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 CANADA and
NISHNAWBE ASKI NATION

Interested Parties

WRITTEN SUBMISSIONS OF THE FIRST NATIONS CHILD AND FAMILY CARING SOCIETY

Motions regarding Canada's failure to comply with the Canadian Human Rights Tribunal's orders regarding immediate relief

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There can be no keener revelation of a society's soul than the way in which it treats its children – Nelson Mandela[1]

Q. Ms. Clarke: What consideration are you giving to a child's best interest in deciding to not take this forward? [...]

A. Canada's Witness: An individual child's best interests?

Q. Ms. Clarke: Well, an individual, a collective, the children who are affected by the policy?

A. Canada's Witness: Not specifically, I guess.[2]

[1] Quote from Nelson Mandela, cited in Exhibit B to the Affidavit of Mr. Thompson, affirmed on January 30, 2017 [Thompson Affidavit"], Letter from Chief Rupert Meneen to the Honourable Carolyn Bennett dated January 26, 2017.

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PART I - INTRODUCTION

1. Over ten years have passed since the First Nations Child and Family Caring Society of Canada ("the Caring Society") and the Assembly of First Nations ("the AFN") were forced to lodge a human rights complaint to demand justice for First Nations children served under the First Nations Child and Family Service Program ("FNCFS Program") and to force Canada to live up to its legal obligations under Jordan's Principle. After ten years and the landmark substantiation of the complaint by this Panel, justice and equality continue to evade First Nations children and their families.

2. On January 26, 2016, the Canadian Human Rights Tribunal substantiated the complaint, finding Canada's FNCFS Program and approach to Jordan's Principle discriminated against First Nations children on the basis of race and national or ethnic origin ("the January 2016 Decision"). The January 2016 Decision was celebrated by First Nations and non-Indigenous peoples and organizations across the country and around the world. Many joined the Caring Society in sharing the Panel's hope that its legally binding decision would be a "turning point that [would lead] to meaningful change for First Nations children and families in this country."[3]

3. More than one year later, the evidence shows that the discrimination First Nations children have faced continues, as Canada has failed to take the necessary steps to provide immediate relief to First Nations children and their families. Current funding levels to the FNCFS Program, and those projected for the next five years, were established prior to the release of the January 2016 Decision, with no consideration given to development or best interests of the children the FNCFS Program is meant to serve. The funding approach outlined in Budget 2016 and related forecasted investments were not modified to take the Tribunal's findings and orders into account, as the subsequent additional funds have been allocated in an *ad hoc* way and re-allocated from other sources internal to INAC. Since the release of Budget 2016, government officials have not sought additional funding authority for the FNCFS Program nor have they made any meaningful efforts to determine the cost to provide the immediate relief sought by the Complainants and the Interested Parties or to address the Tribunal's concerns. Just as Canada sought to evade human rights scrutiny through its various legal tactics during the hearing, it is now seeking to avoid compliance with the Tribunal's orders by claiming it needs to have conversations and discussions with its partners and stakeholders. The evidence shows, however, that these conversations and discussions are stalling tactics on the part of Canada as they continue to occur even when Canada has already unilaterally determined its funding levels and has no intention of responding to the needs articulated by partners and stakeholders.[4]

4. At the same time, Canada continues to use a narrow definition of Jordan's Principle in its training materials, on its website, and in its communications with staff and

2 Cross-Examination of Cassandra Lang, February 7 and 8, 2017 ["Lang Cross Examination"] at p 245, lines 1-10.

3 *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada,* 2016 CHRT 10 at para 40.

4 Affidavit of Cassandra Lang affirmed January 25, 2017 ["Lang Affidavit"] at para 12; Lang Cross Examination at pp 39-43; Affidavit of Cindy Blackstock, affirmed December 17, 2016 ["Blackstock Affidavit"], paras. 17 and 24.

stakeholders, contrary to the Tribunal's orders. Put simply, the evidence is clear that Canada is either unable or unwilling to comply with the Tribunal's January 2016 Decision and its subsequent April 2016 and September 2016 remedial orders. In the meantime, Canada's ongoing pattern of racial discrimination continues to harm First Nations children and their families. The evidence shows that the recent suicide deaths of the two girls from Wakepeka could have been prevented with appropriate community based mental health services.[5] But contrary to Jordan's Principle, the girls did not receive the services they needed due to Canada's failure to assess a funding request to address the gaps in mental health services in the community.[6]

5. The Caring Society submits that faced with a respondent that is unwilling and/or unable to take the steps necessary to comply with the Tribunal's January 2016 Decision and April 2016 and September 2016 remedial orders, this Tribunal must render clear enforceable orders of immediate relief to compel Canada to take the necessary actions required to lessen the impact of its discriminatory conduct towards First Nations children until long-term relief is achieved in accordance with the *Canadian Human Rights Act* and the best interests of the child. The 163,000 children impacted by this case cannot wait any longer. The time for change is now.

[5] Affidavit of Dr. Michael Kirlew, affirmed January 27,2017 ["Kirlew Affidavit"], paras. 5-6.
[6] Kirlew Affidavit at paras 15-16.

PART II - THE FACTS

A. The Public's Response to the CHRT Decision

6. The Caring Society and the AFN's human rights complaint regarding the FNCFS Program and Jordan's Principle has been referred to as one of the most watched cases in Canadian history. The interest in the complaint's adjudication foretold the outpouring of support following the release of the Tribunal's January 2016 Decision finding in favour of the children.

7. In the days and weeks following the Tribunal's January 2016 Decision, the Caring Society received over 1,000 messages, emails, phone calls and letters from people across Canada and around the world welcoming the Decision. For example, on January 26, 2016, Chief Ron Evans, from Norway House Cree Nation, sent a letter thanking the Caring Society for its work and congratulating the organisation for the children's victory.[7]

8. Children across the country organised numerous parties to celebrate the Tribunal's January 2016 Decision. For example, on March 10, 2016, Dr. Blackstock visited Walpole Island First Nation, on Bkejwanong Territory (in southwestern Ontario). When she arrived, the students surprised her with a celebration of the Tribunal's Decision. The school's walls had posters, thank you cards, and cardboard hearts decorated by the students. One of the posters said "Thank you for caring for us Cindy. You are my hero." Children as young as 5 years old participated in the celebration.[8]

9. On February 10, 2016, over 600 children participated in Have a Heart Day on Parliament Hill, by writing letters to elected officials urging them to take action so that First Nations children can grow up safely with their families, get a good education, and be healthy and proud of who they are. Over 300 of the children who attended Have a Heart Day on Parliament Hill attended a luncheon event later that day inside Parliament's Centre Block to celebrate the Tribunal's Decision. The children read letters, sang songs, and cut a cake in celebration of the Tribunal's January 2016 Decision. Across Canada, more than 5,500 Canadians celebrated Have a Heart Day in 2016.[9]

10. On June 6, 2016, the students of Pierre Elliott Trudeau Elementary School in Gatineau organized a special party, during which they prepared a lunch for Dr. Blackstock and the Caring Society's legal team. Some of the students attending the school come from Northern First Nations communities in Quebec. All of the students had closely followed

[7] Blackstock Affidavit at para 25. See also Exhibit E to Blackstock Affidavit: Letter from Chief Ron Evans to the Caring Society dated January 26, 2016.

[8] Blackstock Affidavit at para 26. See also Exhibit H to Blackstock Affidavit: Picture of students at Walpole Island First Nations on Bkejwanong Territory celebrating the decision.

[9] Blackstock Affidavit at para 27. See also Exhibit G to Blackstock Affidavit: Picture of the children at Have a Heart Day on Parliament Hill and Picture of children cutting the cake honoring the Decision at the luncheon event inside.

the case and learned about the Tribunal's January 2016 Decision in class. After the meal, the students presented Dr. Blackstock with a book they had made to thank her for her work with and for children.[10]

11. On August 1, 2016, Norway House Cree Nation, Jordan River Anderson's home community, hosted the annual Jordan Principle's Parade. This parade is held each year in honor of Jordan River Anderson, after whom Jordan's Principle is named, and in honour of his family. The parade was extremely well attended by children and adults from the community, including members of Jordan's family, many of whom made hand-made floats honoring Jordan's Principle. There were prizes for the best dressed Jordan's Principle wheelchair, bike, stroller and teddy bear. After the parade, the community held a special ceremony to thank Dr. Blackstock and others, for honoring Jordan's legacy.[11]

12. On September 13, 2016, Alanis Obomsawin's documentary regarding the Caring Society and the AFN's human rights complaint, entitled *We Can't Make the Same Mistake Twice*, premiered at the Toronto International Film Festival ("TIFF"). The premiere was sold out and was attended by over 450 people, including Jordan River Anderson's sister and many children and youth.

13. On November 21, 2016, the Caring Society hosted a viewing of *We Can't Make the Same Mistake Twice* at the Mayfair Theatre in Ottawa for over 250 elementary and secondary students, many of whom had also attended the hearings. The documentary continues to tour the country and as of the time of Dr. Blackstock's December 17, 2016 affidavit, had been shown in Halifax, Sudbury, Gatineau, Vancouver, Montreal, and for a second time in Toronto at the Imaginative Film and Media Art Festival.[12]

14. As of December 17, 2016, there were 15,238 registered witnesses for the Caring Society's "I am a Witness" campaign, which encourages citizens and groups to follow the Caring Society and the AFN's human rights complaint. Though the hearing is now over, the number of registered witnesses continues to grow and there is a great interest among registered witnesses in monitoring how Canada is responding to the Tribunal's findings of discrimination and remedial orders. The Caring Society frequently receives emails, letters, and messages from individuals and organizations inquiring about Canada's compliance with the Tribunal's January 2016 Decision and April 2016 and July 2016 remedial orders. Tragically, the Caring Society also continues to regularly hear about the disastrous impact that Canada's inequitable funding of child welfare services and failure to properly implement Jordan's Principle is having on children, families and communities. [13]

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[10] Blackstock Affidavit at para 29. See also Exhibit I of Blackstock Affidavit: Picture of book made by students of Pierre Elliot Trudeau School.
[11] Blackstock Affidavit at para 30. See also Exhibit J to Blackstock Affidavit: Pictures of Jordan's Principle Parade.
[12] Blackstock Affidavit at para 31.
[13] Blackstock Affidavit at para 32.

B. Canada's Response to the CHRT January Decision

i. Budget 2016 and the FNCFS Program

15. On the day the Tribunal's January 2016 Decision was released, both the Minister of Indigenous and Northern Affairs and the Minister of Justice stated that they welcomed the Tribunal's findings. In its first submissions in this complaint after the Tribunal's January 2016 Decision, Canada also stated that it looked "forward to working with the parties to make immediate and long-term changes to the funding of child welfare on reserves."[14] Despite these representations, Canada failed to take any meaningful steps to comply with the Tribunal's January 2016 Decision or relieve the discrimination experienced by First Nations children and their families from January 26, 2016 until the release of Budget 2016 on March 22, 2016. [15]

16. Canada relied almost entirely on the funding provided in Budget 2016, including forecasts for future years, as evidence of its compliance with the Tribunal's Decision in its April 6, 2016 submission on remedy and in its May 24, 2016 compliance report. However it was not until Canada filed its September 30, 2016 compliance report, that Canada advised the Tribunal and the parties that the Budget 2016 amounts for First Nations child and family services were determined during the Fall of 2015, prior to the release of the Tribunal's January 2016 Decision.[16]

17. As such, Budget 2016 is not based not on the Tribunal's findings in its January 2016 Decision. Rather, Canada acted alone in preparing Budget 2016, without consultation with First Nations, First Nations Child and Family Services Agencies ("FNCFS Agencies"), the Parties, or with independent experts. Canada's unilateral effort was based on information that Canada claims to have gathered via tripartite discussions in 2013-2014 and updated with data from 2015. [17] Moreover, according to Cassandra Lang, the government official responsible for implementing the national policy and program management for the FNCFS Program, no changes were made to the funding provided to FNCFS Agencies in Budget 2016 following the release of the Tribunal's January 2016 Decision or the Tribunal's subsequent remedial orders.[18]

18. Budget 2016 was publicly released on March 22, 2016 and included additional funding for the FNCFS Program. As a part of the media budget lock-up prior to the release of Budget 2016, which Dr. Blackstock attended, federal officials made themselves available to answer questions. Paula Isaak, Assistant Deputy Minister for INAC's Education and Social Development Programs and Partnerships Sector, was present at the March 22, 2016 budget lock-up and explained that the $71 million provided for the FNCFS Program took account of additional funds that INAC had recently provided for prevention

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[14] Canada's Submissions on Remedy, March 10, 2016 at para 1.
[15] Blackstock Affidavit at para 18.
[16] Lang Affidavit, Exhibit 1: September 30, 2016 Compliance Report ["September Compliance Report"] at p 2.
[17] *Ibid*.
[18] See for example, Lang Cross Examination at p 30, lines 13-18 & p 10, line 7 to p 11, line 2. See also Lang Cross Examination at p 90, line 13 to p 91.

services. Dr. Blackstock asked Ms. Isaak what funds she was referring to as, to Dr. Blackstock's knowledge, INAC had not provided any new prevention investments since 2010 when the last region was added to the EPFA regime. Ms. Isaak could not provide any more details on the alleged new prevention funding that Budget 2016 accounted for. Dr. Blackstock also asked if the $71 million included provisions for inflation-related losses in purchasing power. Ms. Isaak was unable to respond to these questions.

19. INAC officials did not seek the authority to fund further measures of immediate relief based on their belief that it "could potentially be large amounts of money".[19] In fact, INAC has not requested a change in its funding authorities since 2012/2013.[20] Canada's witness admitted that no consideration was given to child development,[21] or the best interests of the child when determining whether to seek further authorities for additional funding for child welfare services for First Nations children:[22]

> Q. Ms. Clarke: What consideration are you giving to a child's best interest in deciding to not take this forward?
>
> A. Ms. Lang: An individual child's best interests? [...]
>
> Q. Ms. Clarke:. Well, an individual, a collective, the children who are affected by the policy?
>
> A. Ms. Lang: Not specifically, I guess.[23]

20. Canada has failed to put in place a system to ensure INAC administrators and staff responsible for the FNCFS Program and other staff responsible for Jordan's Principle have read the Tribunal's decisions and understand the Tribunal's Decisions.[24] Instead, Canada relied on sending emails to regional officials, absent any formal process for ensuring the Tribunal's January 26, 2016 Decision and April 2016 and September 2016 remedial orders were read and understood. The perils of this approach are apparent in the testimony of Ms. Cranton, the Director of Northern Operations for Health Canada's Northern Region, who conceded that she had not read the Tribunal's Decisions prior to her preparation for her cross-examination.[25]

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[19] For quote see Lang Cross Examination at p 107, lines 4-21.
[20] Lang Cross Examination at p 241, line 20 to p 242, line 4.
[21] Lang Cross Examination at p 132, lines 1-16.
[22] Lang Cross Examination at p 245, lines 1-10.
[23] Lang Cross Examination at p 245, lines 1-10.
[24] Cross-Examination of Robin Buckland on February 6 and 7, 2017 ["Buckland Cross Examination"] at p 272, line 3 to p 273, line 10. See also Lang Cross Examination at p 212, line 19 to p 213, line 18.
[25] Cross-Examination of Lee Cranton on February 17, 2017 ["Cranton Cross Examination"] at p 78, line 21 to p 79, line 10.

21. Individuals responsible for the Tribunal's January 2016 Decision and remedial orders have little or no experience with Indigenous Peoples or formal academic or professional training in child welfare. [26]

ii. Failure to conduct an effective costing exercise

22. Over one year after the decision was rendered, INAC officials have still not taken the steps necessary to determine the cost of funding the immediate relief sought by the Complainants and the Interested Parties at their actual costs or to address the areas of concern identified by the Tribunal. [27] Moreover, Canada has failed to respond to the Tribunal's concern about the manner in which funding for the FNCFS Program is determined.[28] In fact, INAC officials have not yet begun the process of identifying the immediate relief items for which more information would be required in order to assess this cost and implement. When asked whether someone has "actually looked at all the data that would be needed to fund all the immediate relief items and made a determination [it] need[s] more in this or [it has] enough on this", Ms. Lang responded:

> I don't think we've -- I don't believe we've itemized that we need, you know, X item or Y item under this issue specifically. I don't think we've said, outlined individual line items to get to a calculation.[29]

23. INAC has, however, reallocated up to $ 1.975 million from INAC infrastructure funding to fund FNCFS agencies to identify their "actual needs and distinct circumstances".[30] On October 28, 2016, three days before Canada's October compliance report was due, Margaret Buist, Director General of INAC's Children and Families Branch wrote a letter to all FNCFS Agency directors to advise agencies they could apply for up to $25,000 to provide INAC with information about their distinct needs and circumstances in order to "inform [INAC's] thinking on new funding approaches".[31] When asked why INAC waited more than nine months after the Decision to send this letter to FNCFS agencies, Ms. Lang stated:

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[26] Ms. Lang holds a Masters of Library Science and a Bachelor of Arts in English and French literature. See Lang Cross Examination at p 84 line 18 to 22. Ms. Buckland is a Registered Nurse. See Affidavit of Robin Buckland, affirmed January 25, 2017 ["Buckland Affidavit"] para 1. Ms. Cranton holds a business degree. See Cranton Cross Examination at p 77, line 17.

[27] Lang Cross Examination at p 110, line 12 to p 113, line 3 & p 328, line 12 to p 332, line 17.

[28] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs),* 2016 CHRT 16 (CanLII) at para 30.

[29] Lang Cross Examination at p 117, lines 14-18.

[30] Lang Affidavit at para 9. Lang Cross Examination at p 170, lines 5-6. See also Request for Information on Cross Examination of Cassandra Lang ("RFI-CL") RFI-CL-20: "Funds in the departmental budget that may be redistributed for the needs of, or priorities for, First Nations children are taken from Infrastructure funding."

[31] Lang Affidavit, Exhibit 2: October 31, 2016 Compliance Report ["October Compliance Report"], Annex A.

> Well, we had -- we were undertaking various types of engagement. We have conversations that occur at technical tables and at, and at tripartite tables. So this letter was an opportunity to get to some more specific -- to get specifically to agencies in terms of, in terms of understanding what their individual needs were.[32]

24. Although Ms. Lang admits to having no formal training on data collection and statistics, INAC retained no outside expertise to assist it in formulating the request for information on needs from agencies in order to ensure that the information provided would be reliable and consistent.[33] According to economist Dr. Loxley's uncontested expert evidence, it is unlikely that INAC has the internal capacity to collect and interpret the information obtained from FNCFS agencies from this letter. Dr. Loxley explained:

> Based on my past experience with INAC, it is unlikely that it has the capacity to process the information sought from individual agencies and to put it into a coherent policy framework. There is also the question of whether approaching individual agencies to determine their needs is the correct one given the isolated perspectives that agencies might have. Regional tables are already planning to examine budgetary requirements and it may be that the collective sharing of information and perspectives on the budget is a superior one in terms of more accurately determining needs. Agency needs are probably much better arrived at through the planned collective and consultative regional budget/costing exercises which can draw upon appropriate technical expertise. The money offered by INAC, which is probably quite inadequate for larger agencies, might be better invested in those exercises. [34]

25. INAC presented no reply evidence in response to Dr. Loxley's opinion on INAC's lack of capacity to collect such information from agencies and declined to cross-examine Dr. Loxley on his affidavit.

26. Furthermore, Ms. Buist's October 28, 2016 letter fails to specifically solicit information on some of the most pressing immediate relief matters identified in the Tribunal's January 2016 Decision at paras 384-389 relating to strengthening families and preventing children from being placed in child welfare care. By way of example, the October 28, 2016 letter does not ask FNCFS Agencies to provide information relating to their ability to provide First Nations children with an equitable opportunity to remain in their families or to be reunited with their families in a timely fashion. When asked whether INAC was expecting answers with regards to these issues, INAC's witness stated:

> A. Ms. Lang: No, we don't ask -- we don't provide that as a potential question specifically.
>
> Q. Mr. Wuttke: So it's likely that you won't get a response to that type of question

[32] Lang Cross Examination at p 185, lines 14-21.

[33] Lang Cross Examination at p 219, lines 5-18 & p 85, line 12 to p 89, line 3.

[34] Affidavit of John Loxley, affirmed on January 5, 2016 ["Loxley Affidavit"], Exhibit A: Report on the Government of Canada's Response to the Canadian Human Rights Tribunal Orders Regarding Discrimination in its First Nations Child and Family Services Program ["Loxley Report"] at p 8.

> because it's not in your letter? I mean, a response to that type of issue because it's not in your letter?
>
> A. Ms. Lang: They may not, but we also indicate any other areas of need or particular circumstances we deem -- or the agencies deem applicable to the community needs. So we've mentioned in a few places, please provide us with more than this, here are some examples.
>
> Q. Mr. Wuttke: Would it not have been easier if you would have included this excerpt from the Tribunal's decision and say, in addition, the Tribunal has addressed these issues, can you please provide your thoughts on this as well? Would that not have been easier and that way you get the broad range of questions you've been ordered to look at, but also the information you're seeking?
>
> A. Ms. Lang: We could have provided that information as well.[35]

27. When asked why Ms. Buist's October 28, 2016 request for information on agency needs did not mirror the items of immediate relief identified by the Tribunal, INAC's witness re-affirmed that FNCFS Agencies would have to provide the additional items for consideration identified by the Tribunal of their own initiative, stating:

> There are some more specific items that are in, in the letter. The letter is only -- or the items listed are not an exhaustive list. We indicate that examples of various agencies may wish to provide information, but we would welcome information on, on any other items that, that they're looking for -- or that they wish to provide us information on as well.[36]

28. INAC's witness later conceded it was "possible" that Ms. Buist's October 28, 2016 letter would not generate information relating to all of the issues of concern identified by the Tribunal.

> Q. Mr. Wuttke: Sure. Given the fact that not all the concerns of the Tribunal's decisions are not included in your letter even though they may be alluded to, are you not concerned that you may not get information regarding what the Tribunal would like you to do in the responses and that may somewhat not give you the full range of data you're looking for? Is that a concern of your department?
>
> A. Ms. Lang: I suppose it's possible. We tried to, as I said, we tried to, you know, make sure that we provided -- we indicated that we were interested in a full range of, of information as the agencies wished to provide it to us.[37]

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[35] Lang Cross Examination at p 330, line 24 to p 331, line 23.
[36] Lang Cross Examination at p 329, lines 12-18.
[37] Lang Cross Examination at p 332, lines 7-17.

iii. INAC's "Phased approach"

29. According to Canada, the "full implementation" of Budget 2016 investments will be reached in Year 4 (2019-2020).[38] In its October 31, 2016 Compliance Report, Canada stated that INAC's rationale for using this "phased approach" was based on previous reports that had noted that FNCFS Agencies experienced challenges in staff hiring and retention. The October 31, 2016 Compliance Report goes on to state that "this approach was used in order to mitigate the risk of lapsing or failing to expend funding."[39]

30. INAC cited three reports in support of its contention that a phased approach to immediate relief funding for FNCFS Agencies was necessary: (1) INAC's April 2012 *Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia*;[40] (2) INAC's June 2014 *Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program*;[41] and (3) the New Brunswick Office of the Ombudsman and Child and Youth Advocate's February 2010 *Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick*.[42]

31. Following Ms. Lang's cross-examination, Canada confirmed that there were no further reports or documents being relied on to support Canada's assertions regarding FNCFS Agency capacity.[43]

32. Two of the three reports cited by Canada in support of its rationale for a five year budget roll out with the largest investments in years 4 and 5 are INAC regional child and family services program audits for Saskatchewan/Nova Scotia and Manitoba.[44] While these audits note that <u>some</u> FNCFS Agencies have experienced challenges in recruiting and retaining qualified staff, <u>none</u> of those reports recommends limiting the funding provided to FNCFS Agencies as a solution to remedy this challenge.[45] Rather, inequitable

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[38] Canada's July 6, 2016 reply submissions regarding its May 10 and 24, 2016 compliance reports at p 2.

[39] Lang Affidavit, Exhibit 2: October Compliance Report, at pp 5-6.

[40] Lang Cross Examination, Exhibit 12: AANDC Report titled "Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia", dated April 27, 2012 (also filed as Tab 146 in CHRC Book of Documents (Vol 9)).

[41] Lang Cross Examination, Exhibit 11: AANDC Report titled "Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program", dated June 2014.

[42] Lang Cross Examination, Exhibit 13: New Brunswick Office of the Ombudsman and Child and Youth Advocate report titled "Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick", dated February 2010 (also filed as Tab 60 in CHRC Book of Documents (Vol 5)).

[43] RFI-CL-4; RFI-CL-5; RFI-CL-6.

[44] Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia for the First Nations Child and Family Services Program, INAC, Evaluation, Performance Measurement and Review Branch, April 2013; Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program, INAC, Evaluation, Performance Measurement and Review Branch, June 2014.

[45] It is noted that the Saskatchewan and Nova Scotia evaluations also note that INAC Headquarters also experience similar challenges in recruiting and retaining staff and have "struggle[d] to effectively perform their work given their current staffing limitation".

funding is identified as one of the *causes* of difficulties experienced when recruiting and retaining staff. In fact, the excerpt cited in Footnote 1 in Canada's September 30, 2016 compliance report states:

> "Moreover almost 60 percent of agencies reported in their business plans that staff recruitment and retention was an issue. Some reasons given include the rural/remoteness factor, **salary levels,** stress/trauma and shortage of people with the necessary qualifications (emphasis added)" [46]

33. Under cross-examination, Ms. Lang stated that concerns about "agency capacity" was only "one of the issues" that caused Canada to adopt its phased approach to funding FNCFS agencies.[47] When asked about the other reasons for which agencies could not be fully funded immediately, Ms. Lang stated that time was needed to "set up a structure that took into account these new roles".[48] Ms. Lang also explained that Canada's budget cycle was one of the reasons for the phased approach. She stated:

> Also in terms of the way the budget cycle works when funding was announced, certainly for the first year. It wouldn't have been the case for subsequent years, but certainly the way the budget cycle works, by the time that an announcement was made and then funding was approved and able to be transitioned, it may be a few months later in the year as well. So it may not -- so the first year may not have been able to, to go out -- it wouldn't have been able necessarily to go out for, for April 1st, so -- and then there's -- so agencies would have a more limited time to expend the funds within that fiscal year. [49]

34. Despite Ms. Lang's assertions that agency capacity was "only one of the issues" underlying Canada's phased approach, in response to the Caring Society's request that Canada provide "any other reports that INAC is relying on with respect to the phased approach", Canada confirmed that "INAC is not relying on any other reports relied [sic]."[50]

35. Accordingly, Canada has been unable to produce any studies, reports or documentation in support of Ms. Lang's claim that phased funding was required in order to "set up a structure" or because of "budget cycles". When asked whether INAC's concerns about capacity and budget cycles could be addressed by phasing in funding in year one and fully funding agencies in year two, INAC's witness stated that "that's a possibility for consideration."[51]

[46] Lang Cross Examination, Exhibit 11: AANDC Report titled "Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program", dated June 2014 at p 33.
[47] Lang Cross Examination, at p 129, lines 11-14.
[48] Lang Cross Examination at p 129, lines 15-19.
[49] Lang Cross Examination at p 129, lines 17-25.
[50] RFI-CL-7.
[51] Lang Cross Examination at p 130, line 23.

36. Commenting on INAC's phased approach to immediate relief funding, Dr. Loxley stated:

> INAC explained that the five year budget allocation was arrived at by estimating what a full-year's implementation would cost in year 4 and then making assumptions about how quickly different agencies could reach full implementation, given program and staff constraints. These assumptions are critical but are not defined or differentiated between EPFA and non-EPFA regions and agencies. [52]

37. Canada provided no evidence relating to the assumptions underlying its phased approach to funding. It also provided no evidence as to why the assumptions of lack of agency capacity were applied universally to all First Nations Child and Family Services Agencies.

38. Canada's delayed approach to the full implementation of immediate relief funding is of great concern, given the crucial milestones in a child's development that can occur in a five-year period. Despite these important milestones, Canada's witness admitted that child development was not considered in its phased approach to funding of FNCFS agencies. Under-cross examination, Ms. Lang stated:

> Q. Ms. Clarke: Let me just ask this question on the five-year phased in approach […] Do you consider child development when you figured out the five-year phased rollout?
>
> A. Ms. Lang: I'm sorry, what do you mean by that?
>
> Q. Ms. Clarke: Was there any consideration of how a child develops within those five years when the year five was chosen for the budget phased in approach?
>
> A. Ms. Lang: In terms of individual children and how --
>
> Q. Ms. Clarke: How children develop within five years, zero to five, five to ten, eight to thirteen? Was that considered at all in selecting year five?
>
> A. Ms. Lang: I don't recall that being the case, but I, I don't have a firm answer on that.
>
> Q. Ms. Clarke: Did you consider it yourself?
>
> A. Ms. Lang: No.[53]

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[52] Loxley Affidavit, Exhibit A: Loxley Report p 12.
[53] Lang Cross Examination at p 132, lines 1-16.

iv. Reallocation of funds to relieve pressures and for other purposes

39. INAC has not committed to ceasing its practice of reallocating funding for FNCFS agencies from other INAC programs for First Nations Peoples. This refusal to cease its practice of reallocating funds contradicts Canada's assurance in its May 24, 2016 submissions that Budget 2016 will "contribute to a more stable and predictable funding environment within INAC, reducing the need for reallocation from other critical programs such as infrastructure and housing". [54]

40. Since the release of Budget 2016, INAC has already reallocated $20 million from its Infrastructure budget, which, as noted in the Finance Minister's 2016 Budget Day speech, covers vital services such as housing, building schools, fire protection, and water,[55] to cover shortfalls in the Budget 2016 allocation for FNCFS Agencies.[56] According to Ms. Lang's evidence, both in her affidavit and on cross-examination, this additional $20 million in funding is not aimed at providing immediate relief in accordance with the Decision but to "respond to pressures" faced by individual agencies related to increased maintenance costs, deficits, and changes in provincial legislation.[57]

41. INAC has also re-allocated $1.9 million from its internal budget to increase prevention services for families at risk and to adjust its funding approach for small FNCFS Agencies.[58]

42. In addition to this, INAC has also re-allocated $1.975 million from its internal budget to respond to FNCFS Agency requests for funding as part of Canada's October 28, 2016 data collection exercise. [59]

43. In addition, INAC has also re-allocated $1.5 million to respond to FNCFS Agency requests to implement a cultural vision for their programming.[60] To that end, in a letter dated October 28, 2016, Margaret Buist wrote to all FNCFS Agencies directors offering up to $75,000 to agencies to "develop and implement culturally-based programs and tools for the community(ies)" they serve.[61]

44. The above evidence demonstrates that INAC is continuing its practice of transferring millions of dollars from its Infrastructure budget, despite the Tribunal's January 2016 Decision specifically noting this practice's impacts for children, given that these reallocations are from a program that addresses underlying risk factors for First

[54] Canada's Submissions in Response to April 26, 2016 Ruling, dated May 24, 2016 ["May Compliance Report"] p 8.
[55] Canada, *House of Commons Debates*, 42nd Parliament, 1st Session, March 22, 2016 at p 1925.
[56] Lang Cross Examination at p 167, lines 3-6; RFI-CL-20.
[57] Lang Affidavit at para 4. See also Lang Cross Examination at p 166, lines 2-18.
[58] Lang Affidavit at para 5; Lang Cross Examination at p 170, lines 1-6; RFI-CL-20.
[59] Lang Affidavit at para 9; RFI-CL-20.
[60] Lang Affidavit at para 9. Lang Cross Examination, at p 170, lines 5-22.
[61] Lang Affidavit at Exhibit 2: October Compliance Report, Annex "A".

Nations children.[62] The re-allocation of almost $25.5 million from INAC's infrastructure budget undermines the investments in schools, housing, nursing stations, residences for health care workers, and water and wastewater infrastructure noted in Minister Morneau's Budget Day speech on March 22, 2016.[63]

v. Canada's assertion that there will be no more immediate relief until its self-imposed "engagement" exercise is completed

45. According to Ms. Lang's evidence, Canada will not implement any additional immediate relief until it meets its own self-imposed requirements of:

a. "collaboration with its partners"[64] through a "multi-pronged engagement process to gather information on agency needs and work collaboratively towards medium and long-term reform" with its partners"[65] and

b. the provision of information on actual needs of agencies is provided.[66]

46. By imposing these conditions on its immediate relief action, Canada is effectively supplanting of the Tribunal's order to "immediately" end its discriminatory conduct.

47. Despite Canada's claims that it cannot move forward with immediate relief until it satisfies the above conditions, Ms. Lang testified that Canada has no list of the identified information gaps it needs to fill in order to comply fully with the immediate relief orders, nor has anyone within government been assigned the task for compiling such a list. [67]

48. Absent any idea of what information gaps that need to be filled to implement immediate relief, Canada cannot provide any specific targets for when the engagement/collaboration/information on needs exercises will be complete and First Nations children can therefore expect any further relief from Canada's discriminatory conduct. More problematic still is the fact that, as of now, there is no additional funding forecasted in INAC's five-year budget for increased service levels resulting from Canada's "multi-pronged engagement process".

[62] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 2 at paras 373-375.
[63] Canada, *House of Commons Debates*, 42nd Parliament, 1st Session, March 22, 2016 at p 1925.
[64] Lang Affidavit at para 12.
[65] Lang Affidavit at para 13.
[66] Lang Affidavit, Exhibit 2: October Compliance Report at p 2. No timeline is provided for this program reform.
[67] Lang Cross Examination, at p 62, lines 9-15.

vi. Small agencies

49. With regard to small agencies, Canada stated that it has taken "some initial steps".[68] In particular, INAC has set a child population of 300 as the lowest threshold for funding scaling. INAC indicates that a child population count of 300 children was selected as the new threshold. This new threshold is not based on the actual needs of agencies or the financial pressures they face. Rather, the new threshold was chosen because it is "the next level up from the 250 ordered by the Tribunal in INAC's current scale."[69]

50. In response to the Tribunal's September 14, 2016 order, INAC also offered additional funding of $1.9 million for prevention services and small agencies. Ms. Lang confirmed that this is not, however, "new money" but funds that have been reallocated from elsewhere within the department.[70] Documents produced in relation to the cross-examination confirm that the funds are being reallocated from INAC's Infrastructure budget.[71]

51. According to Dr. Loxley's uncontested opinion, "while being a step in the right direction, the underlying problem of inadequate funding for small agencies and large step increases in funding for relatively small increases in the child population still remain".[72] Dr. Loxley went on to observe that the solution proposed in Wen:de of adjusting funding smoothly for every increase in children of 25 above a minimum and up to a maximum threshold would seem to address both of these problems.

52. Canada provided no evidence in response to Dr. Loxley's expert evidence that its current funding remains inadequate for small agencies and does not address the negative consequences of large step increases of funding for relatively small increases in child population. Likewise, Canada has failed to produce any evidence demonstrating that its approach to funding small agencies is linked to their actual needs.

[68] Lang Cross Examination, at p 90, line 13 to p 91, line 6.
[69] Lang Affidavit at Exhibit 2: October Compliance Report at p 4.
[70] Lang Cross Examination, at p 170, lines 5-22.
[71] RFI-CL-20.
[72] Loxley Affidavit, Exhibit A: Loxley Report.

vii. Child service purchase amount

53. INAC recognised that the child service purchase amount of $100 per child (which was developed in 1989) was inadequate and raised it to $175 per child.[73] INAC has stated that this amount was determined, as an interim measure, based on discussions with regional offices about the range of child service purchase amounts used across the country.[74] INAC has also stated that:

> INAC recognizes that applying a nationally consistent amount may not meet the needs of individual agencies. Therefore, as part of the engagement and reform process, INAC will review the information provided by FNCFS agencies in response to its October 28 letter, and continue national and regional discussions, to define a child service purchase amount based on need.[75]

54. INAC has not provided the Tribunal or the Complainants with any evidence documenting these "discussions with regional offices about the range of child service purchase amounts used across the country" or establishing the rationale behind the new child service purchase amount. According to Dr. Loxley, the increase from $100 per child to $175 per child "seems to be an arbitrary increase". His uncontested opinion was that:

> [t]ying the ultimate resolution to the data collection exercise is once again questionable and it also ensures further delays. Furthermore, the adjustment to the per child amount of 75% should be put into the context of an increase in the cost of living of 72% since 1989 (http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/econ46a-eng.htm) the last date the per child amount was adjusted. There is, therefore, almost no increase in the real value of the per child amount. [76]

55. In response to Dr. Loxley's expert evidence, Canada provided no evidence that INAC's new child service purchase amount is linked to the actual needs of FNCFS agencies or, at the very least, is reasonably comparable to what is provided across the country. Likewise, Canada has failed to provide the Tribunal with the information it requested detailing how the child service purchase amount was determined.

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[73] In its October compliance report, INAC acknowledges that $100 was not sufficient to meet the needs of FNCFS agencies. It wrote:

> Regarding determining funding for the child service purchase amount, INAC heard, from tripartite discussions with provinces/Yukon and First Nations partners as well as concerns raised by witnesses who testified before the Tribunal, that the FNCFS program's funding of $100 for the child service purchase amount was not sufficient to meet needs.

[74] Lang Affidavit, Exhibit 2: October 31, 2016 Compliance Report at p 8.

[75] Lang Affidavit, Exhibit 2: October 31, 2016 Compliance Report at p 8.

[76] Loxley Affidavit, Exhibit A: Loxley Report at p 10.

viii. Receipt, assessment, and investigation of child protection reports

56. In its May 24, 2016 compliance report, Canada stated that it has allocated $45.0 million over the next five years in additional funding to support intake and investigation services.[77] At the request of the Tribunal, INAC provided further details in its October 31, 2016 compliance report regarding its current funding for receipt, assessment and investigation. The report stated:

> Regarding intake and investigation ("receipt, assessment and investigation"), INAC proactively amended its calculations to respond to possible agency needs in this area, understanding that intake and investigation are not required services under provincial standards in all regions.
>
> In Alberta, funding calculations reflect a change in provincial service delivery and include a specific budget allocation for intake and for assessment and investigation. For both, a ratio of 1 worker to 800 children (0-18 population) was applied as a result of INAC discussions with the INAC regional office and their discussions with provincial officials. The salary amounts were estimated based on salary amounts for similar positions.
>
> In other regions, where intake and investigation is not generally a requirement under provincial standards, a single budget item was added to support intake and investigation. This was done to allow agency service providers to use operations funding to support intake and investigation services. INAC estimated the ratio of intake and investigation workers to children by using the ratios applied to other positions in the region (e.g., the ratio of other support workers). Exceptions apply in the following regions:
>
> - Prince Edward Island – the Mi'kmaq Confederacy of PEI (MCPEI) provides prevention services and purchases protection services (including intake and investigation) from the province
> - Manitoba – INAC provided increased funds for direct service workers to support intake and investigation
> - British Columbia – C3 and C4 delegated Aboriginal agencies do not provide protection services, therefore, a line item for intake and investigation was not added. A line item for intake and investigation was applied to C6 Aboriginal Agencies, which provide both prevention and protection services.
>
> As part of the engagement and reform process, INAC will review the information provided by FNCFS agencies in response to its October 28 letter, and continue national and regional discussions to determine funding for intake and investigation services based on need.[78]

[77] May Compliance Report at p 7.
[78] Lang Affidavit, Exhibit 2: October Compliance Report at pp 8-9.

57. According to Dr. Loxley's uncontested opinion, INAC's approach to determining the appropriate funding levels for receipt, assessment and investigation of child protection report is "questionable".

> On the receipt, assessment and investigation of child protection reports, INAC outlines the different approaches in different Provinces and once more ties the ultimate resolution of the question to the receipt of data from the collection exercise commissioned in its October 28 letter to agencies, which will then be used in national and regional discussions. Once again, this is a questionable approach.[79]

58. Canada provided no evidence in response to Dr. Loxley's expert evidence that INAC's approach to funding receipt, assessment and investigation of child protection reports is "questionable".

ix. Legal fees

59. Canada's method of funding legal fees for FNCFS Agencies remains unclear. According to past submissions made to the Tribunal, Canada has considered using the provincial legal aid rates for child welfare proceedings,[80] but has also indicated that it is willing to discuss additional options in light of concerns expressed by the Caring Society.[81] Canada's May 24, 2016 submission stated that the

> "development of a comprehensive approach to administering legal fees will require engagement. In the meantime, INAC Regional Offices can submit requests to be considered by INAC Headquarters for additional funds to cover these requirements".[82]

60. Based on Canada's September 30, 2016 compliance report, the amount provided to FNCFS Agencies for legal fees varies from $10,000 to $50,000, depending on the province in which the FNCFS Agency is located.[83] The variance does not appear to be linked to provincial legal aid rates, as submitted by Canada.[84] Canada has produced no evidence demonstrating that this funding is linked to the actual needs of FNCFS Agencies or, at the very least, is reasonably comparable to what is provided by provinces/territories across the country.

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[79] Loxley Affidavit, Exhibit "A": Loxley Report at p 10.
[80] Canada's March 10, 2016 Submissions to the Tribunal at para 25.
[81] Canada's April 6, 2016 Submissions to the Tribunal at para 12.
[82] May Compliance Report at p 6-7.
[83] Lang Affidavit, Exhibit 1: September Compliance Report, Annex C.
[84] For example, agencies in Alberta have been allocated $ 33,500 for legal fees and agencies in Saskatchewan has been allocated $ 40,000. Yet, as noted by Canada in its March 10, 2016 submissions regarding immediate relief (see para 25 and footnote 1), the Alberta legal aid rate is $125 per hour while the hourly rate in Saskatchewan in $88 per hours. Canada does not provide an explanation as to why less funds are allocated to Alberta agencies in comparison to Saskatchewan for legal fees when the standard legal aid rate is 30% higher in Alberta, as compared to Saskatchewan.

61. According to Dr. Loxley's uncontested expert opinion, it is "not likely" that INAC's approach to funding legal fees will resolve the concerns identified by the Tribunal with regards to legal fees. He explained:

> On the issue of legal fees, INAC's response is that some provision is made in core funding and this varies from Province to Province. It is then prepared to review requests for additional funds to cover legal requirements on a case-by-case basis. INAC is also relying on its data collection exercise to throw light on an appropriate level of funding for legal fees in future. This is not likely the way to resolve what is really a technical/professional issue revolving around the necessary number of hours for different types of legal work and the appropriate fee per hour. [85]

62. Canada provided no evidence in response to Dr. Loxley's opinion. Likewise, Canada has failed to provide the Tribunal with the information it requested detailing how the funding for legal fees was determined.

x. Building Repairs

63. In its May 24, 2016 compliance report, INAC stated that it "will pursue discussions on the broader issues of infrastructure related to FNCFS as part of future long-term reform efforts".[86] When asked by the Tribunal to provide detailed information as to how it is addressing the issue, INAC stated in its October 31, 2016 compliance report that:

> [a]s part of the engagement and reform process, INAC will review the information provided by FNCFS agencies in response to its October 28 letter, and continue national and regional discussions to develop a longer-term response to infrastructure needs.[87]

64. Dr. Loxley's uncontested expert opinion was that INAC's approach to funding the cost of building repairs "is not likely to resolve this issues". He explained that:

> [o]n the issue of immediately addressing the costs of building repairs, INAC once more defers this until data on agency needs is collected. Given the urgency of these repairs from a safety compliance point of view, the probable lack of awareness of many agencies of the facility condition index (a tool to measure urgency of repairs on a cost basis) and given the concerns about the efficacy of the data collection exercise, this approach is not likely to resolve the issue.

65. Canada did not challenge Dr. Loxley's expert evidence that INAC's approach to funding receipt the cost of reports is "not likely to resolve the issue".

[85] Loxley Affidavit: Exhibit A, Loxley Report at p 9.
[86] May Compliance Report at p 7.
[87] Lang Affidavit, Exhibit 2: October Compliance Report at pp 7-8.

xi. Ad hoc funding for legal fees and repairs

66. In addition to the measures described above, Ms. Lang sent an email on October 24, 2016 to INAC regional offices stating that if FNCFS Agencies experienced any funding pressure relating to specific legal fees for a child, requests for additional funds should be submitted to INAC to cover these requirements. In addition, the email stated that INAC will "continue to consider requests related to minor capital expenditures […] on a case-by-case basis."[88]

67. When asked whether the information noted in her email of October 24, 2016 was passed on to every FNCFS Agency, Ms. Lang said that she "believe[d] so", but that she could not "speak to each specific region"[89]. Under cross-examination, Ms. Lang conceded that she did not recall exactly what information she was relying on to formulate her belief that FNCFS Agencies had received the information. She also noted INAC lacked any formal mechanisms to ensure that the information was provided to FNCFS agencies:

> A. Ms. Lang: I believe some of them mentioned it to me or mentioned that they were, yes, mentioned that they were sending on further, further communications or that they were having conversations.
>
> Q. Ms. Clarke: When you say that some of them mentioned it to you, can you help me, explain what that means?
>
> A. Ms. Lang: I believe in, in subsequent conversations, some of the regional directors indicated that they had, had forwarded that or, or that they had communicated that further.
>
> Q. Ms. Clarke: So when you say that they mentioned it in conversations, the regional directors called you directly to say thank you for your e-mail, I've now forwarded it on to all the agencies in my region?
>
> A. Ms. Lang: I don't recall if there were specific phone calls only to that effect. I think, I think some of them mentioned them in other conversations.
>
> Q. Ms. Clarke: Can you just help me understand what -- what does a conversation mean?
>
> A. Ms. Lang: I was talking with them about something, whether it was this issue or, or another issue that we may have been engaged on.
>
> Q. Ms. Clarke: So you don't have a formal mechanism in place to ensure that when you send a direction to the regional directors, they are ensuring that their agencies know that information?

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[88] Lang Affidavit, Exhibit 2: October Compliance Report, Annex B.
[89] Lang Cross Examination at p 151, lines 9-19.

A. Ms. Lang: I didn't ask for a formal communication to say that they had done that.[90]

68. INAC does not have any established criteria for assessing requests for legal or building repair funds.[91] INAC's witness conceded that their approach to funding legal fees and repairs is *ad hoc*.[92] Furthermore, it is not clear how much funding is available to respond to such requests. INAC's witness advised that such *ad hoc* requests would be funded out of a "reserve fund",[93] which Canada later advised had $28,536,054 allocated to it at the beginning of fiscal year 2016/2017.[94] However, it is unclear how much funding remains in the "reserve fund", or what the competing pressures on this "reserve fund" might be.

xii. Paying for Immediate Relief Based on their Actual Cost Pending a Resolution at the NAC

69. Ms. Lang's January 25, 2017 affidavit indicates that, with regard to prevention funding, "INAC is considering […] reimbursing or funding [FNCFS] agencies based on actual costs (similar to what is done in the case of maintenance".[95] However, when asked under cross-examination whether providing immediate relief by paying matters like legal services, intake services, or building repairs would be a possibility while INAC engages in further conversations with its partners, Ms. Lang stated:

> A. Ms. Lang: Well, some of those actuals could potentially be large amounts of money. In order to be able to access large amounts of money, that may be beyond the department's resources. We would need to, to put forward a request within the federal government and we would need support, we would need clear way to establish calculations, clear support and be able to provide a solid case to move forward with the request. We can't just have something that's -- we need to have something that's, that is sound in terms of the, in terms of the background and the support, the supporting information and evidence that we can bring forward to, to have that request considered.[96]

70. Ms. Lang conceded that INAC funds maintenance for children in care for more than 90 days based on their actual costs and that there was no limitation to the funding available through this stream.[97] She acknowledged that this approach contemplated paying, for example, for the maintenance cost for every First Nations child in Ontario if they were brought into care, but would not commit to paying the costs to keep children safely in their

[90] Lang Cross Examination at p 151, line 10 to p 152, line 19.
[91] Lang Cross Examination at p 153, lines 12-15.
[92] Lang Cross Examination at p 153, lines 18-23.
[93] Lang Cross Examination at p 154, lines 2-13.
[94] RFI-CL-10.
[95] Lang Affidavit at para 6.
[96] Lang Cross Examination at p 107, lines 10-21.
[97] Lang Cross Examination at p 327, lines 2-20.

own homes.[98] Under cross-examination, Ms. Lang was asked about INAC's rationale for providing unlimited funding to apprehend children from First Nations families while putting restrictions on funding to keep children in their homes. She stated:

> A. Ms. Lang. In terms of, in terms of maintenance funding, there are specific bills to be paid to address, to address a child who has been taken into care. In terms of prevention, I think that's part of that ongoing understanding and conversation to understand what are the types of prevention needs that are out there, what do -- what types of, what types of supports can, can help to address those needs and understanding that in conjunction with what may exist already through other programs and then how, how that support could be provided and what, what information would be used to be able to determine how to fund that[99]

C. Other INAC Initiatives Relating to Child Welfare

71. Since the release of the Tribunal's January 2016 Decision, INAC has commenced other initiatives that it claims are aimed at improving its FNCFS Program. For example, INAC has appointed a Minister's Special Representative ("MSR") to "gather advice and perspectives" from a range of partners across the country. Canada's witness stated that this initiative was not ordered by the Tribunal,[100] and is not linked to the implementation of the Tribunal's orders regarding immediate relief.[101]

72. The CV provided by Canada for the MSR contains no reference to academic credentials in social work and demonstrates that the MSR is not a registered social worker.[102] Ms. Lang was also unable to confirm that MSR has any direct work experience relating to First Nations child welfare.[103]

73. The MSR's Statement of Work lists seven outputs and deliverables, of which the majority relates to political relationships and reporting. Only one relates to the Tribunal's Decision. In particular, the MSR is asked to

> "guide, inform and take part in the development of a final report outline actionable options for reforming the First Nations Child and Family Services Program, sensitive to the ruling of the Canadian Human Rights Tribunal, the Truth and Reconciliation Commission's Calls to Actions, and the federal/provincial/territorial considerations of child and family services on and off reserve.[104]

74. Ms. Lang testified that the MSR is collecting "best practices" and, under cross-examination, confirmed that the phrase "best practices" appears nowhere in the MSR's

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[98] Lang Cross Examination at p 324, line 18.
[99] Lang Cross Examination at p 322, lines 4-15.
[100] Lang Cross Examination at p 229, line 21 to p 230, line 1.
[101] Lang Cross Examination at p 248, lines 4-9.
[102] RFI-CL-27 and biographical statement identified at the website provided.
[103] Lang Cross Examination at p 230, lines 14-22.
[104] Lang Affidavit, Exhibit 4: Minister's Special Representative Statement of Work.

statement of work,[105] and agrees that the Tribunal did not direct INAC to undertake this exercise.[106]

75. On December 6, 2016, the First Nations Leadership Council, composed of the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations wrote an open letter to Minister Bennett expressing concerns about unilateral the appointment of Dr. Wesley-Esquimaux as the MSR. The First Nations Leadership Council also expressed concerns with respect to Canada's failure to comply with the Tribunal's January 2016, April 2016, and September 2016 Decisions and about the vague goals and lack of transparency regarding the MSR's discussions with First Nations and FNCFS Agencies relating to child welfare.[107]

76. During the AFN Special Chiefs Assembly on December 6, 7, and 8, 2016, the Chiefs in Assembly unanimously passed a resolution expressing deep concern regarding Canada's failure to immediately and fully comply with the Tribunal's January 2016 Decision and its ensuing April 2016 and September 2016 remedial orders. The resolution also expressed concern about the lack of accountability for the MSR and called on INAC to reorient her mandate to increase INAC's capacity to comply with the Tribunal's January 2016 Decision and further remedial orders and to implement the Truth and Reconciliation Commission's Calls to Action.[108] Ms. Lang confirms that, notwithstanding the federal government's statement that it takes a Nation to Nation relationship with First Nations and that Chiefs across Canada voted for the AFN resolution, Canada took no action to change the MSR's work, scope or meetings.[109]

77. Canada is also in the process of organising a "Youth Summit" with former youth in care. The decision to organise the Summit was taken unilaterally by INAC and Ms. Lang could not recall specifically any partners specifying there was a need for this.[110] Canada's witness was also unaware of any ethical standards to be followed by Canada when speaking to youth about their experience in care.[111]

D. Jordan's Principle

78. On January 26, 2016, the Tribunal ordered Canada to "cease applying its narrow definition of Jordan's Principle and to take measures immediately to implement the full meaning and scope of Jordan's Principle."[112] In its January 2016 Decision, the Tribunal described Jordan's Principle in the following terms:

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[105] Lang Cross Examination at p 233, line 15 to p 234, line 6.
[106] Lang Cross Examination at p 235, lines 4-10.
[107] Blackstock Affidavit at para 43. See also Blackstock Affidavit, Exhibit U: Letter of the First Nations Leadership Council to Minister Bennett.
[108] Blackstock Affidavit at para 45. See also Blackstock Affidavit, Exhibit W: letters from participants at the Special Chiefs Assembly of the Assembly of First Nations.
[109] Lang Cross Examination at p 250, line 11 to p 252, line 1.
[110] Lang Cross Examination at p 228, lines 4-13.
[111] Lang Cross Examination at p 227, line 21 to p 228, line 3.
[112] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 481.

> 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 <u>between departments</u> 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 being denied essential public services or experiencing delays in receiving them [emphasis in original].[113]

79. Since the Tribunal's January 26, 2016 decision, Health Canada has been deeply involved in Canada's response concerning Jordan's Principle. A February 15, 2016 Memorandum to the Minister of Health, a version of which was released via an access to information request, states that "[Health Canada] is directly implicated as the decision is directed to the [Government of Canada] broadly."[114] Ms. Buckland confirmed under cross-examination that Health Canada's view is that it is imperative that Health Canada work closely with INAC throughout the process of responding to the Tribunal's decision regarding Jordan's Principle.[115]

i. Canada's slow implementation re Jordan's Principle

80. Canada's early actions regarding Jordan's Principle (February-April 2016) did not "immediately" alleviate the discrimination for children in any discernible way.

81. Instead, Canada's actions were limited to internal analysis of the Tribunal's decision and communications with Jordan's Principle focal points and the executives of Health Canada's regional branches.[116] Based on Canada's April 6, 2016 further submissions regarding immediate relief, it would appear that discussions between INAC and Health Canada did not begin until sometime between March 10, 2016 and April 6, 2016.[117] A June 1, 2016 Record of Decisions of a First Nations and Inuit Health Branch senior management committee meeting notes that "interim measures" regarding Jordan's Principle were not in place until May 10, 2016[118] (the same day Canada's first compliance report regarding Jordan's Principle was due).[119]

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[113] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 351.
[114] Buckland Cross Examination, Exhibit 2: Memorandum to Minister of Health re Impacts of the Canadian Human Rights Tribunal's Decision on Health Canada (Assembly of First Nations / First Nations Child and Family Caring Society Human Rights Complaint), created February 15, 2016 at p 2.
[115] Buckland Cross Examination at p 10, line 22 to p 11, line 6.
[116] Buckland Cross Examination at p 30, line 15 to p 33, line 25.
[117] Canada's Further Submissions on Remedy, dated April 6, 2016 at para 9.
[118] RB-RFI-#5: Bundle of First Nations Inuit and Health Branch Records of Decisions at p 13 (FNIHB SMC-Operations, Wednesday, June 1st, 2016; 1:00 – 4:00 PM, Record of Decisions at p 2).
[119] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 10 at para 34.

82. Despite Ms. Buckland's evidence that Canada was aware "right away that we needed to engage with our partners to be able to fully respond to the Tribunal's decision",[120] and Canada's assertion as early as March 10, 2016 that "[c]hanges to Jordan's Principle will have an impact beyond the parties and require engagement with a wide range of partners",[121] it would take Canada nearly three and a half months following the Tribunal's January 26, 2016 decision to formally reach out to "its partners".[122] Ms. Buckland was not able to provide a credible explanation for this delay.[123] Of note: Canada's efforts to "reach out to its partners" came the day before the date fixed by the Tribunal for the submission of Canada's first compliance report regarding Jordan's Principle (May 10, 2016).[124]

83. Canada's Budget 2016, released on March 22, 2016, contained no funding for Jordan's Principle.

84. As of April 6, 2016, Canada's public position regarding its response to the Tribunal's January 26, 2016 ruling regarding Jordan's Principle was to state on its website that its approach to Jordan's Principle was "under review".[125]

85. Due to Canada's lack of action to comply with its January 26, 2016 order, the Tribunal pronounced a more specific definition of Jordan's Principle in its subsequent April 26, 2016 remedial order. In its April 26, 2016 order, the Tribunal noted Canada's lack of action with regard to Jordan's Principle and clarified that its January 26, 2016 order required Canada "to 'immediately implement', not immediately start discussions to review the definition in the long-term."[126]

86. In its April 26, 2016 remedial order, the Tribunal ordered Canada to apply the following definition of Jordan's Principle: "all jurisdictional disputes (this includes between federal government departments) and involving all First Nations children (not only those children with multiple disabilities)."[127]

87. On May 10, 2016, Canada stated in its compliance report that it had eliminated "the requirement that First Nations children on reserve must have multiple disabilities that require multiple service providers"[128] and had "expanded Jordan's Principle to apply to all jurisdictional disputes and now includes those between federal government departments".[129] However, Canada's May 10, 2016 submission failed to confirm Canada

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[120] Buckland Cross Examination at p 29, lines 6-21.
[121] Canada's March 10, 2016 submissions regarding immediate relief at para 26.
[122] Buckland Cross Examination, Exhibit 4: May 9, 2016 letter from S. Perron and P. Isaak to "Distribution List", also filed as part of Annex "I" to Canada's October 31, 2016 compliance report.
[123] Buckland Cross Examination at p 27, line 8 to p 30, line 10.
[124] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 10 at para 34.
[125] Canada's Further Submissions on Remedy, dated April 6, 2016 at para 13.
[126] *FNCFCSC et al v AGC*, 2016 CHRT 10 at para 32.
[127] *FNCFCSC et al v AGC*, 2016 CHRT 10 at para 33.
[128] May Compliance Report at para C1.
[129] May Compliance Report at para C2.

was applying Jordan's Principle to all First Nations children and to all public services available to other children.

88. The Caring Society's June 8, 2016 submission regarding Canada's May 10, 2016 and May 24, 2016 compliance reports noted that Canada's May 10, 2016 compliance report was vague,[130] and specifically noted that the May 10, 2016 compliance report did not specifically confirm that Jordan's Principle would apply to all children.[131]

89. On July 5, 2016, the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, and the Honourable Jane Philpott, Minister of Health, jointly announced Canada's "new approach" to Jordan's Principle without consultation with First Nations or the Parties.[132] As the fact sheet attached to Minister Bennett and Minister Philpott's joint statement specified, "[t]he 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."[133]

ii. The Child First Initiative

90. The Child First Initiative is composed of three components: (1) an Enhanced Service Coordination Function; (2) a Service Access Resolution Fund; and (3) data collection to support a longer-term approach to Jordan's Principle commencing April 1, 2019.[134]

91. During the cross-examination of Ms. Buckland, the Caring Society learned that these three components are to be carried out from now until March 31, 2019 on the strength of $382 million in funding (reduced annually by any funds unspent, which are returnable to Canada's general revenue), broken down in the following amounts:

a. $38 million allocated to Enhanced Service Coordination;
b. $327 million allocated to the Service Access Resolution Fund; and
c. $17 million allocated to contractors and Full Time Equivalent civil servant human resources.[135]

[130] Caring Society's June 8, 2016 submission regarding Canada's May 10, 2016 and May 24, 2016 compliance reports ["Caring Society June Submissions"] at para 69.
[131] Caring Society June Submission at para 70(c).
[132] Lang Affidavit, Exhibit 2: October Compliance Report, Annex I: Joint Statement from the Minister of Health and the Minister of Indigenous and Northern Affairs on Responding to Jordan's Principle, dated July 5, 2016.
[133] Lang Affidavit, Exhibit 2: October Compliance Report, Annex I: Fact Sheet: Jordan's Principle – Addressing the Needs of First Nations Children.
[134] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I.
[135] Buckland Cross Examination at p 104, line 19 to p 107, line 17; & Exhibit 6: Excerpt from Health Canada Presentation to the Health Committee of the Mi'kmaq-Canada-Nova Scotia Tripartite Forum, dated August 29, 2016.

92. During the cross-examination of Ms. Buckland, the Caring Society learned that the Enhanced Service Coordination envelope is broken down per region, with set amounts allocated per fiscal year in the following amounts (for regional breakdowns per year, see RFI-RB-8):

a. 2016/17: $7.5 million;
b. 2017/18: $15.3 million; and
c. 2018/19: $15.6 million.[136]

93. During the cross-examination of Ms. Buckland, the Caring Society learned that the Service Access Resolution Fund envelope is not divided regionally,[137] and is broken down per fiscal year in the following amounts:

a. 2016/17: $76.6 million;
b. 2017/18:$115.3 million; and
c. 2018/19: $132.1 million.[138]

94. However, when considering the Service Access Resolution Fund envelope, it must be recalled that, as the Caring Society learned during Ms. Buckland's cross-examination, any funds that go unspent within a fiscal year, even if those funds have been assigned to meet a service need by Health Canada, are returned to the Consolidated Revenue Fund.[139]

95. Accordingly, of the $76.6 million of the Service Access Fund allocated to the 2016/17 fiscal year, Canada could only confirm that $5.7 million (7%) had been spent as of January 11, 2017 (more than 6 months after the Child First Initiative had been announced).[140] While an additional $5.3 million of the Service Access Resolution Fund envelope had been allocated as of January 11, 2017, that money remains liable to being returned to the Consolidated Revenue Fund if it is not expended in the 11 weeks remaining in the fiscal year. The same is true of the remaining $59.4 million in funds that were unallocated as of January 11, 2017 (for a total of 22% of the total Service Access Resolution Fund envelope).

iii. Canada's limited and fluctuating definitions of Jordan's Principle

96. On July 6, 2016, Canada confirmed to the Tribunal that its approach was limited to First Nations children living on-reserve with a disability or short-term condition requiring health or social services.[141]

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[136] Request for Information on Buckland Cross Examination ["RFI-RB"] RFI-RB-8.
[137] Buckland Cross Examination at p 109, lines 4-23.
[138] RFI-RB-9.
[139] Buckland Cross Examination at p 110, line 5 to p 111, line 11.
[140] Buckland Affidavit, at Exhibit "A".
[141] Canada's July 6, 2016 further reply submissions regarding immediate relief at para 36.

97. In its September 14, 2016 decision, the Tribunal criticized Canada for its narrow analysis of Jordan's Principle, noting that "[t]his type of narrow analysis is to be discouraged moving forward as it can lead to discrimination".[142]

98. The definition Canada used in its new approach to Jordan's Principle was also criticized by the Tribunal in its September 14, 2016 decision as appearing too restrictive, such that Canada was required to explain no later than October 31, 2016 "why it formulated its definition of Jordan's Principle as such so that [the Tribunal] can assess its full impact."[143]

99. On September 26, 2016, Dr. Blackstock, on behalf of the Caring Society, wrote to Minister Philpott, expressing serious concern that Health Canada officials were promulgating Canada's restrictive definition of Jordan's Principle publicized on July 5, 2016 and criticized by the Tribunal in its September 14, 2016 decision, in official government presentations.[144]

100. In its October 31, 2016 compliance report, Canada justified its focus on children with a disability or short-term condition requiring health or social services due to these children being "the most vulnerable" First Nations children.[145] Canada did not specifically confirm in its October 31, 2016 compliance report that Jordan's Principle was being applied to all First Nations children, residing on- and off-reserve.[146] Minister Philpott did not respond to the Caring Society's September letter until October 27, 2016, stating that Health Canada officials would discuss Canada's approach to Jordan's Principle at the Tribunal's case conference then expected for November 2016, and that further details would be provided in Canada's October 31, 2016 compliance report.[147]

101. Canada's October 31, 2016 compliance report demonstrated that Canada was failing to ensure that <u>all</u> First Nations children had access to the services they require, without delay. Notably, Annex "I" to Canada's October 31, 2016 compliance report demonstrated that the contents of the September 21-22, 2016 Health Canada Jordan's Principle presentation that caused Dr. Blackstock to write to Minister Philpott on September 26, 2016 and that caused the Caring Society's counsel to write to Canada's counsel on October 11, 2016,[148] were being used widely by government officials across the country.

102. While a variety of iterations of the July 5, 2016 definition were used,[149] the emphasis remained on First Nations children living with a disability or short-term

[142] *FNCFCSC et al v AGC*, 2016 CHRT 16 at para 118.
[143] *FNCFCSC et al v AGC*, 2016 CHRT 16 at para 119.
[144] Exhibit RB-8, Letter from Dr. C. Blackstock to the Hon. J. Philpott dated September 26, 2016.
[145] Lang Affidavit, Exhibit 2: October Compliance Report at p 6.
[146] Lang Affidavit, Exhibit 2: October Compliance Report at pp 5-7.
[147] Exhibit RB-9, Letter from the Hon. J. Philpott dated October 27, 2016.
[148] Exhibit RB-10, Letter from Dr. C. Blackstock to the Hon. J. Philpott, dated November 14, 2016 at p 8 (Letter from D. Taylor to J. Tarlton, dated October 11, 2016).
[149] Exhibit RB-10, Letter from Dr. C. Blackstock to the Hon. J. Philpott, dated November 14, 2016 at pp 2-3.

condition. This emphasis was cause for great concern, given that Canada's October 31, 2016 compliance report and attached annexes made it clear that Canada was negotiating service agreements with third parties to provide a new "Enhanced Service Coordination" function, based on a definition that did not comply with the Tribunal's April 26, 2016 order, and was imposing service delays through the "Service Access Resolution" function contrary to the Tribunal's April 26, 2016 order. Dr. Blackstock raised these concerns with Minister Philpott in a November 16, 2016 letter.[150]

103. Since defending its approach to Jordan's Principle as one that "include[d] proactive measures that include a focus on the most vulnerable children" in its October 31, 2016 compliance report,[151] Canada's evidence is now that it "is reviewing all cases in which a First Nations child has been identified with a need for health or social care services/supports, regardless of their condition or place of residency."[152] Under cross-examination, Ms. Buckland attempted to explain that:

> […] 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.
>
> […]
>
> 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.[153]

104. According to Ms. Buckland's version of events, Canada's approach always applied to all First Nations children, and the public emphasis and communication limited to First Nations children living on-reserve with a disability or short-term condition was a communications error.[154] In a December 22, 2016 letter to the Caring Society, Minister Philpott also referenced a need to update Canada's briefing materials and publicly available information to reflect "that Canada agrees that Jordan's Principle applies to all First Nations children and fully supports the Canadian Human Rights Tribunal's ruling."[155]

105. Ms. Buckland's evidence that Canada has always applied a broad definition of Jordan's Principle is contradicted by other evidence provided by Canada,[156] including in

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[150] Exhibit RB-10, Letter from Dr. C. Blackstock to the Hon. J. Philpott, dated November 14, 2016.
[151] Lang Affidavit, Exhibit 2: October Compliance Report at p 6.
[152] Buckland Affidavit at para 4.
[153] Buckland Cross Examination at p 39, line 17 to p 40, line 21.
[154] Buckland Cross Examination at p 16, lines 7-22; at p 40, lines 22-25; at p 44, line 8 to p 45, line 10.
[155] Buckland Affidavit, Exhibit "G": Letter from Hon. J. Philpott to Dr. C. Blackstock, dated December 22, 2016.
[156] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Fact Sheet: Jordan's Principle – Addressing the Needs of First Nations Children; Canada's July 6, 2016 further reply submissions regarding

the August 2016 Interim Guidance document attached to Ms. Cranton's affidavit as Exhibit "E" (provided to the complainants and interested parties after Ms. Buckland's cross-examination was complete),[157] and Ms. Cranton's evidence on her cross-examination that "I agree that that has been sort of a shifting definition" and that at least in the first half of 2016, Canada's approach to Jordan's Principle was limited to First Nations children living on-reserve with a disability or short-term condition.[158]

106. Following a request for information during the course of Ms. Buckland's cross-examination, Canada provided 14 separate draft versions of a Jordan's Principle intake form (variously titled "Jordan's Principle-Child First Initiative Form Version 1.0"; "Jordan's Principle-Child First Initiative Form Version 2.0"; "Jordan's Principle Case Tracking Form"; and "Jordan's Principle Case Management Form"). The evolution of these forms may reflect the evolution of Canada's approach (as Ms. Buckland stated in her cross-examination: "we're working on getting it perfect and I would say with the first draft of our intake form, we didn't have it perfect)[159] but certainly reflects the restrictive nature of the initial definition formulated by Canada when the Child First Initiative was announced remains largely intact.

107. Indeed, the first version of the Intake Form contains three points at which continued consideration of a Jordan's Principle case appears to be exceptional: question 3.2 "Status" (Is service being considered despite **status** ineligibility? [emphasis in original]),[160] question 3.3 "Residence" (If [the reason for leaving the reserve was not to access services], is service being considered despite **residency** ineligibility [emphasis in original]),[161] and question 3.5 "Normative Standard" (if [the province would not make an exception to the fact that the service/product is outside of provincial normative standard and still pay], is service still being considered despite not meeting **provincial normative standard** eligibility?).[162]

immediate relief at para 36. Canada's October 31, 2016 compliance report at p 6-7. Exhibit G of Buckland Affidavit, Letter from Minister Philpott to Dr Cindy Blackstock, dated December 22, 2016; Canada's October 31, 2016 compliance report at p 6; Canada's October 31, 2016 compliance report at Annex I: Atlantic First Nations Health Partnership, Public Health and Primary Care Committee Update (July 5-6, 2016); Canada's October 31, 2016 compliance report at Annex I: Letter dated August 4, 2016 from Debra Keays-White (Regional Executive Officer, FNIHB Atlantic Region) to Atlantic First Nations Chiefs; Letter dated July 7, 2016 from Jocelyn Andrews (Regional Executive Officer, FNIHB Alberta Region) to Chiefs of Alberta; Letter dated August 8, 2016 from Shawn Grono (Director of Nursing, FNIHB Alberta Region) to All FNIHB and Band Employed Nurse; Health Canada Information Sheet for Nursing Staff re Jordan's Principle (undated).

[157] Affidavit of Lee Cranton sworn February 10, 2017 ["Cranton Affidavit"] at Exhibit "E", "Child First Initiative Based on Jordan's Principle: Interim Guidance for NIHB Regional Medical Transportation Staff", dated August 8, 2016.

[158] Cranton Cross Examination at p 79 line 23 to p 80 line 21.

[159] Buckland Cross Examination at p 50, line 24 to p 51, line 1.

[160] RFI-RB-4a at pp 2-3.

[161] RFI-RB-4a at p 3.

[162] RFI-RB-4A at p 4.

108. Status ineligibility, residency ineligibility, and provincial normative standard ineligibility remained grounds for exceptional consideration in the second version of the Jordan's Principle-Child First Initiative Form Version 1.0.[163]

109. In the third version of the Jordan's Principle-Child First Initiative Form Version 1.0, the list of potential grounds of ineligibility grew to five, with a further ground of ineligibility was added at question 4.0 "Age" (Is service being considered despite **age** ineligibility? [emphasis in original],[164] and at question 4.4 Disability (Is service being considered despite **disability** ineligibility? [emphasis in original]).[165]

110. The five grounds of ineligibility (age, status, residency, disability, and provincial normative standard), were maintained through the first version of the Jordan's Principle-Child First Initiative Form Version 2.0,[166] as well as the second,[167] third,[168] fourth,[169] fifth,[170] sixth,[171] and seventh[172] versions of that document.

111. Canada eliminated the status- and residency-related grounds of ineligibility from the tenth version of its intake form, the "Jordan's Principle Case Tracking Form" (see questions 3.2 "Status" and 3.3 "Residence"), asking for "details" for non-status and off-reserve children (though these two questions remained under the heading "Eligibility" in the questionnaire). Ineligibility criteria were maintained for age (question 3.1), disability (question 3.4), and provincial normative standard (question 5.1.1).[173]

112. Canada's November 2, 2016 "Jordan's Principle Case Management Form" maintained references regarding ineligibility on the grounds of age (question 3.1) and disability (question 3.4), but dropped the reference to "eligibility" with regard to the provincial standard of care, asking instead "If [the product/service does not meet provincial/territorial normative standard], explain why the service/product is still being considered despite not meeting provincial/territorial normative standard".[174]

113. The twelfth version of Canada's Jordan's Principle intake form, the December 2, 2016 "Jordan's Principle Case Management Form", dropped all references to "ineligibility", instead changing the heading of section 3.0 of the form from "Client Eligibility" to "Client Information", and requesting "details" regarding children living off-reserve, for requests for individuals who were not "children" according to the

[163] RFI-RB-4a at pp 11-13.
[164] RFI-RB-4a at p 20.
[165] RFI-RB-4a at pp 21-22.
[166] RFI-RB-4a at pp 28-35 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[167] RFI-RB-4a at pp 38-45 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[168] RFI-RB-4a at pp 47-51 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[169] RFI-RB-4a at pp 53-57 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[170] RFI-RB-4a at pp 59-64 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[171] RFI-RB-4a at pp 66-71 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[172] RFI-RB-4a at pp 73-77 (see questions 3.1, 3.2, 3.3, 3.4, and 5.1.1)
[173] RFI-RB-4a at pp 79-83.
[174] RFI-RB-4a at pp 85-89.

province/territory of residence, for non-status children, or for children who did not have a disability or interim critical condition,[175] and an explanation for children for whom the request was not within the provincial normative standard.[176]

114. The approach taken in the December 2, 2016 version of the "Jordan's Principle Case Management Form" was maintained for the December 6, 2016 and December 12, 2016 versions of the "Jordan's Principle Case Management Form",[177] and for the version dated December 13, 2016 that the Caring Society understands is the Jordan's Principle intake form currently in use.[178]

115. The sequence described above demonstrates that some time on or before November 2, 2016, Canada excluded "residence" and "status" as ground of presumptive ineligibility, as it was ordered to do with regard to residence,[179] and encouraged to do with regard to status (in the context of the Tribunal's consideration of eligibility under the *1965 Agreement*).[180] Sometime between November 2, 2016 and December 2, 2016 (following the Caring Society's November 14, 2016 letter),[181] Canada removed the remaining references to ineligibility from its intake form.

116. In addition to the sequence described above, Ms. Cranton confirmed in her cross-examination that a restrictive definition, limited to children on-reserve and with a disability or short-term condition, was applied in the interim period following the Tribunal's January 2016 decision, and into summer 2016.[182]

117. Regardless of amendments in Canada's intake form, Canada has presented no evidence demonstrating good faith efforts to ensure First Nations and the public were aware of the changing approach and inviting them to report cases based on the new criteria. In fact, Ms. Buckland acknowledged that the definition of children with critical short term illnesses and disabilities was still being promoted on the Government's website the day of her cross examination (February 6, 2017) and that this definition was continued to be used in correspondence with First Nations.

118. Absent external stimuli (the Tribunal's rulings and pressure from the parties to this complaint), Canada fails to take action and even when it does expand its narrow approaches internally, it withholds the new approaches secret from First Nations and the public whilst actively promoting a consistently narrow approach.

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[175] RFI-RB-4a at pp 93-94.
[176] RFI-RB-4a at p 98.
[177] RFI-RB-4a at pp 102-109; RFI-RB-4a at pp 111-118.
[178] RFI-RB-4b at pp 1-8.
[179] *First Nations Child and Family Caring Society et al v Attorney General of Canada*, 2016 CHRT 16 at para 118.
[180] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16 at para 98.
[181] Exhibit RB-10, Letter from Dr. C. Blackstock to Hon. J. Philpott, dated November 14, 2016.
[182] Cranton Cross Examination at p 79, line 11 to p 80, line 21.

119. This lack of action, and the exclusions it creates, is all the more concerning given that only Health Canada is engaged in a process of looking at past Jordan's Principle cases where services were denied (though Canada has yet to respond to the AFN's request for information regarding the number of years into the past this process is considering).[183] INAC has yet to undertake such a review.[184]

iv. Canada's approach to Service Access Resolution imposes delays through case conferencing

120. During her cross-examination, Ms. Buckland described the way in which First Nations children can access the Service Access Resolution Fund where they are not receiving a service due to a jurisdictional conflict or service gap.

121. Under cross-examination, Ms. Buckland summarized Canada's approach to Jordan's Principle in the following way:

> […] if a case comes forward with a First Nation child who has a need, a health or social service need that is not being met by the programs that are available to that child, then we will work to make sure that we either assist the family and the child in terms of navigating to those services and getting access to those services or we will provide funding for those services [emphasis added].[185]

122. The above summary, and the balance of Ms. Buckland's cross-examination, make it clear that Canada's "service navigation approach" imposes delays on First Nations children attempting to access the Service Access Resolution Fund. These delays essentially arise due to an approach that construes the Service Access Resolution Fund as a fund of last resort.[186]

123. During her cross-examination, Ms. Buckland explained that, in situations where a Jordan's Principle case comes to Canada's attention through the local Jordan's Principle focal point, the focal point completes the intake form and sends it to headquarters via email.[187] 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.[188]

124. In cases where the "service navigation approach" does not 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.[189] In such cases, Canada has set the following service standards:

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[183] Buckland Cross Examination at p 285, line 14 to p 287, line 1.
[184] Lang Cross Examination at p 146, line 16 to p 147, line 5.
[185] Buckland Cross Examination at p 51, lines 3-9.
[186] Buckland Cross Examination at p 76, line 25 to p 78, line 8.
[187] Buckland Cross Examination at p 65, line 19 to p 67, line 3.
[188] Buckland Cross Examination at p 78, lines 3-8.
[189] Buckland Cross Examination at p 65, line 19 to p 67, line 3.

a. Urgent cases: 12 hours;
b. Cases within a province's normative standard: 5 days;
c. Cases outside a province's normative standard: 7 days; and
d. Large group cases: 7 days (in reality, 2 weeks).[190]

125. Canada's decision to place "service navigation" as a precondition to accessing the Service Access Resolution Fund imposes delays on First Nations children. An example presented to Ms. Buckland during her cross-examination is illustrative:

a. January 19, 2017: Ms. Buffalo requests assistance from Health Canada with regard to bussing her son;
b. January 19, 2017: Health Canada requests further information from Ms. Buffalo;
c. January 20, 2017: Ms. Buffalo provides the information requested;
d. January 27, 2017: Health Canada advises Ms. Buffalo that Health Canada is working with INAC to determine whether INAC's education program could assist with the request; and
e. February 3, 2017: Ms. Buffalo writes to Health Canada requesting an update.

126. In Ms. Buffalo's case, there was a delay of at least two weeks following Ms. Buffalo's having provided complete information, caused by Health Canada's attempt to identify an INAC program that could pay for the service. The arm of government first contacted did not address the matter directly (by either funding the service and seeking reimbursement from INAC's education program, or denying Ms. Buffalo's request), as it is required to do by Jordan's Principle. As Ms. Buckland conceded under cross-examination, the response to Ms. Buffalo's case demonstrates that "there's additional work to be done".[191]

v. Canada's lack of performance measurement regarding Jordan's Principle

127. The data collection component of Canada's "Child First Initiative" remains in its nascent stage. While Ms. Buckland's affidavit asserts that Canada's "[i]nternal processes will further be refined to improve data collection and reporting",[192] Ms. Buckland's evidence on cross-examination demonstrates that Canada's data collection process is in fact at the development, as opposed to the refinement stage. As Ms. Buckland put it, Canada's "focus has been identify the kids, work to meet their needs and, and get the money out the door so that those needs are met. So the focus has not been refining and spending time on all of the policies and procedures."[193]

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[190] Buckland Cross Examination at p 67, lines 6-13; at p 72, lines 6-21.
[191] Buckland Cross Examination at p 82, lines 1-12; see also generally p 76, line 16 to p 82, line 17.
[192] Buckland Affidavit at para 19.
[193] Buckland Cross Examination at p 92, lines 12-15.

128. At this stage, Canada is not formally tracking the number of Jordan's Principle cases that are denied or in progress,[194] nor the number of cases in which its "service standards" are met for making a decision regarding a Jordan's Principle case.[195] As Ms. Buckland conceded Canada's procedures for tracking Jordan's Principle cases "definitely needs to be augmented to further track with better detail."[196]

129. However, as the Tribunal recognized in its January 26, 2016 decision and reiterated in its September 14, 2016 remedial decision, "[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."[197]

130. Canada's lack of information about the number of Jordan's Principle cases in progress, the number of Jordan's Principle cases that have been denied, or the time that it is taking to process Jordan's Principle cases (including whether or not Canada's service standards are being met) makes it impossible to determine whether Canada's approach respects human rights principles and sound social work practice.

vi. Canada's lack of an appropriate appeals process for Jordan's Principle cases

131. In her January 25, 2017 affidavit, Ms. Buckland advised that "Canada is implementing an approval and appeal process to review all requests in a timely manner."[198] However, under cross-examination, Ms. Buckland advised that the appeal process was simply one in which the family of a child that had been denied the service advised the local Jordan's Principal focal point of the desire to appeal, following which the case would be referred for review at the Assistant Deputy Minister level.[199]

132. The flow chart (dated after Ms. Buckland's cross-examination) that was provided by Canada in response to the Caring Society's request for documents relating to the appeal process confirms the *ad hoc* nature of this process.[200]

133. More concrete measures are required to ensure fair process for families of children whose requests for services under Jordan's Principle are refused. The *ad hoc* procedures formulated by Canada provide no assurance as to the timeliness of the appeal process.

134. The appeal procedures described and provided, such as they are, also give no details as to the "rationale" that will be given to the family. In fact, Ms. Buckland's evidence regarding the one case of service denial of which she was aware was that Canada's

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[194] Buckland Cross Examination at p 97, line 10 to p 98, line 2.
[195] Buckland Cross Examination at p 72, line 22 to p 73, line 22.
[196] Buckland Cross Examination at p 96, line 25 to p 97, line 1.
[197] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 2 at para 482; *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada*, 2016 CHRT 16 at para 29.
[198] Buckland Affidavit at para 11.
[199] Buckland Cross Examination at p 117, line 3 to p 118, line 7.
[200] RFI-RB-11 at p 2.

"rationale" was provided to the family over the phone,[201] leaving the family with no written record of the reasons for the service denial. While it is certainly of benefit for the family to have the opportunity to have their questions regarding the service denial answered, it is essential that families be provided with a written record of the rationale for the service denial, in order to ensure future precision regarding the reasons for service denials moving forward in the appeal process, and to enable the family to better seek assistance in appealing a service denial.

E. The Caring Society's Efforts to Help Canada Comply with the Decision

135. Before the Decision was released and thereafter, the Caring Society has made multiple and sustained efforts to propose evidence-based methods and mechanisms to Canada to decrease the harm experienced by First Nations children and their families. On December 14, 2015, in anticipation of the Decision, Dr. Blackstock wrote to Ms. Isaak regarding the information needs for the National Advisory Committee ("NAC") in order to be able to move forward with dispatch in establishing the committee.[202]

136. In addition to this, Dr. Blackstock and the Caring Society team prepared a series of accessible and user-friendly information sheets outlining the shortcomings in INAC's child and family services formulae and presenting possible immediate relief measures that Canada could undertake to lessen the discriminatory impact of its FNCFS Program and fully implement Jordan's Principle. The recommendations in these information sheets are largely based on reforms presented by the Auditor General of Canada and in joint First Nations/INAC reports on child and family services (and previously agreed to by INAC). These information sheets respectively titled "Action Reforms of Directive 20-1, the Enhanced Prevention Focused Approach, and the 1965 Indian Child Welfare Agreement" were posted on the Caring Society's website on January 10, 2016. In particular, the information sheets made the following recommendations which are relevant to the motion:

a) Approve child in care related legal expenses as an eligible expense under the maintenance budget and increase the maintenance budget to cover such costs;
b) Fund agency building renovations by qualified contractors where facility conditions pose a health and safety hazard;
c) Approve costs related to the receipt and investigation of child maltreatment reports at actual costs pending further review;
d) Replace the current operations registered child populations thresholds of 251, 501, 801 and 1000 in the operations formula with the recommended funding increments per every 25 children on reserve as recommended in Wen:de;
e) Increase the per child amount for prevention from \$100 per child to \$200 per child; and
f) Immediately update the schedule of the 1965 Indian Welfare Agreement to include the current provisions of child welfare statutes ensuring statutory requirements such as covering the costs of band representatives and prevention services.[203]

[201] Buckland Cross Examination at p 117, lines 20-23.
[202] Blackstock Affidavit, Exhibit A: December 14, 2015 Letter to Paula Isaak from Cindy Blackstock.
[203] Blackstock Affidavit, Exhibit B: Caring Society Information Sheets.

137. On January 11, 2016, Dr. Blackstock personally wrote to Minister Bennett to recognize her appointment as Minister of Indigenous and Northern Affairs. In this letter, she urged Minister Bennett to act quickly to reform the FNCFS Program and referred her to the Caring Society's information sheets.[204]

138. On February 11, 2016, Jonathan Thompson (of the AFN) and Dr. Blackstock met with Ms. Isaak and Ms. Lang to discuss the implementation of immediate relief for First Nations children.

139. Following the February 11, 2016 meeting, Ms. Isaak wrote to Dr. Blackstock on March 1, 2016 regarding the re-establishment of the NAC. On March 2, 2016, Dr. Blackstock responded to this letter stating that immediate relief could be provided prior to recalling the NAC. In particular, she stated that while the Caring Society supports the reconstitution of a national and regional tables to negotiate medium and longer-term reform, its view was that the reconstitution of the national and regional tables was not required in order for immediate relief measures to be put in place. She also added that Canada's procedural considerations and convenience should not shield it from its human rights obligations towards First Nations children.[205]

140. While Dr. Blackstock was acting in good faith that Canada was interested in collaborating on solutions, INAC officials failed to advise Dr. Blackstock that Canada's financial response to the Tribunal's January 2016 Decision had been pre-determined months before the Tribunal ruled.

141. On March 31, 2016, after having spent more time analyzing the funding for child welfare services in the 2016 Budget (delivered on March 22, 2016), Dr. Blackstock met with Minister Bennett to discuss the importance of implementing immediate relief for First Nations children. Dr. Blackstock expressed her disappointment that the amounts in Budget 2016 were developed without consultation with First Nations. Dr. Blackstock asked how the amounts were calculated and expressed her view that the $ 71 million was insufficient to address the immediate relief requirements in the Tribunal's Decision and that Budget 2016 contained no new funding for Jordan's Principle, raising significant concerns regarding Canada's implementation of the Tribunal's January 2016 Decision. Dr. Blackstock urged the Minister to review the Caring Society's information sheets to inform improvements to INAC's budget allocations. Dr. Blackstock further urged the Minister to ensure that INAC moved quickly to establish the NAC and Regional tables to address matters relating to medium- and long-term reform.[206]

142. On May 2, 2016, Dr. Blackstock again met with Minister Bennett, Rick Theis (the Minister's Chief of Staff), INAC Deputy Minister Hélène Laurendeau, Ms. Lang, and Ms. Isaak, and other INAC officials, as well as AFN officials Mr. Thompson and Peter

[204] Blackstock Affidavit at para 16 & Exhibit C: January 11, 2016 Letter to Minister Bennett from Cindy Blackstock.
[205] Blackstock Affidavit, Exhibit D: March 2, 2016 Letter to Paula Isaak from Cindy Blackstock.
[206] Blackstock Affidavit at para 20.

Dinsdale. Dr. Blackstock again reiterated her disappointment with Budget 2016. She again asked federal officials for a detailed calculation of Budget 2016 and the forecasts for future years and a response to her calculations of the shortfall. She did not receive a response. She also presented her own detailed calculations of the shortfall in funding for child welfare based on information available departmental data.[207] Dr. Blackstock emphasized that she was not interested in "being right but rather in doing right" by the children and hoped the Department would take the same approach in its response to her concerns regarding Budget 2016 and Canada's response to the Panel's orders on Jordan's Principle.[208]

143. On September 21, 2016, Dr. Blackstock again met with Minister Bennett, Mr. Theis and another official from the Minister's office. During this meeting, she expressed concerns with Canada's failure to comply with the Tribunal's orders and Canada's failure to provide FNCFS Agencies with funding for cultural visioning (Touchstones of Hope model). Dr. Blackstock also expressed concern about Canada's unilateral decision-making and subsequent failure to meaningfully respond to legitimate questions the Caring Society had posed to understand these announcements. Dr. Blackstock also expressed her view that Canada's unilateral decision-making process on Budget 2016 and Jordan's Principle was out of step with the government's commitment to a "Nation to Nation" relationship with First Nations. Dr. Blackstock also noted, with concern, that Canada's submissions to the Tribunal indicated that INAC officials were relying on existing policies and authorities to delay the implementation of the Tribunal's orders even though these policies and authorities had been ruled discriminatory.[209]

F. Criticism of Canada's failure to comply with the Tribunal's orders

144. Since the release of the CHRT's January 2016 Decision, numerous credible organizations have noted Canada's failure to respect the order and take action to provide immediate relief. For example, in its "Concluding observations regarding Canada" dated March 22, 2016, the UN Committee on Economic, Social and Cultural Rights ("CESCR") recommended that Canada review and increase its funding to family and child welfare services for Indigenous Peoples living on reserves and fully comply with the Tribunal's January 2016 Decision. The CESCR also called on Canada to implement the Truth and Reconciliation Commission's recommendations with regards to Indian Residential Schools.[210]

145. On February 16, 2016, Chief Ron Ignace of the Skeetchestn Indian Band (located in British Columbia) sent a letter to Prime Minister Trudeau in relation to the Truth and Reconciliation Commission's Calls to Action regarding child welfare and the Tribunal's January 2016 Decision. The letter urged the Prime Minister, as Minister of Youth, to take

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[207] Blackstock Affidavit at para 22.
[208] Blackstock Affidavit at para 17-22.
[209] Blackstock Affidavit at para 23.
[210] Blackstock Affidavit at para 33 & Exhibit L : CESCR March 23, 2106 Concluding Observations.

a leadership role in ensuring that Canada fully and immediately ends its discriminatory practices towards First Nations children and their families.[211]

146. On February 25, 2016, Debbie Pierre, Executive Director of the Office of the Wet'Suwet'en First Nation, wrote a letter to Prime Minister Trudeau urging him to take immediate action to reform its First Nations child welfare services. The letter noted that the Wet'Suwet'en First Nation has developed an innovative and culturally appropriate wellness conceptual model to design, plan, implement and evaluate all services provided to their children, youth and families, but that none of these initiatives was currently funded by the government.[212]

147. On October 26, 2016, nine months following the release of the Tribunal's January 2016 Decision, the Legislative Assembly of Manitoba passed a motion condemning Canada for failing to comply with the Tribunal's January 2016 Decision and urging immediate compliance.[213] This motion decried Canada's "inaction in equitably funding social services for First Nations people."[214] Debate on the motion repeatedly referenced Canada's failure to comply with the Canadian Human Rights Tribunal decisions and the impacts such a failure has on children and families. Specifically, The Honourable Member for Fort Rouge, Mr. Wab Kinew, who moved the motion noted:

> Again the reason that we are debating this today is because, for the first time in the history of this country, the character of discrimination against First Nations people living on reserve has been brought into stark relief thanks to the decision rendered by the Canadian Human Rights Tribunal." (2409)

Referring to the 5 year roll out of Budget 2016 amounts for First Nations child and family services Mr. Kinew states:

> [A]nd really, any reasonable person, when looking at what the federal Liberals announced- this funding that's rolled in-rolled out in stages, going up to 2018, 2019, 2020, 2021. Any reasonable person should ask why should First Nations kids have to wait for equality until after the next federal election? It doesn't make any sense. We should have equality now. We should have had equality a generation ago. And yet we have an opportunity with this tribunal ruling to move forward in a good way.[215]

148. On October 27, 2016, the New Democratic Party introduced an opposition motion to the House of Commons calling on Canada to comply with the Decision. On November

[211] Blackstock Affidavit at para 34 & Exhibit M: February 16, 2016 Letter to Prime Minister Trudeau from Chief Ron Ignace.
[212] Blackstock Affidavit at para 35 & Exhibit N: February 25, 2016 Letter to Prime Minister Trudeau from Debbie Pierre.
[213] Lang Cross Examination, Exhibit 14: House of Commotions Motion, dated October 27, 2016.
[214] Manitoba Legislative Assembly, Debates and Proceedings, Official Report (Hansard), First Session – 41st Legislature at p 2408.
[215] Manitoba Legislative Assembly, Debates and Proceedings, Official Report (Hansard), First Session – 41st Legislature at p 2409.

1, 2016, the opposition motion passed in the House of Commons unanimously. The motion called on Canada to immediately comply with the Tribunal's January 2016 Decision, properly and fully implement Jordan's Principle, inject $155 million in new funding for the delivery of child welfare services for First Nations children and families and to stop fighting First Nations families in court who are trying to access government services for their children.

149. Despite a public assertion to the contrary by Minister Bennett during an interview on CBC Radio's "The Current",[216] Ms. Lang conceded that Canada failed to provide the additional funds pursuant to the motion.[217] Furthermore, two days after the motion passed in the House of Commons, Canada continued litigation against a First Nations teenager requiring $8,000 worth of medical treatment so that she can eat and talk without chronic pain.[218]

150. On November 1, 2016, UNICEF Canada made a statement supporting the passage of the House of Commons motion.[219]

151. Following the Auditor General of Canada's 2008 and 2011 audits on First Nations child and family services, on November 29, 2016, the Auditor General of Canada released his Fall 2016 report, which included the following statement:

> Another picture that reappears too frequently is the disparity in the treatment of Canada's Indigenous peoples. My predecessor, Sheila Fraser, near the end of her mandate, summed up her impression of 10 years of audits and related recommendations on First Nations issues with the word "unacceptable." Since my arrival, we have continued to audit these issues and to present at least one report per year on areas that have an impact on First Nations, including emergency management and policing services on reserves, access to health services, and most recently, correctional services for Aboriginal offenders. When you add the results of these audits to those we reported on in the past, I can only describe the situation as it exists now as beyond unacceptable.[220]

152. On December 6, 2016, the First Nations Leadership Council, composed of the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations wrote an open letter to Minister Bennett urging her to take immediate action to comply with the Decision. The letter further expressed concern that Canada has not established the NAC process. [221]

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[216] Lang Cross Examination, Exhibit 16: Transcript of CBC interview January 26, 2017.
[217] Lang Cross Examination at p 298, lines 1-18.
[218] Blackstock Affidavit at para 40.
[219] Blackstock Affidavit at para 41.
[220] Blackstock Affidavit at para 42 & Exhibit T :November 29, 2016, Message from the Auditor General.
[221] Blackstock Affidavit at para 43 & Exhibit U: December 6, 2016 Letter to Minister Bennett from the First Nations Leadership Council.

153. On December 6, 2016, the Office of the Parliamentary Budget Officer released a report entitled "Federal Spending on Primary and Secondary Education on First Nations Reserves." The report concluded there are considerable funding shortfalls between INAC funding and funding provided under provincial formulas in the context of First Nations elementary and secondary education.[222]

154. On December 6, 7 and 8, 2016, Dr. Blackstock attended the Special Chiefs Assembly of the Assembly of First Nations. During this time, numerous individuals advised her of their disappointment regarding Canada's failure to comply with the Decision. Ten individuals provided her with letters expressing their concerns.[223]

155. During the Special Chiefs Assembly, the Chiefs in Assembly unanimously passed a resolution expressing deep concern regarding Canada's failure to immediately and fully comply with the Decision and the ensuing compliance orders. The resolution called on Canada to immediately comply with any and all orders issued by the Tribunal without reservation and to establish the NAC and Regional Tables. [224]

156. On December 9, 2016, Dr. Blackstock was invited to appear before the Inter-American Commission on Human Rights ("IACHR") in Washington, D.C. on behalf of the Caring Society for a special hearing convened on the human rights situation of Indigenous children in Canada. The focus of her presentation was Canada's failure to respect the Tribunal's January 2016 Decision in violation of the United Nations Convention on the Rights of the Child, the United Nations Declaration on the Rights of Indigenous Peoples, the American Convention on the Rights and Duties of the Man, and the American Declaration of the Rights of Indigenous Peoples. The Caring Society's main requests to the IACHR were to urge Canada to comply with the Decision and for the IACHR to hold a follow-up hearing within one year to determine Canada's compliance with any observations and recommendations it made. Following the presentation, the IACHR Special Rapporteur on the Rights of the Child of the IACHR, Esmeralda Arosemena de Troitińo, stated that "we need to protect ever child, every last boy and girl".[225]

157. On December 13, 2016, Amnesty International Canada (English Branch) and Amnistie internationale Canada (francophone) released their annual Human Rights Assessment of Year One of the current federal government. Although the report noted some positive "promises", it concluded that the current government's human rights record was still a work in progress. The assessment expressed serious concern about Canada's

[222] Blackstock Affidavit at para 44 & Exhibit V: Federal Spending on Primary Education on First Nations Reserves, Report of the Office of the Parliamentary Budget Officer, dated December 6, 2016.
[223] Blackstock Affidavit at para 45 & Exhibit W: Letters of Concern.
[224] Blackstock Affidavit at para 46 & Exhibit X: Special Chiefs Assembly, Resolution no. 83/2016, December 8, 2016.
[225] Blackstock Affidavit at para 47 & Exhibit Y: Caring Society Hearing Brief to the Inter-American Commission on Human Rights, dated November 29, 2016.

failing to take immediate remedial action as explicitly called for in the Decision. It graded the current government's policy on First Nations child welfare as "non progress".[226]

G. Ongoing harm to children

158. In the course of the hearing, the Tribunal heard evidence of the harm caused to First Nations children as a result of Canada's ongoing racial discrimination. The Tribunal accepted this evidence and found that INAC's FNCFS Program negatively impacts First Nations children and their families.[227] In particular, the Tribunal found that Canada's failure to implement Jordan's Principle and inequitable FNCFS Program incentivised the removal of children from their homes. [228]

159. The tragic suicide deaths of two 12 year old girls in Wapekeka First Nation in Ontario have shed light on the consequences of Canada's ongoing discrimination against First Nations children and the serious flaws in its approach to Jordan's Principle in particular. While Health Canada and INAC have Jordan's Principle focal points in place, funding requests to address gaps in services continue to be denied or ignored if those who report Jordan's Principle cases do not put the case forward through the focal points.

160. The propensity for those who report Jordan's Principle cases not to report cases via the Jordan's Principle focal points is amplified by Canada's use of a narrow and definition for Jordan's Principle (children with disabilities and short term illnesses). Relevant to Wapekeka First Nation, the definition of Jordan's Principle that Canada has publicized until recently does not mention mental health services.

161. For example, in July 2016 Wapekeka First Nation submitted a funding proposal, which specifically mentioned reports of a suicide pact among young girls in the community, to Health Canada to address gaps in mental health services that have went – and continues to go - unaddressed at the provincial level.[229] Shockingly, even after the death of the two girls in the community, Ms. Buckland, who reports directly to Health Canada's Senior Assistant Deputy Minister on Jordan's Principle,[230] had failed to read the proposal submitted by Wapekeka First Nation until the day of her cross-examination.[231] When asked in cross-examination whether the proposal could have been considered a Jordan's Principle case, she stated:

> I guess I can -- yes, but I can only answer, I can only answer that to the extent which I have full knowledge of what's in the proposal and I don't. But essentially, if there

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[226] Blackstock Affidavit at para 48 & Exhibit Z: Amnesty International Canada, Human Rights Assessment of Year One, dated December 13, 2016.
[227] *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 (CanLII) at para 457-458.
[228] *Ibid.*
[229] Kirlew Affidavit at para 15-16.
[230] Buckland Affidavit at para 1.
[231] Buckland Cross Examination, line 5 to p 176, line 5.

> is a, if there's a gap and it's not being met elsewhere, that's why Jordan's Principle is in place.[232]

162. In the media, a Health Canada official was quoted stating that the proposal was not granted because it was submitted at "awkward time".[233]

163. It is no exaggeration to state that Canada's failure to fully implement Jordan's Principle is having deadly consequences for First Nations children. According to Dr. Kirlew, the suicide deaths of the two girls from Wakepeka could have been prevented with appropriate community based mental health services.[234] Canada has been given over a year to implement Jordan's Principle and it has failed to do so. In light of the tragic and serious consequences of Canada's inaction, the Caring Society submits that the Tribunal must exercise its remedial powers without delay.

164. Marie Wilson, one of the three Commissioners chosen to lead the Truth and Reconciliation Commission of Canada, explained that many of the witnesses she heard from while at the TRC told her that the worst part of their experience relating to Indian Residential Schools was their rupture from their families. She explained:

> Going into the hearings, I was braced to hear accounts of sexual abuse. I imagined we would hear that this was the worst thing that happened to children in the school system. But that was not the case. Over and over again we heard that the worst part was the rupture from family and home and everything and everyone familiar and cherished. This rupture was the worst, and the most universal. This was a very important revelation because it underscored a critical issue about the legacy of residential schools: that even though the schools have been closed throughout the country for two decades now, we as a country have never stopped the practice of removing Indigenous children from their homes and communities and placing them in state-sponsored care. We do this in hugely disproportionate numbers compared to the Indigenous percentage in the population, and in larger numbers than in the days of residential schools.[235]

165. Based on this experience, Ms Wilson is of the view that, as long as Canada's discriminatory conduct continues, the child welfare system may be considered a continuation of, or a replacement for, the residential school system.[236] Canada failed to file any evidence in reply to Ms Wilson's affidavit and her evidence is therefore uncontroverted, unchallenged and ought to be accepted by the Tribunal.

[232] Buckland Cross Examination at p 174, line 24 to p 175, line 4.
[233] Kirlew Affidavit at para 16.
[234] Kirlew Affidavit at para 5-6.
[235] Affidavit of Marie Wilson, affirmed on December 18, 2016 at para 6.
[236] *Ibid* at para 6.

PART III – THE LAW

When a person deliberately fails to obey a court order, he shows disregard for the obligations which he owes to others in his community, disrespect for his community's system of justice which enforces those obligations, and disdain for the fundamental principle that all persons who live in our community do so subject to the rule of law. By disobeying a court order, a person seeks to place himself above and beyond the law of his community. His disobedience also creates conditions of gross inequality, rewarding those who turn their backs on the law, while placing burdens on those who follow the law.[237]

166. On January 26, 2016, the Tribunal found Canada to be discriminating in the provision of the FNCFS Program and in not fully implementing Jordan's Principle, contrary to the *Canadian Human Rights Act* (the "CHRA"). Canada has publicly welcomed the decision and stated that it would not seek judicial review.

167. As the Tribunal noted when it granted NAN's motion for leave to intervene,

> 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*.[238]

168. Canada cannot, at this stage of the proceedings, seek to re-litigate the Tribunal's findings of discrimination. This would in effect place the Complainants in a position where they need to prove their case once again and allow Canada to renege on its promise not to seek judicial review.

169. Since the January 2016 Decision, Canada has made multiple submissions seeking to convince the Tribunal not to issue any binding orders, on the basis that it is making "efforts" to comply with the Tribunal's decisions.

170. Canada bears the burden of demonstrating to the Tribunal that it has complied with the orders for immediate relief made to date. If Canada in fact believes that it has appropriately and fulsomely complied with the January 2016 Decision and the subsequent immediate orders, it must adduce evidence in this regard and satisfy the Tribunal that it has addressed.

[237] *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic*, 2009 CanLII 9423 (ON SC) at para 5.
[238] *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 11 (CanLII) at para 11.

171. The Caring Society also submits, for the reasons argued below, that it is only where full compliance is demonstrated that this Tribunal might consider refraining from making a binding order under section 53(3) of the CHRA. The mere expression of an intention to comply with the Tribunal's January 2016 Decision and related remedial orders, or general efforts by Canada to improve the FNCFS Program, do not negate the need for binding orders, especially where Canada's intention is vague, qualified or partial.

172. Put shortly, efforts are not enough. A result is required, and where that result is lacking, binding orders must be made to ensure compliance with the CHRA. So long as the discrimination continues (and the Caring Society submits it continues), there is no reason to further delay the making of binding orders.

173. Nothing that has happened during the 13 months detracts from the urgency of making the orders for immediate relief that the Caring Society has been seeking since the close of the hearing on the merits in October 2014. To the contrary, Canada's discriminatory treatment has continued to have tragic and grave consequences on First Nations children and their families.

A. INAC bears the burden of proving compliance with the Tribunal's orders

174. The Supreme Court of Canada has called the human rights system the "final refuge of the disadvantaged and the disenfranchised."[239] As such, courts have held that the standard for a complainant to establish *prima facie* discrimination before a human rights tribunal should not be overly burdensome so as to advance the legislation's objective of providing protection to the most vulnerable members of our society and to promote the overarching goal of eradicating discrimination in Canadian society. [240]

175. Once a complainant establishes *prima facie* discrimination, the onus shifts to the respondent to justify its conduct or refute the claim. According to the Supreme Court of Canada, this is an "onerous burden, and properly so" as this reinforces the primacy of human rights.[241] One of the main reasons behind this shifting burden in discrimination is that it would be unfair for complainants, who do not have access to the respondent's information, to bear the onus of demonstrating that the respondent's conduct is justified. As explained by the Supreme Court Canada in *Simpson-Sears*:

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[239] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (SCC), [1992] 2 S.C.R. 321, at p 339.

[240] *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at para 28.

[241] *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 SCR 161, 2007 SCC 4 (CanLII) at para 52. This standard has been accepted and applied by this panel when it ordered the Respondent to "clearly demonstrate" that it is addressing the findings of discrimination made in the January Decision. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs),* 2016 CHRT 16 (CanLII) at para 9, 39, 40, 41, 48, 49, 80, and 81.

> It seems evident to me that in this kind of case the onus should again rest on the [respondent], for it is the [respondent] who will be in possession of the necessary information to show undue hardship, and the [complainant] will rarely, if ever, be in a position to show its absence.[242]

176. Just as complainants are rarely in a situation to show the absence of undue hardship, it is equally difficult for a successful complainant to establish that a respondent has failed to take the necessary steps to cease its discriminatory conduct. As has been demonstrated through the immediate relief process in this complaint, and as was the case in *Simpson-Sears*, it is Canada, and not the Complainants or the Interested Parties, who is in possession of the necessary information to show whether the immediate relief ordered by the Tribunal has been provided. As such, the Caring Society submits that Canada bears the burden of proof in this motion.

177. Furthermore, having already established *prima facie* discrimination through a 72-day hearing, the Caring Society submits that it would be unfair to require the Complainants and the Interested Parties to once again establish *prima facie* discrimination. This would, in effect, be akin to requiring the Complainants to re-litigate their case to again prove breaches of the *CHRA*. This would be contrary to the overarching objective of the *CHRA* and the Tribunal's Rules of Procedure, which both aim to ensure informal and expeditious hearings.

178. In the absence of evidence clearly demonstrating that Canada has fully addressed the immediate relief items ordered by the Tribunal, the Tribunal must find that Canada's breaches of the *CHRA* are ongoing. The necessary conclusion flowing from Canada's continuing breaches is that the discrimination identified by the Tribunal in its January 2016 Decision persists, such that further appropriate remedial orders of immediate relief pursuant to section 53(2) of the *CHRA* are required.[243]

B. Canada's claims to be "making efforts" insufficient to refute prima facie discrimination

179. In an attempt to refute the Complainants' case of continuing *prima facie* discrimination, Canada has tendered evidence to demonstrate that it is "making efforts" to comply with the Tribunal's orders. For example, Ms. Lang states that her affidavit and attached compliance reports aim to detail Canada's "effort to comply with the Tribunal's orders".[244] Similarly, when asked in cross-examination about Canada's ongoing failure to fund mental health services in Ontario, Ms. Lang answered:

> I think we're making an effort to discuss a range of, a range of issues that are

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[242] *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at para 28.
[243] This panel adopted this term in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs),* 2016 CHRT 16 (CanLII) at paras 39, 40, 41, 48, 39, 50, 88.
[244] Lang Affidavit at para 3.

coming up. It's going to take time, given different issues that have been raised to be able to move forward on, on the various pieces.[245]

180. Likewise, Ms. Buckland was cross-examined about the fact that Canada continued to use a narrow definition of Jordan's Principle that excluded children who did not have a disability or an interim critical condition in its internal and external communications, she emphasized that INAC was "trying to focus" its effort and "trying to start somewhere". She explained:

> 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. This part, as we said in the October 31st compliance report, this, what was articulated in actually both of these presentations is a slight variation on the same thing. 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. It could well be on reserve. Where are -- where do we need to do a better job in terms of meeting the needs of kids, it's on reserve.[246]

181. The intention of Canada's officials to "try" to take steps to comply with the Tribunal's orders is immaterial to determining whether Canada has appropriately addressed all of the items of immediate relief identified by the Tribunal. For nearly thirty years, it has been well established in human rights law that intention is not a necessary element of discrimination. As explained by the Supreme Court of Canada,

> It is not a question of whether this discrimination is motivated by a desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.[247]

182. As such, the Caring Society submits that compliance with the Tribunal's orders is a results-based, and not an efforts-based, obligation. Subjective claims of "effort" are not relevant. After all, Canada was ordered to "immediately cease" discriminating, not to make an "effort" towards that end. The proper focus for ascertaining Canada's compliance with the Tribunal's orders must remain on the concrete results of its efforts to alleviate the discrimination faced by First Nations children and their families.

183. What is more, a number of "efforts" cited by Canada, such as the appointment of the MSR or the convening of a youth summit, are not clearly related to compliance with the Tribunal's orders. In the absence of evidence that INAC's staff's efforts to try to comply with the Tribunal's orders have translated into <u>fully</u> addressing all of the immediate relief items identified by the Tribunal, the Caring Society asks this Tribunal to find as a fact that

[245] Lang Cross Examination at p 60, lines 10-13.
[246] Buckland Cross Examination at p 40, line 22 to p 41, line 8.
[247] *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219, 1989 CanLII 96 (SCC) at p 1234, quoting the Abella Report on Equality in Employment.

Canada has failed to comply with the Tribunal's orders. The Caring Society asks that further orders be made pursuant to 53(2) of the *CHRA* to correct that situation.

C. Canada's unilateral initiatives not aimed at addressing the CHRT's findings of discrimination not relevant to the determination of non-compliance

184. In seeking to relieve itself of its onus to demonstrate that it has clearly addressed all of the immediate relief items identified by the Tribunal, Canada has tendered evidence of various unilateral initiatives linked to child welfare that it has commenced in the past year. For example, Ms. Lang described in her affidavit a "national engagement process" which includes a Youth Summit with children who have been in care and the appointment of the MSR.[248] Ms. Lang conceded under cross-examinations that this "engagement process" was not a part of immediate relief ordered by the Tribunal.[249] She also conceded that the MSR and the Youth Summit were actions taken unilaterally and that INAC has faced criticism from First Nations groups, including the Chiefs in Assembly of the AFN.[250]

185. Even the measures that Canada claims are aimed at providing immediate relief do not address the Tribunal's areas of concern in a comprehensive manner. For example, INAC's October 28, 2016 letter seeking to collect data from FNCFS agencies regarding their actual needs and circumstances did not include all of the areas of immediate relief identified by the Tribunal.[251] Likewise, INAC's letter of October 24, 2016 to regional offices offers to provide *ad hoc* temporary relief on a "case-by-case" basis to FNCFS Agencies facing financial pressures relating only to legal fees and building repairs, but no other circumstances.[252]

186. The MSR, the Youth Summit with former children in care, and other unilateral INAC initiatives are not relevant to the Tribunal's determination of whether Canada has appropriately addressed the items of immediate relief as identified by the Tribunal.

187. The focus of this motion in particular is whether Canada has clearly addressed all of the immediate relief items ordered by the Tribunal. As such, Canada's evidence relating to its various unilateral initiatives relating to the FNCFS Program is not relevant to the Panel's determination of whether Canada's discrimination is ongoing or whether immediate relief has been provided to First Nations children and their families.

D. Compliance with legal binding orders seeking to cease discrimination cannot be accomplished through ad hoc and arbitrary measures

188. In an effort to demonstrate that it is complying with the Tribunal's orders, Canada has referred to a number of *ad hoc* initiatives. For instance, Canada pointed to an email

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[248] Lang Affidavit at para 14-19, 32.
[249] Lang Cross Examination at p 228, lines 9-13; at p 248, lines 4-9; at p 251, lines 20-24.
[250] Lang Cross Examination at p 228, lines 9-13; at p 248, lines 4-9; at p 251, lines 20-24.
[251] Lang Cross Examination at p 328 lines 12 to p 332 line 17.
[252] Lang Affidavit, Exhibit 2: October Compliance Report, Annex B.

INAC headquarters sent to its regional offices days before its October 31, 2016 compliance report to the Tribunal, stating that it will consider requests for funding for building repairs and legal fees on a case-by-case basis. No mechanism was put in place to ensure that this information was systematically passed on to FNCFS Agencies and Canada has tendered no evidence to demonstrate that any FNCFS Agencies actually received funding for building repairs or legal costs through this mechanism. [253]

189. Essentially, Canada's approach to addressing building repairs and legal fees is akin to a charity-based model of funding. FNCFS Agencies are expected to beg for the funding that they desperately need and Canada will "consider" these requests on a case-by-case basis. Charity is not equality and the charity model of funding has long been recognised as incompatible with substantive equality and human rights principles as it reinforces power imbalance and vulnerability and exacerbates the effects of discrimination.[254]

190. Canada's *ad hoc* measures are wholly inadequate. Compliance with a legally binding decision relating to quasi-constitutional rights cannot depend on *ad hoc*, discretionary and unpredictable band-aid solutions based on arbitrary and unclear criteria. This is particularly true where the Complainants proved widespread, systemic discrimination against 163,000 First Nations children, and their families. Such conclusions require systemic remedies.

191. This Panel recognised First Nations children as rights bearers, worthy of equal opportunity in accordance with the *CHRA*.[255] This finding was not challenged by Canada. Remedying discrimination against these children to "have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have"[256] must be done in a manner that is consistent with the core human rights values such as participation and empowerment. [257] It is only through the imposition of transparent, effective, and comprehensive remedial orders that such a goal will be achieved. Indeed, Canada has demonstrated that it cannot be left to decide alone how to redress the ongoing discrimination facing First Nations children and their families.

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[253] Lang Cross Examination at p 151, lines 9-25; at p 152, lines 1-19.

[254] J Kirkemann Boesen & Martin, T., "Applying a Rights-Based Approach : An inspiration guide for civil society.'' The Danish Institute for Human Rights, 2007.

[255] *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 (CanLII) at para 1 and 3. As stated by Esmeralda Arosemena de Troitiño, Special Rapporteur on the Rights of the Child of the Inter-American Human Rights Commission during the hearing on Canada's discriminatory treatment of First Nations children on December 9, 2016: "children are subjects of rights". Available online at <https://www.youtube.com/watch?v=fs1KygVerl8>.

[256] *CHRA*, s 2.

[257] See *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497, 1999 CanLII 675 (SCC) at para 53 quoted in various decisions of human rights tribunals and courts including *Eagleson Co-Operative Homes Inc. v. Théberge,* 2006 CanLII 29987 (ON SCDC), *Arzem v. Ontario (Community and Social Services),* 2006 HRTO 17 (CanLII) and Condon v. Prince Edward Island, 2002 PESCTD 41 (CanLII).

PART IV – RELIEF SOUGHT

It was said long ago in a celebrated case, that if a man has a right, he must have a means to vindicate and maintain it, and a remedy if he is aggrieved in the exercise and enjoyment of it . . . for want of right and want of remedy are reciprocal.[258]

A. Canada has failed to clearly demonstrate that immediate relief has been provided

192. In its face, Budget 2016 fails to provide the relief necessary to remedy the discrimination identified by the Tribunal. The funding announced in Budget 2016 ($71 million for 2016-2017 and $99 million in 2017-2018) falls short of the investment the evidence before the Tribunal suggests is necessary to provide immediate relief, particularly when one considers that the amount in question is greater in 2016 dollars, due to inflation. In the 2012 Way Forward presentation (CHRC Tab 248), INAC recognized that $108.13 million (in 2012 dollars) would be required to implement EPFA (which the Tribunal found to be discriminatory) in all jurisdictions, with full support for all aspects of child welfare including intake, early intervention, and allowing for a developmental phase.

193. More specifically, Canada has failed to "clearly demonstrate" that it has implemented the Tribunal's orders of immediate relief, particularly with regard to the following issues:

i. Building repairs

194. Canada has tendered no evidence to establish that it has provided any immediate relief to FNCFS Agencies for building repairs. Rather, Canada states that it "will pursue discussions on the broader issues of infrastructure related to FNCFS as part of future long-term reform efforts".[259] No timeline is provided for these broader discussions and it is unclear when, if ever, funding for much-needed building repairs will be provided to FNCFS Agencies in a consistent and predicable manner.

195. While INAC pursues these discussions on broader issues, Canada has stated that it will "consider requests related to minor capital expenditures […] on a case-by-case basis."[260] However, Canada has failed to produce any evidence to establish that this information has actually been passed on to FNCFS agencies.[261] It is unknown what the criteria will be to make these case-by-case assessments.[262] It is also unknown whether any

[258] *Ex p. Renaud et al.* (1873), 14 N.B.R. 273 at p 277, by Ritchie C.J.N.B, quoted in *Exploits-White Bay Roman Catholic School Board v. Newfoundland Teachers' Association*, 1982 CanLII 2960 (NL SCTD)
[259] May Compliance Report at p 7.
[260] Lang Affidavit, Exhibit 2: October Compliance Report, Annex B.
[261] Lang Cross Examination at p 153, lines 12-15.
[262] Lang Cross Examination at p 154, lines 2-13.

FNCFS Agencies have sought funding for building repairs through this process, or whether any funding has flowed to any FNCFS Agencies for building repairs since INAC's October 24, 2016 email. Moreover, Canada has produced no evidence in response to Dr. Loxley's expert opinion that its approach will likely not resolve this issue of building repairs. [263]

196. Canada has failed to "clearly demonstrate" that it has addressed the discriminatory aspects of its failure to fund building repairs. The Caring Society respectfully requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief, and order Canada to remedy this issue at the earliest possible time, and to confirm in writing once this has been done.

ii. Legal fees

197. Similarly, Canada has failed to demonstrate that its current approach to the funding of legal fees is related to the actual needs of FNCFS Agencies or is reasonably comparable to those provided off reserve. While INAC is currently providing FNCFS agencies from $20,000 to $50,000 for legal fees, depending on the Province in which the FNCFS Agency is located, as noted earlier in this submission, this variance does not appear to be linked to provincial legal aid rates (bearing in mind that legal aid rates are a questionable metric of comparability, given that legal aid funds counsel for parents whose children have been apprehended, and not counsel for the children's aid society that has apprehended the child).[264]

198. In fact, given that Canada's approach provides for an FNCFS Agency's legal budget solely based on the criterion of the province in which the FNCFS Agency is located, it is not possible for Canada to argue that the FNCFS Agency's needs have been taken into account in this regard. This results in a wide variance in legal budgets available to FNCFS Agencies across Canada:

a. New Brunswick: $50,000 per year;
b. Saskatchewan: $40,000 per year;
c. Yukon Territory: $40,000 per year;
d. Alberta: $33,500 per year;
e. British Columbia: $30,000 per year;
f. Newfoundland and Labrador: $30,000 per year;
g. Prince Edward Island: $25,000 per year;
h. Quebec: $20,000 per year; and
i. Nova Scotia: $10,000 per year.[265]

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[263] Loxley Affidavit, Exhibit A: Loxley Report at p 1.
[264] Lang Affidavit, Exhibit 1: September Compliance Report, Annex C. For example, agencies in Alberta have been allocated $ 33,500 for legal fees and agencies in Saskatchewan has been allocated $ 40,000. Yet, as noted by the respondent in its March 10, 2016 submissions at p 6, the Alberta legal aid rate is $125 per hour while the hourly rate in Saskatchewan in $88 per hours. The respondent does not provide an explanation as to why less funds are allocated to Alberta agencies in comparison to Saskatchewan for legal fees when the standard legal aid rate is 30% higher in that province.
[265] Lang Affidavit, Exhibit 1: September Compliance Report, Annex C.

199. This approach leads to the counterintuitive result in which an FNCFS Agency like New Brunswick's St. John River FNCFS Agency, which is funded on the basis of having 75 children in care (based on the assumption of 6% children in care), receives more than double the funding of Quebec's Uashat/Maliotenam FNCFS Agency, which is funded on the basis of having 88 children in care (based on 2013/14 actuals).

200. As a further example, New Brunswick's St. John River FNCFS Agency receives $10,000 per year more in legal funding than Saskatchewan's Meadow Lake Tribal Council FNCFS Agency, despite the fact that Saskatchewan's Meadow Lake Tribal Council is funded on the basis of having 174 children in care (based on the assumption of 6% children in care), almost 100 more children than the St. John River FNCFS Agency.[266]

201. Of course, it must be remembered that the number of children in care is not always a reliable indicator of an FNCFS Agency's court docket, as there may be court orders short of apprehensions (such as supervision orders or kinship placements) that still require an FNCFS Agency's legal counsel to do work.

202. Considering Canada's legal budget figures on their face, it is also highly improbably that the budgets provided are comparable to those afforded to provincial child and family service agencies.

203. For instance, even the most generous of the legal budgets provided by Canada (New Brunswick at $50,000 per year) would not be sufficient to allow an FNCFS Agency to hire in-house counsel. Assuming a reasonably experienced external lawyer working at a reasonably hourly rate of $140/hour (the Government of Canada external counsel rate applicable to lawyers of 5-6 years' experience),[267] Alberta's Saddle Lake First Nation Wah-Koh-To-Win FNCFS Agency, which has 107 children in care (based on 2014/15 actuals), would be able to afford 2.1 hours per child in care based on its annual budget of $33,500 (excluding GST, and bearing in mind that the number of children in care is an incomplete metric of an FNCFS Agency's caseload). It is not credible that any provincial or territorial child and family services agency would accord so few hours per case.

204. For a complete analysis of the legal budgets provided per agency, and the number of legal hours that could be worked by outside counsel of 5-6 years' experience at $140/hour (excluding GST), and the resulting number of hours per child in care, please see the attached Table 1.

205. Canada also did not provide any evidence in response to Dr. Loxley's expert evidence that its approach to funding legal fees will "not likely" resolve the technical/professional issue revolving around the necessary number of hours for legal fees.

206. The Caring Society submits that the Respondent has failed to "clearly demonstrate" that it has addressed the discriminatory aspects of its funding of legal fees. It respectfully

[266] Lang Affidavit, Exhibit 1: September Compliance Report, Annex C.
[267] Caring Society's February 18, 2016 submissions regarding Immediate Relief at Schedule "C".

requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief.

207. Given Dr. Loxley's uncontested opinion that the matter of legal fees "is really a technical/professional issue revolving around the necessary number of hours for different types of legal work and the appropriate fee per hour",[268] the Caring Society submits that the Tribunal should order Canada to remedy this issue by reimbursing the actual number of hours spent by FNCFS Agency legal counsel on cases at the hourly rate payable according to the Government of Canada's system of hourly rates for outside counsel.

iii. Child service purchase amount

208. In response to the Tribunal's orders, INAC has increased the child service purchase amount from $100 to $175 per child. This represents an increase of 75% to the per child amount. However, as explained by Dr. Loxley, there has been an increase of 72% in the cost of living since 1989, when the per child amount was last adjusted. As such, there has been almost no increase in the real value of the child service purchase amount.[269]

209. Canada has produced no evidence to demonstrate whether this amount is linked to the actual needs of FNCFS Agencies or is reasonably comparable to what is elsewhere across the country. It is unclear what, if any, criteria or factors were considered to determine the new child service purchase amount. Canada has produced no evidence in response to Dr. Loxley's expert opinion that this "seems to be an arbitrary increase" and that it will likely not resolve the issue.

210. Canada has stated that it will "review the information provided by FNCFS agencies in response to its October 28, 2016 letter, and continue national and regional discussions, to define a child service purchase amount based on need".[270] No timeline is provided for this "review" and it is unclear when a new child service purchase amount will be established or the criteria that will be used to make this determination. There is no mechanism for FNCFS Agencies to seek additional funding from INAC should they experience financial pressures due to the expenses in excess of the funding provided by the child service purchase amount.

211. Given that Canada has failed to "clearly demonstrate" that it has addressed the discriminatory aspects of its funding of child service purchase amount, Canada should be ordered to increase the child service purchase amount to $200 per child. This amount, which has been proposed on numerous occasions by the Caring Society, will provide extra purchasing power to FNCFS Agencies, over and above accounting for inflation since 1989, in order to redress the serious deficiencies caused by over two decades of discrimination by Canada. A further adjustment can be considered by the NAC as part of the medium- to long-term reform process.

[268] Loxley Affidavit, Exhibit A: Loxley Report at p 9.
[269] Loxley Affidavit, Exhibit A: Loxley Report at p 10.
[270] October Compliance report at p 8.

212. Accordingly, the Caring Society respectfully requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief and order Canada to increase the child service purchase amount to $200 per child within 30 days of the Tribunal's ruling.

iv. Intake and investigations

213. In response to the Caring Society's argument that INAC has not clearly demonstrated that it has complied with the Tribunal's orders with respect to intake and investigations, Canada states that it added only a single budget line for intake and investigations in all regions other than Alberta because this is "not generally a requirement under provincial standards".

214. Canada does not provide any evidence in support of this claim, on which it has based its funding levels for investigation reports. It does not provide any evidence to demonstrate how it has calculated the amounts attributed in the single line item for intake and investigations. Most surprisingly, there are no clear budget lines for intake and investigations for FNCFS agencies in Nova Scotia, Quebec, Prince Edward Island and Saskatchewan. The Respondent does not explain how or whether funding is allocated for intake and investigations in these regions.

215. The Caring Society submits that INAC's submissions relating to intake and investigation reveal a grave misunderstanding of the role of FNCFS Agencies. It is patently false that intake and investigation are not required in most regions. Whether or not provincial legislation requires these functions, intake and investigation are core functions of child welfare agencies and are essential to prevention services aimed at keeping children safely in their homes.[271] In fact, Canada's own witness (Ms. D'Amico) acknowledged during the hearing on the merits that "FNCFS Agencies are doing more intake and investigations as part of their prevention strategies" and that "EPFA does not include funds for intake and investigation."[272]

216. In the case of certain categories of delegated agencies, Canada submits that these "delegated Aboriginal agencies do not provide protection services, therefore, a line item for intake and investigation was not added."[273] Canada's refusal to provide funding for intake and assessments perpetuates the very discriminatory conduct identified by the Tribunal and reinforces existing incentives to remove children from their home. There is no foundation in human rights law to support the contention that a respondent who has been found to be in breach of its human rights obligations can refrain from providing a service on the basis that the service was denied for discriminatory reasons in the past, or by another service provider. This circular reasoning would result in discrimination continuing to occur indefinitely. Given that intake and investigations are essential to prevention, Canada's funding policy ought to aim to enable FNCFS Agencies to conduct

[271] *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 (CanLII) at para 145.
[272] Ibid at para 145.
[273] Lang Affidavit, Exhibit 2: October Compliance Report at p 8.

this core function in order to develop and implement culturally appropriate strategies that will help keep their children in the home.

217. Canada's approach to funding of intake and investigation is based on flawed assumptions regarding the functions of FNCFS Agencies and the actual needs of children and families. Moreover, INAC has failed to produce any evidence in response to Dr. Loxley's expert opinion that its approach to determining the appropriate funding levels for receipt, assessment and investigation of child protection report is "questionable". In light of this, Canada has failed to "clearly demonstrate" that it has addressed the discriminatory aspects of its funding of intake and investigations. The Caring Society respectfully requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief and order Respondent to remedy this issue on the first reasonable occasion.

v. Small agencies

218. With regard to small agencies, Canada stated that it has taken "some initial steps".[274] In particular, INAC has set a child population of 300 as the lowest threshold for scaling. INAC indicates that a child population count of 300 persons was selected as the new threshold. This new threshold is not based on the actual needs of agencies or the financial pressures they face. Rather, the new threshold was chosen because it is "the next level up from the 250 ordered by the Tribunal in INAC's current scale."[275]

219. The Respondent provided no evidence in response to Dr. Loxley's expert opinion that its current funding remains inadequate for small agencies and relating to large step increases of funding for relatively small increases in child population. Likewise, it has failed to produce any evidence demonstrating that its funding formula for small agencies is linked to its their actual needs.

220. The Caring Society submits that the Respondent has failed to "clearly demonstrate" that it has addressed the discriminatory aspects of its funding of for small agencies. It respectfully requests that the Tribunal make a finding of non-compliance with regards to this item of immediate relief and order Respondent to remedy this issue on the first reasonable occasion.

vi. Jordan's Principle

1. Canada's definition of Jordan's Principle does not comply with the Tribunal's orders

221. In its April 2016 Decision on remedy, the Tribunal clearly ordered that Jordan's Principle be applied by Canada to include to <u>all</u> First Nations children and <u>all</u> jurisdictional disputes. The Tribunal's definition of Jordan's Principle is not limited to a type of service in particular. Furthermore, in its September 2016 Decision, the Tribunal emphasized that <u>all</u> children meant children residing on- and off-reserve.

[274] Lang Cross Examination at p 90, line 13 to p 91, line 6.
[275] Lang Affidavit, Exhibit 2: October Compliance Report at p 4.

222. The Caring Society submits that Canada has patently failed to "clearly demonstrate" that it has complied with this item of immediate relief. Indeed, Canada's own documents reveal various narrow definitions contrary to the Tribunal's orders:

a. First Nations children living on reserve with a disability or a short-term condition;[276]

b. First Nations children living on-reserve with a disability or a short-term condition <u>requiring health or social services</u> [emphasis added];[277]

c. First Nations children with a disability or a <u>critical</u> short-term health or social service need living on reserve, or who ordinarily reside on reserve [emphasis added][278];

d. First Nation child with a disability or a discrete condition that requires services or supports <u>that cannot be addressed within existing authorities</u> [emphasis added];[279]

e. First Nation children living on reserve with an ongoing disability <u>affecting their activities of daily living</u>, as well as those who have a <u>short term issue for which there is a critical need</u> for health or social supports [emphasis added];[280]

f. First Nations children living on reserve and in the Yukon who have a disability or an interim critical condition <u>affecting their activities of daily living</u> have access to health and social services <u>comparable to children living off reserve</u> [emphasis added];[281]

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[276] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Fact Sheet: Jordan's Principle – Addressing the Needs of First Nations Children.

[277] Canada's July 6, 2016 further reply submissions regarding immediate relief at para 36. Lang Affidavit, Exhibit 2: October Compliance Report at p 6-7. Buckland Affidavit, Exhibit G: Letter from Minister Philpott to Dr Cindy Blackstock, dated December 22, 2016.

[278] Lang Affidavit, Exhibit 2: October Compliance Report at p 6.

[279] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Atlantic First Nations Health Partnership, Public Health and Primary Care Committee Update (July 5-6, 2016).

[280] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Letter dated August 4, 2016 from Debra Keays-White (Regional Executive Officer, FNIHB Atlantic Region) to Atlantic First Nations Chiefs; Letter dated July 7, 2016 from Jocelyn Andrews (Regional Executive Officer, FNIHB Alberta Region) to Chiefs of Alberta; Letter dated August 8, 2016 from Shawn Grono (Director of Nursing, FNIHB Alberta Region) to All FNIHB and Band Employed Nurse; Health Canada Information Sheet for Nursing Staff re Jordan's Principle (undated).

[281] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Presentation dated August 29, 2016 delivered by FNIHB Atlantic Region to the Health Committee of the Mi'kmaq-Nova Scotia-Canada Tripartite Forum at slide 5; Presentation dated September 2016 delivered by FNIHB Atlantic Region to the Public Health and Primary Care Committee, Non-Insured Health Benefits Committee, and the Atlantic First Nations Health Partnership at slide 5; Presentation dated September 2016 delivered by Health Canada to the First Nations of Quebec and Labrador Health Directors' Network at Slide 4.

g. 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.[282]

223. Moreover, under cross-examination, INAC's witness stated that Canada's definition of Jordan's Principle is also limited to children as defined by provincial legislation.[283] Accordingly, Jordan's Principle applies until the age of 19 in British Columbia, Nova Scotia, New Brunswick, Newfoundland and Labrador, the Northwest Territories, Yukon, and Nunavut,[284] and until the age of 18 in Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and Prince Edward Island.[285]

224. However, Saskatchewan, Nova Scotia, and Newfoundland and Labrador all define a child as under the age of 16.[286] Accordingly, in the child and family services context, there is a risk that Canada will only apply Jordan's Principle until the age of 16 in these jurisdictions. Such an approach would be unacceptable, and would constitute further discrimination under the *CHRA*. Jordan's Principle is not restricted to services provided under a province's child and family services legislation. It applies to all services provided to all children, including those aged 16 and 17.

225. The Caring Society also notes, with concern, that Canada has failed to take any formal measures to ensure that all staff are aware of the Tribunal's Decisions regarding Jordan's Principle, understand those decisions, and have the tools and resources to implement those decisions. Notably, a senior regional staff member from Ontario noted

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[282] Lang Affidavit, Exhibit 2: October Compliance Report at Annex I : Presentation dated September 15, 2016 delivered by FNIHB Atlantic Region to the Non-insured Health Benefits Committee at slide 4; Presentation dated September 21-22, 2016 delivered by FNIHB Atlantic Region to the Public Health and Primary Care Committee, the Non-insured Health Benefits Committee, and the Atlantic First Nations Health Partnership at slide 4; Presentation dated September 28, 2016 delivered by the Co-Chairs of the Atlantic First Nations Health Partnership to the All Chiefs and Councils Assembly of the Atlantic Policy Congress of First Nations Chiefs Secretariat at Slide 4; Presentation dated October 6, 2016 delivered by FNIHB Atlantic Region to the Innu Round Table at slide 4; Presentation dated October 12, 2016 delivered by FNIHB Atlantic Region to the Mi'kmaq-Prince Edward Island-Canada Health Policy and Planning Forum and the Child and Family Services Policy and Planning Forum at slide 4; Presentation dated September 7, 2016 delivered by Health Canada to unspecified audience at slide 3; Presentation dated September 15, 2016 delivered by Health Canada to unspecified audience at slide 3.

[283] Buckland Cross Examination at p 264, lines 8-12. A "child" is defined as a person 16 years old or younger in the *Child and Family Services Act*, RSO 1990, c C.11, section 4(1) and 65(60).

[284] *Age of Majority Act*, RSBC 1996, c 7, s 1(a); *Age of Majority Act*, RSNS 1989, c 4, s 2(1); *Age of Majority Act*, RSNB 2011, c 103, s 1; *Age of Majority Act*, SNL 1995, c A-4.2, s 2; *Age of Majority Act*, RSNWT 1988, c A-2, s 2; *Age of Majority Act*, RSY 2002, c 2, s 1(1); and *Age of Majority Act*, RSNWT (Nu) 1988, c A-2, s 2.

[285] *Age of Majority Act*, RSA 2000, c A-6, s 1; *Age of Majority Act*, RSS 1978, c A-6, s 2(1); *The Age of Majority Act*, CCSM, c A7, s 1; *Age of Majority and Accountability Act*, RSO 1990, c A.7, s 1; *Civil Code of Quebec*, CCQ-1991, Article 153; and *Age of Majority Act*, RSPEI 1988, c A-8, s 1.

[286] *The Child and Family Services Act*, RSS 1989-90, c C-7.2, s 2(1)(d); *Children and Family Services Act*, SNS 1990, c 5, s 3(1)(e); and *Children and Youth Care and Protection Act*, SNL 2010, c C-12.2, s 2(1)(c).

that she had developed her understanding of Jordan's Principle based largely on media reports and, more recently, on discussions with other Health Canada staff.[287]

226. Canada has failed to provide convincing evidence to demonstrate that it has taken measures to eliminate the above noted restrictions in Jordan's Principle or informed its staff and stakeholders that it has broadened its definition. In fact, even after the filing of its latest compliance report and after receiving the Caring Society's motion on Jordan's Principle, Canada has continued to rely on its narrow definition. By way of example, on February 3, 2017, Jocelyn Andrews, Regional Executive Office at the First Nations and Inuit Health Branch (Alberta Region) wrote to the Chiefs of First Nations in Alberta to advise them that the First Nations Consortium was selected to develop and operationalize service-coordination that will serve all First Nations children on and off reserves in Alberta. In the letter, Ms. Andrews wrote:

> During [the] transition, please continue to engage the Jordan's Principle focal points should you become aware of any First Nations children <u>with disabilities or short term critical conditions</u> that have unmet needs. (emphasis added)[288]

227. Similarly, Canada's website referred to a narrow definition of Jordan's Principle which restricts its application to social and health services and children with disabilities and short-term critical conditions as recently as February 8, 2017.[289] In light of the foregoing, the Caring Society requests that the Tribunal find that Canada has failed to respect the orders made in the Tribunal's January 2016, April 2016, and September 2016 Decisions by continuing to fail to implement the full scope of Jordan's Principle.

2. Some are not more equal than others

228. The Caring Society acknowledges that the stated goal of Canada's "Child-First Initiative" appears to shift the focus off of the resolution of disputes in order to take a more proactive approach, which focuses on identifying needs for services before a dispute arises. This is logical – Jordan's Principle addresses a systemic problem, and as such requires systemic solutions. However, Canada's proactive measures with respect to the Child-First Initiative does not absolve it of its obligation to comply with the Tribunal's orders requiring it to ensure that certain First Nations children do not continue to experience discrimination as a result of a narrow definition of Jordan's Principle.

229. It is also not open to Canada to legitimize narrowing Jordan's Principle, and thus the pool of children that Canada is obligated to relieve from its discriminatory conduct, to a sub-group of children. Indeed, the Tribunal will recall that in Canada's defence of the Complaint on the merits, Canada relied on this same strategy to legitimize its discriminatory definition and approach to Jordan's Principle. Specifically, Canada

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[287] Cranton Cross Examination at p 79 line 4 to p 80 line 1 and at p 104 line 8 to p 106 line 5.
[288] Buckland Cross Examination, Exhibit 11: Letter from J. Andrews to the Chiefs of First Nations in Alberta, dated February 3, 2017.
[289] Lang Cross Examination, Exhibit 8: Excerpt from Health Canada's website dated February 8, 2017; Lang Cross Examination at p 149, line 10 to p 150, line 10.

tendered a 2011 Health Canada presentation that purported to justify the limitation of Jordan's Principle to children with multiple disabilities experiencing conflicts between the federal and provincial governments in the following terms:

> 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.[290]

230. While Canada's new approach to Jordan's Principle has an ameliorative purpose, for some children and in some circumstances, its scope and the process it imposes does not clearly address <u>all</u> First Nations children with service needs.

231. First Nations children, like other children in Canada, are entitled to non-discriminatory access to public services. Accordingly, Canada must not be permitted to justify its limitation of Jordan's Principle to a subset of First Nations children based on their greater vulnerability. The *CHRA* requires Canada to address the needs of <u>all</u> members of the disadvantaged group (First Nations children), not only those who are most disadvantaged. Canada must now fully comply with the Tribunal's orders. Canada is not entitled, at this stage of the proceedings, to raise defences or justifications for what amounts to partial compliance.

232. It also bears noting that Jordan's Principle is designed to ensure that First Nations children can access all government services available to other Canadian children without discrimination. By definition, a child to whom Jordan's Principle applies will be disadvantaged, given that they will have experienced a service or bureaucratic procedural obstacle due to their First Nations status. Canada will perpetuate this disadvantage if it fails to ensure that such children are included in the scope of its new approach to Jordan's Principle. This is discriminatory, contrary to section 5 of the *CHRA*. Canada cannot replace one discriminatory approach to Jordan's Principle (as found by the Tribunal in its January 26, 2016 decision) with another.

233. In light of the foregoing, the Caring Society requests that the Tribunal make a finding that Canada has failed to respect its Orders in 2016 CHRT 2, 2016 CHRT 10, and

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[290] Attorney General of Canada's Book of Documents, Tab 39, Health Canada PowerPoint Presentation printed with notes, titled "Update on Jordan's Principle: The Federal Government Response" and dated June 2011 at p 6. Cross-Examination of Corinne Baggley by Mr. Poulin, May 1, 2014 (Vol 58) at p 18, line 19 to p 19, line 20.

2016 CHRT 16 in adopting a definition of Jordan's Principle in the context of the Child First Initiative announced on July 5, 2016.

3. Canada's emphasis on the normative standard of care in a First Nations child's province of residence risks undermining substantive equality required

234. In a number of the presentations included at Annex "I" to Canada's October 31, 2016 compliance report, the stated goal of Canada's "Child-First Initiative" is described as being to "ensure that children living on reserve […] have equitable access to health and social services comparable to children living off reserve."[291] There are also numerous references in these presentations to the Child First Initiative providing access to services <u>within the normative standard of care in the province/territory of residence</u>.

235. As the Tribunal recognized in its January 26, 2016 decision, provincial comparability is an inadequate measure when designing programs and initiatives to provide substantive equality to First Nations children. The Tribunal recognized that "the actual service needs of First Nations children and families […] are often higher than those off reserve."[292]

236. In light of this recognition, the Tribunal found that "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".[293] Similarly, Jordan's Principle requires an outcome-based, and not process-based, approach to access to services.

4. Delays in processing amount to discrimination

237. In its April 2016 Decision, the Tribunal ordered that "[p]ursuant 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."[294]

238. Despite the clarity of this order, the "Service Access Resolution" function outlined in the presentations attached to Annex I of Canada's October 31, 2016 compliance report and described by Ms. Buckland during her cross-examination appears to continue to impose delays on First Nations children. Indeed, the "Service Access Resolution" function appears to be a multi-step process that decision-makers must go through in order to accord funding for a service from the "Reserve Fund", which is preceded by a "service navigation"

[291] See for instance: Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Presentation dated August 29, 2016 delivered by FNIHB Atlantic Region to the Health Committee of the Mi'kmaq-Nova Scotia-Canada Tripartite Forum at slide 6.
[292] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 388.
[293] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 465.
[294] *FNCFCSC et al v AGC*, 2016 CHRT 10 at para 33.

effort by INAC or Health Canada officials to fund the service need out of an existing program.

239. This process is all the more concerning given that it contains no transparent and independent mechanism for a family or service provider to appeal a denial of service with respect to their child nor is there any assurance that the Respondent will ensure any appeal process it develops in the future will adhere to access to justice principles.

240. Further, where a First Nation's child's case does not fall within "the normative standard of care", it appears inevitable that there will be case conferencing or other procedural delays. Indeed, the presentation delivered by FNIHB to the First Nations of Quebec and Labrador Health Directors' Network in September 2016 explicitly noted that there will be varying timelines for responses: "Every case is different and every request is different. The length of time required to obtain a decision can depend on many factors, but we will work with partners to get a decision quickly".[295] From Ms. Buckland's cross-examination, the Caring Society learned that Health Canada's hope is that these delays will be no more than five days for cases within a province's normative standard, and no more than seven days for cases outside a province's normative standard. However, Canada is not measuring its performance against these aspirations.[296]

241. Any delays in accessing public services, related to a child's First Nations status, are discriminatory and therefore the burden lies with Canada to ensure its processes, including internal reviews on matters such as normative standard, do not adversely differentiate against First Nations children.

242. This case-by-case process, where FNIHB will consider whether "an exception" should be made and which includes inquiry into whether access to services or support has been sought through existing Health Canada, INAC, or provincial programs, echoes the flawed approach found in the 2009 and 2013 Memorandums of Understanding that the Tribunal found discriminatory, given that they had "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 [was] even provided."[297]

243. Furthermore, though Canada has set up targets relating to the timeline for the approval of Jordan's Principle requests, as noted above, more than a year after the Decision its witness was not able to confirm how often these targets were actually met.[298]

244. Most importantly, Canada's 'service standards' relate to the lapse of time for a decision to be made relating to a request and not the time it takes for the service to be

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[295] Presentation dated September 2016 delivered by Health Canada to the First Nations of Quebec and Labrador Health Directors' Network at Slide 9.
[296] Buckland Cross Examination at p 92, lines 12-15; at p 67, lines 6-13; at p 72, lines 6-21.
[297] *FNCFCSC et al v AGC*, 2016 CHRT 2 at para 379.
[298] Buckland Cross Examination at p 72, line 6 to p 73, line 22.

actually provided to the child. There are no targets relating to time it will take to provide the service to children, and these delays are not tracked by Health Canada. [299]

245. In light of the foregoing, Canada should be required to confirm to the Tribunal that the Service Access Resolution function has been modified so 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."[300] Canada should be required to file revised Health Canada policy materials confirming that this is the case within 5 days of the Tribunal's order.

5. Dissemination of information

246. On July 6, 2016, Ms. Isaak and Sony Perron, Assistant Deputy Minister of FNIB sent a letter to an as yet undisclosed distribution list announcing Canada's new approach to Jordan's Principle and indicating that "[o]ver the coming months, Health Canada and Indigenous and Northern Affairs Canada will actively engage with provinces and Yukon Territory and First Nations to establish supports that would address gaps in health and social services for First Nations children on reserve with an ongoing disability or who have a discrete, short-term condition."[301]

247. Annex "I" to Canada's October 31, 2016 compliance report provides evidence of many of the activities undertaken during this engagement. These include consultation with stakeholders regarding the selection criteria to be used to identify the organizations that will fulfill the service coordination function. This is concerning, as the scope of Jordan's Principle may well affect the type of organization needing to be selected to deliver the service coordination function.

248. Given that funding arrangements for the "Enhanced Service Coordination" function are being, or have already been, concluded,[302] Canada should be required to proactively, and in writing, correct the record with any person, organization, or government who received, or could be in receipt of, Health Canada's flawed presentation material on Jordan's Principle. Indeed, Ms. Buckland agreed under cross-examination that "I think clarity in terms of – clarity and accuracy in terms of our communication is going to be very, very important."[303] Given that the July 5, 2016 announcement regarding Canada's new approach to Jordan's Principle was posted on Government of Canada websites and that

[299] Buckland Cross Examination at p 89, line 6 to p 90, line 6.
[300] *FNCFCSC et al v AGC*, 2016 CHRT 10 at para 33.
[301] Lang Affidavit, Exhibit 2: October Compliance Report, Annex I: Letter from P. Isaak and S. Perron to undisclosed recipients, dated July 6, 2016.
[302] FNIHB's goal after a September 16, 2016 meeting with the Rehabilitation Centre for Children in Winnipeg was to finalize a contribution between FNIHB and the Rehabilitation Centre for Children "shortly", see Minutes of Meeting with Rehabilitation Centre for Children re Jordan's Principle Child First Initiative dated September 16, 2016 at p 3, found in Annex I to Canada's October 31, 2016 compliance report.
[303] Buckland Cross Examination at p 53, lines 13-15.

Canada's narrow definition remained there until at least February 8, 2017, these efforts should involve the general public as well.

249. In addition, Canada must revisit any funding agreements and/or other arrangements already concluded to ensure that they reflect the full and proper scope and implementation of Jordan's Principle. The agreement of regional organizations to implement a government initiative cannot insulate that initiative from compliance with the Tribunal's orders in particular, or with the *CHRA* more generally.

Orders sought regarding Jordan's Principle

250. Canada's approach to Jordan's Principle means that First Nations children are more likely to be able to access public services available to other children (albeit with access that is subject to further delays related to their First Nations status) if they have a disability or critical short-term condition. Such an approach is inherently discriminatory as other non-First Nations children do not need to have a disability or critical short-term condition in order to equitably access public services in Canada.

251. Accordingly, the Caring Society respectfully requests that the Tribunal make a finding that Canada has failed to comply with the Tribunal's January 2016, April 2016 and September 2016 orders regarding Jordan's Principle by adopting a definition of Jordan's Principle that is contrary to the definition ordered by the Tribunal, and by imposing policy review or case conferencing in the context of the Child-First Initiative before funding is provided to a First Nations child with a service need.

252. In order to ensure Canada's full implementation of Jordan's Principle, the Caring Society also seeks series of orders regarding Canada's method of implementing Jordan's Principle, detailed in section (g) below.

B. Immediate relief at the first reasonable occasion

253. In its January 2016 Decision, this Panel made numerous findings of discrimination against Canada. Canada has failed to "clearly demonstrate" that it has eliminated this discrimination. Hence, this Panel may make remedial orders as follows:

> **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:
>
> > **(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;

254. When interpreting the Tribunal's remedial powers under the CHRA, the Supreme Court of Canada has emphasized that, by virtue of its quasi-constitutional status, human rights legislation is paramount to other legislation as well as to the government's right to allocate resources. In *Kelso*, the Court stated: "The government's right to allocate resources cannot override a statute such as the *Canadian Human Rights Act.*"[304] As such, human rights tribunals have routinely ordered respondents and governments in particular, to provide a particular service that has been found to have been denied for discriminatory reasons.[305]

255. Human rights tribunals and courts have repeatedly stressed the importance that appropriate remedies be ordered when findings of discrimination have been made.[306] According to the Canadian Human Rights Tribunal, "the entire purpose of the *Act* is to provide a meaningful remedy for those who have suffered discrimination[307]." In fact, in at least one jurisdiction in Canada, the Human Rights Tribunal is expressly *required* to order a respondent to cease its discriminatory conduct if a complaint is substantiated.[308] This is consistent with the legal maxim of *ubi jus ibi remeduim*, according to which for every legal wrong, the law must provide a remedy. Indeed, Parliament's legislative objective of eradicating discrimination can only be achieved if the Tribunal exercises its remedial jurisdiction under 53(2).

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[304] *Kelso v the Queen [*1981] 1 SCR 199 at 207; see also *Canada (Attorney General) v. Uzoaba*, [1995] 2 FCR 569, 1995 CanLII 3589 (FC).

[305] For example, *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360 (CanLII), the OHRT ordered Ontario to provide retroactive and ongoing funding of the special diet allowance for the lead complainants and *Hogan v. Ontario (Health and Long-Term Care)*, 2005 HRTO 49 (CanLII) the OHRT ordered Ontario to fund sex-reassignment surgery. In *Moore*, the Supreme Court of Canada did not overturn the Tribunal's order against the District to establish mechanisms to ensure that accommodations for Severe Learning Disabilities students meet the stated goals in legislation and policies, and provide a range of services to meet their needs, stating at para 65 that the order was essentially akin to directed the District to comply with the *Human Rights Code*.

[306] *Milano v. Triple K Transport Ltd*., 2003 CHRT 30 (CanLII) at para 64. *Martin v. Saulteaux Band Government*, 2002 CanLII 23560 (CHRT) at para 144. *Thorson v Northwest Territories*, 2013 CanLII 82655 (NT HRAP) at para 151.

[307] *Brooks v. Department of Fisheries and Oceans*, 2005 CHRT 14 (CanLII) at para 14.

[308] *Human Rights Code*, [RSBC 1996] CHAPTER 210, section 37(2)(a)

> 37 (2) If the member or panel determines that the complaint is justified, the member or panel
> (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention

256. The evidence before the Tribunal relating to this motion has established that a remedial order is required to ensure that the discriminatory conduct identified by the Tribunal will cease. Indeed, in the year following the Tribunal's January 2016 Decision, Canada has shown itself to be either unwilling or unable to take many basic steps necessary to comply with the Decision, such as ensuring staff have read the decision, are accountable for specific tasks, and have the requisite academic training and work experience to implement the Tribunal's orders.

257. With respect to the Tribunal's January 2016, April 2016, and September 2016 Decisions, Canada has failed to put in place a reliable system for ensuring that INAC administrators and staff responsible for the FNCFS Program have read the Tribunal's decisions and understand them.[309] For example, Canada has not implemented a formal system to ensure all staff tasked with the implementation of the Decisions have read the Decisions, understand them, and have the tools in place to implement the Tribunal's orders. Instead, Canada has relied on a series of informal emails and conversations between headquarters staff and senior regional officials, who are assumed to be passing the information along to other regional staff and to Canada's First Nations partners.

258. The perils of this informal approach are evidenced by the cross-examination of Health Canada's witness from Ontario in this motion, Ms. Cranton. Ms. Cranton is a key individual responsible for implementing the Decisions, but testified that she had not read the Tribunal's Decisions prior to her preparation for her cross-examination, in February 2017.[310] Moreover, Canada admits to not having a work-plan that specifically assigns tasks to individuals to ensure tasks related to compliance with the Decisions are completed.[311]

259. With respect to staff qualifications, Canada has failed to assign persons with the requisite academic credentials and work experience in child and family services and broad-based program reform to oversee and implement the Decisions. Canada's witnesses (all high-level executives tasked with implementing the Decision), testified that they have little or no prior experience working closely with First Nations Peoples and do not have formal academic or professional training in social work or child welfare.[312] Indeed, even the MSR has no academic training in child welfare and is not a registered social worker.

260. Absent a social work degree, Canada's staff are ineligible for registration with licensed professional bodies to ensure their accountability to social work standards and ethics, including giving paramount attention to the best interests of the child and child development when making important decisions about the FNCFS Program.[313] In light of this, the Caring Society submits that the Tribunal must exercise its remedial powers under

[309] Buckland Cross Examination at p 272, line 3 to p 273, line 10. See also Lang Cross Examination at p 212, line 19 to p 213, line 18.
[310] Cranton Cross Examination at p 79, lines 4-10.
[311] Lang Cross Examination at p 78 line 18 to p 79 line 12; at p 356 line 6 to p 357 line 1.
[312] Ms. Lang holds a Masters of Library Science and a Bachelor of Arts in English and French literature. See Lang Cross Examination at p 84 line 18 to 22. Ms. Buckland is a Registered Nurse. See Buckland Affidavit at para 1. Ms. Cranton holds a business degree. See Cranton Cross Examination at p 77, line 17.
[313] Lang Cross Examination at p 132, lines 1-16; p 245, lines 1-10.

the CHRA to ensure the enforcement of its decisions and the achievement of Parliament's legislative objective of eradicating discrimination.

C. Funding Based on Actual Expenses

261. Pursuant to section 53(2)(b) of the *CHRA* and in keeping with the Tribunal's broad remedial powers when seeking to enforce the quasi-constitutional rights the *CHRA* guarantees, the Caring Society seeks orders that Canada be required to fund legal fees, building repairs, intake and investigations and the child service purchase amount based on their actual cost until the Complainants and Canada have agreed upon the appropriate measures necessary to end the discriminatory practices.

262. In the absence of evidence relating to any other appropriate method of funding these expenses, the Caring Society submits that funding these expenses based on their actual cost is the only option available to the Tribunal that will ensure that the adverse impact of INAC's funding formulas are not perpetuated until the Complainants and Canada agree on the appropriate measures to end the discriminatory practices.

263. Canada has presented no evidence to demonstrate that the relief sought by the Caring Society would be inappropriate or cause it to experience undue hardship. As was the case in *Simpson-Sears*, it is Canada who is in possession of the necessary information to determine how the immediate relief items identified by the Tribunal may be addressed on an interim basis, or any hardship it may experience as a result of this order.

264. Furthermore, the fact that INAC has failed to conduct a costing exercise with the information in its possession to estimate the amounts required to provide FNCFS Agencies with immediate relief (having left its first attempts at this data collection until more than nine months after the Tribunal's January 2016 Decision) cannot shield Canada from its obligation to comply with the Tribunal's legally binding decision. In *Moore v British Columbia*, the Supreme Court of Canada held that a respondent could not evade its human rights obligations by claiming financial hardship when it had not conducted a proper costing exercise to determine the actual needs of students with disabilities or the cost of meeting these needs. In upholding the finding of discrimination against the school district, Justice Abella wrote:

> More significantly, the Tribunal found, as previously noted, that the District undertook *no* assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. This was cogently summarized by Rowles J.A. as follows:
>
> > The Tribunal found that prior to making the decision to close [the Diagnostic Centre], the District did not undertake a needs-based analysis, consider what might replace [the Diagnostic Centre], or assess the effect of the closure on severely learning disabled students. The District had no specific plan in place to replace the services, and the eventual plan became learning assistance, which, by definition and purpose, was ill-suited for the task. The philosophy for the restructuring

> was not prepared until two months after the decision had been made (paras. 380-382, 387-401, 895-899). *These findings of fact of the Tribunal are entitled to deference, and undermine the District's submission that it discharged its obligations to investigate and consider alternative means of accommodating severely learning disabled students before cutting services for them.* Further, there is no evidence that the District considered cost-reducing alternatives for the continued operation of [the Diagnostic Centre].
>
> The failure to consider financial alternatives completely undermines what is, in essence, the District's argument, namely that it was justified in providing no meaningful access to an education for Jeffrey because it had no economic choice. In order to decide that it had *no* other choice, it had at least to consider what those other choices were.
>
> Given the Tribunal's findings that the District had other options for addressing its budgetary crisis, its conclusion that the District's conduct was not justified should not be disturbed. The finding of discrimination is thereby confirmed.[314]

265. Just as a respondent cannot evade its human rights obligation to accommodate by failing to estimate the cost of accommodation, INAC cannot refuse to provide FNCFS Agencies with immediate relief based on the fact that it has failed to conduct a costing exercise. Having failed to tender any evidence on alternative means to provide this immediate relief, funding FNCFS Agencies expenses based on their actual cost is the only way to ensure that the adverse impacts of INAC's funding formulae are not perpetuated until Canada and the Complainants agree on the appropriate measures necessary to end the discriminatory practices identified by the Tribunal.

266. Furthermore, Canada has tendered no evidence to establish that it would be unable to fund the items of immediate relief based on their actual cost. As acknowledged by Canada's witness, INAC currently funds maintenance for children in care and no limitation has been established for that funding.[315] Canada's witness also acknowledged that she did not believe that there was anything stopping INAC from funding items of immediate relief, such as legal fees, based on their actual costs.[316] The Caring Society submits that an order from the Tribunal is required to compel Canada to do so.

D. Order to Cease Reallocations Immediately

267. Canada has not ceased its practice of reallocating funding for FNCFS agencies from other INAC programs for First Nations Peoples. In fact, it has not even committed to trying to cease this practice. Rather, in its May 24, 2016 compliance report, Canada merely stated that Budget 2016 will "contribute to a more stable and predictable funding environment

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[314] *Moore v. British Columbia (Education)*, [2012] 3 SCR 360, 2012 SCC 61 (CanLII) at para 52-53.
[315] Lang Cross Examination at p 327, lines 15-20.
[316] Lang Cross Examination at p 157, line 14 to p 158, line 10.

within INAC, reducing the need for reallocation from other critical programs such as infrastructure and housing".[317]

268. This has not been the case. As demonstrated by the evidence, INAC has already reallocated $ 20 million from its infrastructure budget to fund FNCFS Agencies.[318] Much of this funding is not aimed at providing immediate relief in accordance with the Decision, but to "respond to pressures" faced by individual agencies.[319] In addition to this, INAC has also reallocated $1.9 million to fund prevention for families at risk and small agencies, $1.5 million to implement a cultural vision for their programming and $1.975 million to fund FNCFS Agencies to identify their "actual needs and distinct circumstances.[320]

269. The Caring Society submits that INAC's ongoing reallocation of funds from infrastructure is a clear breach of the *CHRA*. Accordingly, pursuant to section 53(2)(a) of the *CHRA*, the Caring Society requests that INAC be ordered to cease its discriminatory practice of reallocating funds from other First Nations program in order to fund its FNCFS Program.

E. Clear written policies and dissemination of information needed to cease the discriminatory conduct

270. Human rights tribunals and commissions have repeatedly stressed the importance of written policies in order to ensure compliance with human rights legislation.[321] As explained by the Ontario Human Rights Commission, clear written policies that set a standard of expected behaviour and sends the message that respect for human rights legislation is to be taken seriously.[322]

271. As demonstrated in the evidence before the Tribunal relating to this motion, Canada claims that it has adopted the full meaning and scope of the Jordan's Principle by providing oral instructions to its staff. However, many internal government documents and communications with stakeholders continue to use a narrow definition of Jordan's Principle that restricts its application to children with disabilities or short-term conditions.[323]

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317 May Compliance Report at p 8.
318 Lang Cross Examination at p 167, lines 3-6.
319 Lang Affidavit para 4. See also Lang Cross Examination at p 165, line 2 to p 168, line 15.
320 Lang Affidavit, Exhibit A: Letter from Margaret Buist to FNCFS agency directors dated October 28, 2016. See also Lang Affidavit at para 9. Lang Cross Examination at p 170, lines 5-22.
321 See for example, *Milano v. Triple K Transport Ltd*., 2003 CHRT 30 (CanLII) at para 64 and *Martin v. Saulteaux Band Government*, 2002 CanLII 23560 (CHRT) at para 144. *Thorson v Northwest Territories*, 2013 CanLII 82655 (NT HRAP) at para 153.
322 Ontario Human Rights Commission A policy primer: Guide to developing human rights policies and procedures December 2013 at p 8-9.
323 Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Fact Sheet: Jordan's Principle – Addressing the Needs of First Nations Children; Canada's July 6, 2016 further reply submissions regarding immediate relief at para 36. Lang Affidavit, Exhibit 2: October Compliance Report at p 6-7. Buckland Affidavit, Exhibit G: Letter from Minister Philpott to Dr Cindy Blackstock, dated December 22, 2016; Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Atlantic First Nations Health

272. During the hearing on the merits, Member Bélanger expressed concern about INAC's common of practice failing to take notes during meetings.[324] Having argued during the hearing on the merits that INAC's practice of conducting its business verbally was a cause of discrimination, the Caring Society submits that Canada cannot now rely on oral, undocumented conversations when seeking to eliminate the pattern of discrimination that has existed in the department for years through the narrow definition of Jordan's Principle.

273. The Ontario Human Rights Commission has also stressed that sound communication plans are necessary, particularly in large and complex organisations, to ensure full compliance with human rights.

> Sound communication strategies are essential to the success of any human rights plan, policy or procedure. Employees, tenants or customers must clearly understand the content of the strategy and their rights and responsibilities, why the strategy was developed and how it will be implemented. Information should be readily accessible and easy to understand [325]

274. In light of Canada's ongoing failure to confirm in writing its policies relating to funding formulae and Jordan's Principle and to demonstrate that it is clearly communicating these to FNCFS Agencies in a timely manner, the Caring Society submits that any immediate relief ordered by the Tribunal must be communicated clearly to FNCFS Agencies in order to ensure that these measures are implemented fully and properly and in a manner to reduce the adverse impacts of INAC's funding formulae on First Nations children. As such, the Caring Society requests that Canada be ordered to inform FNCFS Agencies by phone, email and mail, and to and publicly post a notice of any orders made by the Tribunal within 30 days of the order.

Partnership, Public Health and Primary Care Committee Update (July 5-6, 2016); Lang Affidavit, Exhibit 2: October Compliance Report at Annex I: Letter dated August 4, 2016 from Debra Keays-White (Regional Executive Officer, FNIHB Atlantic Region) to Atlantic First Nations Chiefs; Letter dated July 7, 2016 from Jocelyn Andrews (Regional Executive Officer, FNIHB Alberta Region) to Chiefs of Alberta; Letter dated August 8, 2016 from Shawn Grono (Director of Nursing, FNIHB Alberta Region) to All FNIHB and Band Employed Nurse; Health Canada Information Sheet for Nursing Staff re Jordan's Principle (undated); Buckland Cross Examination, Exhibit 11: Letter from J. Andrews to the Chiefs of First Nations in Alberta, dated February 3, 2017; Cranton Affidavit, Exhibit E: "Child First Initiative Based on Jordan's Principle: Interim Guidance for NIHB Regional Medical Transportation Staff", dated August 8, 2016.

[324] Cross-Examination of B. D'Amico by D. Poulin, March 19, 2014 at p 141, lines 1-5.

[325] Ontario Human Rights Commission, "A policy primer: Guide to developing human rights policies and procedures", December 2013 at p 6.

F. Absence of permissible justification for failing to provide immediate relief on the first reasonable occasion

275. The only limitation relating to the kind of relief this Tribunal may order is enumerated that section 54 of the Act.[326] In the absence of the situation described in section, no further limitations may be "read into" the Tribunal's remedial powers under section 53(2)(b). As expressed by the Ontario Human Rights Tribunal,

> ... a legislature would have to use very clear language to limit the ambit of a term; it is not open to the Tribunal to read in a limitation that the legislature has not created. [327]

276. INAC has indicated that it has the intention to "further refine formulas as the program reform is complete, and the information on actual needs of agencies is provided"[328]. This position is echoed in Ms. Lang's affidavit, which states that no further reform will be undertaken by Canada until there is "collaboration with its partners"[329] through a "multi-pronged engagement process to gather information on agency needs and work collaboratively towards medium and long-term reform" with its partners".[330]

277. The Caring Society submits that ongoing "conversations" by INAC staff and the MSR are not a permissible limitation on the relief that may be ordered by the Tribunal now that the complaint has been substantiated.[331] The *CHRA* clearly states that orders made pursuant to section 53(2)(b) must require the respondent to provide the right or privilege that was denied as a result of discriminatory conduct at the "first reasonable occasion" possible. There is no language in the CHRA that supports the Respondent's claim that it may refrain from complying with its human rights obligations by discussing its discriminatory conduct with partners.

278. Furthermore, the evidence demonstrates that INAC's "conversations" are not good faith efforts to understand and meaningfully respond to the actual needs of First Nations children and their families. By way of example, from February 11, 2016 to March 22, 2016, INAC representatives engaged in several "conversations" relating to the funding formulas

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[326] Section 54 states:

> 54 No order that is made under subsection 53(2) may contain a term
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> (a) requiring the removal of an individual from a position if that individual accepted employment in that position in good faith; or
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> (b) requiring the expulsion of an occupant from any premises or accommodation, if that occupant obtained those premises or accommodation in good faith.

[327] *Dopelhamer v. Workplace Safety and Insurance Board,* 2009 HRTO 2056. See also *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667 at para 81.

[328] October Compliance report at p 2. No timeline is provided for this program reform.

[329] Lang Affidavit at para 12.

[330] Lang Affidavit at para 13.

[331] The term "conversation" appears 105 times in the Lang Cross Examination.

for the FNCFS Program with the complainants. During this time, funding levels for FNCFS Agencies had already been established through Budget 2016. No changes were made to this Budget following the release of the Decision or INAC's discussions with the complainants. Similarly, INAC's witness also conceded that needs identified during such "discussions" and "conversations" will not lead to immediate case-by-case funding but may be "looked at" in "medium or longer term."[332]

279. Likewise, Canada's alleged concerns about FNCFS Agencies' lack of capacity cannot be used to restrict this Tribunal's role to ensure compliance with the *CHRA*. None of the studies relied upon by INAC when advancing this claim supports this position in any way. Rather, inequitable funding is identified as one of the *causes* of difficulties experienced when recruiting and retaining staff.[333] The report states:

> "Moreover almost 60 percent of agencies reported in their business plans that staff recruitment and retention was an issue. Some reasons given include the rural/remoteness factor, **salary levels,** stress/trauma and shortage of people with the necessary qualifications (emphasis added)"

280. In addition to lacking a basis in fact, Canada's contention that it is not required to comply with its human rights obligations because it is of the view that FNCFS Agencies are not "ready" for equality is wholly inconsistent with human rights jurisprudence. It is not the role of a respondent who has been found to be in breach of the CHRA to determine that it would not be in the victim's best interest for the discriminatory conduct to cease at the first reasonable occasion. Implicit in this Respondent's argument is the belief that FNCFS Agencies do not know what is best for themselves or First Nations children. This thinking reflects the very stereotypes and discriminatory attitudes about First Nations Peoples that the *CHRA* seeks to eradicate.

281. Similarly, Canada's various 'budget cycles' are not a permissible limitation on the Tribunal's remedial powers. As noted above, the Supreme Court of Canada has emphasized that human rights legislation is paramount to government's right to allocate resources.

282. This is in consistent with the language of the *CHRA* that requires that a party found to have discriminated contrary to the *CHRA* to "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". Moreover, ordering Canada to provide immediate relief on the first reasonable occasion rather than in the next convenient budget cycle will also ensure that First Nations children are provided with the urgent mental health services they require in life or death situations.[334]

[332] Lang Cross Examination at p 32, line 5 to line 15 and p 38, line 18 to p 43, line 4.
[333] Lang Cross Examination, Exhibit 11: AANDC Report, "Implementation Evaluation of the Enhanced Prevention Focused Approach in Manitoba for the First Nations Child and Family Services Program, dated June 2014 at p 33.
[334] Kirlew Affidavit at para 16.

G. Summary of the Orders sought

283. The Caring Society asks:

a. That the Tribunal find that the Canada has failed to comply with the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10 and CHRT 16 by:
    i. Continuing to reallocate funds to the FNCFS Program from other INAC programs;
    ii. Failing to immediately remedy the adverse effects of its failure to appropriately fund the legal costs of FNCFS Agencies;
    iii. Failing to immediately remedy the adverse effects of its failure to appropriately fund small FNCFS Agencies;
    iv. Failing to immediately remedy the adverse effects of its failure to appropriately fund building repairs for FNCFS Agencies;
    v. Failing to immediately remedy the adverse effects of its failure to appropriately fund intake and investigations for FNCFS Agencies; and
    vi. Failing to immediately remedy the adverse effects of its failure to appropriately fund the child service purchase amount for FNCFS Agencies.

b. An Order that, until such time as Canada and the Complainants have agreed upon and implemented the appropriate measures necessary to end the discriminatory conduct in question or until further order of the Tribunal, Canada shall:
    i. Immediately cease reallocating funds to the FNCFS Program from other INAC programs, retroactive to January 26, 2016;
    ii. Immediately fund, on the basis of their actual cost, the legal costs of FNCFS Agencies, retroactive to January 26, 2016;
    iii. Immediately replace the population threshold for core FNCFS Agency funding with the recommended funding increments per every 25 children on reserve as recommended in *Wen:de*, adjusted for inflation, retroactive to January 26, 2016;
    iv. Immediately fund, on the basis of their actual cost, building repairs for FNCFS Agencies where required by applicable fire, safety, building codes and regulations or where there is other evidence of non-compliance with applicable fire, safety and building codes and regulations, retroactive to January 26, 2016;
    v. Immediately fund, on the basis of their actual cost, the intake and investigations of FNCFS Agencies; and
    vi. Immediately increase the child service purchase amount for FNCFS Agencies to $200 per child.

c. Advise all FNCFS Agencies by phone, email and mail, and publicly post a notice on the INAC website, with 30 days of the order, that Canada will immediately fund the above noted expenses based on their actual costs.

d. An Order requiring Canada to provide, within 30 days of the Order, a reliable data collection, analysis and reporting methodology, as well as ethical research guidelines respecting Indigenous peoples that include protection of Indigenous intellectual property, that will be applied to said research, for approval by the Tribunal upon further submissions by the parties, to guide the data collection process launched following its October 28, 2016 email to FNCFS Agencies;

e. An Order requiring Canada to provide FNCFS Agencies with funding a minimum amount of $25,000 for data collection for small agencies, which amount shall be scaled proportionality upwards for large agencies and multi-site agencies where required for an FNCFS Agency, to prepare for costing exercises.

f. An Order requiring Canada to serve and file affidavit material detailing its compliance with the Tribunal's Orders within 30 days of those Orders;

g. An Order that Canada immediately cease relying upon and perpetuating definitions of Jordan's Principle that violates the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10 and 2016 CHRT 16 (First Nations children with "disabilities and those who present with a discrete, short-term issues for which there is a critical need for health or social supports");

h. An Order that within 15 days of the Tribunal's Order, Canada post definitions and approaches to Jordan's Principle that fully comply with the Tribunal's orders on the home pages of Health Canada and INAC's websites with appropriate links to specialized topic pages and that Canada take out full page advertisements in two national newspapers, a provincial/territorial newspaper in each province/territory, regional Indigenous newspapers where they exist. and post a televised announcement on Aboriginal Peoples Television Network in French and English, providing details of compliant definitions of Jordan's Principle and a 24-hour toll free reporting line for Jordan's Principle cases. This is to be done at Canada's expense from budgets not related to the governance or services provided to First Nations peoples.

i. An Order that within 45 days of the order, Canada, in consultation with the Complainants and Interested Parties, develop Jordan's Principle public education materials and ensure their proper distribution to First Nations communities, professionals and other stakeholders. Canada will then fully fund and ensure that the public education materials are provided to all First Nations, all First Nations child and family service agencies and other service agencies providing services to First Nations children and families. This will include Canada funding the translation of public relations materials into First Nations languages.

j. An Order that, within 30 days of the Order, Canada contact, in writing, all stakeholders who received communications including the definition of Jordan's Principle that violates the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16, and to immediately advise these stakeholders in writing that Jordan's Principle includes all jurisdictional disputes involving all First Nations children resident on and off reserve;

k. An Order that, within 30 days of the Order, Canada 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, which includes all jurisdictional disputes involving all First Nations children; and

l. An Order that Canada immediately cease imposing service delays due to policy review or case conferencing or any other procedure through the Child First Initiative's Service Access Resolution Function.

m. An Order that Canada immediately make mental health services available to all First Nations children in Ontario.

n. An Order that Canada immediately implement reliable internal systems to ensure that all possible Jordan's Principle cases are immediately identified and addressed including those where the reporter does not know the case is a Jordan's Principle case.

o. An Order that Canada track its performance in delivering its Child-First Initiative, and report the results of that performance tracking to the Tribunal at regular intervals.

p. An Order that Canada immediately provide the services already enumerated in the service gaps documents tendered as evidence during the hearings (CHRC Tabs 78 and 302) and provide written confirmation to the Tribunal that such funding has been made available and service providers and the public are aware of their right to access such services.

H. The reporting process moving forward

284. More than one year has passed since the Tribunal rendered its January 2016 Decision in favour of the children. Some of the delays in the implementation of immediate relief can be attributed to repeated delays in the consideration of immediate relief flowing from unexpected submissions from Canada, or a lack of clarity regarding proper procedure among the parties.

285. Timelines for cross-examinations on Canada's compliance reports were only established after the collapse of the November 2016 case conference, when Complainants and the Interested Parties filed motions seeking the implementation of immediate relief. With the exception of minor deviations within the schedule based on discrete circumstances, the parties have been able to work towards certain hearing dates regarding immediate relief over the course of a 3.5 month period.

286. The Caring Society would welcome the opportunity to make submissions on the reporting process moving forward to ensure that issues relating to immediate, mid-term and long term relief are dealt with as informally and expeditiously as possible and in accordance with the best interests of the child.

287. In particular, the Caring Society requests that moving forward, the Tribunal direct that, following any future remedial orders, 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 by the complainants and interested parties, followed by the filing of written arguments and oral submissions. The process of exchanging evidence and the opportunity to cross-examine Canada's witnesses has contributed to making the remedial process more transparent, and, in the absence of disclosure obligations on Canada's part, has ensured that the complainants and interested parties remain able to assist the Tribunal in the context of the adversarial process.

288. The Caring Society also wishes to make submissions regarding the possibility of the Tribunal appointing an *amicus* attorney pursuant to its implied statutory authority, in order to oversee Canada's compliance with Tribunal orders in the future and to advise the Tribunal and the parties as to Canada's progress, so that any issues arising from the implementation of the Tribunal's orders may be dealt with as informally and expeditiously as possible, and in accordance with the best interests of the child.[335]

[335] While this is a novel request, human rights tribunals have established systems to monitor respondents' compliance to orders in the past. See for example, *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* [1997] C.H.R.D. No. 3 (CHRT) where the respondent was ordered to create and report to an internal review committee. See also *C.N.R. v. Canada (Human Rights Commission) ("Action Travail des Femmes")* [1987] 1 S.C.R. 1114, where the respondent was ordered to report its progress on gender equality to the human rights commission.

PART V - CONCLUSION

289. During this hard fought last 10-years case, while First Nations children waited, Canada repeatedly took the position that it was not discriminating against First Nations children within the meaning of the CHRA. In fact, it took almost every legal avenue available to prove that its conduct was not reviewable within the parameters of the Act. On January 26, 2016, the Complaint was substantiated on every ground and a finding was made that Canada is discriminating against First Nations children and their families. No judicial review application followed and Canada's officials say that they accept the findings made by the Tribunal.

290. Canada's conduct to date suggests otherwise. Its approach to the Tribunal's orders for immediate relief is flippant, ad hoc and not in keeping with the findings made in this case. Canada's "above the law" approach to implementing the CHRT remedies in this case presents a very disturbing example and "creates conditions of gross inequality, rewarding those who turn their backs on the law, while placing burdens on those who follow the law." If allowed to continue, the precedent could inspire other change resistant Respondents found responsible for discrimination to follow Canada's example rendering the CHRA a legislative paper tiger. This is to be avoided at all costs.

291. Canada's efforts to excuse its failure to "immediately cease" its discriminatory conduct ignores the realities facing First Nations children who are touched by the child welfare system. Canada's residential school policy, its involvement in the 60's scoop and its ongoing discrimination today all involved the removal of children from their families based on race. Justice Belobaba's description of the harm wrought by Canada to 60's scoop survivors brings into stark focus the harms experienced by First Nations children at the center of this case:

> The impact on the removed aboriginal children has been described as "horrendous, destructive, devastating and tragic." The uncontroverted evidence of the plaintiff's experts is that the loss of their aboriginal identity left the children fundamentally disoriented, with a reduced ability to lead healthy and fulfilling lives. The unemployment, violence and numerous suicides. Some researchers argue that the Sixties Scoop was even 'more harmful that the residential schools':
>
>> Residential schools incarcerated children for 10 months of the year, but at least the children stayed in an Aboriginal peer group; they always knew their First Nation of origin and who their parents were and they knew that eventually they would be going home. In the foster and adoptive system…"[336]

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[336] *Brown v. Canada (Attorney General),* 2017 ONSC 251 at para 7.

292. The time for conversations is over. The time for stated intentions is over. The time for best efforts is over. First Nations children deserve to experience substantive equality while they are still children. Time is passing and the children are growing. Now is the right time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 28, 2017

for

David P. Taylor / Anne Leveque
Sarah Clarke / Sébastien Grammond /
Kaila Morin (student-at-law)

Counsel for the Caring Society

PART VI – LIST OF AUTHORITIES

Legislation

Tab

1. *Canadian Human Rights Act,* R.S.C., 1985, c. H-6

2. *Child and Family Services Act,* RSNS 1990, c 5, section 3(a)(e)

3. *Children and Youth Care and Protection Act,* SNL 2010, c C-12.2, section 2(1)(c)

4. *Human Rights Code,* [RSBC 1996] CHAPTER 210

Cases

Tab

5. *Arzem v. Ontario (Community and Social Services)*, 2006 HRTO 17

6. *Ball v. Ontario (Community and Social Services),* 2010 HRTO 360

7. *Brooks v. Department of Fisheries and Oceans*, 2005 CHRT 14

8. *Brown v. Canada (Attorney General),* 2017 ONSC 251

9. *C.N.R. v. Canada (Human Rights Commission),* [1987] 1 S.C.R. 1114

10. *Canada (Attorney General) v. Uzoaba*, [1995] 2 FCR 569 (FC)

11. *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667

12. *Condon v. Prince Edward Island*, 2002 PESCTD 41

13. *Dopelhamer v. Workplace Safety and Insurance Board,* 2009 HRTO 2056

14. *Eagleson Co-Operative Homes Inc. v. Théberge*, 2006 CanLII 29987 (ON SCDC)

15. *Exploits-White Bay Roman Catholic School Board v. Newfoundland Teachers' Association*, 1982 CanLII 2960 (NL SCTD)

16. *Hogan v. Ontario (Health and Long-Term Care),* 2005 HRTO 49

17. *Kelso v the Queen* [1981] 1 SCR 199

18. *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497

19. *Martin v. Saulteaux Band Government,* 2002 CanLII 23560 (CHRT)

20. *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* [2007] 1 SCR 161

21. *Mercedes-Benz Financial (DCFS Canada Corp.) v. Kovacevic,* 2009 CanLII 9423 (ON SC)

22. *Milano v. Triple K Transport Ltd*., 2003 CHRT 30

23. *Moore v. British Columbia (Education),* [2012] 3 SCR 360

24. *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* [1997] C.H.R.D. No. 3 (CHRT)

25. *Ontario Human Rights Commission v Simpson-Sears*, [1985] 2 SCR 536

26. *Thorson v Northwest Territories,* 2013 CanLII 82655 (NT HRAP)

27. *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321

Other sources

Tab

28. J Kirkemann Boesen & Martin, T., "Applying a Rights-Based Approach : An inspiration guide for civil society.'' The Danish Institute for Human Rights, 2007

29. Ontario Human Rights Commission, "A policy primer: Guide to developing human rights policies and procedures" (December 2013)

Table 1 Calculations to determine the total number of hours lawyers can spend on each child's case per agency in 2015/2016

A	B	C	D	E	F	G	H
#	Province	Agency	Total number of children in care in 2015/2016	Annual legal budget per agencies in 2015/2016 (in $)	Number of hours lawyers can provide services within the annual legal budget (Column E / 140 $ which is the rate for outside counsel with 5-6 years of experience according to Federal justice rates : http://www.justice.gc.ca/eng/abt-apd/la-man/index.html)	Total number of hours lawyers can spend on each child's case (Column F / Column D)	Notes
1	Newfoundland and Labrador	Government of NL	191	30 000	190	0,99	Children in care based on actuals 13/14
2	Newfoundland and Labrador	Miawpukek Mi'kamawey Mawi'omi	14	30 000	190	13,55	Children in care based on 6%
3	Prince Edward Island	MCPEI CFS	13	25 000	157	12,05	Children in care based on 6%
4	Nova Scotia	Mi'kmaw FCS	372	10 000	62	0,17	No info provided regarding source of data for children in care
5	New-Brunswick	Elsipogtog First Nation	55	50 000	316	5,75	Children in care based on 6.0%
6	New-Brunswick	North Shore	76	50 000	316	4,16	Children in care based on actuals 13/14

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7	New-Brunswick	St John River	74	50 000	316	4,27	Children in care based on 6.0%
8	Québec	Conseil de la Nation Attikamek-Sipi CFS	95	20 000	124	1,31	Children in care based on 6%
9	Québec	Attikamewk d'Opiticiwan CFS	59	20 000	124	2,11	Children in care based on actuals 13/14
10	Québec	Gesgapegiag CFS	15	20 000	124	8,28	Children in carae based on actuals 13/14
11	Québec	Grand Conseil Wabanaki CFS	6	20 000	124	20,71	Children in care based on 6%
12	Québec	Nation Huronne-Wendat CFS	23	20 000	124	5,4	Children in care based on 6%
13	Québec	Kahnawake CFS	100	20 000	124	1,24	Children in care based on 6%

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14	Québec	Kitigan Zibi Amishnabeg CFS	23	20 000	124	5,4	Children in care based on 6%
15	Québec	Montagnais Du Lac St. Jean CFS	54	20 000	124	2,3	Children in care based on actuals 13/14
16	Québec	Regroupement Mamit Innuat CFS	42	20 000	124	3	Children in care based on 6%
17	Québec	Conseil Montagnais de Shefferville CFS	18	20 000	124	6,9	Children in care based on actuals 13/14
18	Québec	Restigouche CFS	34	20 000	124	3,65	Children in care based on actuals 13/14
19	Québec	Uashat/Maliotenam CFS	88	20 000	124	1,41	Children in care based on actuals 13/14

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20	Québec	Natashquan CFS	21	20 000	124	5,92	Children in care based on actuals 13/14
21	Québec	CJ Laurentides	15	20 000	124	8,28	Children in care based on 6%
22	Québec	CPEJ Outaouais	26	20 000	124	4,78	Children in care based on actuals 13/14
23	Québec	CPEJ Abitibi Temiscamingue	273	20 000	124	0,46	Children in care based on actuals 13/14
24	Québec	Betsiamites CFS	63	20 000	124	1,97	Children in care based on actuals 13/14
25	Québec	Conseil Montagnais Essipit CFS	3	20 000	124	41,42	Children in care based on 6%
26	Ontario	-	-	-	-	-	-

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27	Manitoba	Awasis Agency	457	Detail not provided	-	-	Children in care based on actuals 13/14
28	Manitoba	Cree Nation CFCA	238	Detail not provided	-	-	Children in care based on 7%
29	Manitoba	Island Lake CFS	319	Detail not provided	-	-	Children in care based on 7%
30	Manitoba	Kinosao Sipi Minisowin Agency	165	Detail not provided	-	-	Children in care based on 7%
31	Manitoba	Nisichawaysihk Cree Nation Wellness Centre	119	Detail not provided	-	-	Children in care based on 7%
32	Manitoba	Opaskwayak Cree Nation CFS Agency	89	Detail not provided	-	-	Children in care based on 7%
33	Manitoba	Nikan Awasisik Agency	169	Detail not provided	-	-	Children in care based on 7%

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34	Manitoba	Anishinaabe CFS	119	Detail not provided	-	-	Children in care based on 7%
35	Manitoba	Dakota Ojibway CFS	231	Detail not provided	-	-	Children in care based on actuals 13/14
36	Manitoba	Intertribal CFS	53	Detail not provided	-	-	Children in care based on 7%
37	Manitoba	Peguis CFS	92	Detail not provided	-	-	Children in care based on 7%
38	Manitoba	Sandy Bay First Nation CFS	120	Detail not provided	-	-	Children in care based on 7%
39	Manitoba	Sagkeeng CFS	89	Detail not provided	-	-	Children in care based on 7%
40	Manitoba	Southeast CFS	442	Detail not provided	-	-	Children in care based on actuals 13/14
41	Manitoba	West Region CFS	217	Detail not provided	-	-	Children in care based on actuals 13/14

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42	Saskatchewan	Agency Chiefs CFS	119	40 000	260	2,18	Children in care based on 6%
43	Saskatchewan	Ahtahkakoop CFS	42	40 000	260	6,18	Children in care based on 6%
44	Saskatchewan	Athabasca Densuline CFS	96	40 000	260	2,71	Children in care based on 6%
45	Saskatchewan	BTC Human Services Corp	41	40 000	260	6,34	Children in care based on 6%
46	Saskatchewan	Kanaweyimik CFS	97	40 000	260	2,68	Children in care based on 6%
47	Saskatchewan	Lac La Ronge CFS	161	40 000	260	1,61	Children in care based on 6%
48	Saskatchewan	Meadow Lake Tribal Council CFS	174	40 000	260	1,49	Children in care based on 6%
49	Saskatchewan	Montreal Lake CFS	52	40 000	260	5	Children in care based on 6%
50	Saskatchewan	Onion Lake FS	110	40 000	260	2,36	Children in care based on 6%

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51	Saskatchewan	Peter Ballantyne CFS	173	40 000	260	1,5	Children in care based on 6%
52	Saskatchewan	Sturgeon Lake CFS	46	40 000	260	5,65	Children in care based on 6%
53	Saskatchewan	Nechapanuk Centre CFS	89	40 000	260	2,92	Children in care based on 6%
54	Saskatchewan	Qu'Appelle CFS	43	40 000	260	6,04	Children in care based on 6%
55	Saskatchewan	Saskatoon Tribal Council HFS	108	40 000	260	2,41	Children in care based on 6%
56	Saskatchewan	Touchwood CFS	105	40 000	260	2,47	Children in care based on 6%
57	Saskatchewan	Wahkotowin	42	40 000	260	6,18	Children in care based on 6%
58	Saskatchewan	Yorkton Tribal Council CFS	198	40 000	260	1,31	Children in care based on 6%

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59	Alberta	Akamkispatanaw Ohipkihawsowin	71	33 500	228	3,21	Children in care based on actuals 14/15
60	Alberta	Athabasca Tribal Council	37	33 500	228	6,16	Children in care based on 6%
61	Alberta	Bigstone Cree Nation	75	33 500	228	3,04	Children in care based on 6%
62	Alberta	Kainaiwa Children's Services Corp	163	33 500	228	1,4	Children in care based on 6%
63	Alberta	Kasohkowew Child Wellness	254	33 500	228	0,90	Children in care based on actuals 14/15
64	Alberta	KeeTasKeeNow CFS	93	33 500	228	2,45	Children in care based on 6%
65	Alberta	Little Red River Cree Nation CFS	140	33 500	228	1,63	Children in care based on 6%

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66	Alberta	Lesser Slave Lake Indian Regional Council	50	33 500	228	4,56	Children in care based on 6%
67	Alberta	Piikani Nation	38	33 500	228	6	Children in care based on 6%
68	Alberta	North Peace Tribal Council	57	33 500	228	4	Children in care based on 6%
69	Alberta	Saddle Lake First Nation Wah-Koh-To-Win	107	33 500	228	2,13	Children in care based on actuals 14/15
70	Alberta	Siksika Family Services	95	33 500	228	2,4	Children in care based on actuals 14/15
71	Alberta	Stoney CFS	182	33 500	228	1,25	Children in care based on actuals 14/15
72	Alberta	Tribal Chiefs CFS	83	33 500	228	2,75	Children in care based on 6%

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73	Alberta	MOTTCFS West	52	33 500	228	4,38	Children in care based on actuals 14/15
74	Alberta	Tsuu T'ina Nation CFS	62	33 500	228	3,68	Children in care based on actuals 14/15
75	Alberta	Western Cree	51	33 500	228	4,47	Children in care based on 6%
76	British Columbia	Ayas Men Men	45	30 000	191	4,25	Children in care based on actuals 13/14
77	British Columbia	Lalum'Utul'Smun'Eem	59	30 000	191	3,24	Children in care based on 6%
78	British Columbia	Spallumcheen CFS	37	30 000	191	5,17	Children in care based on actuals 13/14
79	British Columbia	Kwumut Lelum CFS	50	30 000	191	3,83	Children in care based on 6%
80	British Columbia	Gitxan	42	30 000	191	4,56	Children in care based on 6%

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81	British Columbia	Knucwentwecw FCS	24	30 000	191	7,97	Children in care based on 6%
82	British Columbia	Nlha'7kapmx CFS	22	30 000	191	8,7	Children in care based on 6%
83	British Columbia	Nuu-Chah Nulth CHS	62	30 000	191	3,09	Children in care based on 6%
84	British Columbia	Scw'Ex'Mx CFS	34	30 000	191	5,63	Children in care based on actuals 13/14
85	British Columbia	Fraser Valley Aboriginal CFS	49	30 000	191	3,9	Children in care based on 6%
86	British Columbia	Carrier Sekani	57	30 000	191	3,36	Children in care based on 6%
87	British Columbia	Secwepemc CFS	36	30 000	191	5,31	Children in care based on 6%
88	British Columbia	Northwest Inter-Nation FCS	55	30 000	191	3,48	Children in care based on 6%

Table 1 Calculations to determine the total number of hours lawyers can spend on each child's case per agency in 2015/2016

A	B	C	D	E	F	G	H
#	Province	Agency	Total number of children in care in 2015/2016	Annual legal budget per agencies in 2015/2016 (in $)	Number of hours lawyers can provide services within the annual legal budget (Column E / 140 $ which is the rate for outside counsel with 5-6 years of experience according to Federal justice rates : http://www.justice.gc.ca/eng/abt-apd/la-man/index.html)	Total number of hours lawyers can spend on each child's case (Column F / Column D)	Notes
89	British Columbia	Nil/Tu,O	45	30 000	191	4,25	Children in care based on 6%
90	British Columbia	Ktunaxa?Kinbasket TC	12	30 000	191	15,94	Children in care based on actuals 13/14
91	British Columbia	Heiltsuk Kaxla CFS	18	30 000	191	10,63	Children in care based on 6%
92	British Columbia	Nezul Be Hunuyeh CFS	25	30 000	191	7,65	Children in care based on actuals 13/14
93	British Columbia	Namgis	14	30 000	191	13,67	Children in care based on 6%
94	British Columbia	Haida CFS	21	30 000	191	9,11	Children in care based on 6%
95	British Columbia	Desniqi Services Society	39	30 000	191	4,91	Children in care based on 6%
96	British Columbia	Ministry of CFS	790	30 000	191	0,24	Children in care based on 6%

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#	**Province**	**Agency**	**Total number of children in care in 2015/2016**	**Annual legal budget per agencies in 2015/2016 (in $)**	**Number of hours lawyers can provide services within the annual legal budget (Column E / 140 $ which is the rate for outside counsel with 5-6 years of experience according to Federal justice rates : http://www.justice.gc.ca/eng/abt-apd/la-man/index.html)**	**Total number of hours lawyers can spend on each child's case (Column F / Column D)**	**Notes**
97	Yukon	Government of Yukon	129	40 000	272	2,11	Children in care based on 6%