but by contrast, there were 37,847 IAP applications.

[243] The TRC also submits that unlike the statements it has collected, the Claimant's IAP testimony is given under oath and subjected to questioning by the adjudicator to ascertain its reliability.

[244] In contrast, the Chief Adjudicator relied on Dr. Flaherty's opinion that IAP Documents are not required for the TRC to achieve its mandate. Dr. Flaherty noted that journalists, historians, political scientists, and other scholars write about the legacy of residential schools in Canada without access to Claimant files. It was also noted that the TRC may obtain statements

from Claimants on a voluntary basis and that it has obtained 7,000 such statements from survivors of whom 40 percent have chosen to remain anonymous.

[245] The Twenty-Four Catholic Entities weighed into the debate by submitting that the nature of the IAP procedure reduces the reliability of the IAP Documents as a record of the truth of the allegations.

[246] The Twenty-Four Catholic Entities point out that the alleged perpetrator is not a party and sometimes not a participant at the IAP because of death, unavailability, or choice. They note that when a participant, the alleged perpetrator has no right of confrontation and his or her right to defend the allegations of wrongdoing are attenuated. The Twenty-Four Catholic Entities suggest that some of the Claimants' allegations are false allegations and made against persons who can be shown not to have been at the Indian Residential School at the time of the alleged wrongdoing. The Twenty-Four Entities submit that the outcome of the IAP should be treated as no more than a confidential claims process and not a reliable or a complete historical record.

[247] The Sisters of St. Joseph also weighed in and it submitted that the IAP was a flawed process that could and did lead to biased and inaccurate outcomes. It noted that of the approximately 20,000 IAP Claims which have been completed, the overwhelming vast majority were not defended by a religious order and that meant that IAP Documents produced and collected for those IAP Claims would reflect a one-sided record of what allegedly happened.

[248] The Sisters of St. Joseph submitted that there is no historical value of the IAP Documents because they were not created for the purpose of recording history; rather, the Sisters of St. Joseph submitted that the IAP Documents were created in the context of a private and confidential adjudicative process where if certain allegations were made and told a certain way, the teller would receive significant amounts of money.

[249] For their part, Independent Counsel acknowledged the importance of maintaining an historical record of the residential schools; however, Independent Counsel submitted that the TRC and the NRC do not require the IAP Documents in order to fulfill their mandates.

7. Canada's Custody and Control of the IAP Documents and its Plan for Them

[250] I return to the matter of Canada's custody and control of the IAP Documents because how Canada treats government records is a part of the factual nexus for interpreting the IRSSA, and how Canada treats government records is also part of the factual nexus for determining the competing RFDs.

[251] As a department of Canada, AANDC is subject to the *Library and Archives of Canada Act*, the *Privacy Act*, *supra* and the *Access to Information Act, supra*. Canada submits that both SAO and the Secretariat, which are branches of AANDC, are subject to this statutory regime.

[252] During the time when AANDC is using government records and until the documents or records have no operational value, AANDC retains its documents. While it is retaining the documents, in accordance with the exemption in s. 19 of the *Access to Information Act*, *supra*, AANDC protects the privacy of individuals with respect to whom personal information has been collected by preventing public distribution of that information, while also providing individuals with a right of access to their own information as provided in the federal *Privacy Act, supra*.

[253] The Secretariat and SAO both have digital and hard copies of IAP Documents.

[254] The digital documents are stored on the SADRE. This database contains approximately 45,000 pages of material. SADRE functions with an asymmetrical access system that permits employees of SAO and the Secretariat to access different, but overlapping, sets of electronic records. Employees from either the Secretariat and/or SAO may effectively transfer documents through SADRE by granting access permissions.

[255] In addition, the Secretariat maintains a secure server that contains transcripts of all IAP hearings held before mid-2011, the audio recordings of all the hearings held since mid-2011, and electronic copies of transcripts for every hearing that was transcribed since mid-2011.

[256] As of February 3, 2014, there were 795,038 unique documents in SADRE. Of these, medical, workers' compensation, income tax, employment insurance, Canada Pension Plan, corrections, and education documents constituted 272,547 of the documents (34.3%).

[257] The hard copies of IAP Documents are in offices in Regina and Ottawa. The Regina office possesses approximately 21,000 IAP files and approximately 1,540 hearing transcript files. It also holds 5,380 ADR files (the predecessor to the IAP) and 110 boxes of closed financial files.

[258] Between September 19, 2007 and August 25, 2013, approximately 1,924 ADR decisions and approximately 14,744 IAP decisions were rendered. These decisions are only minimally redacted to remove the name of the alleged perpetrator from the Claimant's copy of the decision. Unredacted versions, which are provided to counsel for the parties, are also kept by the Secretariat.

[259] Upon the expiry of the retention period, the issue will become how to dispose of the documents. Pursuant to s. 12 of the *Library and Archives of Canada Act*, *supra* disposition of any records held by AANDC may occur only with the written consent of the Librarian and Archivist. LAC has the authority to destroy government records. Subsection 12(1) of the *Library and Archives Canada Act*, states:

> 12(1) No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, without the written consent of the Librarian and Archivist or of a person to whom the Librarian and Archivist has, in writing, delegated the power to give such consents.

[260] With regards to IAP records, LAC issued a *Records Disposition Authority No. 2011/010*, dated February 26, 2013. A Record Disposition Authority ("RDA") is the official instrument used to direct the disposition of government records.

[261] *RDA No. 2011/010* stated:

> The Deputy Head and Librarian and Archivist of Canada, pursuant to subsections 12(1) and 13(1) of the *Library and Archives of Canada Act*, is of the opinion that records described in the attached Agreement are of historic or archival importance. The Librarian and Archivist, therefore, requires their transfer to the care and control of Library and Archives Canada in accordance with the Terms and Conditions set out in the Appendix to the Agreement, and consents to the disposal of all other records, when the Aboriginal Affairs and Northern Development Canada decides that it is no longer necessary to preserve these information resources to satisfy operational or legal requirements.

[262] Under a RDA, records identified as having historical or archival value by the Librarian and Archivist are transferred to LAC after the expiry of the retention period in accordance with a transfer agreement between LAC and AANDC. After transfer, the transferred records fall under the care and control of LAC. The non-transferred documents remain under the custody and control of their custodian, in this case AANDC.

[263] On August 7, 2012, AANDC and LAC signed an Agreement for the Transfer of Archival Records. A substantive appendix to the AANDC-LAC Agreement provides that "[all] electronic copies of the Notice of Decision document and Settlement Package for each IAP and ADR case" must be transferred to LAC when they are no longer required by AANDC.

[264] Under the Agreement for the Transfer of Archival Records, the balance of the IAP Documents could be disposed of by AANDC at its discretion and in accordance with law.

[265] Records transferred to LAC are registered into LAC's collection management system, where they are identified as Code 32, meaning that they are restricted by law, until a determination has been made otherwise. Access restrictions on records at LAC may be re-evaluated upon an Access to Information and Privacy request.

[266] Of the IAP Documents, the Appendix specifies that only electronic copies of the Notice of Decision for each IAP case are to be transferred to LAC: the Appendix also requires the transfer of certain other records that do not qualify as IAP Records, including settlement packages, strategic documents relating to the IAP, and ADR pilot project case files.

[267] The Appendix further specifies certain documents that are not to be transferred to LAC, including IAP paper case files, other electronic case documentation related to the IAP, working files related to the IAP, Persons of Interest files (relating to alleged perpetrators), and tombstone information contained in SADRE. Such documents may be destroyed by AANDC in accordance with the RDA 2011/010 after the expiry of applicable retention periods.

[268] Dr. Flaherty, who was a deponent for the Chief Adjudicator, predicted that most of the IAP Documents not sent to LAC would be destroyed. He deposed:

> It is important to remember that most of the administrative records produced about IAP claimants on a mandatory basis would normally be destroyed by the original custodians - and not archived by them - because such routine records are not "of enduring value." This would be true for individual health records, welfare records, social work records, unemployment records, and income tax records. Criminal and correctional records would likely be stored in a manner comparable to court records. Juvenile court records might be preserved but are not normally available to researchers except under very strict controls.

[269] Dr. Flaherty, who is an expert about the regulation of privacy and access to information, recommended the destruction of the documents to protect the privacy interests of Claimants. In his affidavit, at paragraphs 13 and 62, he deposed as follows:

> It is not normal in Canada to collate, compile, and link such administrative records about such a large group of specific victims. Having served their administrative purposes to settle claims, there is a strong argument to destroy all of the claimant records to protect the current and historical reputations and privacy interests of the claimants and any third parties identified in the claims records. … The accumulation of so much sensitive information on a stigmatized population is truly extraordinary. My primary recommendation is destruction.

8. The History of the RFDs

[270] Before moving on to the discussion and analysis, the last factual matter to discuss is the circumstances that prompted the RFDs.

[271] The ADR process, which was the precursor to the IAP, opened in November 6, 2003, and continued to accept applications until the Approval Date of the IRSSA Agreement, March 19, 2007. Under the ADR Claimants were given the option of having the transcript of their hearing deposited in an archive developed for the purpose. As noted above, this option was continued as part of the IAP. However, the option was an arid option because no work was done during the life of the ADR process or for the first few years of the IAP, to develop an archive for the transcripts or to promote the option.

[272] In mid-2010, then Executive Director of the Secretariat Jeffery Hutchinson asked John Trueman of the Secretariat to develop a consent form to enable Claimants to share information from their IAP claims with the TRC. Mr. Trueman drafted a form and communicated with Tom McMahon, TRC's Executive Director and with Ry Moran, TRC's Director of Statement Gathering.

[273] There seems to have some progress in developing a form, and in October 2010, the OC met with the TRC and there was a direction to go forward with a consent form for Claimants who wished to share their information with the TRC. However, on October 25, 2010, Justice Murray Sinclair, Chair of the TRC, wrote Dean Moran, Chair of the OC, and requested that the IAP provide all of its records to the TRC. He also requested that the IAP recognize the TRC as an archive developed for the purpose of receiving Claimant transcripts.

[274] On January 11, 2011, Dean Moran replied that the OC was unanimously of the view that the disclosure of IAP Documents would be a profound breach of trust to the Claimants who had been promised confidentiality, but the OC was ready to assist those Claimants who choose to share their testimony and was prepared to make a vigorous effort to obtain consents to the release of transcripts and other information. She said that the OC would work with the TRC to develop a consent form that could be given to IAP Claimants. She said, however, that the fundamental principle that must be respected was that the personal information contained in the IAP Documents belonged to each Claimant, who had the right to choose whether it would be disclosed.

[275] After this exchange, the Secretariat resumed a dialogue with the TRC to develop a consent form, but the problem appears to be that the TRC never abandoned its wish to obtain the IAP Documents, even if the Claimant did not sign a consent.

[276] The TRC was also of the view that it was the Secretariat's responsibility to develop and implement a consent program and that it had failed to do so. The TRC was prepared to be helpful, but it was not its responsibility to develop the program. Nevertheless, the communications between the Secretariat and the TRC about developing a consent form continued until around May 2011 and then the dialogue stopped.

[277] Meanwhile, discussions began between the Secretariat and LAC about the eventual disposition of the IAP Documents. These discussions engaged the interest of the OC, which

formed a working group to examine the question of disposition of records and make recommendations.

[278] In October 2011, the working group reported, and the OC decided as an interim measure to create a transcript archive to be housed within the Secretariat for later transfer to a permanent home. With the Claimant's consent, transcripts could be delivered to an archive with names of persons materially implicated in the claim redacted but the Claimant's own information preserved. The Secretariat was directed to redraft the consent form for review by the OC and then the plan was that following approval of the draft, the Chair would write to the TRC to advise that the IAP planned to implement the transcript archive.

[279] In December 2011, the OC met to review the revised draft of the consent form and discussed how the form should address the TRC's desire to obtain the documents. The Committee members were generally of the view that court intervention would likely be in cases where the Claimant did not consent, and the TRC would likely be involved. The OC decided to contact the TRC to determine whether they would be open to a structured discussion of these issues with the possible assistance of the Hon. Frank Iacobucci.

[280] On February 2, 2012, representatives of the Secretariat met with Ms. Kim Murray, Executive Director of the TRC, and she indicated that the TRC was not interested in the assistance of the Honourable Frank Iacobucci, who was Canada's negotiator in the process that led to the settlement. Instead, she asked if the TRC could meet with the OC.

[281] On February 28, 2012, the TRC's Justice Sinclair, Executive Director Kim Murray, and Legal Counsel Julian Falconer attended a meeting of the OC. Justice Sinclair indicated that the TRC wished to put into place a plan to obtain the IAP Documents because the IAP had the bulk of IRS survivors' stories of abuses and the TRC was concerned that if these stories were not reflected in its report, it would lack a full picture.

[282] Justice Sinclair raised the TRC's view that the confidentiality assurances given to Claimants were not compatible with the IRSSA. Justice Sinclair explained that the TRC would be bringing a request for directions on the document disclosure obligations of Canada and the churches to the courts and would, if the OC wished, include a question about the IAP's obligations.

[283] Dean Moran thanked Justice Sinclair and his colleagues for coming to the OC meeting. After the meeting, although there was supposed to be a follow up, no work resumed to develop a consent form.

[284] On August 14, 2013, the TRC delivered its RFD.

[285] On October 11, 2013, the Secretariat delivered its RFD.

I. DISCUSSION AND ANALYSIS

1. Introduction

[286] At the most general level, the two RFDs and the Sisters of St. Joseph's motion to quash raise four questions. The first question is whether the Chief Adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature. The third

question is what can and should the court direct with respect to the disposition of the IAP Documents. The fourth question arises from the answer to the third. The fourth question is what should be done with the documents and by whom before their final disposition, be that archiving the documents at LAC or NCTR or be that destroying the IAP Documents.

[287] These four questions raise a myriad of particular questions some of which I have addressed and already answered above. In the discussion that follows, I will complete the analysis and answer the questions.

[288] By way of overview, I answer the first question "yes." The Chief Adjudicator and the TRC have standing because they are entitled to bring RFDs as "such other entity as this court may allow [to] apply for a directions."

[289] My answer to the second question is that the RFDs are not premature. I have two explanations for this answer. First, the RFDs are not premature because the IRSSA does not provide a prior dispute resolution mechanism for the Chief Adjudicator's RFD and since the TRC's RFD raises the same questions, there is no point in postponing resolving the RFDs, particularly because it would be irresponsible for the court to do so where the issues are important to ensuring that the IRSSA is properly administered.

[290] Second, it would be triumph of form over substance to postpone making a decision and this is especially so because it is inconceivable that the NAC would be able to agree on a binding solution that, in any event, involves a determination of several legal issues within the domain of the court.

[291] I have outlined my answer to the third question in the Introduction to these Reasons for Decision. My answer is that the court has and should exercise its jurisdiction to make a Destruction Order. More particularly, the Order should provide that: (a) with the redaction of personal information about alleged perpetrators or affected parties and with the consent of the Claimant, his or her IAP Application Form, hearing transcript, hearing audio recording, and adjudicator's decision may be archived at the NCTR; (b) Canada shall retain all IAP Documents for 15 years after the completion of the IAP hearings; (c) after the retention period, Canada shall destroy all IAP Documents; (d) any other person or entity in possession of IAP Documents shall destroy them after the completion of the IAP hearings.

[292] There are three reasons for the answer that the court can order the destruction of the documents. First, as a matter of contract interpretation, destruction is what the parties agreed, and the court can enforce *in rem* the parties' bargain. Second, the IAP Documents are subject to the implied undertaking, and the court can enforce the implied undertaking to require the destruction of the IAP Documents. Third, the IAP Documents are subject to the law governing a breach of confidence and in the circumstances of the IAP Documents, the appropriate remedy to prevent a breach of confidence is to destroy the documents.

[293] My answer to the fourth question has also been foreshadowed. There should be a notice program to advise Claimants of their option of providing personal information about their experiences at the Indian Residential Schools to the NCTR.

2. The TRC's and the Chief Adjudicator's Standing

[294] The first question is whether the Chief Adjudicator and the TRC have standing to bring the RFDs. The second question is whether their RFDs are premature.

[295] The Sisters of St. Joseph bring a motion to quash the RFDs of the TRC and the Chief Adjudicator on the grounds that both lack standing or alternatively because the TRC and the Chief Adjudicator have not exhausted the dispute resolution mechanisms provided by the IRSSA.

[296] I disagree with the Sisters of St. Joseph's argument for two mutually distinct reasons.

[297] The first reason is that because the Chief Adjudicator's RFD is not premature, both he and the TRC have standing,

[298] Under paragraph 31 of the Order approving the IRSSA, the court declared that "such other entity as this court may allow" may apply for directions in respect of the implementation or administration of the IRSSA. Both the TRC and the Chief Adjudicator are "such other entity as this court may allow." In other words, I grant them leave to bring their respective RFDs.

[299] Although its standing has not previously been challenged, the Chief Adjudicator has previously brought five RFDs. Indeed, the Chief Adjudicator brought a RFD jointly with the Sisters of St. Joseph regarding the procedure for dealing with allegations of bias on the part of an adjudicator during an IAP. Similarly, although it has not previously been challenged, the TRC has previously brought RFDs. In any event, I would grant standing to both entities.

[300] However, to be compliant with paragraph 31 of the Approval Order, "the other entity" may apply for directions only after fully exhausting the dispute resolution mechanisms mandated by the Agreement. In the circumstances of the case at bar, there is no dispute resolution mechanism for the Chief Adjudicator to exhaust and, therefore, it has standing to bring its RFD and its RFD is not premature.

[301] I disagree with the argument of the Sisters of St. Joseph that there was a dispute resolution mechanism available to the Chief Adjudicator in the circumstances of its RFD request. The Sisters of St. Joseph posited that the Chief Adjudicator ought to have sought instructions from the OC, which, in turn, would seek directions from the NAC, which, in turn, would have a right to bring this matter to the court. I disagree with this proposition.

[302] While it undoubtedly would be exhausting, I do not see how following this serpentine route makes for a dispute resolution mechanism for the Chief Adjudicator. Ultimately, the Chief Adjudicator's dispute about the fate of the IAP Documents is as much if not more of a dispute with Canada as it is dispute with the TRC. The dispute involves the autonomy of the Secretariat and the administration of the IAP. The Chief Adjudicator's dispute with Canada goes to the enforcement of the confidentiality provisions of the IRSSA, and much more is involved than document production, disposal, and archiving. The heart of the dispute is about the operative integrity and success of the missions of both the IAP and the TRC. It is much more about the confidentiality and privacy concerns of the parties to the IRSSA and it is about the tension in the agreement between providing compensation without further harming the victims and achieving truth and reconciliation so that the harms will not be repeated in the future. The IRSSA did not provide an alternative dispute resolution mechanism for this dispute.

[303] In my opinion, there was no dispute resolution mechanism available for the Chief Adjudicator to exhaust.

[304] Since the Chief Adjudicator has standing for its RFD, the TRC also has standing even if it did not avail itself of the dispute resolution mechanisms available to it. This conclusion follows from the analysis of Justice Goudge in *Fontaine v. Canada (Attorney General)*, 2013 ONSC 684.

[305] In that case, Canada contested the standing of the TRC to bring a RFD on the exact same grounds relied on by the Sisters of St. Joseph in the immediate case. However, in the case before Justice Goudge, the AFN and the Inuit Representatives – who are both signatories to the Agreement – also had sought answers to the same questions as the TRC. Consequently, the issue of the TRC's standing was technically moot because others had standing. Thus, an RFD applicant without standing can coattail its RFD when there is a RFD applicant with standing before the court. Given the fact that the treatment of IAP Documents impacts the work of both the TRC and the Chief Adjudicator, and given the broader importance of the issues to the legacy of Residential Schools, it would be a victory of form over substance to preclude the TRC from bringing forward matters important to the administration of the IRSSA. The court is, after all, charged with supervision of the proper implementation of the Agreement.

[306] That last comment brings me to my second reason for concluding that the TRC and the Chief Adjudicator have standing to bring their RFDs and for concluding that the RFDs are not premature. The second reason is that in my opinion, in appropriate cases, the court retains the jurisdiction to deem that a party or "other entity" has exhausted the dispute resolution mechanisms of the IRSSA. This extraordinary jurisdiction does not require an amendment to the IRSSA, and this jurisdiction exits because the court always has an obligation to oversee the administration of the IRSSA and always retains the attendant jurisdiction to do so.

[307] In the case at bar, it was a foregone conclusion that the NAC would not muster five votes in favour of the TRC's plan for the IAP Documents. There are seven representatives on NAC and it appears that Canada, AFN, likely the Inuit Organizations, the Church Organizations, and likely the three plaintiffs' counsel are opposed to the TRC's plans. The TRC's RFD request would inevitably have exhausted itself unfavourably, and thus it would inevitably be in the position to say that it had exhausted the dispute resolution mechanisms. As for the Chief Adjudicator's RFD request, it appears to be opposed by Canada, and, thus, even if approved by the NAC, a RFD would have inevitably followed. In any event, both the TRC and the Chief Adjudicator raised very serious issues that ultimately would require the court's attention. Thus, if necessary, I would deem any dispute resolution mechanisms to have been exhausted.

[308] I, therefore, conclude that the Chief Adjudicator and TRC have standing and that their respective RFDs are not premature.

3. What Can and Should Happen to the IAP Documents?

(a) The Interpretation of the IAP Confidentiality Provisions in the IRSSA

[309] In essence, Canada argues that by the express references to the *Access to Information Act* and the *Privacy Act*, the plain meaning of the confidentiality provisions of the IRSSA expressly told the Claimants that their IAP Documents might be disclosed, and, therefore, whatever other

express assurances of confidentiality the Claimants might find in the IRSSA, they knew that their IAP Documents were not confidential and could be retained by Canada and Canada could decide which documents would be destroyed and which documents would be archived at LAC. Further, Canada argues that given the express references to the *Access to Information Act* and the *Privacy Act*, it would take an amendment to the IRSSA for the court to order the destruction of the IAP Documents.

[310] Given Canada's argument, it is perhaps ironic that APPENDIX B to the Guide, which was used by the Secretariat (a branch of a government department of Canada) and endorsed or adopted by other emanations of Canada, comes closer to what I regard as the proper interpretation of the confidentiality provisions in the IRSSA.

[311] My interpretation is that before a necessary and promised destruction of the IAP Documents, the documents will be retained by Canada, where, in the interim, the IAP Documents would be governed by the *Access to Information Act* and the *Privacy Act*. The retention period was designed to allow the documents to be disclosed in very limited circumstances involving criminal and child protection proceedings. That is, in essence, the interpretation provided in APPENDIX B, which promotes confidentiality and provides the examples of the reasons why the documents might have to be disclosed in limited circumstances including current child protection proceedings.

[312] For convenience, I repeat the interpretation of the confidentially provisions that Canada had and continues to announce as set out in APPENDIX B; visualize:

> Subject to the *Access to Information Act*, *the Privacy Act* and any other applicable law, or where your consent to share information has been obtained, personal information about you and other individuals identified in your claim will be dealt with in a private and confidential manner. In certain situations, the government may have to provide personal information to certain authorities. For example, in a criminal case before the courts, the government may have to provide information to the police if they have a search warrant. Another example is where the government has to provide information to child welfare authorities or the police if it becomes aware that a child is currently in need of protection.

[313] Mr. Russell from SAO, who was a deponent for Canada, deposed that Canada complied with its statutory obligations to protect privacy and confidentiality. He stated that "consent from affected individuals remains the primary prerequisite for the release of IAP records outside the IAP Process, except where otherwise required by law, such as in criminal investigations or by court order."

[314] During argument, however, Canada relied on the provision in Section "o" of Schedule "D" that explains that information at a hearing will be kept confidential "except their own evidence, or as required within this process or otherwise by law." Canada submitted that this provision meant that the Claimants were told that their documents would not be confidential because "or otherwise by law" meant the *Access to Information Act* and the *Privacy Act*, which entailed possible disclosure. I asked whether "or otherwise by law" might just be a reference to the needs of the *Criminal Code*. Notwithstanding the examples set out in APPENDIX B, Canada denied that "or otherwise by law" included the *Criminal Code*.

[315] In my opinion, the plain meaning of the confidentiality provisions of the IRSSA is different than the interpretation posited by Canada for these RFDs and closer to the interpretation set out in APPENDIX B. The parties to the IRSSA interested in confidentiality, most particularly the survivors of the Indian Residential Schools and the Church entities obliged by law to protect the privacy of their members and interested in protecting their own reputations, intended the highest possible degree of confidentiality and privacy during the IAP and most particularly during IAP hearings, which would be recorded sessions.

[316] That high degree of confidentiality is what the plain meaning of the IAP promises. But, by the plain meaning of the IRSSA, the Claimants and the Defendants, including Canada, also did not intend (nor could they reasonably have expected) that the IRSSA could be used to cover up criminal activity or to bury information that a child is currently in need of protection.

[317] There is certainly no express language in the IRSSA that told the Claimants and Defendants that in addition to necessary and predictable exceptions to confidentially for criminal proceedings and current; i.e., imminent, child welfare proceedings, their IAP Documents would be archived at LAC, where pursuant to s. 8 (3) of the *Privacy Act* their personal information may be disclosed in accordance with the regulations to any person or body for research or statistical purposes. That is not the high degree of confidentiality that the parties bargained for.

[318] In advancing its purported plain language interpretation of the confidentiality provisions, Canada relies on the interpretative fact that the confidentiality provisions for the IAP refer to the *Privacy Act* and the *Access to Information Act*. I regard these references as necessary to provide a mechanism during the retention period for the disclosure of the documents for the limited purposes of the prosecution of criminal or child protection proceedings. But for these provisions, the *Privacy Act*, and the *Access to Information Act* would not apply to the IAP Documents.

[319] In other words, I agree with the Chief Adjudicator's argument that these statutes would not apply because both statutes require that the information is "under the control of a government institution." A document is under the control of a government institution when: (1) the contents of the document relate to a departmental matter; and (2) the government institution could reasonably expect to obtain a copy of the document upon request: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at para. 50. In my opinion, the IAP Documents are not under the control of a government institution; rather, they are under the control of various supervisory bodies, including ultimately the court under the IRSSA.

[320] I disagree, however, with the Chief Adjudicator's categorical submission that the *Privacy Act* and the *Access to Information Act* do not apply to the IAP Documents. It was the contracting parties' intention that these Acts apply during the retention period.

[321] In advancing its purported plain language interpretation of the confidentiality provisions of the IRSSA, Canada relies on the interpretative fact that Appendix II (Acceptance of Application) of Schedule "D" expressly requires everybody but Canada to destroy the IAP Application Form. The Appendix states that: "and all copies other than those held by the Government will be destroyed on the conclusion of the matter." However, it is precisely because there needs to be a retention period where the IAP Documents would be available for criminal and child welfare proceedings that Canada needed to retain a copy of the Application Form. But, it does not follow that Canada could retain the Application Form and other IAP Documents and

then send some part of them to LAC, where the documents would be available for persons for research or statistical purposes. That is not what the parties bargained for.

[322] What the parties bargained for was that the IAP Documents would be treated as highly confidential but subject to the very limited prospect of disclosure during a retention period and then the documents, including Canada's copies, would be destroyed. That's more or less what Canada told the IAP Claimants in the Guide to the IAP Application, omitting the point that eventually the documents would be destroyed. In interpreting the IRSSA, the court can now give the Claimants the assurance that the IAP Documents will eventually be destroyed and in the interim the documents will be kept confidential subject to very limited exceptions.

[323] I arrive at the above interpretation by the normal principles of contract interpretation and without relying on the implication of terms to the IRSSA.

[324] That said, if I am wrong and the express language of the IRSSA cannot be taken to specify what is to happen to the IAP Documents after the completion of the IAP hearings, then I agree with the Chief Adjudicator's argument that it is an implied term of the IRSSA that the IAP Documents will be destroyed.

[325] After a careful review of the background to the IRSSA, it can be presumed that the parties intended that the IAP Documents would be destroyed after the completion of the IAP. That implied term arises as a matter of necessity and to give the Agreement operative efficiency because otherwise the IAP's objective of compensating the survivors would fail, and failure is the worst kind of inefficiency.

[326] Near to absolute confidentiality was a necessary aspect of the IAP. Near to absolute confidentiality meant that the IAP Documents would be used for the IAP only subject to very limited exceptions that necessitated that the documents be retained so that criminals and child abusers or those incapable of caring for their children would not escape the administration of justice. After these uses were completed, the confidentiality would become absolute and the IAP Documents would be destroyed. This approach to confidentiality is necessary to make the IAP work and this treatment of the IAP Documents is also necessary to not re-victimize the Claimants and to promote healing and reconciliation between the Claimants and Canada.

[327] The eventual destruction of the IAP Documents after a retention period is the proper interpretation of the IRSSA. I can add that the retention period is also necessary so that the Claimants could have a cooling down period to decide whether they might exercise their option to have the transcript of the IAP archived with redactions to protect the private information of others.

[328] I, therefore, conclude that as a matter of contract interpretation, this court can answer the RFDs by stating that the IAP Documents be destroyed after a retention period.

(b) The Implied Undertaking and the Court's Control of the IAP Documents

[329] The implied undertaking provides a second reason that the court has the jurisdiction to order that the IAP Documents be destroyed after a retention period. However, before explaining why this is so, it is necessary to address again the matter of who controls the IAP Documents.

[330] The Chief Adjudicator argues that the IAP Documents are court records and that it then follows that the documents are not in the possession or control of Canada. The Chief Adjudicator makes this argument with the aim that the court exclusively have the authority to determine what is to happen to the IAP Documents

[331] In my opinion, the IAP Documents are in the possession of Canada, but ultimately nothing turns on that conclusion because having possession of IAP Documents is not determinative. The pertinent question is whether the court has the jurisdiction to decide what should happen to these documents after the completion of the IAP and that question is not determined by the mere fact of who has possession or control over the documents.

[332] As I will explain, my answer is that the court has the jurisdiction to make an order *in rem* (against the world) that the IAP Documents be destroyed subject to the right of the Claimants to consent to certain IAP Documents being archived at the NCTR. The Destruction Order would be binding on persons in possession of the IAP Documents, be their possession pursuant to ownership, bailment, licence, statutory authority or even just finding the document.

[333] I can say immediately that the court's jurisdiction does not arise because the IAP Documents are court records. In my opinion, the IAP Documents are not court records; rather, they are documents that the court has the jurisdiction to control *in rem*, which does not make them court records.

[334] Court records would be subject to s. 74 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that court records are to be disposed of in accordance with the directions of the Deputy Attorney General subject to the approval of the Chief Justice of the relevant court. Canada submitted that the IAP Documents could not be court records because if they were, then the IAP Documents would be subject to the open court principle, and this would expose the IAP Documents to the public, which was obviously not the intent of the parties to the IRSSA. I agree that the IAP Documents were not intended to be subject to the open court principle, which they would be, if they were court records.

[335] The IAP Documents are a product of an alternative dispute resolution mechanism, and one of the attractions of adjudication outside of the court is that the adjudication is private and the open court principle does not apply. Under an arbitration agreement, the parties can obtain privacy, something not available from the court system, which is public and invasive of privacy. The IAP is an alternative dispute resolution system, and the parties bargained for privacy and confidentiality.

[336] During argument, Canada conceded, however, that it would have been possible for the IRSSA parties to contract for absolute confidentiality as might be achieved by private arbitration. Canada argued, however, that in the IRSSA negotiations, the potential had not been actualized by the Agreement signed by the parties. For the reasons set out above, I disagree with Canada's interpretation of the contract.

[337] This all said, as I will explain below, the open court principle is relevant to the analysis of what to do with the IAP Documents after the work of the IAP is completed. The relevance is that in its exceptions, the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[338] I can also say immediately that the court's jurisdiction over the IAP Documents does not depend upon whether the Secretariat is a branch of AANDC or a separate or semi-separate or autonomous or semi-autonomous entity independent of Canada and its branches. Insofar as the IRSSA is concerned, the court's jurisdiction extends to the signing parties, to the Chief Adjudicator, to the OC, the NAC, the TRC, the Secretariat, and to SAO, which undoubtedly is a branch of the AANDC. In some instances, the court's jurisdiction over the IAP Documents is *in rem* and would extend to non-parties such as the Ontario Provincial Police ("OPP"), which was the case in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283.

[339] In *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, I explained at length the sources of this court's jurisdiction over the production of documents in the IAP process. Although I rely on it, I will not repeat that discussion here, and I simply say that those sources of jurisdiction apply not only to deciding what documents should be produced for the IAP proceedings, which was the issue in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, but also to deciding what should happen to IAP Documents after the completion of the IAP hearings, which is the issue in the immediate case.

[340] In *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, after some analysis, which again I will not repeat here, I concluded that the IAP was a form of litigation that replaced or continued the individual and class actions that were settled by the IRSSA. I held that the implied or deemed undertaking that applied to the proceedings that came before the IAP did not preclude Canada from producing certain documents (the OPP documents) for the IAP and for the TRC because the deemed undertaking rule only applies to proceedings other than the proceeding in which the evidence was obtained. Provided that the disclosure was in accordance with the IRSSA, it was not a breach of the implied undertaking to transfer OPP documents to the TRC. It is a logically corollary of my analysis that the deemed or implied undertaking, however, would apply to the IAP Documents should they be used outside of the IRSSA.

[341] Apart from being a logical extension of my analysis in *Fontaine v. Canada (Attorney General)*, 2014 ONSC 283, the disclosure of documents in the IAP is part of litigation, and it arises as a matter of the common law and the civil law as an incident of litigation. See: *Juman v. Doucette*, [2008] 1 S.C.R. 157; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] S.C.R. 743; *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.). The purpose of the implied undertaking is to protect a litigant in civil proceedings from having his or her discovery testimony used for collateral purposes.

[342] In *Goodman v. Rossi*, at pages 363-64, the Ontario Court of Appeal stated:

> Where a party has obtained information by means of a court compelled production of documents or discovery, which information could not otherwise have been obtained by legitimate means independent of the litigation process, the receiving party impliedly undertakes to the court that the private information so obtained will not be used, vis-à-vis the producing party, for a purpose outside the scope of the litigation for which disclosure was made, absent consent of the producing party or with leave of the court; any failure to comply with the undertaking shall be a contempt of court.

[343] At page 367, the Court explained the rationale for the implied undertaking as follows:

> [The] principle is based on recognition of the general right of privacy which a person has with respect to his or her documents. The discovery process represents an intrusion on this right under the compulsory processes of the court. The necessary corollary is that this intrusion should not be

> allowed for any purposes other than that of securing justice in the proceeding in which the discovery takes place.

[344] In my opinion, the implied undertaking applies to the IAP and it would be a breach of the implied undertaking, for Canada as a party to the IRSSA to provide its IAP Documents to the TRC or the NCTR or to LAC. Achieving IAP Documents at LAC may have a commendable collateral purpose or preserving history, but it would constitute a breach of the implied undertaking, unless the court ordered that the undertaking does not apply. I would not make such an order in the circumstances of the administration of the IRSSA.

[345] The case at bar is similar to the situation in *Andersen Consulting v. R.*, [2001] 2 F.C.J. No. 57, where the Federal Court held that where Canada obtains materials subject to the implied undertakings rule, that material is not within the control of a government institution and must be returned or destroyed at the conclusion of the litigation.

[346] In *Andersen*, *supra*, Andersen Consulting and Canada settled a civil dispute, and the lawyers for Canada took the position that Canada would neither return nor destroy the documents it had obtained as a part of the discovery process and that Canada was obliged by law to retain them and in due course to deliver them to what is now LAC. Justice Hugessen ordered the documents destroyed. Justice Hugessen explained that the implied undertaking is not a matter of contract but is imposed by the court itself on a litigant. He disagreed that what is now the *Library and Archives Canada Act*, *supra* and what was then the *National Archives of Canada Act*, R.S.C., 1985 (3rd Supp.), c. 1, stood in the way of imposing the implied undertaking. He stated at paragraphs 16 and 17 of his judgment:

> 16. It is a fair inference that Parliament's interest in creating the public archive was primarily in ensuring that the archives should contain those documents relating to the actual operations of government as such [page333] rather than to government in its incidental role as plaintiff or defendant in civil litigation.
>
> 17. More important, the cases under the Access to Information Act do not deal with a situation where the law itself imposes a condition upon the government institution which receives a document. This is critical. Documents received by Justice in the discovery process are not subject to a merely voluntary condition. Lawyers for the Crown do not have the option of refusing to give the implied undertaking: by accepting the documents they are bound towards the court to deal with them only in the way permitted by the undertaking. That condition is imposed upon the solicitors and upon the department and the government they serve prior to the documents ever coming into their possession. Furthermore, the undertaking extends not only to the documents themselves but, much more significantly, to all information obtained as a result of the discovery process, e.g. through answers to oral questions. The court in extracting the undertaking is concerned not so much with the documents as pieces of paper but rather, and significantly, with the information they may contain. That information is to remain private unless and until it comes out in open court. While the point does not arise for decision herein, I seriously doubt that it could be called "government information". It is not in the government's control because the latter's possession of it is constrained and restricted by law.

[347] Relying on the Federal Court of Appeal's decision in *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, 2007 FCA 272, Canada, however, submitted that *Andersen Consulting v. R.* was distinguishable and that Canada was entitled to have the IAP Documents that it controlled archived at LAC without court interference.

[348] In *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, pursuant to the *Employment Equity Act*, CIBC provided confidential commercially sensitive information to the Canadian Human Rights Commission. The Commission subsequently received a request under the *Access to Information Act* for disclosure of the information, and the Commission advised CIBC that it would disclose the confidential information. Reversing the lower court, the Federal Court of Appeal held that the Canadian Human Rights Commission controlled the information, which made the information subject to the *Access to Information Act*, but CIBC's information was covered by an exception to disclosure under the *Access to Information Act*. The outcome of CIBC's appeal was that the confidentiality of its information was protected, but Canada relies on the Federal Court's conclusion that the Commission controlled CIBC's documents and thus the information was subject to the *Access to Information Act*. Canada uses that holding to argue that in the case at bar, Canada controlled the IAP Documents subject to the *Access to Information Act*.

[349] Subject to its relevance to the law about the enforcement of the law about breach of confidence, which I discuss later, I do not see, however, how *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)*, helps Canada in the case at bar. In that case, the Federal Court of Appeal did not overrule or even doubt *Andersen Consulting*, which it noted was not an *Access to Information Act* case. Further, *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission)* did not involve the implied undertaking and did not engage the same policy concerns as the case at bar.

[350] I conclude that Canada's possession of the IAP Documents is subject to the implied undertaking and that the court can order the IAP Documents destroyed to enforce the implied undertaking.

(c) Privacy, Confidentiality, and the Court's Control of the IAP Documents

[351] *Canadian Imperial Bank of Commerce v. Canada (Canadian Human Rights Commission), supra*, and several other cases noted in *Andersen Consulting v. R., supra* are authority that an expectation of confidentiality arising from the dealings and agreements between the source of the record and the government institution are not sufficient to withdraw a record from the control of the government institution within the meaning of the *Access to Information Act*. See: *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* (1997), 4 Admin. L.R. (3d) 96 (F.C.T.D.); *Canada Post Corp. v. Canada (Minister of Public Works*), [1995] 2 F.C. 110.

[352] In my opinion, none of these cases have any application to the circumstances of the case at bar where Canada entered into an agreement that contained confidentiality provisions that settled class proceedings in nine jurisdictions and which agreement required court approval and which agreement was subject to the administrative and supervisory jurisdiction of the courts under class action statutes including Ontario's *Class Proceedings Act, 1992*. In such circumstances, Canada is bound by the class action settlement agreement including its confidentiality provisions. The IRSSA, a class action and court-approved settlement agreement, bound Canada to the terms of the settlement and bound Canada and the other parties to the courts' administration of the agreement including its confidentiality provisions that are

entrenched into the agreement and that were complemented by additional assurances from Canada and from the Chief Adjudicator, who is a court officer.

[353] The Destruction Order that I shall make does not require an amendment to the IRSSA and indeed is an express or implied term of the IRSSA. Conversely, the archival of the IAP Documents at LAC or at NCTR without the consent of the Claimants would require an amendment to the IRSSA. Further, without the consent of the Claimants, the archiving would be a breach of the implied undertaking and a breach of confidence.

[354] Earlier in these Reasons for Decision I held that the IAP Documents were not court records and as such were not subject to the open court principle that would provide the public with access to what would otherwise be private and in the case of IAP Documents very private and very personal information. I also observed, however, that the open court principle has lessons about when and how to protect the confidentiality and the privacy of parties who might be injured by the disclosure of a court record.

[355] The point I now wish to make is that if the IAP Documents had been court documents, they, without doubt, would have been sealed by court order. In my text with John Morden, *The Law of Civil Procedure in Ontario* (2nd ed.) (Markham, NexisLexis, 2014), I discuss the open court principle at paragraphs 3.735 and 3.738 as follows [footnotes omitted]:

> In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 which concerned a request for a sealing order in proceedings before the Federal Court, the Supreme Court of Canada formulated a test for when a sealing order should be granted. Justice Iacobucci stated that a sealing order should only be granted when: (1) the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.
>
> While courts are reluctant to grant a sealing order, there are grounds that would justify a sealing order, and courts have been prepared to grant sealing orders in a variety of circumstances including:
>
> • protecting the privacy of infants and parties under a disability, particularly a mental disability;
>
> • protecting the safety of a child of a wealthy couple involved in a custody case from an appreciable risk of being kidnapped if information regarding the child was made public;
>
> • protecting the identity of a police informant;
>
> • protecting the privacy of personal medical information in a class action;
>
> • protecting the privacy of victims of a sexual assault;
>
> • protecting a genuine trade secret or confidential property;
>
> • preventing the disclosure of a non-parties' confidential information, especially where disclosure by a party would contravene a confidentiality agreement;
>
> • protecting the disclosure of information subject to the privilege for communications in furtherance of settling litigation (litigation settlement privilege);

> • preventing the subject matter of the litigation from being ruined by its disclosure; and
>
> • preventing the efficacy of proceedings under the Companies' Creditors Arrangement Act from being undermined.

[356] If a sealing order had been granted for the IAP Documents, the sealed documents, practically speaking, would never be unsealed, and they certainly would not be unsealed so that Canada could deliver copies of IAP Documents to LAC where, among other exceptions, an individual's personal information may be disclosed for research purposes 110 years after the birth of the individual.

[357] A breach of confidence occurs when a confider discloses confidential information to a confidant in circumstances in which there is an obligation of confidentiality and the confidant misuses the confidential information: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).

[358] A confider and confidant relationship does not necessarily require that there be any contractual, fiduciary, or other direct relationship between the parties and confidential relationships may arise as a matter of the common law and equity. A confidant may include any direct recipient of confidential information from the confider and any third party who uses or discloses information that is actually or constructively known to have been used or disclosed by someone in breach of confidence or that is subsequently discovered to have been so used or disclosed. A confidant who receives confidential information, even if it later becomes public knowledge, may not use it to the detriment of the confider. Any use of confidential information other than for a permitted use is a breach of confidence. If a breach of confidence is established, the court has the jurisdiction to grant a wide range of both common law and equitable remedies. The general goal of the remedies is to put the confider into as good a position as it would be but for the breach.

[359] See: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1994] 8 W.W.R. 727 (B.C.S.C.), varied (1996), 138 D.L.R. (4th) 682 (B.C.C.A.), varied [1999] 1 S.C.R. 142; *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (C.A.), affg. (1998), 42 B.L.R. (2d) 53 (Ont. Gen. Div.); *Apotex Fermentation Inc. v. Novopharm* (1997), 162 D.L.R. (4th) 111 (Man. C.A.); *International Tools Ltd. v. Kollar*, [1968] 1 O.R. 669 (C.A.); *Tenatronics Ltd. v. Hauf*, [1972] 1 O.R. 329 (H.C.J.); *Polyresins Ltd. v. Stein-Hall Ltd.*, [1972] 2 O.R. 188 (H.C.J.); *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] R.P.C. 375.

[360] Canada's argument is that the parties to the IRSSA and the persons who signed the confidentiality agreements and who received assurances of confidentially contracted out of absolute confidentiality and absolute privacy for the Claimants' personal information. I agree that the parties and participants contracted out of absolute confidentiality and privacy. There were to be exceptions but those exceptions did not include the imperatives of the *Library and Archives Canada Act*, *supra*. The August 7, 2012 Agreement for the Transfer of Archival Records between AANDC and LAC is a breach of confidence. The appropriate remedy is to have the IAP Documents destroyed after a 15-year retention period.

(d) <u>What Should Be Done with the IAP Documents Before their Final Disposition</u>

[361] As discussed above, the IRSSA envisioned that IAP Documents would be retained for a period of time during which they might be disclosed for very limited purposes associated with criminal or child protection proceedings. As discussed above, under the IAP, a Claimant could request a copy of his or her own evidence for memorialization and had the option of having the transcript of the IAP deposited in an archive.

[362] The IRSSA does not specify the duration of the retention period, and in these circumstances a reasonable retention period would be an implied term of the IRSSA. In my opinion, a reasonable retention period is 15 years. Fifteen years is the duration of the absolute limitation period under Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24 Sch. B, and that duration provides a comparable public policy measure for a maximum retention period.

[363] The TRC is no longer pursuing a request to obtain IAP Documents for the NCTR without the Claimants' consent, but the TRC does wish to encourage Claimants to exercise the option of having the transcript of the IAP deposited with the NCTR.

[364] The evidence establishes that to date, perhaps because of the trauma and stress of the retelling of their stories at the IAP hearings, few Claimants have exercised their option to archive the IAP transcript.

[365] The evidence establishes that there has been a dialogue between the OC and the TRC about obtaining transcripts and that Canada is willing to facilitate a notice program to encourage Claimants to archive their transcripts.

[366] The evidence establishes that the Claimants were not advised of their option to archive a transcript during the early years of the IAP and the more recent practice of advising Claimants of their rights is not working possibly because of the emotional turmoil of the IAP hearing. A cooling off period is required so that a reasoned decision may be made. After the cooling off period, the Claimants can revisit their decision about the IAP Documents with the knowledge that if they do not exercise their option the documents will be destroyed after the retention period.

[367] In my opinion, it would be a worthwhile project to develop a notice program to advise the IAP Claimants of the rights they have under the IRSSA to tell their stories to the NCTR.

[368] The Church entities oppose the development of a notice program, but provided that the program did not go beyond what is consistent with the IRSSA, I see no merit to their opposition.

[369] I do not regard ordering a program to encourage Claimants to exercise a right or rights that they have under the IRSSA as requiring any amendment to the IRSSA, and, in my opinion, the order falls within the administrative or supervisory jurisdiction of the court.

[370] However, the precise terms of the notice program should be an evidence-based decision. Care needs to be taken that the notice program not inflict physiological harm and re-victimize the survivors of the Indian Residential Schools. Therefore, I direct that the TRC or the NCTR may give Claimants notice that with the Claimant's consent, his or her IAP Application, hearing transcript, hearing audio recording and adjudicator's decision may be archived at the NCTR. The archiving of the document would be conditional on any personal information about alleged

perpetrators or affected parties being redacted from the IAP Document. The court will settle the terms of the notice program at another RFD hearing that may be brought by the TRC or the NCTR.

[371] It may be noted that in arriving at the above decisions, it was not necessary to decide the issue of whether the IAP Documents have historical value. The above decisions are based on: (a) the promises made to the Claimants under the IRSSA and during the IAP; (b) the Claimants' right to control their personal information; and (c) the Claimants' right to control the telling of their own stories; and (d) respect for the Claimants' individual decisions.

[372] A notice program must be designed in a way that respects what is a very difficult, very private, and very personal decision.

J. CONCLUSION

[373] An order should be issued in accordance with the above Reasons for Decision.

[374] The Order will have to be carefully drawn, and it may be necessary to have a further attendance to settle the language and terms of the Order.

[375] As I pointed out during argument, the definition of what is an IAP Document may have to be specified with some precision in any court Order and the manner of making redactions in any documents that make their way to the NCTR will require some attention.

[376] The court's Destruction Order should not be overbroad, and the Destruction Order should not apply to NAC, OC, Chief Adjudicator, AANDC, SAO, and Department of Justice documents simply because they are related to the IAP.

[377] The IAP is itself now a part of the history of Canada, and the court's Destruction Order needs to focus on the personal information of the Claimants and not be overbroad.

[378] I direct that the Chief Adjudicator whose RFD was largely successful to prepare and circulate the first draft of the Order with the above observations in mind.

[379] If the parties cannot agree about the form of the Order, they should contact Court Counsel to make arrangements for an attendance to settle the Order.

[380] Finally, if the parties cannot agree about the matter of costs, they may make submissions in writing within 20 days of the release of these Reasons for Decision followed by a right of reply within a further 20 days.

Perell, J.

Released: August 6, 2014

Schedule "A"

SCHEDULE "N"

MANDATE FOR THE TRUTH AND RECONCILIATION COMMISSION

There is an emerging and compelling desire to put the events of the past behind us so that we can work towards a stronger and healthier future. The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future. The truth of our common experiences will help set our spirits free and pave the way to reconciliation.

Principles

Through the Agreement, the Parties have agreed that an historic Truth and Reconciliation Commission will be established to contribute to truth, healing and reconciliation.

The Truth and Reconciliation Commission will build upon the "Statement of Reconciliation" dated January 7, 1998 and the principles developed by the Working Group on Truth and Reconciliation and of the Exploratory Dialogues (1998-1999). **These principles are as follows: accessible; victim-centered; confidentiality (if required by the former student); do no harm; health and safety of participants; representative; public/transparent; accountable; open and honourable process; comprehensive; inclusive, educational, holistic, just and fair; respectful; voluntary; flexible; and forward looking in terms of rebuilding and renewing Aboriginal relationships and the relationship between Aboriginal and non-Aboriginal Canadians**.

Reconciliation is an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Metis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada. Reconciliation may occur between any of the above groups.

Terms of Reference

1. Goals

The goals of the Commission shall be to:

(a) **Acknowledge Residential School experiences, impacts and consequences**;

(b**) Provide a holistic, culturally appropriate and safe setting for former students, their families and communities as they come forward to the Commission**;

(c) Witness support, promote and facilitate truth and reconciliation events at both the national and community levels;

(d) Promote awareness and public education of Canadians about the IRS system and its impacts;

(e) **Identify sources and create as complete an historical record as possible of the IRS system and legacy. The record shall be preserved and made accessible to the public for future study and use;**

(f) **Produce and submit to the Parties of the Agreement a report including recommendations to the Government of Canada concerning the IRS system and experience including: the history, purpose, operation and supervision of the IRS system, the effect and consequences**

of IRS (including systemic harms, intergenerational consequences and the impact on human dignity) and the ongoing legacy of the residential schools;

(g) Support commemoration of former Indian Residential School students and their families in accordance with the Commemoration Policy Directive (Schedule "X" of the Agreement).

2. Establishment, Powers, Duties and Procedures of the Commission

The Truth and Reconciliation Commission shall be established by the appointment of "the Commissioners" by the Federal Government through an Order in Council, pursuant to special appointment regulations.

Pursuant to the Court-approved final settlement agreement and the class action judgments, the Commissioners:

(a) in fulfilling their Truth and Reconciliation Mandate, are authorized to receive statements and documents from former students, their families, community and all other interested participants, and, subject to (f), (g) and (h) below, make use of all documents and materials produced by the parties. Further, the Commissioners are authorized and required in the public interest to archive all such documents, materials, and transcripts or recordings of statements received, in a manner that will ensure their preservation and accessibility to the public and in accordance with access and privacy legislation, and any other applicable legislation;

(b) shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process;

(c) shall not possess subpoena powers, and do not have powers to compel attendance or participation in any of its activities or events. **Participation in all Commission events and activities is entirely voluntary**;

(d) may adopt any informal procedures or methods they may consider expedient for the proper conduct of the Commission events and activities, so long as they remain consistent with the goals and provisions set out in the Commission's mandate statement;

(e) may, at its discretion, hold sessions in camera, or require that sessions be held in camera;

(f) shall perform their duties in holding events, in activities, in public meetings, in consultations, in making public statements, and in making their report and recommendations without making any findings or expressing any conclusion or recommendation, regarding the misconduct of any person, unless such findings or information has already been established through legal proceedings, by admission, or by public disclosure by the individual. Further, the Commission shall not make any reference in any of its activities or in its report or recommendations to the possible civil or criminal liability of any person or organization, unless such findings or information about the individual or institution has already been established through legal proceedings;

(g) shall not, except as required by law, use or permit access to statements made by individuals during any of the Commissions events, activities or processes, except with the express consent of the individual and only for the sole purpose and extent for which the consent is granted;

(h) shall not name names in their events, activities, public statements, report or recommendations, or make use of personal information or of statements made which identify a person, without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal

proceedings, by admission, or by public disclosure by that individual. Other information that could be used to identify individuals shall be anonymized to the extent possible;

(i) notwithstanding (e), shall require in camera proceedings for the taking of any statement that contains names or other identifying information of persons alleged by the person making the statement of some wrongdoing, unless the person named or identified has been convicted for the alleged wrong doing. The Commissioners shall not record the names of persons so identified, unless the person named or identified has been convicted for the alleged wrong doing. Other information that could be used to identify said individuals shall be anonymized to the extent possible;

(j) shall not, except as required by law, provide to any other proceeding, or for any other use, any personal information, statement made by the individual or any information identifying any person, without that individual's express consent;

(k) shall ensure that the conduct of the Commission and its activities do not jeopardize any legal proceeding;

(1) may refer to the NAC for determination of disputes involving document production, document disposal and archiving, contents of the Commission's Report and Recommendations and Commission decisions regarding the scope of its research and issues to be examined. The Commission shall make best efforts to resolve the matter itself before referring it to the NAC.

3. Responsibilities

In keeping with the powers and duties of the Commission, as enumerated in section 2 above, the Commission shall have the following responsibilities:

(a) to employ interdisciplinary, social sciences, historical, oral traditional and archival methodologies for statement-taking, historical fact-finding and analysis, report-writing, knowledge management and archiving;

(b) to adopt methods and procedures which it deems necessary to achieve its goals;

(c) to engage the services of such persons including experts, which it deems necessary to achieve its goals;

(d) to establish a research centre and ensure the preservation of its archives;

(e) to have available the use of such facilities and equipment as is required, within the limits of appropriate guidelines and rules;

(f) to hold such events and give such notices as appropriate. This shall include such significant ceremonies as the Commission sees fit during and at the conclusion of the 5 year process;

(g) to prepare a report;

(h) to have the report translated in the two official languages of Canada and all or parts of the report in such Aboriginal languages as determined by the Commissioners;

(i) to evaluate commemoration proposals in line with the Commemoration Policy Directive (Schedule "X" of the Agreement).

4. Exercise of Duties

As the Commission is not to act as a public inquiry or to conduct a formal legal process, it will, therefore, not duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement. In the exercise of its powers the Commission shall recognise:

(a) the unique experiences of First Nations, Inuit and Metis former IRS students, and will conduct its activities, hold its events, and prepare its Report and Recommendations in a manner that reflects and recognizes the unique experiences of all former IRS students;

(b) that the truth and reconciliation process is committed to the principle of voluntariness with respect to individuals' participation;

(c) that it will build upon the work of past and existing processes, archival records, resources and documentation, including the work and records of the Royal Commission on Aboriginal Peoples of 1996;

(d) the significance of Aboriginal oral and legal traditions in its activities;

(e) that as part of the overall holistic approach to reconciliation and healing, the Commission should reasonably coordinate with other initiatives under the Agreement and shall acknowledge links to other aspects of the Agreement such that the overall goals of reconciliation will be promoted;

(f) that all individual statements are of equal importance, even if these statements are delivered after the completion of the report;

(g) that there shall be an emphasis on both information collection/storage and information analysis.

11. Access to Relevant Information

In order to ensure the efficacy of the truth and reconciliation process, Canada and the churches will provide all relevant documents in their possession or control to and for the use of the Truth and Reconciliation Commission, subject to the privacy interests of an individual as provided by applicable privacy legislation, and subject to and in compliance with applicable privacy and access to information legislation, and except for those documents for which solicitor-client privilege applies and is asserted.

In cases where privacy interests of an individual exist, and subject to and in compliance with applicable privacy legislation and access to information legislation, researchers for the Commission shall have access to the documents, provided privacy is protected. In cases where solicitor-client privilege is asserted, the asserting party will provide a list of all documents for which the privilege is claimed.

Canada and the churches are not required to give up possession of their original documents to the Commission. They are required to compile all relevant documents in an organized manner for review by the Commission and to provide access to their archives for the Commission to carry out its mandate. Provision of documents does not require provision of original documents. Originals or true copies may be provided or originals may be provided temporarily for copying purposes if the original documents are not to be housed with the Commission.

Insofar as agreed to by the individuals affected and as permitted by process requirements, information from the Independent Assessment Process (IAP), existing litigation and Dispute Resolution processes may be transferred to the Commission for research and archiving purposes.

12. National Research Centre

A research centre shall be established, in a manner and to the extent that the Commission's budget makes possible. It shall be accessible to former students, their families and communities, the general public, researchers and educators who wish to include this historic material in curricula.

For the duration of the term of its mandate, the Commission shall ensure that all materials created or received pursuant to this mandate shall be preserved and archived with a purpose and tradition in keeping with the objectives and spirit of the Commission's work.

The Commission shall use such methods and engage in such partnerships with experts, such as Library and Archives Canada, as are necessary to preserve and maintain the materials and documents. To the extent feasible and taking into account the relevant law and any recommendations by the Commission concerning the continued confidentiality of records, all materials collected through this process should be accessible to the public.

13. Privacy

The Commission shall respect privacy laws, and the confidentiality concerns of participants. For greater certainty:

(a) any involvement in public events shall be voluntary;

(b) notwithstanding 2 (i), the national events shall be public or in special circumstances, at the discretion of the Commissioners, information may be taken in camera;

(c) the community events shall be private or public, depending upon the design provided by the community;

(d) if an individual requests that a statement be taken privately, the Commission shall accommodate;

(e) documents shall be archived in accordance with legislation.

CITATION: Fontaine v. Canada (Attorney General), 2014 ONSC 4585
COURT FILE NO.: 00-CV-129059
DATE: 20140806

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARRY PHILIP FONTAINE in his personal capacity and in his capacity as the Executor of the estate of Agnes Mary Fontaine, deceased, et al.

Plaintiffs

- and -

THE ATTORNEY GENERAL OF CANADA, et al.

Defendants

REASONS FOR DECISION

Perell, J.

Released: August 6, 2014

@B,00021778,OR
@1@Z20070102
@2

A.A. v. B.B. et. al.*

[Indexed as: A.A. v. B.B.]
@3

83 O.R. (3d) 561
@4

Court of Appeal for Ontario,
McMurtry C.J.O., Labrosse and Rosenberg JJ.A.
January 2, 2007

* Vouz trouverez la traduction fran‡aise de la d,cision si-dessus … la p. 575, post.
@6

Family law -- Children -- Declaration of parentage -- Jurisdiction -- Application judge not having jurisdiction under Children's Law Reform Act to grant declaration that woman living in stable same-sex union with child's biological mother was child's mother -- Court having power to make order in exercise of its parens patriae jurisdiction -- Declaration granted -- Children's Law Reform Act, R.S.O. 1990, c. C.12.

Charter of Rights and Freedoms -- Procedure -- Appellant applying unsuccessfully for declaration that she was child's mother -- Appellant not raising Charter issues before application judge in order to gain tactical advantage of having application unopposed by intervenor -- Relief sought by appellant being available on appeal without resorting to Charter -- Appellant not being permitted to raise Charter issues for first time on appeal -- Canadian Charter of Rights and Freedoms.

A and her partner C had been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B. They thought it would be in the child's best interests that B remain involved in his life. A, B and C all wished to have A's motherhood recognized to give her all the rights and obligations of a custodial parent. A and C did not apply for an adoption order because, if they did so, B would lose his status as the child's parent under the Child and Family Services Act, R.S.O. 1990, c. C.11. Instead, A brought an application for a declaration that she was the child's mother. The application was dismissed. The application judge would have granted the order sought but found that he did not have jurisdiction to do so, either under the Children's Law Reform Act ("CLRA") or through exercise of the court's inherent parens patriae jurisdiction. A appealed. For the first time,

she raised the argument that her rights under ss. 7 and 15 of the Canadian Charter of Rights and Freedoms were violated.

Held, the appeal should be allowed.

In order to raise a Charter issue for the first time on appeal, three prerequisites must be met. First, there must be a sufficient evidentiary record to resolve the issue. Second, the failure to raise the issue at trial must not have been a tactical decision. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to hear the Charter issue on appeal. In this case, the second prerequisite was not met. Because no Charter issues were raised before the application judge, he refused to permit the Alliance for Marriage and Family to intervene to oppose the application. Apparently, A wished to take advantage of the obvious tactical advantage of proceeding with an unopposed application. The third prerequisite was not met as the relief requested could be granted without resorting to the Charter, as discussed below.

The application judge did not err in finding that the CLRA only permits a declaration of a single father and a single mother of a child. As the relevant provisions of the CLRA are unambiguous, resort could not be had to the Charter as an interpretive aide. [page562]

The court's inherent parens patriae jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap. A legislative gap existed in this case. The purpose of the CLRA was to declare that all children have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme. Because of these changes, the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide. It was contrary to D's best interests that he was deprived of the legal recognition of the parentage of one of his mothers. There was no other way to fill this deficiency except through the exercise of the parens patriae jurisdiction. The legislative gap was not deliberate. There was no doubt that the legislature did not foresee the possibility of declarations of parentage for two women. The gap in the legislation was revealed by changing social conditions and

medical knowledge. There was nothing in the legislative history of the CLRA to suggest that the legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act. A was entitled to a declaration that she was the child's mother.

@5

Cases referred to

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 100 B.C.L.R. (3d) 1, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 93 C.R.R. (2d) 189, 18 C.P.R. (4th) 289, 2002 SCC 42; R. v. Brown, [1993] 2 S.C.R. 918, [1993] S.C.J. No. 82, 105 D.L.R. (4th) 199, 155 N.R. 225, 16 C.R.R. (2d) 290, 83 C.C.C. (3d) 129, apld

Beson v. Newfoundland (Director of Child Welfare), [1982] 2 S.C.R. 716, [1982] S.C.J. No. 95, 142 D.L.R. (3d) 20, 44 N.R. 602; E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60, 61 Nfld. & P.E.I.R. 273, 31 D.L.R. (4th) 1, 71 N.R. 1, 185 A.P.R. 273, 13 C.P.C. (2d) 6 (sub nom. Eve (Re)); M.D.R. v. Ontario (Deputy Registrar General) (2006), 81 O.R. (3d) 81, [2006] O.J. No. 2268, 270 D.L.R. (4th) 90, 141 C.R.R. (2d) 292, 30 R.F.L. (6th) 25, 148 A.C.W.S. (3d) 943 (S.C.J.) (sub nom. Rutherford v. Ontario (Deputy Registrar General)), consd

Other cases referred to

A. (A.) v. B. (B.), [2003] O.J. No. 1215, 225 D.L.R. (4th) 371, 38 R.F.L. (5th) 1 (S.C.J.); A. v. Liverpool City Council and another, [1982] A.C. 363, [1981] 2 All E.R. 385, [1981] 2 W.L.R. 948, 79 L.G.R. 621, 145 J.P. 318, 2 F.L.R. 222 (H.L.); Bagaric and Juric et al. (Re) (1984), 44 O.R. (2d) 638, [1984] O.J. No. 3069, 2 O.A.C. 35, 5 D.L.R. (4th) 78, 40 C.P.C. 211 (C.A.); C.R. v. Children's Aid Society of Hamilton, [2004] O.J. No. 3301, [2004] 4 C.N.L.R. 1, 8 R.F.L. (6th) 285, 132 A.C.W.S. (3d) 1107 (S.C.J.); Hy and Zel's Inc. v. Ontario (Attorney General), [1993] 3 S.C.R. 675, [1993] S.C.J. No. 113, 107 D.L.R. (4th) 634, 160 N.R. 161; L. (T.D.) v. L. (L.R.), [1994] O.J. No. 896, 114 D.L.R. (4th) 709, 1 L.W.R. 573, 4 R.F.L. (4th) 103 (Gen. Div.) (sub nom. Low v. Low); R. v. R. (R.) (1994), 19 O.R. (3d) 448, [1994] O.J. No. 1458, 91 C.C.C. (3d) 193, 30 C.R. (4th) 293 (C.A.); Symes v. Canada, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, 110 D.L.R. (4th) 470, 161 N.R. 243, 19 C.R.R. (2d) 1, 94 DTC 6001 (sub nom. Symes v. Canada, Symes v. M.N.R., R. v. Symes) [page563]

Statutes considered

Canadian Charter of Rights and Freedoms, ss. 7, 15 Child and Family Services Act, R.S.O. 1990, c. C.11, s. 158(2) [as am.] Children's Law Reform Act, R.S.O. 1990, c. C.12, Part I, ss.

1, (1), (2), Part II, ss. 4, (1), 8, 10 [as am.], 12(2) Citizenship Act, R.S.C. 1985, c. C-29, s. 3(1)(b) Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A., s. 20(1)5

Authorities referred to

Ontario Law Reform Commission, Report on Family Law (1973)
Victorian Law Reform Commission, Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage
@6

APPEAL from the judgment of Aston J., [2003] O.J. No. 1215, 225 D.L.R. (4th) 371 (S.C.J.), dismissing an application for a declaration of parentage.
@8

Peter A. Jervis, Jennifer Mathers and Shelby Austin, for appellant A.A.

Alfred A. Mamo and Meysa Maleki, for respondent B.B.

C.C., in person.

Thomas G. Bastedo,Q.C., amicus curiae

Clare E. Burns and Katherine Kavassalis, Office of the Children's Lawyer, for D.D.

Michael A. Menear, Robert W. Staley and Ranjan Agarwal, for intervenor Alliance for Marriage and Family.

Bradley Berg and Courtney Harris, for intervenor Family Service Association of Toronto.

Martha A. McCarthy and Joanna Radbord, for intervenor

Melissa Drake Rutherford, et al.
@7

The judgment of the court was delivered by

[1]ROSENBERG J.A.: -- Five-year-old D.D. has three parents: his biological father and mother (B.B. and C.C., respectively) and C.C.'s partner, the appellant A.A. A.A. and C.C. have been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B.B. The two women would be the primary caregivers of the child, but they believed it would be in the child's best interests that B.B. remain involved in the child's life. D.D. was born in 2001. He refers to A.A. and C.C. as his mothers.

[2]In 2003, A.A. applied to Aston J. for a declaration that, like B.B. and C.C., she was D.D.'s parent, specifically his mother. Had he thought he had jurisdiction, Aston J. would have

made that declaration. He found at para. 8 that: [page564]

> The child is a bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need. The applicant has been a daily and consistent presence in his life. She is fully committed to a parental role. She has the support of the two biological parents who themselves recognize her equal status with them.

[3]However, the application judge found that he did not have jurisdiction to make the declaration sought, either under the Children's Law Reform Act, R.S.O. 1990, c. C.12 (the "CLRA") or through exercise of the court's inherent parens patriae jurisdiction. He therefore dismissed the application. No constitutional argument was made before him.

[4]On appeal to this court, the appellant repeats the same arguments as those made before the application judge. For the first time, she also raises constitutional issues alleging violation of her rights to equality and fundamental justice under ss. 15 and 7 of the Canadian Charter of Rights and Freedoms. The appellant is supported by B.B., C.C. and various intervenors, including the Children's Lawyer [See Note 1 below] acting on behalf of D.D., and the applicants from M.D.R. v. Ontario (Deputy Registrar General) (2006), 81 O.R. (3d) 81, [2006] O.J. No. 2268 (S.C.J.), a case that raised related issues.

[5]The Alliance for Marriage and Family, a coalition of five public interest organizations, was permitted to intervene. The Alliance submits that the application judge properly dismissed the application, that the CLRA is not capable of being interpreted to permit a declaration that a child has two mothers, and that the parens patriae jurisdiction is not available. The Alliance also submits that this court should not entertain the Charter arguments and that, in any event, the CLRA is not unconstitutional.

[6]The Attorney General for Ontario has chosen not to intervene to support the legislation. In these circumstances, the court appointed Mr. Thomas G. Bastedo, Q.C. as amicus curiae. Mr. Bastedo submits that the application judge properly interpreted the CLRA. He submits, however, that the court should make the declaration sought under its parens patriae jurisdiction.

[7]For the following reasons, I would allow the appeal. While I agree with the application judge that the CLRA does not permit the making of the order sought, I am satisfied that the order can [page565] be made by exercising this court's parens patriae jurisdiction. Because they were not raised before the application judge, I would decline to deal with the Charter issues. I will deal with this latter issue first.

Raising a Constitutional Issue for the First Time on Appeal

[8]On September 16, 2005, McMurtry C.J.O. granted leave to the appellant to file a supplementary factum and amended Notice of Appeal to "deal with Charter issues". Whether this court should decide the Charter issues, however, is a matter for the panel hearing the appeal. In her appeal, A.A. submits that her rights under ss. 7 and 15 of the Charter were infringed. A.A. did not file any additional material in support of these arguments. She submits that the material filed before the application judge is sufficient to allow this court to undertake a Charter analysis. Further, any deficiency in the record is cured by reference to the record from M.D.R. v. Ontario (Deputy Registrar General). That record was placed before this court as part of the order granting M.D.R. intervenor status on this appeal.

[9]L'Heureux-Dub, J. in her dissenting opinion in R. v. Brown, [1993] 2 S.C.R. 918, [1993] S.C.J. No. 82, 83 C.C.C. (3d) 129, at pp. 133-34 C.C.C., set down three prerequisites for when a court will permit a party to raise a Charter issue for the first time on appeal. In R. v. R. (R.) (1994), 19 O.R. (3d) 448, [1994] O.J. No. 1458, 91 C.C.C. (3d) 193 (C.A.), this court accepted that, while L'Heureux-Dub, J. was speaking in dissent, the majority did not take issue with this part of her reasons for judgment. The three prerequisites were as follows:

> First, there must be a sufficient evidentiary record to resolve the issue. Secondly, it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial. Third, the court must be satisfied that no miscarriage of justice will result from the refusal to raise such new issue on appeal.

(Brown, p. 927 S.C.R., p. 136 C.C.C.)

I note that the onus is on the party seeking to raise the Charter issue to demonstrate that they meet these requirements.

[10]I have some concern that the appellant cannot meet the first prerequisite in view of the comments of the majority of the Supreme Court of Canada in Hy and Zel's Inc. v. Ontario (Attorney General), [1993] 3 S.C.R. 675, [1993] S.C.J. No. 113, at p. 694 S.C.R.: "In the absence of facts specific to the appellants, both the Court's ability to ensure that it hears from those most directly affected and that Charter issues are decided in a proper factual context are compromised." In Hy and Zel's Inc., the appellants sought to rely on a record filed in another case raising identical [page566] issues. A.A. similarly seeks to rely upon the M.D.R. record to supplement the record in this case.

[11]However, I need not decide whether there is a sufficient

evidentiary record because the appellant has not met the second prerequisite by showing that she did not raise the Charter issues for tactical reasons. Before the application judge there was no party, including the Attorney General, opposing the application for a declaration under the Act. Since no Charter issues were raised, the application judge refused to permit the Alliance to intervene to oppose the application. It would seem that the appellant wished to take advantage of the obvious tactical advantage of proceeding with an unopposed application. The appellant has not advanced any explanation in this court for not advancing the Charter issues at first instance.

[12]Finally, the appellant does not meet the third prerequisite set out in Brown. I have concluded that this court's parens patriae jurisdiction is available to give the appellant the remedy she seeks. Therefore, no miscarriage of justice will ensue to these litigants if this court does not decide the Charter issues. In the result, I would decline to address the Charter issues in this case. The Charter claims under ss. 7 and 15, which would have broad implications beyond the facts of this particular case, can be dealt with in another case on the basis of a proper record.

The Importance of a Declaration of Parentage

[13]A.A. seeks a declaration that she is a mother of D.D. She and C.C. have not applied for an adoption order because, if they did so, B.B. would lose his status as D.D.'s parent by reason of s. 158(2) of the Child and Family Services Act, R.S.O. 1990, c. C.11. That section provides: "For all purposes of law, as of the date of the making of an adoption order ... (b) the adopted child ceases to be the child of the person who was his or her parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent".

[14]A.A., B.B. and C.C. seek to have A.A.'s motherhood recognized to give her all the rights and obligations of a custodial parent. Legal recognition of her relationship with her son would also determine other kindred relationships. In their very helpful factums, the M.D.R. intervenors and the Children's Lawyer summarize the importance of a declaration of parentage from the point of view of the parent and the child:

-- the declaration of parentage is a lifelong immutable declaration of status; [page567]

-- it allows the parent to fully participate in the child's life;

-- the declared parent has to consent to any future adoption;

-- the declaration determines lineage;

-- the declaration ensures that the child will inherit on intestacy;

-- the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;

-- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada (Citizenship Act, R.S.C. 1985, c. C-29, s. 3(1)(b)); [See Note 2 below]

-- the declared parent may register the child in school; and

-- the declared parent may assert her rights under various laws such as the Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A, s. 20(1)5.

[15]Perhaps one of the greatest fears faced by lesbian mothers is the death of the birth mother. Without a declaration of parentage or some other order, the surviving partner would be unable to make decisions for their minor child, such as critical decisions about health care: see M.D.R. at para. 220. As the M.D.R. intervenors say: "A declaration of parentage provides practical and symbolic recognition of the parent-child relationship." An excerpt from the M.D.R. record dramatically demonstrates the importance of the declaration from the child's point of view. I resort to this part of the M.D.R. record because D.D. is too young to provide this kind of information. The 12-year-old child of one of the applicants said this in her affidavit:

> I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this -- they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.
>
> . . . . .
>
> It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family. [page568]

[16]In M.D.R. at paras. 227 and 228, Rivard J. referred to some of the submissions discussed in the Victorian Law Reform Commission's position paper entitled Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage at pp. 15 and 17:

> These submissions reported that the non-birth mother often encounters obstacles and ignorance, and at times hostility, in her dealings with government agencies and service

> providers where legal status is a relevant factor. Because the non-birth mother cannot be named as a parent on the child's birth certificate, she is unable to produce evidence of her relationship to the child unless she has taken steps to obtain a Family Court parenting order or some form of written authority from the birth mother.
>
> [W]e [Lesbian Parents Project Group] feel that legal recognition of our role as parents to our children is essential for their safety and social well being. It is critical to children that they have reflected back to them the value and integrity of their lives, including the legitimacy of their families ... Equal familial status sends a powerfully positive message to all social institutions that have an influence on our children's lives. It obliges them to acknowledge and respect the families our children live in.

The Children's Law Reform Act

[17] The appellant applied for an order that she is the mother of D.D. under s. 4 in Part II of the CLRA. Section 4 provides as follows:

> 4(1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.
>
> (2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.
>
> (3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.
>
> (4) Subject to sections 6 and 7, an order made under this section shall be recognized for all purposes.

(Emphasis added)

[18] The application judge accepted that the relationship of mother and child need not be biological or genetic, but after a careful consideration of the legislative scheme and the applicable rules of interpretation, he held that Part II of the CLRA contemplates only one mother of a child. He relied principally on the use of the words "the father" and "the mother" in s. 4(1), which connote a single father and a single mother. I do not find it necessary to repeat the same analysis. The application judge's reasons are reported at [2003] O.J. No. 1215, 225 D.L.R. (4th) 371 and 38 R.F.L. (5th) 1. [page569] I

agree with his analysis of the statute. I would, however, elaborate on three points.

[19]As the application judge noted, the process of statutory interpretation favoured by the Supreme Court of Canada requires a court to consider the grammatical and ordinary meaning of the provisions in question, the legislative history and the intention of the legislature, the scheme of the Act, and the legislative context. I wish to further elaborate on the legislative history and intention of the legislature as well as on the scheme of the Act. Finally, I will comment on the use of the Charter as in interpretative aid.

Legislative History and Intention of the Legislature

[20]The CLRA was intended to remove disabilities suffered by children born outside of marriage. As the Ontario Law Reform Commission observed in its 1973 Report on Family Law at p. 1: "These disabilities arise at the moment of birth and may remain with the child throughout his lifetime." The Commission therefore "accorded high priority to finding a means by which the child born outside marriage may be allowed to enjoy the same rights and privileges as other children in our society". The Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. The Commission's recommendations were enacted into legislation in the form of Parts I and II of the CLRA. The Commission's central recommendation concerning equality of children is found in the Act's first section:

> 1(1) Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.
>
> . . . . .
>
> (4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

[21]The CLRA was progressive legislation, but it was a product of its time. It was intended to deal with the specific problem of the incidents of illegitimacy -- the need to "remove, as far as the law is capable of doing so, a stigma which has been cast on children who in the nature of things cannot be said to bear responsibility for it" (p. 11). The possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme. The Act does not deal with, nor contemplate, the disadvantages that a [page570] child born into

a relationship of two mothers, two fathers or as in this case two mothers and one father might suffer. This is not surprising given that nothing in the Commission's report suggests that it contemplated that such relationships might even exist.

Scheme of the Act

[22] When the scheme of the CLRA is considered, especially the relationship between the various provisions in Parts I and II, it is apparent that the Act contemplates only one mother and one father. The application judge drew attention to many of these provisions. He referred in particular to s. 8, which deals with the presumption of paternity. He was of the view that this section contemplated only one father. This view of the legislation is also consistent with the adoption provisions in the Act whereby no more than two persons can apply for an adoption order and the order extinguishes other parental status. I agree with that interpretation of the legislation.

[23] Further, in my view, an interpretation of the Act that allows for a declaration of a single father and a single mother is fortified by s. 12(2) of the Act, which provides that:

> 12(2) Two persons may file in the office of the Registrar General a statutory declaration, in the form prescribed by the regulations, jointly affirming that they are the father and mother of a child.

(Emphasis added)

[24] I agree with the application judge that the CLRA, and in particular s. 4(1), is unambiguous. The court has jurisdiction to make a declaration in favour of one male person as the father and one female person as the mother. Since D.D. already had one mother, the application judge had no jurisdiction under s. 4(1) to make an order in favour of A.A. that she too was the mother of D.D.

Use of the Charter as an Interpretative Aid

[25] A.A. and certain intervenors submit that the CLRA should be interpreted in a manner consistent with the Charter, and in particular the equality rights guaranteed in s. 15. However, the Charter may be used as an interpretive guide only in circumstances of genuine ambiguity. See Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 62 where Iacobucci J. wrote: "[I]t must be stressed that, to the extent this Court has recognized a aeCharter values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory [page571] provision is subject to differing, but equally plausible, interpretations" (emphasis in original). Also see Symes v. Canada, [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 105.

[26]Since I have found that there is no ambiguity, it is not open to this court to use Charter values to interpret the provision.

Parens Patriae Jurisdiction

[27]The court's inherent parens patriae jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap. This is not a case about a child being in danger. If the parens patriae authority were to be exercised it would have to be on the basis of a legislative gap.

[28]The application judge held that the court's parens patriae authority was not available to make the declaration in favour of A.A., although he appeared to accept that such an order would be in the best interests of the child. In his view, any gap was deliberate and the court was effectively being asked to legislate because of a perception that the legislation was under-inclusive. The application judge was also concerned about the potential impact on other children if other persons, such as step-parents or members of a child's extended family, came forward seeking declarations of parenthood.

[29]I take a different view of the exercise of the parens patriae jurisdiction. The Supreme Court of Canada has considered this jurisdiction on several occasions, in particular in Beson v. Newfoundland (Director of Child Welfare), [1982] 2 S.C.R. 716, [1982] S.C.J. No. 95 and E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, [1986] S.C.J. No. 60. La Forest J. reviewed the history of the parens patriae jurisdiction at length in Eve. He concluded at p. 426 S.C.R. with the following statement:

> As Lord MacDermott put it in J. v. C., [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in Re X, supra, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

(Emphasis added)

[30]The comments of La Forest J. about the broad nature of the parens patriae jurisdiction and the broader discretion under the impact of changing social conditions are particularly apt in this case. However, Eve concerned the court's jurisdiction to authorize a medical procedure. It was not principally concerned [page572] with the court's jurisdiction

to fill a legislative gap. A case somewhat closer to the problem at hand is the Supreme Court's decision in Beson. In that case, the Director of Child Welfare for Newfoundland removed a child from an adoptive home shortly before the expiration of the probationary residence period required for an adoption. The legislation did not give the potential adoptive parents any right of appeal from the Director's action taken during the probationary period. Speaking for the court, Wilson J. found that there was accordingly a legislative gap that could be filled by the exercise of the parens patriae jurisdiction. She adopted the following statement from the reasons of Lord Wilberforce in A. v. Liverpool City Council and another, [1981] 2 All E.R. 385, [1982] A.C. 363 (H.L.), at pp. 388-89 All E.R.:

> But in some instances there may be an area of concern to which the powers of the local authority, limited as they are by statute, do not extend. Sometimes the local authority itself may invite the supplementary assistance of the court. Then the wardship may be continued with a view to action by the court. The court's general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority.

(Emphasis added)

[31]The determination of whether a legislative gap exists in this case requires a consideration of whether the CLRA was intended to be a complete code and, in particular, whether it was intended to confine declarations of parentage to biological or genetic relationships. If the CLRA was intended to be confined to declarations of parentage based on biology or genetics, it would be difficult to find that there is a legislative gap, at least as concerns persons with no genetic or biological link to the child.

[32]As discussed above, the application judge was of the view that the jurisdiction to make parentage declarations is not confined to biological or genetic relationships. The Alliance for Marriage and Family challenges that proposition. The Alliance points out that s. 1(1) of the CLRA refers to a person being the child of his or her "natural parents". I agree that the Act favours biological parents. For example, s. 10 gives a court power to order blood tests or DNA tests where it is called upon to determine a child's parentage. However, the Act does not define parentage solely on the basis of biology. For example, s. 1(2) treats adopting parents as natural parents. Often one or both of the adopting parents will not be the biological parents of the child. Similarly, s. 8 enacts presumptions of paternity that do not all turn upon biology; the obvious example is the presumption of paternity flowing simply [page573] from the fact that the father was married to

the child's mother at the time of birth. Further, as Ferrier J. pointed out in L. (T.D.) v. L. (L.R.), [1994] O.J. No. 896, 114 D.L.R. (4th) 709 (Gen. Div.), at para. 18, the declaration made under s. 4(1) is not that the applicant is a child's natural parent, but that he or she is recognized in law to be the father or mother of the child.

[33] Further, even if the CLRA was intended to limit declarations of paternity and maternity to biological parents, that would not answer the question of whether there is a gap. Advances in reproductive technology require re-examination of the most basic questions of who is a biological mother. For example, consider the facts of M.D.R. v. Ontario (Deputy Registrar General). M.D.R. involved a case where one lesbian partner was the gestational or birth mother and the other partner was the biological mother, having been the donor of the egg.

[34] I return to the earlier discussion of the intention of the CLRA. The legislation was not about the status of natural parents but the status of children. The purpose of the legislation was to declare that all children should have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the legislature of the day. As MacKinnon A.C.J.O. said in Bagaric and Juric et al. (Re) (1984), 44 O.R. (2d) 638, [1984] O.J. No. 3069 (C.A.), at p. 648 O.R.: "The Legislature recognized by this legislation present social conditions and attitudes as well as recognizing that such declarations have significance beyond material ones."

[35] Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The CLRA, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.

[36] In my view, this is as much a gap as the gap found in Beson, where adopting parents were deprived of a right of appeal. Wilson J. described the gap in that case in the following terms at p. 724 S.C.R.: [page574]

> If the Besons had indeed no right of appeal under the statute from the Director's removal of Christopher from their home, then I believe there is a gap in the legislative scheme

> which the Newfoundland courts could have filled by an exercise of their parens patriae jurisdiction. Noel J., in other words, could have done more than recommend that the Director give Christopher the chance of the good home available with the Besons. He could have so ordered. It was not a matter of substituting his views for those of the Director. It was a matter of exercising his parens patriae jurisdiction in light of a deficiency in the statute. If it were not in Christopher's best interests that he be removed from the appellants' home, then in the absence of any statutory right of appeal through which his interests might be protected, Noel J. had an obligation to intervene.

[37]It is contrary to D.D.'s best interests that he is deprived of the legal recognition of the parentage of one of his mothers. There is no other way to fill this deficiency except through the exercise of the parens patriae jurisdiction. As indicated, A.A. and C.C. cannot apply for an adoption order without depriving D.D. of the parentage of B.B., which would not be in D.D.'s best interests.

[38]I disagree with the application judge that the legislative gap in this case is deliberate. There is no doubt that the legislature did not foresee for the possibility of declarations of parentage for two women, but that is a product of the social conditions and medical knowledge at the time. The legislature did not turn its mind to that possibility, so that over 30 years later the gap in the legislation has been revealed. In the result, the statute does not provide for the best interests of D.D. Moreover, a finding that the legislative gap is deliberate requires assigning to the legislature a discriminatory intent in a statute designed to treat all children equally. I am not prepared to do so. See the comments of Rivard J. in M.D.R. at paras. 93-103. There is nothing in the legislative history of the CLRA to suggest that the legislature made a deliberate policy choice to exclude the children of lesbian mothers from the advantages of equality of status accorded to other children under the Act.

[39]This holding would, it seems, be consistent with the position of the government. As stated earlier, the Crown in Right of Ontario did not intervene in this case, but its position on this issue is known. In M.D.R., the Crown took the position that the CLRA in fact could be interpreted to allow for a declaration that two women were the mothers of a child. Since I have found otherwise, it does no violence to the government's position to make the declaration sought by the appellant in this case through exercise of the parens patriae jurisdiction.

[40]One final note. In C.R. v. Children's Aid Society of Hamilton, [2004] O.J. No. 3301, [2004] 4 C.N.L.R. 1 (S.C.J.), at para. 125, Czutrin J. held that the exercise of the parens patriae jurisdiction [page575] does not depend upon a

legislative gap if the exercise of that jurisdiction is the only way to meet the paramount objective of legislation. I should not be taken as foreclosing that possibility. Since I have found a gap, I have not found it necessary to decide whether the same result could be achieved in the way suggested by Czutrin J.

Disposition

[41]Accordingly, I would allow the appeal and issue a declaration that A.A. is a mother of D.D. I would order that there be no costs of the appeal or of the application. Finally, I would like to thank all counsel for their submissions, especially Mr. Bastedo who agreed to act as amicus curiae in this important and novel case.

Appeal allowed.

Notes

Note 1: The Children's Lawyer submits that the CLRA can be interpreted to permit the declatation sought and therefore argues that there is no gap in the legislative scheme to permit invoking the court's parens patriae jurisdiction. If the CLRA cannot be interpreted to permit making the declaration, the Children's Lawyer supports the appellant's submissions that the legislation violates ss. 7 and 15 of the Charter.

Note 2: D.D.'s citizenship is not an issue in this case as he was born in Canada.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cabianca v. British Columbia (Registrar General of Vital Statistics),* 2019 BCSC 2010

Date: 20191125
Docket: E182656
Registry: Vancouver

In the Matter of the *Family Law Act*, S.B.C. 2011, c. 25, s. 31

And

In the Matter of a Male Infant
Born on June 7, 2018 at Vancouver, B.C.

Between:

Marc Christopher Cabianca, Xiaoming Liu and Nana Liu

Petitioners

And

Registrar General of Vital Statistics

Respondent

- and -

In the Matter of the *Family Law Act*, S.B.C. 2011, c. 25, s. 31

And

In the Matter of a Female Infant
Born on January 20, 2019 at Vancouver, B.C.

Docket: E190412
Registry: Vancouver

Between:

Marc Christopher Cabianca, Xiaoming Liu and Nana Liu

Petitioners

And

Registrar General of Vital Statistics

Respondent

Before: The Honourable Madam Justice MacDonald

Reasons for Judgment

Counsel for the Petitioners:	L.A. Kahn, Q.C.
Counsel for the Respondent:	M. Butler
Place and Date of Trial/Hearing:	Vancouver, B.C. September 18, 2019
Place and Date of Judgment:	Vancouver, B.C. November 25, 2019

Introduction

[1] This petition is about whose names can appear on birth registrations when children are born with the assistance of reproductive technologies. The petition engages Part 3, "Parentage", of the *Family Law Act,* S.B.C. 2011, c. 25 [*FLA*]. The petitioners are Marc Christopher Cabianca ("Marc"), Xiaoming Liu ("Echo"), and Nana Liu ("Nana").

[2] Part 3 of the *FLA* is a comprehensive statutory framework for determining parentage. Here it arises in the context of two semen donation agreements signed on February 27, 2018. The petitioners did not strictly follow the statutory scheme and contrary to their wishes, Marc, the biological father, was not registered as a parent on the birth registrations of their two children, Luca Yian Cabianca ("Luca"), born in June 2018, and Luna Yiyue Cabianca ("Luna"), born in January 2019.

[3] The petitioners seek the following orders:

(a) A declaration that the petitioners, Marc, Nana, and Echo, are the parents of Luca**.**

(b) The Registrar amend the Registration of Birth of Luca to provide that all the petitioners are the parents of Luca.

(c) A declaration that the petitioners, Marc, Nana, and Echo, are the parents of Luna**.**

(d) The Registrar amend the Registration of Birth of Luna to provide that all the petitioners are the parents of Luna.

[4] The petitioners seek relief under s. 31 of the *FLA* with regard to Luca and under s. 29(4) of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 with regard to Luna.

[5] The respondent, the Registrar General of Vital Statistics (the **"**Registrar"), is opposed to the relief sought respecting Luca. The Registrar takes no position to the

relief sought respecting Luna but prefers to obtain a s. 31 *FLA* declaration from this Court.

Background Facts

[6] The evidence is not controversial. I accept the facts as outlined by the petitioners in their chambers brief, which I summarize:

- Marc, Echo, and Nana are residents of British Columbia. Echo and Nana have been living in a committed same-sex relationship since 2010. Marc is a close friend of Echo and Nana and provided them with semen donations for their two children.

- During the first week of September 2017 the petitioners entered into a verbal semen donation agreement (the "Verbal Agreement"), which provided that Marc would donate his semen to Echo and Nana for each of them to become pregnant. Pursuant to the Verbal Agreement, Echo became pregnant as a result of assisted reproduction using Marc's semen.

- On February 27, 2018 Marc, Echo, and Nana entered into a written semen donation agreement (the "Donor Agreement") which recorded the terms of the Verbal Agreement. The Donor Agreement provides, *inter alia*:

    - Recital A(2): The purpose of this Agreement is to enable Echo and Nana to have one or more Offspring by using Echo's ova and Marc's semen.
    - Recital C(2): Marc donated his semen to Echo for her use in the conception and parenting of a child.
    - Recital C(3): Marc desires and intends to have a parental relationship with any Offspring born of the donated semen.
    - Recital D(3)(ii): They [Echo and Nana] accept all parental rights and responsibilities for the Offspring thus conceived and born.
    - Recital G(1)-(3):

    The parties intend that:

        - Echo and Nana shall be the legal mothers of any Offspring born pursuant to their Agreement.

        - Marc shall be the legal father of any Offspring born pursuant to this Agreement.
        - Echo and Nana and Marc intend to enter into a Parenting Agreement for the Offspring for parenting arrangements for Marc and the financial responsibilities Marc may undertake in regard to the Offspring.
    - Paragraph 4(a): Echo and Nana shall be conclusively presumed to be the legal parents of any Offspring born from the Procedure conceived pursuant to this Agreement.
    - Paragraph 4(b)(i) and (ii):
        - (b)(i) Echo and Nana shall enter their names as a Parent on the Registration of Birth of any Offspring contemplated by this Agreement.
        - (ii) Marc shall enter his name as a Parent on the Registration of Birth of any Offspring born from the Procedure contemplated by this Agreement.
    - Paragraph 4(c): Echo and Nana shall take parental responsibility and custody of any Offspring conceived pursuant to this Agreement...
    - Paragraph 4(d): The parties shall enter into a Parenting Agreement as referred to in Recital G(3) as soon as practicable...

- On February 27, 2018 the petitioners entered into a further semen donation agreement (the "Pre-Conception Agreement") for Nana to become pregnant. The terms of the Pre-Conception Agreement are almost identical to the Donor Agreement with the exception of naming Nana in Recital A(2).

- The petitioners also entered into a Parenting Agreement dated February 27, 2018 (the "Parenting Agreement"). The Parenting Agreement contains the terms for parenting time, guardianship roles, and financial support for the children.

- Luca was born on June 7, 2018 in Vancouver, B.C. Marc is his biological father and Echo is his biological mother. Although somewhat ambiguous, according to their Verbal Agreement and their written Donor Agreement, all the petitioners were to be identified as parents on Luca's birth registration.

- The Registrar was unable to register the birth identifying Marc, Echo, and Nana as parents of Luca because the written Donor Agreement was not signed prior to conception as required by s. 30 of the *FLA*. On June 16, 2018 Echo and Nana registered Luca's birth with the Registrar identifying themselves as Luca's parents.

- In April 2018 Nana became pregnant as a result of assisted reproduction pursuant to the Pre-Conception Agreement.

- On November 27, 2018 the petitioners entered into an Addendum Agreement to resolve the ambiguities arising from the Donor Agreement, the Pre-Conception Agreement, and the Parenting Agreement. The Addendum Agreement provides, *inter alia*:

    - Regardless of any inconsistency in the Agreements, the Petitioners intended that Marc would be a parent and identified as such on any child's birth registration.
    - The Petitioners prepared the Agreements without legal advice, and did not appreciate there may be ambiguities about their intentions.
    - The Petitioners agreed and intended each that would be identified as parents on the birth registration of any child.

- Luna was born on January 20, 2019. Marc is her biological father and Nana is her biological mother. The petitioners intended that they all be listed as parents on Luna's birth registration. However, on January 24, 2019 Nana and Echo registered themselves as the parents of Luna because the online registration procedure only allows for two parents on the birth registration. They were under the mistaken impression that by separately submitting the Birth Registration Summary and other supporting documents to the Vital Statistics Agency, they could subsequently request the Registrar to amend the birth registration of Luna to add Marc as a parent.

- That same day, Marc emailed the Vital Statistics Agency regarding Luna's birth registration. On February 14, 2019, the Vital Statistics Agency

advised Marc that Luna's birth was already registered with Nana and Echo as parents. The Registrar did not exercise its discretion pursuant to s. 29 of the *Vital Statistics Act* to register Marc as a parent.

Statutory Framework

[7] Part 3 of the *FLA* is a comprehensive statutory framework for the purpose of determining parentage. For the first time the legislation codifies how parentage is to be decided for births resulting from reproductive technologies.

[8] Section 23 of the *FLA* states that parentage for all purposes is to be determined by Part 3:

> 23 (1) For all purposes of the law of British Columbia,
>
> (a) a person is the child of his or her parents,
>
> (b) a child's parent is the person determined under this Part to be the child's parent, and
>
> (c) the relationship of parent and child and kindred relationships flowing from that relationship must be as determined under this Part.
>
> (2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must be read as a reference to, and read to include, a person who comes within the description because of the relationship of parent and child as determined under this Part.

[9] Section 20(1) of the *FLA* defines "assisted reproduction":

> "assisted reproduction" means a method of conceiving a child other than by sexual intercourse; …

[10] Section 24 expressly provides that a donor is not automatically deemed to be a parent:

> **Donor not automatically parent**
>
> 24 (1) If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child
>
> (a) is not, by reason only of the donation, the child's parent,
>
> (b) may not be declared by a court, by reason only of the donation, to be the child's parent, and

(c) is the child's parent only if determined, under this Part, to be the child's parent.

(2) For the purposes of an instrument or enactment that refers to a person, described in terms of his or her relationship to another person by birth, blood or marriage, the reference must not be read as a reference to, nor read to include, a person who is a donor unless the person comes within the description because of the relationship of parent and child as determined under this Part.

[11] Section 27 provides for parentage when a child is conceived through assisted reproduction:

Parentage if assisted reproduction

27 (1) This section applies if

(a) a child is conceived through assisted reproduction, regardless of who provided the human reproductive material or embryo used for the assisted reproduction, and

(b) section 29 [parentage if surrogacy arrangement] does not apply.

(2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's birth mother is the child's parent.

(3) Subject to section 28 [parentage if assisted reproduction after death], in addition to the child's birth mother, a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent unless there is proof that, before the child was conceived, the person

(a) did not consent to be the child's parent, or

(b) withdrew the consent to be the child's parent.

[12] Section 30 of the *FLA* articulates how parentage is determined in the context of assisted reproduction if the parties contemplate another arrangement for parenting:

30 (1) This section applies if there is a written agreement that

(a) is made before a child is conceived through assisted reproduction,

(b) is made between

(i) an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended parent or intended parents, or

(ii) the potential birth mother, a person who is married to or in a marriage like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential

> birth mother and a person married to or in a marriage-like relationship with the potential birth mother.
>
> and
>
> (c) provides that
>
> (i) the potential birth mother will be the birth mother of a child conceived through assisted reproduction, and
>
> (ii) on the child's birth, the parties to the agreement will be the parents of the child.
>
> (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are the parties to the agreement.
>
> (3) If an agreement described in subsection (1) is made but, before a child is conceived, a party withdraws from the agreement or dies, the agreement is deemed to be revoked.

[13] Section 31 of the *FLA* provides this Court with jurisdiction to make declarations of parentage where there is a “dispute” or “any uncertainty” as to parentage:

> 31 (1) Subject to subsection (5), if there is a dispute or any uncertainty as to whether a person is or is not a parent under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent:
>
> (a) the Supreme Court;
>
> (b) if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court.
>
> …
>
> (3) To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part.

Problems

[14] In this case, both Luca and Luna were born as a result of assisted reproduction as defined in s. 20 of the *FLA*. It was the intention of the petitioners that Marc be identified as a parent on both children’s birth registrations. The Donor Agreement and Pre-Conception Agreement provide for that in Recital G(2). Unfortunately, two of the petitioners did not seek legal advice and these same

agreements appear to state a contrary intention to Marc being identified as a parent in other recitals.

[15] The petitioners did not comply with Part 3 of the *FLA*. Marc is ineligible to be identified on Luca's birth registration pursuant to s. 30(1) of the *FLA* because the written Donor Agreement was not signed prior to Luca's conception. Marc is eligible to be on Luna's birth registration pursuant to s. 30 of the *FLA* because the Pre-Conception Agreement was signed prior to her conception. However, due to a mistake, Nana and Echo registered only themselves on her birth registration assuming that Marc could be added later.

Issues

1. Does this Court have jurisdiction to allow Marc to be identified as an additional parent on the birth registration of Luca?

2. If so, should I exercise my discretion under s. 31 of the *FLA* to allow Marc to be identified as an additional parent on the birth registration of Luca?

3. Assuming s. 24 of the *Vital Statistics Act* applies, should I exercise my discretion under s. 31 of the *FLA* and order that Marc be registered as an additional parent on the birth registration of Luna?

Position of the Parties

Regarding Luca

[16] Under s. 31(1), "if there is a dispute or any uncertainty as to whether a person is or is not a parent" under Part 3 of the *FLA*, the court may "make an order declaring whether a person is a child's parent." The petitioners argue that because some uncertainty exists regarding whether Marc is a parent of Luca in the Donor Agreement, I should exercise my discretion under s. 31 of the *FLA* and declare that Marc is the parent of Luca.

[17] The respondent takes the position that there is no dispute or uncertainty as to whether or not Marc is a parent under Part 3 of the *FLA*. Therefore, the petitioners

have not met the preconditions for the court to exercise its jurisdiction under s. 31 of the *FLA*.

Regarding Luna

[18] The petitioners argue that they have complied with the requirements of s. 30 of the *FLA* and the non-registering of Marc on the birth registration was simply a technical oversight.

[19] The respondent agrees that the petitioners complied with the requirements of s. 30. Because the Pre-Conception Agreement was executed prior to Luna's conception, all three individuals are entitled to be the parents of Luna. The respondent is not opposing the petition regarding Luna's birth registration on this basis.

[20] While the respondent takes no position on the technical mistake, it takes the position that a court declaration of parentage pursuant to s. 31 of the *FLA* is required to have Marc added as a parent on Luna's birth registration. This is because the Registrar wishes to ensure Part 3 of the *FLA* is interpreted correctly and applied consistently, creating certainty with respect to assisted reproduction in B.C.

[21] The respondent requests that if I exercise my discretion under s. 31, the decision provide clarification that it does not stand as a precedent for future parties to "disregard the clearly expressed statutory requirements of Part 3 of the *FLA*."

Legal Framework

Jurisdiction under Section 31

[22] This petition concerns ss. 30 and 31 of the *FLA*. Section 30 has not been the subject of previous judicial interpretation. Section 31 has been interpreted in two companion cases of Justice Fitzpatrick regarding parentage in surrogacy arrangements pursuant to s. 29 of the *FLA*: *Family Law Act (Re)*, 2016 BCSC 22 [*FLA #1*] and *Family Law Act (Re)*, 2016 BCSC 598 [*FLA #2*].

[23] Prior to the enactment of the *FLA,* this Court had inherent jurisdiction to make declarations of parentage, if appropriate: *Rypkema v. H.M.T.Q. et al.,* 2003 BCSC 1784 at para. 29. In *Rypkema*, a biological mother and father used a surrogate mother to carry their child to term. They had entered into a surrogacy agreement. The issue in *Rypkema* was whether the genetic parents should be declared as the parents for the purpose of the child's birth registration. The case was governed by the previous *Family Relations Act*.

[24] Relying upon *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, Justice Gray emphasized the importance of recording parentage on a birth certificate. In doing so, she concluded that the intention of the parties, as set out in their surrogacy agreement, prevailed:

> [30] Here, all parties intended that the genetic parents would be the child's parents and that they would raise him as their child. The petitioners are the genetic parents and the social parents. The surrogate who gave birth to the child consents to the genetic mother being recognized and registered as the legal mother of the child, and surrendered custody of the child to the petitioners. This is not a case in which the court must determine which of two or more claimants is the parent.
>
> [31] Including the petitioners' particulars on the birth registration is an important means for the petitioners to participate in their child's life and for affirming the parent-child relationship. It will enable the petitioners to have the presumptive proof of their relationship to their child without the trouble and expense of the adoption process. It will enable them to register the child in school, obtain airline tickets and passports for him, and assert his rights under laws including the *B.C. Benefits (Child Care) Act* and the *Young Offenders Act.*

[25] Justice Gray exercised her discretion and declared that the petitioners should be registered as the biological parents on the birth registration of the child: para. 32.

[26] Under the *FLA*, there is a question whether this Court still has inherent jurisdiction to make declarations of parentage when the situation falls outside of, or the parties did not comply with, the legislative scheme of the *FLA*. In *FLA #2*, Fitzpatrick J. held that under the new *FLA*, parentage is to be determined by Part 3. She provided a helpful overview of the purposes of Part 3 of the *FLA* and the concerns it was designed to address:

> [13] The *FLA*, Part 3, entitled "Parentage", was intended to provide a comprehensive statutory framework for the purpose of deciding parentage in the context of the varied relationships that can arise where children are born as a result of assisted reproduction. These new provisions expand upon the traditional relationships that arise by reason of biology and adoption, and create a scheme designed to acknowledge the parental relationships that arise (or do not arise), within this new reality by which children are born.

[27] I agree that Part 3 is a comprehensive statutory framework and completely codifies the determination of who is a parent of a child. This Court therefore lacks inherent jurisdiction to determine parentage outside the scope of the statutory scheme: *L.M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367; *B.A.N. v. J.H.*, 2008 BCSC 808. Parentage must therefore be addressed under Part 3 and the jurisdiction to provide a remedy is limited to relief provided pursuant to s. 31 of the *FLA*.

Luca

[28] Like s. 29, s. 30 focusses on the intention of the parties as to who is a parent of a child. The intention of the parents must be set out in a written agreement *prior* to the conception of the child. This, unfortunately, was not done here. The petitioners cannot rely upon s. 30 with respect to Luca. Relief is limited to s. 31.

[29] Since the petitioners have conceded that there is no "dispute", I must determine whether there is "any uncertainty" as to whether or not Marc is a parent under Part 3 of the *FLA* so that the petitioners may bring themselves within s. 31 of the *FLA*. If so, I must determine whether I should exercise my discretion and order that Marc be placed on Luca's birth registration.

[30] The respondent argues that s. 31 does not apply because there is no "uncertainty" as to whether Marc is a parent under Part 3 of the *FLA*. Echo and Nana are eligible parents under Part 3 and are registered on Luca's birth registration as his parents. Section 24 expressly provides that a donor is not automatically deemed to be a parent and there was no pre-conception written agreement under s. 30 of the *FLA*. In the absence of a written agreement, the birth mother and her partner are the parents: s. 27.

[31] The respondent argues that this is not a case where the situation was not contemplated by Part 3; it is a situation where the petitioners did not comply with the legislation. There is no uncertainty regarding how the law applies. It is simply a mistake on the part of the petitioners. In these circumstances the Registrar argues the petitioners have not met the preconditions for this Court to exercise its jurisdiction under s. 31.

[32] The reasoning of Fitzpatrick J. in *FLA #2* is instructive:

> [38] While its provisions are intended to be comprehensive, the *FLA* anticipates that not all situations may be addressed by its provisions, and that circumstances may arise where relief is appropriate even without strict compliance with the statutory provisions. In that respect, s. 31 of the *FLA* confirms the court's continuing (but now statutory), jurisdiction to make declarations of parentage where there is a "dispute" or "uncertainty" as to parentage …
>
> [39] Accordingly, prior to exercising its statutory jurisdiction, the court must find that there is either a dispute or uncertainty regarding a person's parentage. I am not aware of any prior court decision that has applied this provision, save for the Reasons. In the Reasons, at para. 44, I found that there was some uncertainty relating to the parentage of the child arising from the application of Quebec laws to the surrogacy situation of the petitioners.
>
> [Emphasis added.]

[33] The respondent's interpretation does not take into account subsection (3) which states: "To the extent possible, an order under this section must give effect to the rules respecting the determination of parentage set out under this Part." In my view, this wording is broad enough to grant this Court jurisdiction to correct mistakes that result in non-compliance with the requirements in s. 30. To find otherwise would be inconsistent with the remedial purpose of s. 31.

[34] The respondent argues that Part 3 is one part in the *FLA* that does not refer to "best interests of the child." The best interests of the child therefore do not apply in these circumstances. I disagree.

[35] When Fitzpatrick J. interpreted ss. 29 and 31 of the *FLA* in *FLA #1*, she outlined the benefits of parentage declarations to both the parents and the child:

> [45] D.D. and M.L. have also referred to the benefits of declarations of parentage, as accepted by the Court in *A.A. v. B.B.*, 2007 ONCA 2, at para. 14, which I would adopt and summarize as follows:
>
> - it is a life-long immutable declaration of status;
> - it allows the parent to fully participate in the child's life;
> - it determines lineage;
> - it will determine other kindred relationships;
> - the declared parent may obtain important personal and identifying documentation for the child, such as a social insurance number, a health card, airline tickets and passports;
> - it may determine Canadian citizenship;
> - it will establish a parent's right to register the child in school;
> - the declared parent has to consent to any future adoption;
> - it will allow that parent to assert rights as such under applicable legislation; and
> - it will allow that child to assert rights as such under applicable legislation, including perhaps those arising upon an intestacy.
>
> [46] These benefits clearly go beyond those obtained by the issuance of a British Columbia birth certificate. Importantly, these benefits are enjoyed not only by the intended parents, but also extend to the child. It is trite to state that the legislative intent under the *FLA,* and the intent of this Court when applying its provisions, is ensuring that a child's best interests are paramount.

[36] The above reasoning applies equally to s. 30 of the *FLA*. I agree with Fitzpatrick J. that the underlying purpose of the *FLA* is to ensure the best interests and welfare of the child are paramount. Justice Fitzpatrick also emphasized the need for stable family relationships: para. 44.

[37] The importance of a child's birth registration cannot be underestimated. It is a document that describes a child's origin and provides rights to both parents and children. It should be inclusive and reflect the intentions of those involved with the child's birth. The petitioners' intentions should be given a liberal interpretation, consistent with s. 31 of the *FLA*.

[38] Relying on the *Interpretation Act*, R.S.B.C. 1196, c. 238, Fitzpatrick J. applied a broad definition of "uncertainty" in *FLA #2*. At para. 44 of Fitzpatrick J.'s reasons she found that there was some uncertainty relating to the parentage of the child

arising from the application of Quebec laws to the surrogacy situation of the petitioners.

[39] I similarly find that there is some "uncertainty" regarding whether Marc is a parent under Part 3 of the *FLA*. Not only was there not a written agreement prior to conception, uncertainty arises from the drafting of the post-conception Donor Agreement. Despite their intentions, the petitioners did not clearly express them in the Donor Agreement.

[40] I note that the Legislature chose to use the phrase "any uncertainty" which is broader than just "uncertainty". The broad wording allows many situations to fall within its purview, including mistakes on the part of petitioners.

[41] In my view this interpretation of "any uncertainty" is consistent with the remedial purpose of s. 31, which does not require strict compliance with the other provisions in Part 3. It only requires compliance "to the extent possible". This interpretation is also consistent with s. 8 of the *Interpretation Act*, which states that "[e]very enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The term "any uncertainty" should take into account the best interests of the child and the right to have all their parents listed on their birth registration.

[42] The respondents argue that *FLA #2* can be distinguished because in the case before me the petitioners' intentions are ambiguous as evidenced by the Donor Agreement. I find this is precisely why there is some "uncertainty" which brings the Petitioners' situation within s. 31. Despite this ambiguity in the post-conception Donor Agreement, the evidence before me from all of the petitioners was that they all agree Marc should be listed as a parent on Luca's birth registration. I also note that Luca has Marc's surname, Cabianca.

[43] It is contrary to Luca's best interests, and to a liberal and purposive interpretation of the *FLA*, to hold the parties to a high standard in terms of drafting

agreements. Luca's birth registration should reflect his parents' intentions. Marc should be added as a parent on his birth registration.

Luna

[44] Due to the Pre-Conception Agreement, the petitioners fell within s. 30 of the *FLA* and Marc was entitled to be registered on Luna's birth registration. Unfortunately, Marc was not registered due to confusion on the part of Echo and Nana regarding the registration process. This was because the online registration form does not permit the registration of more than two parents.

[45] On the same day as Echo and Nana registered Luna's birth, as soon as Marc became aware of the mistake, he contacted the Registrar and requested that the mistake be corrected. His intention was clear from the outset.

[46] Under the *Vital Statistics Act,* the Registrar may correct technical errors on a birth registration:

> **Corrections of errors and omissions**
>
> **29** …
>
> (3) If on receipt and examination of a registration it appears to the registrar general that an error or omission exists in the registration, the registrar general must inquire into the matter and may correct the error or omission on production of evidence of the error or omission satisfactory to the registrar general.
>
> (4) If after a registration has been filed by the registrar general, it is reported to the registrar general that an error or omission exists in the registration, the registrar general must inquire into the matter, and may correct the error or omission on production of evidence of the error or omission satisfactory to the registrar general verified by affidavit and on payment of the prescribed fee.

[47] The same analysis regarding the best interests of the child applies to Luna's claim. Like with Luca, the statute should be construed to be beneficial to the parents and the child. It is in the best interests of the petitioners, but especially the children, that Marc be registered on Luna's birth registration.

[48] In my view, it is not appropriate for the Registrar to decline to identify Marc as a parent on Luna's birth registration based on a technicality. Pursuant to s. 29(4) of

the *Vital Statistics Act*, the Registrar may correct technical errors on a birth registration. In addition, due to the error, there was some uncertainty created regarding the parentage of Luna. Pursuant to s. 31 of the *FLA* I declare that Marc is a parent of Luna.

Miscellaneous

[49] The requirements of s. 30 of the *FLA* are set out in detail precisely because the Legislature deemed those rules would best address situations that arise as a result of assisted reproductions. I agree with Fitzpatrick J. that this decision should not be interpreted as a licence for parties to ignore the technical requirements of Part 3. Section 31 should not be used to circumvent the legislative scheme. This Court should not be expected to remedy every situation where an agreement regarding parentage is not executed prior to conception. While each case will be decided on its own facts, relief should not be presumed.

[50] I also note that guardianship and parenting arrangements respecting children born through assisted reproduction should be kept separate from agreements regarding parentage. The Vital Statistics Agency (the "Agency") is not concerned with guardianship and parenting arrangements. As happened here, providing additional documents to the Agency simply conflates the issues and creates confusion.

[51] At this point in time, the online registration will not give effect to more than two parents on a birth registration. Parents who wish to register more than two parents on a birth registration must deal directly with the Agency. The agreement required by the Agency should state only who agrees to be a parent, consistent with the requirements of the *FLA*. That agreement, together with the multiple parent birth registration form, should be provided to the Agency.

Disposition

[52] I order and declare that the petitioners, Marc, Nana, and Echo, are the parents of Luca**.**

[53] The Registrar should amend the Registration of Birth of Luca to provide that all three petitioners are the parents of Luca.

[54] I order and declare that the petitioners, Marc, Nana, and Echo, are the parents of Luna**.**

[55] The Registrar should amend the Registration of Birth of Luna to provide that all three petitioners are the parents of Luna.

[56] Each party is to bear their own costs.

"D. MacDonald J."