Docket: T1340/7008

**CANADIAN HUMAN RIGHTS TRIBUNAL**

BETWEEN:

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

Complainants

- and -

**CANADIAN HUMAN RIGHTS COMMISSION**

Commission

- and -

**ATTORNEY GENERAL OF CANADA**

(representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

**CHIEFS OF ONTARIO and**
**AMNESTY INTERNATIONAL CANADA AND NISHNAWBE ASKI NATION**

Interested Parties

# SUBMISSIONS ON MOTION (DATED NOVEMBER 22, 2016) REGARDING IMMEDIATE RELIEF BROUGHT BY CHIEFS OF ONTARIO

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## OVERVIEW OF MOTION

1. Chiefs of Ontario (COO) brings this motion regarding the adequacy of the "immediate relief" undertaken by the Respondent Canada in response to the Tribunal's January 26, 2016 order to cease discrimination and its subsequent orders regarding immediate relief.

2. Chiefs of Ontario makes this motion pursuant to its position that Canada has failed to abide by the Tribunal's order to cease discrimination in the immediate term, and in particular with respect to provision of Band Representative services in Ontario, children's mental health services in Ontario, and an Ontario Special Study.

3. The Tribunal in its previous orders has ordered Canada to cease discrimination against First Nations Children in Ontario, and has cited the absence of Band Representative Services and the relative paucity of children's mental health services as being discriminatory. The Tribunal asked Canada to elaborate on how its recent budget will address the Tribunal's decision with respect to provision of Band Representative services and children's mental health service needs, pending longer-term reform.

4. The evidence on the motion clearly answer the Tribunal's question: Canada has no intention of funding the Band Representative program or additional mental health services in Ontario in any time frame that could be called "immediate", nor has Canada taken any serious steps toward determining what services may be required, how or when those services will be provided, or reforming the 1965 Agreement.

5. Chiefs of Ontario says that the steps taken by Canada are not adequate to comply with the Tribunal's orders to cease discrimination, and that further, specific orders are required to alleviate discrimination against First Nations children in Ontario in the short term.

## WHAT CANADA HAS DONE POST-DECISION

6. Canada has submitted reporting letters as ordered by the Tribunal, which were included in the affidavit of Cassandra Lang, sworn January 25 2017.[1]

7. Canada has committed to the following "immediate relief investments" for First Nations children in Ontario:

   (a) in 2016-2017, an increase in prevention funding of $5,833,524.32 for Ontario (excluding Akwesasne) and $2,208,304.80 (for Akwesasne), which was in

[1] Affidavit of Cassandra Lang sworn January 25, 2017, Exhibits 1 and 2.

December 2016 distributed to First Nations to deliver prevention services, on the advice of Chiefs of Ontario.[2]

(b) In total until 2020-2021, increases in prevention funding $59,158,035.48 for Ontario (excluding Akwesasne) and $11,350,528.40 (for Akwesasne). To whom that funding will be distributed is yet to be determined.[3]

8. Canada calculated these budget amounts prior to the release of the Tribunal's decision.[4]

9. Indigenous and Northern Affairs Canada ("INAC") calculated these budget amounts based on Enhanced Prevention Focused Approach ("EPFA") amounts from other parts of the country, or on some other "prevention-based model" amounting to approximately $1000.00 per child. The Tribunal has since held that the EPFA formulae are discriminatory. Canada did not change its budget for increased services to First Nations children in Ontario in response to the Tribunal's decision on this point.[5]

10. The 2016-2021 budget amounts set out for prevention services funding for Ontario represent 93% of what Canada calculated in 2013-2014 was required to provide prevention based services in Ontario. This 93% figure was based on the assumption that Ontario would contribute 7% under the 1965 Agreement cost-sharing provisions. Ontario ultimately did not agree to contribute 7%, and Canada did not increase its budget to make up the shortfall. [6]

11. The 2016-2017 budget amount was 40% of the total amount Canada calculated was required and was prepared to commit to over five years.[7]

12. In other words, in 2016-2017, Canada provided 37% of the total amount Canada calculated was required for prevention funding before the Tribunal's decision, for prevention services funding.[8]

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[2] Affidavit of Cassandra Lang sworn January 25, 2017, Exhibit 1, Annex C; Affidavit of Deputy Grand Chief Denise Stonefish sworn December 16, 2017 at para 15.

[3] Canada's May 24 Reporting Letter to the Tribunal, Annex A, marked as Exhibit CL-3-A in the Cross Examination of Cassandra Lang dated February 7, 2017.

[4] Affidavit of Cassandra Lang sworn January 25, 2017, Exhibit 1 at page 1; Cross Examination of Cassandra Lang February 7 2017 at page 10, lines 7-21.

[5] Affidavit of Cassandra Lang sworn January 25, 2017, Exhibit 1, Annex C; Cross Examination of Cassandra Lang February 7 2017 at page 26, line 8 – Page 28, line 3.

[6] Affidavit of Cassandra Lang, sworn January 25, 2017, Exhibit 1, Annex A; Cross examination of Cassandra Lang February 7 2017 at pages 29, line 5 – page 30, line 17.

[7] Cross examination of Cassandra Lang February 7, 2017 at page 47, lines 22-25.

[8] 40% of 93% of the total amount equals 37%.

## WHAT CANADA HAS NOT DONE POST-DECISION

### Canada has not adjusted its budget to respond to the Tribunal's decision

13. Canada devised its budget which applies to the 2016-2017 through to the 2020-2021 fiscal years in 2013-2014. [9]

14. Canada did not consult with any First Nations, First Nations agencies, Chief of Ontario, or the Province of Ontario while formulating those numbers.[10]

15. Canada did not adjust its budget numbers after receiving the Tribunal's decision in January 2014 to provide any funding for anything other than prevention. In particular, Canada based its 2016-2021 budget investments according to a prevention based model which is stated in its spreadsheets to be "EPFA ask". Those numbers were not revisited after the Tribunal concluded that the EPFA formula is discriminatory.[11]

16. Specifically the budget was not increased to provide Band Representative services or mental health services (or any other services other than prevention services), even after the Tribunal's decision that the failure to provide Band Representative and children's mental health services is discriminatory.[12]

17. Canada's increased funding announced as part of Budget 2016-2017 is based on funding amounts required to increase prevention services in Ontario. For the 2016-2017 budget, Canada directed that the money could only be used for prevention services.[13]

18. INAC's affiant stated in cross-examination that if Band Representative Services were required or permitted by INAC in the future, funding for such services would have to come from the existing funding envelopes as set out in the budget for 2016-2021. However, because the budget is calculated with the aim of increasing prevention funding to a certain amount, this means that First Nations who decided to provide these services in the future would necessarily have to take from their allocation for prevention services.[14]

19. INAC has not sought increased funding authority for Band Representative services or children's mental health services for future years.[15]

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[10] Affidavit of Cassandra Lang sworn January 15, 2017, Exhibit 1 at page 2.
[11] Cross Examination of Cassandra Lang February 7, 2017 at page 28, lines 4-20.
[12] Cross examination of Cassandra Lang February 7, 2017 at page 26, line 8; pages 27, line 18 - page 29, line 4; Cross Examination of Cassandra Lang, February 7, 2017 at page 49, line 20 – page 52, line 5.
[13] Affidavit of Cassandra Lang, sworn January 25, 2017, Exhibit 1, page 1 and Annex C.
[14] Cross Examination of Cassandra Lang, February 7, 2017 at page 49, line 13 – page 51, line 17.
[15] Cross Examination of Cassandra Lang February 7, 2017 at page 50, line 4 – page 51, line 17.

20. Therefore, as it stands, even if Canada allows expenditures for Band Representative services in future years, to fund such services First Nations or First Nations agencies would be required to take away from the prevention moneys that have been allocated, which are already in total less than what Canada judges is necessary to bring children into the discriminatory EPFA formula.

## Canada has not funded Band Representative Services for Ontario First Nations

21. Canada has not agreed that it will provide Band Representative services in Ontario as part of immediate relief.[16] Canada has not committed to any action to provide Band Representative Services other than "looking at" funding Band Representative services in the medium to long term.[17]

22. Canada's position is that before considering funding the Band Representative program, it is required not only to determine the scope and need for Band Representative services in Ontario, but also to do so across the entire country.[18]

23. INAC's affiant is aware that Band Representative roles are detailed in the *Child and Family Services Act*, and that some First Nations in Ontario are already providing Band Representative services out of non-INAC funding or their own revenue.[19]

24. INAC's affiant admitted that despite the Tribunal's orders to alleviate discrimination immediately, and despite the Tribunal's finding that the failure to provide Band Representative services is discriminatory, INAC is not willing to undertake to provide those services in the immediate term.[20]

25. There is no evidence that Canada has taken concrete steps to determine the costs of Band Representative programs in Ontario or in Canada, aside from "conversations" with its partners.

26. Even when specific proposals to provide Band Representative services are made, INAC has rejected those proposals. For example, Mushkegowuk Council in the James Bay region of Northern Ontario made a specific proposal to INAC for Band Representative services which was denied in less than 30 days.[21]

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[16] Affidavit of Deputy Grand Chief Denise Stonefish, sworn December 26 2016 at para 19.
[17] Cross Examination of Cassandra Lang, February 7 2017 at page 42, line 160 – page 43, line 4.
[18] Affidavit of Cassandra Lang sworn January 25, 2017 at para 24; Cross examination of Cassandra Lang February 7, 2017 at Page 38 Line 9 – Page 40 Line 6.
[19] Cross Examination of Cassandra Lang February 7, 2017 at page 20, lines 20-25 and page 22, lines 19-24.
[20] Cross Examination of Cassandra Lang February 7, 2017 at page 42, line 8 – page 43, line 4.
[21] Cross Examination of Cassandra Lang February 7, 2017 at page 33, line 2 – page 35, line 10.

## Canada has not increased mental health services for First Nations children in Ontario

27. Canada has not budgeted for increases in mental health services for First Nations children in Ontario in the budget for 2016-2021 announced in 2016.[22]

28. In response to the assertion of COO's affiant Deputy Grand Chief Stonefish that there was no increase in children's mental health funding in the budget, Health Canada's affiant pointed to existing $300M of federal mental health funding available to all First Nations for people of all age groups across all of Canada, as well as an additional $69M dollars of new mental health funding nationally for all age groups which was announced since the budget.[23] However, neither Health Canada nor INAC provided any evidence demonstrating that this funding has alleviated discrimination with respect to failure to provide children's mental health services.

29. INAC's affiant stated that it was necessarily to coordinate with Health Canada and the provinces in order to address funding for mental health services for First Nations children in Ontario.[24]

30. Despite this, to date little coordination has taken place.

31. Health Canada's affiant on Jordan's Principle has not had a meeting with INAC to discuss mental health service gaps for children in Ontario.[25]

32. INAC's affiant said that INAC "would have" had a "couple" of conversations with Health Canada to discuss children's mental health services, but could recall only one such "conversation" specifically.[26]

33. The government actors who would be charged with providing this funding do not even seem to understand the 1965 Agreement and the gaps it leaves in relation to children's mental health services. Health Canada's affiant stated in cross-examination that she "did not understand" the 1965 Agreement "fully", and in her cross examination by Nishnawbe Aski Nation's (NAN) counsel, did not appear to have an understanding that the 1965 Agreement did not provide for mental health services for First Nations children in Ontario.[27]

34. Health Canada's affiant, under cross-examination, stated that although she did not have anyone with a thorough understanding of the 1965 Agreement reporting to her in the

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[22] Affidavit of Deputy Grand Chief Denise Stonefish sworn December 16, 2017 at para 20; Cross examination of Cassandra Lang, February 7, 2017 at page 51, line 18 – page 52, line 5.
[23] Affidavit of Robin Buckland sworn January 25, 2017 at para 24.
[24] Affidavit of Cassandra Lang sworn January 25, 2017 at para 24.
[25] Cross Examination of Robin Buckland February 6, 2017 at page 217, line 1 – page 218, line 2.
[26] Cross examination of Cassandra Lang February 7, 2017 at page 58, line 16 – page 60, line 13.
[27] Cross Examination of Robin Buckland February 6, 2017 at page 191, line 9 – page 193, line 24.

Jordan's Principle office, she was "confident" that her INAC colleagues did have that understanding and could identify any issues that may arise. [28]

35. However, INAC's affiant did not know about the breadth of Health Canada's services nor Ontario's services available to First Nations children, saying that this was information INAC had not yet identified.[29]

36. Despite being aware that it has no internal understanding of the gaps in children's mental health services, INAC has yet to take steps to internally identify the gaps in children's mental health services for First Nations children in Ontario.

37. INAC has no plan and no deadline for addressing these information gaps. When pressed about when INAC was likely to reach an internal understanding of the gaps in children's mental health services, INAC' s affiant said INAC was "making an effort" but that "it's going to take time". When pressed as to how much time, INAC's affiant resisted providing any timeframe at all for when the work of merely identifying the gaps in children's mental health services would be complete.

38. INAC's affiant stated that the work of determining what mental health services may be needed is, in her view, a "medium to long term" question. When asked when INAC was going to start coordinating with Health Canada or Ontario on children's mental health issues, INAC's affiant was not able to point to a specific timeframe for when that work would be started or completed, saying only "we need to have those conversations. I can't speak to how long it will take to have those conversations, but we need to undertake that engagement which we are doing".[30]

39. In cross-examination, INAC's affiant was evasive when asked if there was anyone within INAC tasked with the project of developing an internal understanding of the gaps in service provision for children's mental health services.[31]

40. INAC's affiant further resisted the suggestion in cross-examination that it may be useful to task a particular individual with responsibility for identifying gaps in children's mental health services and to set a deadline for that work. INAC's affiant only said that INAC could look at assigning the work to a specific person in the department with a deadline as a "possibility".[32]

41. Health Canada's affiant agreed that the new approach to Jordan's Principle may be a way to meet some First Nation's children mental health needs. However, despite this, Canada has not taken steps to publicize the new approach to Jordan's Principle and the

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[28] Cross Examination of Robin Buckland, February 6, 2017 at page 214, Line 23 – page 215, line 10.
[29] Cross Examination of Cassandra Lang, February 7, 2017 at page 52, line 6 – page 53, line 7; page 57, lines 3-9.
[30] Cross Examination of Cassandra Lang, February 7, 2017 at page 53, line 8 – page 55, line 4; page 60, line 23 – page 64, line 6.
[31] Cross Examination of Cassandra Lang February 7, 2017 at page 62, line 12 – page 64, line 6.
[32] Cross examination of Cassandra Lang February 7, 2017 at page 64, line 8 – page 65, line 20.

availability of Jordan's Principle funding to meet children's mental health needs to First Nations, Political-Territorial Organizations or First Nations agencies or service providers. The First Nations Child and Family Caring Society has in great detail in its submissions reviewed Canada's internal and external communications relating to the application of Jordan's Principle since January 2016, and COO relies on those submissions.

42. In response to questions for further information at the cross examinations, Health Canada advised that only 10 children nationally have received Jordan's Principle funding for mental health or addiction services.[33]

## Canada has not seriously sought to reform the 1965 Agreement

43. Canada has not held any serious discussions with Ontario toward the reform of the 1965 Agreement.

44. Canada's evidence on this motion overwhelmingly points to the fact that Canada has not undertaken an internal analysis of the gaps in services created by the 1965 Agreement, in advance of, or concurrent with, longer term reform discussions with First Nations partners and Ontario.

45. INAC's affiant stated that she was not an expert in the 1965 Agreement.[34] She confirmed that Canada has not completed an analysis of the gaps that exist under the 1965 Agreement and provided vague information that work was being done as a group with no individual assigned to do such work. However, she was unable to provide specifics of that work and admitted there was no internal deadline for completing any internal analysis of service gaps created by the 1965 Agreement.[35]

46. Similarly, it does not appear that INAC has specifically tasked someone with or set a deadline for producing an analysis of gaps in service provision under the 1965 Agreement that may arise as a result of proposed amendments to the Ontario *Child and Family Services Act*.[36]

47. INAC's recently appointed regional manager for Ontario – the person INAC's affiant cited as the person responsible for looking at the proposed legislative reforms to Ontario's *Child and Family Services Act* – does not have experience in the 1965 Agreement nor in child and family services. [37]

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[33] Information provided pursuant to the Cross Examination of Robin Buckland February 7 2017 at Page 256 Lines 9-11, provided in an email from M. Chan to all parties dated February 24, 2017 and provided in a common brief prepared by FNCFCS.

[34] Cross Examination of Cassandra Lang, February 7, 2017 at page 8, lines 3-7; page 9, lines 33 - 11.

[35] Cross Examination of Cassandra Lang, February 7, 2017 at page 78, line 8 – page 79, line 20; page 61 Line 21 – page 64, line 6; page 80, lines 3-24.

[36] Cross Examination of Cassandra Lang, February 7, 2017 at page 80, lines 3-24.

[37] Cross Examination of Cassandra Lang, February 7, 2017 at page 81, lines 2-24.

48. By the time of cross examinations on affidavits in this motion, INAC had had one meeting of the "Tripartite Working Group" between Canada, Ontario and Chiefs of Ontario, and had developed preliminary terms of reference for the working group. The subjects of Band Representative and mental health funding and reform of the 1965 Agreement were identified for "future discussion" at that meeting.[38]

49. INAC's affiant identified only three meetings between Canada and Ontario in which the subject of the 1965 Agreement was even raised. There is no evidence from INAC to suggest that those meetings resulted in any substantive discussions about reform to the 1965 Agreement or a plan to reform the 1965 Agreement, nor was there any apparent work product resulting from those meetings.[39]

## Canada has not agreed to an Ontario Special Study to examine the service gaps in Ontario that arise under the 1965 Agreement.

50. Despite all of the knowledge gaps within INAC and Health Canada, Canada has not yet committed to funding an Ontario "Special Study" to determine what service gaps are created by the 1965 Agreement, and how to address those gaps.[40]

## WHAT REMEDIES SHOULD THE TRIBUNAL ORDER?

## The Tribunal should find that Canada continues to discriminate against First Nations children in Ontario

### FINDINGS OF THE TRIBUNAL

51. On January 26, 2016, the Canadian Human Rights Tribunal (the "Tribunal") found at 2016 CHRT 2 that Canada is discriminating against First Nations children across Canada and in Ontario. [41]

52. The Tribunal made numerous findings in the January 2016 Decision with respect to provision of child welfare services in Ontario which are germane to this motion

    (a) With respect to the **1965 Indian Welfare Agreement** ("the 1965 Agreement")

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[38] Affidavit of Cassandra Lang sworn January 15, 2017 at para 23.
[39] Affidavit of Cassandra Lang ("October Compliance Report") sworn January 25, 2016, Exhibit 2 at page 15.
[40] Affidavit of Deputy Grand Chief Stonefish sworn December 16, 2016 at para 21.
[41] *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) ("January 2016 Decision").

> *"The sections of the [1965] [A]greement dealing with child and family services have not been updated since 1981, and the Schedules to the agreement have not been updated since 1998. This is significant given in 1984 Ontario implemented the Child and Family Services Act, which incorporated elements from other pieces of legislation (for example, youth justice and mental health) to address the child and family services needs of Ontarians. At that time, the Government of Canada took the position that AANDC did not have the mandate or resources to start funding justice and health programs, as those types of programs would fall under a different department".* [42]

[…]

> *The Panel finds the situation in Ontario* ***falls short of the objective of the*** **1965Agreement*****"…to make available to the Indians in the Province the full range of provincial welfare programs***[43]*.*

[…]

> *While seemingly an improvement on Directive 20-1 and more advantageous than the EPFA, the application of the* 1965 Agreement *in Ontario also results* ***in denials of services and adverse effects*** *for First Nations children and families. For instance, given the agreement has not been updated for quite some time, it does not account for changes made over the years to provincial legislation for such things as mental health and other prevention services. This is further compounded by* ***a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need****, despite those types of programs being synchronized under Ontario's* Child and Family Services Act. ***The lack of surrounding services to support the delivery of child and family services on-reserve, especially in remote and isolated communities, exacerbates the gap further.***[44]
>
> *AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively,* ***the main adverse impacts found by the Panel are****:*

[42] January 2016 Decision at para 223.
[43] January 2016 Decision at para 246.
[44] January 2016 Decision at para 392.

[…]

- ***The application of the 1965 Agreement in Ontario that has not been updated to ensure on-reserve communities can comply fully with Ontario's Child and Family Services Act***.[45]

[Emphasis added]

(b) With **Respect to Children's Mental Health Services**

*[Health Canada] programs focus more on prevention and* ***mostly deal with adult issues. Health Canada programs do not specifically deal with children in care and do not cover mental health counseling*** .[46]

(c) With Respect to **Band Representative Services**

***The discordance between the objectives and the actual implementation of the program is also exemplified by the lack of funding in Ontario, for Band Representatives under the 1965*** **Agreement**. *Not only does the Band Representative address the need for culturally relevant services, but it also addresses the goal of keeping families and communities together and is directly provided for in Ontario's* Child and Family Services Act.[47]

[…]

***There is also discordance between Ontario's legislation and standards for providing culturally appropriate services to First Nations children and families through the appointment of a Band Representative and AANDC's lack of funding thereof***. *Tellingly, AANDC's position is that it is not required to cost-share services that are not included in the 1965* Agreement.[48]

[Emphasis Added]

## ORDERS MADE BY THE TRIBUNAL THUS FAR

53. In the January 2016 Decision, the Tribunal made the following order:

[45] January 2016 Decision at para 458.
[46] January 2016 Decision at para 241.
[47] January 2016 Decision at para 348.
[48] January 2016 Decision at para 392.

> *AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and* 1965 Agreement *to reflect the findings in this decision.*[49]

54. In its order dated September 14, 2016, the Tribunal again summarized its findings with respect to the ways in which the First Nations Child and Family Services Program, as administered in Ontario through the 1965 Agreement, discriminates against First Nations children:

> *With respect to the 1965 Agreement in Ontario, the Decision found that, while it was seemingly an improvement on Directive 20-1 and more advantageous than the EPFA**, the application of the 1965 Agreement in Ontario also results in denials of services and adverse effects for First Nations children and families**. The Agreement has not been updated for quite some time and **does not account for changes made over the years to the Ontario's Child and Family Services Act for such things as mental health and other prevention services**. This is further compounded by a lack of coordination amongst federal programs in dealing with health and social services that affect children and families in need, despite those types of programs being synchronized under the Ontario's Child and Family Services Act*.[50] [Emphasis added]

55. The Tribunal asked for more information from Canada in its September 2016 Decision, including information about how Canada's 2016-2017 budget investments addressed the findings in the January 2016 Decision in the short term while the 1965 Agreement is being reformed, in particular with respect to Band Representative services and children's mental health services.[51]

56. It is clear from the reporting and the evidence on this motion that Band Representative services are not being funded.[52]

57. With respect to children's mental health services in Ontario, it is clear that there has been either no increase or no significant increase in service to address the gaps created by the 1965 Agreement. Canada has not even undertaken any internal analysis to determine what those gaps are.[53]

58. Where Jordan's Principle may meet unmet mental health needs, Canada has not alleviated those needs through the use of the Jordan's Principle fund (with the exception of 10 children nationally), nor has it internally or externally communicated

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[49] January 2016 Decision at para 481.
[50] 2016 CHRT 16 ("September 2016 Decision") at para 67.
[51] September 2016 Decision at paras 73 and 74.
[52] See paras 21-26, *supra*.
[53] See paras 27-42, *supra.*

that Jordan's Principle is able to meet unmet children's mental health needs in Ontario. Indeed, the evidence suggests that where a need has been identified, as in the case of Wapakeka First Nation, Jordan's Principle did not meet that need.[54]

59. Therefore, the discrimination first identified in the January 2016 decision with respect to the failure to provide Band Representative services and the failure to provide children's mental health services is ongoing and COO is asking the Tribunal to find that the discrimination continues as of the date of its Order.

## The Tribunal should order clear and concrete remedies that respond to the discrimination identified

60. For the reasons that follow, Chiefs of Ontario is requesting that the Tribunal order remedies that are both **specific** and have **deadlines** attached to them.

61. It is well-established that the Tribunal's remedial powers are to be interpreted broadly and liberally, with a view to achieving the purposes of the CHRA.[55] As the Supreme Court has explained on a number of occasions, the key purpose of the CHRA is to eradicate and prevent discrimination.[56]

62. To realize this purpose, the Tribunal's remedial orders must be meaningful and effective.[57] A meaningful remedial order is "relevant to the experience of the claimant" and "address[es] the circumstances in which the right was infringed or denied."[58]. An effective remedial order should minimize delay and difficulty;[59] it should yield *concrete action* that verifiably ameliorates the discrimination identified. Crafting a remedy that is both meaningful and effective may require "flexibility and imagination" on the part of the Tribunal.[60]

63. In crafting remedies, the Tribunal must also be cognizant of its institutional role as a quasi-judicial body.[61] However, as the Supreme Court explained in *Doucet-Boudreau,*

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[54] See paras 41-42, *supra*; Cross Examination of Robin Buckland, February 6, 2017 at page 227 line 24 – page 228, line 8.

[55] *CHRA,* s 2; *CN Railway v Canada (Canadian Human Rights Commission),* [1987] 1 SCR 1114, 1987 CanLII 109 (SCC) at 1134, 1136*; Ontario Human Rights Commission v Simpsons-Sears Ltd.,* [1985] 2 S.C.R. 536 at para 12.

[56] *CN Railway v Canada (Canadian Human Rights Commission)*, *supra* note 55 at p. 1134; *Robichaud v Canada (Treasury Board),* [1987] 2 SCR 84 at 89-90.

[57] *Doucet-Boudreau v Nova Scotia (Minister of Education),* [2003] 3 SCR 3, 2003 SCC 62 at para 25; *Ball v Ontario*, 2010 HRTO 360 at paras 164-170.

[58] *Doucet Boudreau*, supra note 57 at para 55; *Moore v British Columbia (Minister of Education),* 2012 SCC 61; *Hughes v Elections Canada,* 2010 CHRT 4 at paras 50-51.

[59] *Doucet Boudreau*, *supra* note 57 at para 55.

[60] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal,* 2004 SCC 30 (CanLII), [2004] 1 SCR 789, at para 26; see also *Doucet -Boudreau*, *supra* note 57 at paras 24-25 and 94; *Grover v Canada (National Research Council)* (1994), 24 CHRR D/390 (FC) at para 40.

[61] *Hughes, supra* note 58 at para 69.

the boundaries of that role will vary according to the right at issue and the context of each case.[62]

64. In this case, there are several reasons for the Tribunal to adopt a robust remedial approach and order clear, defined and specific remedial orders.

65. First, every day that INAC fails to act to address the discrimination the January 2016 Decision, more "First Nations children are denied an equitable opportunity to remain with their families".[63] This represents a profound, and in many cases, irreparable cultural and personal loss for children and communities.[64] All fundamental human rights must be given "full recognition and effect" through meaningful and effective remedies.[65] However, in contexts where effect of non-compliance is irreparable cultural loss, there is a strong case for clear, directive remedial measures that will ensure effective and timely action.[66]

66. Second, regardless of whether INAC in good faith intends to address the discrimination the Tribunal identified, its record to date reveals a pattern of delay and inaction. The Tribunal's decision on the merits found that INAC was already aware of the shortfalls in its funding formula prior to the Tribunal's ruling, and that INAC failed to respond to numerous reports and studies recommending that it alter its approach.[67] In the year since the decision, little has changed with respect to funding for Band Representatives and children's mental health, and little progress has been made to come to a plan about how to address the discrimination more broadly.

67. Where the respondent has failed to act to address discrimination in a timely way, human rights tribunals have tended to make more specific and robust remedial orders. In *Hughes v Elections Canada,* for example, the Tribunal held that Elections Canada had discriminated against Mr. Hughes on the basis of disability by failing to provide him with an accessible polling station. When crafting a remedy, the Tribunal concluded a stronger and more directive future practices order was required because Elections Canada, having had notice of Mr. Hughes' complaint, had failed to improve the accessibility of the polling location in time for the next election 11 months later.[68]

68. Third, the Tribunal's more deferential and general orders have not been effective in prompting INAC to take concrete action to this point. As a result, the Tribunal must take more robust action in order to ensure its orders have their intended effect. This was the

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[62] *Doucet-Boudreau, supra* note 57 at para 36.
[63] January 2016 Decision at para 385.
[64] *Ibid* at paras 422, 426
[65] *Ibid* at para 469.
[66] See, for instance, *Doucet-Boudreau, supra* note 57 at paras 38-40, where the context of irreparable cultural harm and assimilation associated with denial of the right to minority language schooling contributed to the Trial Judge's decision to rely on a structural injunction to monitor progress on his remedial orders.
[67] January 2016 Decision at paras 187, 197, 292-301, 461.
[68] *Hughes, supra* note 58 at 70.

Ontario Human Right's Tribunal's approach In *McKinnon v Ontario (Corrections Services).* In that case, the Tribunal concluded that Mr. McKinnon had been subject to racist harassment in his workplace, contrary to the *Ontario Human Code.* Among other things, it ordered the Ministry establish a human rights training program approved by the Commission within 6 months.[69] The Tribunal retained jurisdiction to supervise the implementation of its orders. [70]

69. In a subsequent decision in *McKinnon*, the Tribunal noted that its prior orders had not prompted the Ministry to bring its policies and practices into compliance with the Code. It concluded more direct and comprehensive orders were called for:

> *Having found that the orders have not been complied with, that the atmosphere of the Centre remains poisoned, that the complainant has suffered post-decision harms similar to those identified in the 1998 decision, I am obviously called upon to do something about it. In my opinion, since the Ministry failed to implement the original order, the authority I have under s.41(1)(a) of the Code to direct it to do anything that, in my opinion, it ought to do 'to achieve compliance with this Act in respect of the complaint and in respect of future practices' remains operative; and it is incumbent upon me to exercise it. In doing so I must address the root causes of the 'problem at Metro East,' the most critical of which continues to be 'the indifference, ineptitude and bad faith of management at all levels' in dealing with race-based complaints and [Workplace Discrimination and Harassment Protection] matters generally, and I must do so far more carefully, directly, and comprehensively than was done in the 1998 orders. [emphasis added].*[71]

70. The time has come in this case, too, for a more direct remedial approach. This is not a question of punishing the respondent, but rather of ensuring that the ongoing discrimination is addressed without further delay.

71. In making these orders, COO asks that the Tribunal set clear and firm deadlines for action.

72. It has been over 13 months since the Tribunal found that Canada was discriminating against First Nations children and families in the provision of funding for child welfare services. In that period, Canada has taken few steps towards addressing two key areas of discrimination that the Tribunal identified as being the most pressing in Ontario: Band Representatives, mental health services . As the Tribunal identified in 2016 CHRT 10,

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[69] *McKinnon and Ontario Human Rights Commission v Ontario (Ministry of Correctional Services), Frank Geswaldo, George Simpson, P. James and Jim Hume*, [1998] OHRBID No 10, 32 CHHR D/1 at para 335.
[70] *Ibid* at para 336.
[71] *McKinnon v Ontario (Ministry of Correctional Services)*, [2002] OHRBID No 22 at para 238; affirmed on appeal in *Ontario v McKinnon*, 2004 CanLii 47147 (ONCA).

> *Some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the Decision. Instead of being immediate relief, some of these items may now become mid-term relief.*[72]

73. Tribunals across Canada, including the CHRC, regularly impose deadlines for compliance with their orders, whether the order has been made against a private party[73] or a government actor.[74] Clear, precise deadlines increase the effectiveness of a remedy by clarifying for all parties first, the speed at which the Respondent is expected to act and second, precisely when the Respondent has failed to comply with the order imposed on them. This allows complainants and interested parties to seek further assistance from the Tribunal in a timely fashion. Imposing clear deadlines for compliance on the orders made on this motion will help reduce the risk that Canada will continue to rely on "conversations" to the exclusion of concrete action.

74. In recognition of the urgency of remedying discrimination already identified under human rights legislation, timelines imposed for compliance with systemic orders are typically short. For example:

(a) In *Hughes v Canada (Elections Canada),* the Tribunal gave Elections Canada six months to rework its accessibility policies; revise its standard leases for polling stations; and implement a procedure for verifying the accessibility of each polling station;[75]

(b) In *Ball v Ontario*, the Ontario Human Rights Tribunal gave the officials responsible for administering Ontario Works and the Ontario Disability Support program three months to provide the special diet allowance to individuals with hypoproteinemia, hypercholesterolemia, hypertension, and obesity in accordance with the Code principles set out in their Decision;[76] and,

(c) In *Moore v. Canada (Treasury Boar*d), which found the exclusion of same-sex partners from spousal benefits to be contrary to the Canadian Human rights Act, the Tribunal gave Canada 60 days to complete an inventory of all legislation, regulations, and directives which discriminate against same-sex common-law couples and to offer a proposal for the elimination of all such discriminatory provisions.[77]

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[72] *First Nations Child and Family Caring Society of Canada et al. v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 10 (CanLII) ("April 2016 Decision") at para 21.
[73] *Turnbull v Famous Players Inc,* (2001) 40 CHHR D/33 at 87.
[74] *Hughes, supra* note 58 at para 100.
[75] *Ibid* at para 100.
[76] *Ball, supra* note 58 at para 180.
[77] *Moore v Canada (Treasury Board)*, 1996 CanLii 533 (CHRT) at 38.

75. Where there is evidence that a Respondent has been dragging its heels on implementation, or is failing to take its human rights obligations seriously, the Tribunal is justified in imposing a short timeline for compliance. [78]

## The Tribunal should order Canada to provide funding for the Band Representative program and Mental Health Services

76. This motion deals with immediate relief. For Ontario First Nations affected by INAC's discriminatory approach to funding under the 1965 Agreement, there are two clear and discrete sources of discrimination that can be addressed immediately: the total lack of funding for the band representative program and significant gaps in funding for children's mental health services. COO asks that the Tribunal direct INAC to provide funding for these programs.

77. It is not unusual in Canadian human rights jurisprudence for a tribunal to order a government actor or a private party to provide a service, and to adequately fund that service, where this is required to provide a meaningful and effective remedy to discrimination. For example, in *Ball v. Ontario (Community and Social Services),* the Ontario Human Rights Tribunal found that the Ontario Works and Ontario Disability Support Program discriminated on the basis of disability because they failed to provide special diet benefits to individuals with four specific disabilities - hypoproteinemia, hyperlipidemia, hypertension, and obesity. Although the Tribunal acknowledged the remedy touched on "government policy and the design of a complex social welfare scheme", the Tribunal nonetheless directed the government to provide special diet benefits to people with those conditions.[79] To operationalize this, the Tribunal ordered the respondent to retain an expert to develop a special diet program *that* would meet the requirements of the Code, as described in its decision, within 12 months.[80] It also insisted that these programs be reasonably funded.[81]

78. Similarly, in *Kavanagh v Canada,* the Canadian Human Rights Tribunal concluded that Corrections Canada's policy not to fund sex reassignment surgery for inmates in federal prisons discriminated on the basis of sex. It specified that decisions about whether sex reassignment surgery should be funded for a particular inmate should be made by a qualified physician from a recognized gender identity disorder clinic with knowledge of the case. Although this was not how medical assessments and referrals were ordinarily made in federal penitentiaries, the Tribunal concluded that this special process was required to realize substantive equality. It ordered Corrections Canada to formulate a new policy consistent with this approach within 6 months.[82]

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[78] *Lepofsky v Toronto Transit Commission*, 2007 HRTO 23 at para 14; 2007 HRTO 41 at paras 2-5, 12.
[79] *Ball v Ontario, supra* note 57 at paras 163, 172.
[80] *Ibid* at para 162.
[81] *Ibid* at paras 102-108.
[82] *Kavanagh v Canada (Attorney General),* 2001 CanLII 8496 (CHRT) at paras 185-186, 200.

79. On judicial review, Corrections Canada challenged this remedy, arguing the Tribunal erred in leaving the question of whether surgery should be funded to the inmate's doctor, rather than the government. The Federal Court dismissed the challenge, noting:

> *I do not take issue with the conclusion that the role of the court is limited when reviewing policy-based determinations by officials who are accountable for public funds. However, the right of government to allocate resources as it sees fit is not unlimited. It must be exercised according to law. The government's right to allocate resources cannot override a statute such as the Canadian Human Rights Act….* [83]

## REMEDY FOR BAND REPRESENTATIVE SERVICES

80. A similar approach is warranted in this case. The Tribunal has already found that the lack of funding for Band Representatives is one of the main adverse impacts of Canada's discrimination, and a way that Canada fails to provide culturally appropriate services to First Nations children and families in Ontario.[84]

81. The Tribunal's conclusions were echoed and affirmed by the Ontario Superior Court in *Catholic Children's Aid Society of Hamilton v. G.H., T.V. and Eastern Woodlands Métis of Nova Scotia*,[85] a case dealing with the exclusion of Metis children from the "very significant protections" set out in the *Child and Family Services Act*. The Court concluded that the denial of services under the Act, and particularly band representative services, constituted discrimination contrary to the *Canadian Charter of Rights and Freedoms*.[86] The Court said:

> *Furthermore, the advantage of having an Indian band or native community representative involved at all stages of child welfare intervention and the requirement of consultation with these representatives is enormous. These representatives play a vital role in ensuring that child welfare staff and the courts have a full appreciation of the child's cultural heritage, traditions and needs before making decisions about the child. They work to ensure that the child receives culturally appropriate services and placements. Furthermore, they often support the plan advanced by a parent and assist that parent in advancing the plan by highlighting how it will foster the child's ties to their Aboriginal community (citation omitted).*[87]

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[83] *Canada (Attorney General) v Canada (Human Rights Commission),* 2003 FCT 89 (CanLII) at paras 52-53; see also, *Kelso v The Queen*, [1981] 1 SCR 199, 1981 CanLII 171 at 207.
[84] January Decision at paras 392, 425-426.
[85] *Catholic Children's Aid Society of Hamilton v G.H., T.V. and Eastern Woodlands Métis of Nova Scotia,* 2016 ONSC 6287.
[86] *Ibid* at paras 80, 89.
[87] *Ibid* at para 89.

82. The role of a Band Representative is clear and the program is already defined. The *Child and Family Services Act* sets out the role of Band Representatives in the provincial child protection scheme.[88] Canada is familiar with this role from its prior funding of the Band Representative program. Many communities already have a band representative that they pay with their own source revenue. There is no real question about what a band representative does, or how they do it. All that INAC has to do is create a budget line that communities wishing to provide this service can access. COO accordingly submits that INAC should be ordered to make reasonable funding available for Band Representative programs in Ontario, at actuals, until such time as any studies are completed or until the Tribunal makes a further order on the subject matter.

83. Therefore Chiefs of Ontario requests the following order:
    (a) An order that Canada shall fund Band Representative services for Ontario First Nations, at the actual cost of providing those services, until further order of the Tribunal, within 30 days of the Tribunal's order.

## REMEDY FOR CHILDREN'S MENTAL HEALTH SERVICES

84. COO makes a similar request in relation to funding for children's mental health services. The Tribunal has identified the gap in mental health services available to First Nations children as a discriminatory effect of the 1965 Agreement.[89] Canada is aware, generally, that such gaps exist.[90]

85. In its second order on compliance in September, the Tribunal directed INAC to demonstrate how its investments address "the findings in the *Decision* [in Relation to the 1965 Agreement] in the short term, especially in terms of mental health services and Band Representatives."[91]

86. Canada though its evidence and witnesses on this motion attempted to create an impression that it could not possibly know how to fund children's mental health services without having unending "conversations" with First Nations and provincial partners and Health Canada.

87. Chiefs of Ontario submits that it is easy to established which mental health services are provided to Ontario children under the *Child and Family Services Act*, and how they are provided . All Canada must do is speak to Ontario, which currently funds such services for children and youth off-reserve as part of its child welfare programming. The arrangements under the 1965 Agreement are a simple way to allow agencies to provide such services to First Nations children and youth until longer-term reform occurs. For

[88] *Child and Family Services Act*, RSO 1990 c c-11, ss 35, 36, 54(3), 58 ; 61; 64; 69; 116; 141.2; 144.
[89] January 2016 Decision at paras 223, 241.
[90] See para 54, *supra*; Cross Examination of Robin Buckland February 7 2017, at page 241, lines 7-13.
[91] September 2016 Decision at para 73.

instance, the agencies can provide such services to First Nations children on reserve on the same basis as is done in the rest of Ontario, and Canada can fund those services.

88. In addition, as Canada's affiant admitted, "group proposals" for mental health services emanating from First Nations are another way that Canada may fund mental health treatment.[92] This is another way in which Canada may meet those needs until program reform has taken place, but it is ill-publicized and the evidence as set out by the Caring Society suggests that Canada has not been applying Jordan's Principle in this manner.

89. The problem is not one of knowledge or policy design. It is one of commitment. There is no dedicated funding envelope for such services in Ontario, there is no evidence that Canada has intended to use Jordan's Principle funding to systematically increase mental health services in Ontario, and there is no evidence that Canada has advertised the Jordan's Principle funding as a way that mental health needs may be met.[93]

90. Chiefs of Ontario recognizes that it may not be a perfect solution to provide services on the same basis and through the same delivery mechanisms to children and youth not resident on reserves in Ontario. It is likely that community-based solutions as well as agency-based solutions will be required and will ideally meet the needs of First Nations youth in Ontario. However, those decisions are the intended product of medium and long-term consultation and reform. In the meantime, immediate action is required to increase the levels of service to alleviate discrimination in the immediate term.

91. Chiefs of Ontario does not ask the Tribunal to design the program by which children's mental health services are funded. It is simply asks the Tribunal to order Canada to present, in short order, a mechanism to deliver such these services in a way that ameliorates the discriminatory gap in children's mental health services available to First Nations children and youth in care.

92. Accordingly, Chiefs of Ontario asks the Tribunal to order the following:
    (a) An order that, within 30 days, Canada shall reasonably fund mental health services to First Nations children and youth in Ontario.
    (b) Canada shall, within 7 days of the Tribunal's order, send internal and external communications to all Ontario First Nations, the First Nations Child and Family Services agencies, the Political-Territorial Organizations and to COO, notification that Jordan's Principle funding is available to fill the unmet mental health care needs of First Nations children, and publish such communication on its website where the Jordan's Principle information is found.

## The Tribunal should order Canada to undertake a "Special Study"

93. This motion is for immediate relief. However, it is clear that addressing the full scope of the discrimination against First Nations children in Ontario will require more substantial

[92] See, for example, Cross Examination of Robin Buckland February 6 2017, at page 72, lines 6-21.
[93] See para 41, *supra*.

reform over the medium to long term. In its compliance reports to date and on cross-examination, Canada has identified that it is aware that there are information gaps, and cited those gaps as a barrier to addressing the discrimination that arises out of its approach to service provision. In the past 13 months, it has made little progress on addressing those gaps, or even identifying the gaps.[94]

94. The Tribunal may order studies where it is necessary to achieve compliance with its orders. In *Lepofsky v Toronto Transit Commission,* for example, the Ontario Human Rights Tribunal concluded that the Toronto Transit Commission was discriminating against visually impaired riders by failing to call out subway stops, and imposed a comprehensive set of systemic remedies. [95] The Tribunal directed the Toronto Transit Commission to conduct regular surveys of how regularly and consistently subway stop announcements were made, and to report on the findings of those studies to the Tribunal by letter each month. [96]These studies, which monitored compliance with prior awards and identified continuing discriminatory gaps, helped the Tribunal to determine whether and when further orders that would be required.

95. To ensure that medium and longer term relief measures will be designed and implemented before another generation of First Nations children have grown up in a discriminatory system, COO requests that the Tribunal shall order Canada ordered to conduct an Ontario Special Study, to be conducted by independent expert(s) accepted by COO and NAN and fully funded by Canada. The Ontario Special Study should be completed within one year and should:
    (a) identify the gaps in services to First Nations children in the child welfare system arising out of the application of the 1965 Agreement;
    (b) identify the gaps in services that will exist under the amendments to the *Child and Family Services Act* promulgated by Ontario;
    (c) identify appropriate program reform options and/or funding formulae or new structures to address those gaps, accounting for remoteness in all of the above, and
    (d) address any other matters agreed to by Chiefs of Ontario, NAN**,** Canada, and Ontario (if Ontario chooses to participate).

## The Tribunal should remain seized

96. Chiefs of Ontario is asking the Tribunal to remain seized with respect to any orders it makes arising out of this motion or out of the evidence it has heard on this and the other Complainant and Interested Party motions.

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[94] See paras 21-42, *supra.*
[95] *Lepofsky v Toronto Transit Commission*, 2005 HRTO 20; *Lepofsky v Toronto Transit Commissioner,* 2005 HRTO 36.
[96] *Lepofsky v Toronto Transit Commission*, 2005 HRTO 20 at para 5.

97. Given the ongoing delays in implementation of the Tribunal's orders to date, and the harms associated with ongoing delays, COO submits that INAC should be required, through the submission of sworn evidence that may be subject to cross-examination by the parties, to prove it has implemented the Tribunal's orders within 60 days.

## ORDERS REQUESTED

98. Chiefs of Ontario requests the following orders:

(i) A finding that in its failure to provide Band Representative services and to increase children's mental health services in Ontario since the January 2016 decision, the Respondent continues to discriminate against First Nations children in Ontario.

(ii) An order that Canada shall fund Band Representative services for Ontario First Nations, at the actual cost of providing those services, until further order of the Tribunal, within 30 days of the Tribunal's order.

(iii) An order that, within 30 days, Canada shall fund mental health services to First Nations children and youth in Ontario.

(iv) Canada shall, within 7 days of the Tribunal's order, send internal and external communications to all Ontario First Nations, the First Nations Child and Family Services agencies, the Political-Territorial Organizations and to COO, notification that Jordan's Principle funding is available to fill the unmet mental health care needs of First Nations children, and publish such communication on its website where the Jordan's Principle information is found.

(v) An order that Canada shall fund an independent expert agreed to by Chiefs of Ontario and NAN to conduct an "Ontario Special Study" who will produce a report within one year of the Tribunal's order which identifies:

  (A) identify the gaps in services to First Nations children in the child welfare system arising out of the application of the 1965 Agreement;

  (B) identify the gaps in services that will exist under the amendments to the *Child and Family Services Act* promulgated by Ontario;

  (C) identify appropriate program reform options and/or funding formulae or new structures to address those gaps, accounting for remoteness in all of the above, and

  (D) address any other matters agreed to by Chiefs of Ontario, NAN**,** Canada, and Ontario (if Ontario chooses to participate).

(vi) An order that Canada fund Chiefs of Ontario to participate in the development and conduct of the Ontario Special Study.

(vii) An order that, within 45 days, INAC must submit sworn evidence that may be subject to cross-examination by the parties, to prove it has implemented the Tribunal's orders.

(viii) An Order that the Tribunal remain seized in the implementation of this Order.

(ix) Any such further orders that counsel may advise or that this Tribunal may deem fit.

99. Chiefs of Ontario asks that any orders that the Tribunal makes in respect of this motion take into account and address remoteness and isolation factors, as highlighted by Nishnawbe Aski Nation in its submissions. Chiefs of Ontario adopts NAN's submissions in respect of how remoteness factors in Ontario should be addressed in the immediate relief stage.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28TH DAY OF FEBRUARY, 2017

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