Tribunal File No.: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

First Nations Child and Family Caring Society and Assembly of First Nations

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada

Respondent

- and -

Chiefs of Ontario, Amnesty International Canada and Nishnawbe Aski Nation

Interested Parties

Written Submissions of the Canadian Human Rights Commission

(regarding the motions to be heard April 23-26, 2019, regarding major capital funding, downward adjustments for small agencies, and financial compensation)

I. Overview

1. These are the written submissions of the Canadian Human Rights Commission (the "Commission") with respect to the following three matters, which we understand are to be discussed at the hearing dates set for April 23 to 26, 2019:

a) Has Canada responded appropriately to the Tribunal's past rulings regarding major capital needs under the FNCFS Program (including the Community Well-Being and Jurisdictional Initiatives (CWJI) stream), and with respect to services provided pursuant to Jordan's Principle?

b) Has Canada responded appropriately to the Tribunal's past rulings regarding downward adjustments to funding approaches for small agencies?

c) Should the Tribunal grant the financial remedies that the First Nations Child and Family Caring Society (the "Caring Society") and/or the Assembly of First Nations (the "AFN") are seeking, in respect of the discriminatory practices found by the Tribunal?

2. The first two issues (major capital, and downward adjustments for small agencies) are about the implementation of the Tribunal's previous rulings. The third issue (financial compensation) relates to remedial requests from the Caring Society and the AFN that still need to be decided as a matter of first instance. The Commission starts below by making some preliminary comments that may cut across multiple issues, then provides a few comments specific to each of the three issues, in turn.

I. Preliminary Comments

(A) Nature, Scope and Purpose of Retained Jurisdiction

3. The Commission understands the Caring Society has concerns that Canada's policy approaches to major capital, and redress of past downward adjustments for small agencies, do not properly address the discriminatory practices found by the Tribunal. As a result, it seeks further orders, pursuant to the Tribunal's retained jurisdiction to oversee the implementation of past rulings.

4. Those past rulings have set out the nature, scope and purpose of the Tribunal's retained jurisdiction. The Commission sought to summarize those principles in the written submissions that it recently filed in the motion on eligibility under Jordan's Principle, and continues to rely on that summary in the current context.[1] For ease of reference, those submissions stated the following with respect to these matters:

> 7. As the Tribunal emphasized in earlier implementation rulings, its task under the *CHRA* is to ensure that quasi-constitutional rights are given full recognition and effect, through the construction of effective and meaningful remedies. This can be an intricate task that demands innovation and flexibility.[2] Where remedying discriminatory practices will involve complex program reform, it may be best for the Tribunal to give guidance and leave it to parties to work on the details, particularly where there is a need for data

[1] See: Written Submissions of the Commission dated March 20, 2019, on the motion re eligibility under Jordan's Principle, at paras. 7-11.
[2] 2016 CHRT 10 at paras. 11-18; 2017 CHRT 14 at paras. 27-34; 2018 CHRT 4 at paras. 51-52.

collection to inform implementation. This will necessarily entail some back and forth between the parties and the Tribunal.[3]

8. The Tribunal has repeatedly encouraged the parties to collaborate and work together outside the litigation process, with a view to resolving as many aspects of immediate, medium and long-term reform as possible.[4] In that regard, it has on occasion issued consent orders, adopting and endorsing remedial measures that have been agreed among the parties.[5] However, the Tribunal has also said that it will make further orders if need be, to ensure that the discriminatory practices identified in the Decision are eliminated.[6]

9. In considering whether further orders are appropriate, the Tribunal is to act on a principled and reasoned basis, considering the particular circumstances of the case and the evidence and information presented.[7] Among other things, it can examine the actions Canada has taken to date to implement the remedies already granted, and make findings about whether those actions have or have not fully addressed the discriminatory practices at issue.[8]

10. If the Tribunal examines the information provided, and concludes that Canada has implemented policies that satisfactorily address the discrimination found in the Decision, no further orders will be required.[9]

11. However, if the Tribunal is not satisfied that Canada is remedying discrimination in a responsive and efficient way, without repeating patterns of the past, it may be justified in intervening.[10] In such circumstances, it would be open to the Tribunal to make such further orders as are needed to ensure the discrimination is remedied in an effective and meaningful way. For example, the Tribunal might direct Canada to amend a policy that has been shown to have a discriminatory impact. It might clarify a point or concept that has been in dispute, then leave it to the parties to continue their consultations and discussions with that clarification in mind. It would also be open to the Tribunal to refer the issues back to the parties, if needed, to prepare better evidence on what an appropriate order would be.[11]

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[3] 2019 CHRT 7 at paras. 47-50.
[4] For examples, see: 2016 CHRT 16 at para. 12; 2017 CHRT 7 (Choose Life) at paras. 7, 18, 22 and 26-27; 2017 CHRT 35 (Jordan's Principle amendments) at para. 8; 2018 CHRT 4 at paras. 68 (per the Panel) and 454 (per the Panel Chairperson).
[5] For examples, see: 2017 CHRT 7 (Choose Life); 2017 CHRT 35 (Jordan's Principle amendments); 2019 CHRT 1 (Obstruction and costs). The interim Ruling on Jordan's Principle eligibility also acknowledged the utility of consent orders: 2019 CHRT 7 at para. 47.
[6] 2016 CHRT 16 at para. 13; 2017 CHRT 14 at para. 33.
[7] 2017 CHRT 14 at para. 34.
[8] 2017 CHRT 14 at para. 31; 2018 CHRT 4 at para. 18.
[9] 2018 CHRT 4 at para. 54.
[10] 2018 CHRT 4 at paras. 50-54.
[11] 2017 CHRT 14 at para. 27.

(B) Broad Remedial Powers under the *CHRA*

5. Section 53 of the *CHRA* gives the Tribunal a broad statutory discretion to fashion appropriate remedies that aim to make victims whole, and prevent the recurrence of the same or similar discriminatory practices.[12] Determining the appropriate remedies in any given case is a question of mixed fact and law that is squarely within the Tribunal's expertise.[13] In deciding appropriate remedies, human rights decision-makers must be mindful that quasi-constitutional human rights legislation is to be construed liberally and purposively, so that protected rights are given full recognition and effect.[14]

6. In its written submissions with respect to the adequacy of capital funding, Canada argues that the Tribunal does not have the "institutional jurisdiction" to make remedial orders that require the allocation of public funds, or changes to public policy.[15] This argument should be rejected for a number of reasons, whether raised by Canada in the context of major capital, financial compensation, or otherwise.

7. First, the Tribunal has already rejected a virtually identical argument in its Ruling finding continued non-compliance with various remedies relating to the FNCFS Program.[16] Canada did not seek judicial review of that Ruling. The Commission will not repeat all the Tribunal's analysis here, but submits that Canada's argument should be dismissed again, on the same basis, and for the additional reasons set out below.

8. Second, Canada cites the Supreme Court of Canada's decision in *Ontario v. Criminal Lawyers Association of Ontario* for the proposition that, "…absent statutory authority or a challenge on constitutional grounds, courts have no institutional jurisdiction to interfere with the

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[12] *Public Service Alliance of Canada v. Canada Post Corp.*, 2010 FCA 56 at para. 301 (per Evans JA., in dissent) ("*Canada Post (Evans JA.)*") (the SCC later granted appeals, adopting the dissenting reasons of Evans JA.: *Public Service Alliance of Canada v. Canada Post Corp.*, 2011 SCC 57); *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at paras. 13-15 ("*Robichaud*").
[13] *Canada Post (Evans JA.)*, *supra* at paras. 296-297 and 301 (per Evans JA.); *Canada (Social Development) v. Canada (Human Rights Commission)*, 2011 FCA 202 at para. 17 ("*Walden FCA*"); *Collins v. Attorney General of Canada*, 2013 FCA 105 at paras. 2-5.
[14] *Jane Doe v. Attorney General of Canada*, 2018 FCA 183 at para. 23 ("*Jane Doe*"); 2016 CHRT 10 at paras. 11-12.
[15] Respondent's Submissions (re funding for capital expenditures), dated January 29, 2019, at paras. 4-8 ("Respondent's Submissions on Capital").
[16] 2018 CHRT 4, at paras. 21-48. See also: 2017 CHRT 14 at paras. 35-37.

allocation of public funds or the development of public policy" (emphasis added).[17] This proposition does not apply in the present context. Having found infringements of s. 5 of the *CHRA*, the Tribunal clearly has a broad statutory authority under s. 53 to grant meaningful and effective remedies. The current situation is thus very different from that in the *Criminal Lawyers Association* case, which involved no grant of statutory authority, and dealt instead with the boundaries of a court's inherent jurisdiction to appoint and direct the rate of payment for *amicus curiae*.

9. Third, Canada appears to suggest that the Tribunal's broad remedial authority under s. 53 of the *CHRA* is somehow constrained by the provisions of the *Financial Administration Act* (the "*FAA*").[18] This argument fails to account for the quasi-constitutional status of the *CHRA*. As the members of this Panel have recognized, the *CHRA* is presumed to have primacy over other federal legislation, subject only to an express legislative statement to the contrary.[19] As a result, any federal laws that might otherwise limit the scope of the remedial authority in s. 53 of the *CHRA* are presumed to be inoperable, to the extent of their inconsistency.[20] Because nothing in the *CHRA* or the *FAA* expressly displaces this presumption, Canada's arguments about the supposed limiting effects of the *FAA* should be given no weight.

II. Capital Funding

(A) Background

(i) Past Rulings

10. In its Decision and subsequent rulings, the Tribunal found that, among other things, Canada knowingly underfunded prevention services, ceased providing band representative services in Ontario, and failed to properly implement the full scope of Jordan's Principle. The

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[17] Respondent's Submissions on Capital Expenditures, at para. 7 (citing 2013 SCC 43).
[18] Respondent's Submissions on Capital Expenditures, at paras. 4-6.
[19] *Matson et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 13 at para. 143 ("*Matson CHRT*"); *Andrews et al. v. Indian and Northern Affairs Canada*, 2013 CHRT 21 at para. 77 ("*Andrews CHRT*"). Both upheld as reasonable in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31.
[20] For example, the Tribunal has found that the remedial provisions of the *CHRA* have primacy over limiting wording from various federal statutes, including the *Crown Liability and Proceedings Act*, the *Pension Act*, and the *Public Service Employment Act*. See: *Andrews CHRT*, *supra* at paras. 87 and 91 (citing the cases of *Franke v. Canada (Canadian Armed Forces)*, [1998] C.H.R.D. No. 3 at paras. 645-678; and *Canada (Attorney General) v. Uzoaba*, 1995 CanLII 3589 at para. 20 (Fed. Ct.)); and *Matson CHRT*, *supra* at paras. 113-114 (also citing *Uzoaba*).

Tribunal ordered Canada to cease and desist from these and other discriminatory practices, and directed it to provide funding at levels that would allow these services to be provided in a substantively equal and culturally appropriate manner that meets actual needs.

11. It is clear from a review of these previous rulings that the Tribunal's orders extend to the provision of adequate capital funding.

12. For example, in its initial Decision, the Tribunal found that the funding structure under the FNCFS Program created deficiencies for a variety of items, including capital infrastructure, that hinder the ability of agencies to provide mandated child and family services – let alone to provide them in a culturally appropriate way.[21] This finding was based on numerous sources of information.

a) In the first Wen:De Report, the authors noted that the agencies they interviewed reported a lack of funding for, among other things, capital costs.[22]

b) Wen:De Report Two indicated that agencies were inadequately funded in almost every area of operation, including capital costs.[23]

c) Wen:De Report Three recommended economic reforms that included, among other things, providing sufficient funding to cover capital costs for buildings, vehicles and office equipment.[24]

d) There had been no cost-sharing of capital expenditures under the *1965 Agreement* since 1975 – something that had caused children to be sent outside of a community to receive services, due to a lack of treatment facilities within the community.[25]

e) A 2012 AANDC evaluation identified capital expenditures on new buildings as being among the things needed to enable agencies to meet provincial standards, and make agencies more desirable places to work.[26]

13. In two subsequent implementation Rulings, the Tribunal included capital infrastructure on its list of items that Canada was to remedy immediately. It stressed the need for Canada to report

[21] 2016 CHRT 2, at paras. 389 and 458. See also: 2018 CHRT 4 at paras. 138-139.
[22] 2016 CHRT 2, at para. 157.
[23] 2016 CHRT 2, at para. 162.
[24] 2016 CHRT 2, at para. 177.
[25] 2016 CHRT 2, at para. 245.
[26] 2016 CHRT 2, at para. 289

on how it would address urgent building repairs for agencies, and infrastructure needs under the 1965 Agreement.[27]

14. In its last implementation Ruling, the Tribunal found that Canada's proposal to deal with minor capital expenditures (maintenance, repairs, upgrades, renovations) on a case-by-case basis was inadequate. It noted evidence from NAN agencies confirming the existence of chronic and unaddressed capital needs, and ordered Canada to conduct an assessment of the capital needs of all agencies, in order to inform immediate, mid-term and long-term reform. It further ordered that Canada reimburse agencies for the actual costs of performing necessary building repairs, pending completion of the assessment and reform.[28]

(ii) Current State of Affairs

15. Canada has made positive changes with respect to capital since the last implementation Rulings. For example, it amended the Terms and Conditions of the FCNFS Program to clarify that "eligible expenses" include both minor capital (e.g. repairs, maintenance, etc.) and major capital ("the purchase or construction of capital assets (e.g. buildings) that support the delivery of FNCFS services"). The Terms and Conditions further indicate that such expenses are eligible both when incurred by agencies, and by First Nations or others delivering programs under the CWJI stream.[29]

16. In cross-examination in October of 2018, Canada's affiant Paula Isaak (former Assistant Deputy Minister, ISC) admitted it was possible that if prevention dollars were available, but there was no building to put the prevention services workers in, the prevention services likely would not be delivered. She was not aware of the specifics of any such circumstances, but noted that the Tribunal-ordered agency needs assessment was expected to bring forward relevant information about agencies' capital needs.[30]

17. In that regard, the Institute of Fiscal Studies and Democracy ("IFSD") has recently released its Final Report regarding the agency needs assessment. Consistent with the Tribunal's directions, the Final Report includes an assessment of capital, alongside other needs. It indicates that, among

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[27] 2016 CHRT 10, at para. 20; 2016 CHRT 16 at paras. 36, 49 and 97.
[28] 2018 CHRT 4 at paras. 369, 373-374
[29] *Contributions to provide women, children and families with Protection and Prevention Services*, at pp. 10-12, Exhibit "1" to the Affidavit of Lorri Warner sworn Jan. 29, 2019.
[30] Cross-examination of Paula Isaak on October 30, 2018, pp. 86-89 (Joint Record, Vol. 7, Tab 41).

other things, (i) 59% of agencies reported needing building repairs, (ii) agencies expressed concern about the suitability of their premises for program needs, and (iii) the increasing future focus on prevention had prompted a reconsideration of the ownership and use of agency headquarters facilities. With all this in mind, the IFSD recommended (among other things) a one-time capital investment of $116 to $175 million for agencies, and that a benchmark recapitalization rate of a minimum 2% per annum be added to the agency budgets.[31]

18. While the IFSD has done this work with respect to agency needs, Canada has undertaken no specific survey or assessment regarding the capital needs of First Nations in Ontario with respect to the prevention or band representative services they are currently delivering.[32]

19. With respect to Jordan's Principle, the Child First Initiative funding announced in 2016 contains no authorities for capital. Speaking for herself, Dr. Valerie Gideon (Assistant Deputy Minister, ISC), recognized that infrastructure can be a barrier to the delivery of services under Jordan's Principle. For example, in her experience, communities have lacked space to provide confidential and safe mental health services, which is always an important requirement, but is especially so when delivering services to children.[33]

(B) Questions before the Tribunal

20. As the Commission understands it, the issues currently before the Tribunal are:

a. has Canada arrived at a current approach to capital infrastructure that will fully address the adverse discriminatory impacts identified by the Tribunal?, and

b. if not, what further orders (if any) are appropriate?

(C) Submissions

21. The Tribunal's Decision and subsequent rulings already stress the need for adequate capital funding that will enable the delivery of substantively equal and culturally appropriate services. This is a matter of common sense. Having funding available for the delivery of

[31] Institute of Fiscal Studies and Democracy at the University of Ottawa, *Enabling First Nations Children to Thrive: Report to the Assembly of First Nations Pursuant to Contract No. 19-00505-001* (Dec. 15, 2018), at pp. 70-72 ("*IFSD Report*") (attached as Exhibit 2 to the Affidavit of Lorri Warner sworn Jan. 29, 2019).
[32] Cross-examination of Paula Isaak on October 30, 2018, p. 112 (Joint Record, Vol. 7, Tab 41).
[33] Cross-examination of Dr. Valerie Gideon on October 31, 2018, pp. 67-68 (Joint Record, Vol. 7, Tab 42).

prevention or band representative services, or of services under Jordan's Principle, will be meaningless if there are no safe and appropriate spaces where the services can be provided, or where service providers can be housed.

22. The Commission would like to acknowledge that Canada has taken some steps forward with respect to capital, for example by funding the IFSD needs assessment, amending the Terms and Conditions of the FNCFS Program, and discussing capital needs with members of the CCCW, all while paying the actual costs of required building repairs for agencies on an interim basis. The Commission also acknowledges that Canada has confirmed that it is still open to continued discussions around capital. These are all positive developments.

23. At the same time, however, it has now been more than three years since the Tribunal highlighted the need for appropriate capital funding in its initial Decision. Subsequent implementation rulings in 2016 stressed the importance of dealing with pressing capital requirements on an immediate basis. In addition, it has now been almost four months since the release of the IFSD Final Report, and Canada has yet to share a response to its recommendations concerning capital funding.

24. It thus seems that Canada has yet to settle on a comprehensive long-term strategy for meeting actual capital needs, or communicate that strategy to agencies, First Nations and/or other service providers. It also has not established clear directives and instructions for agencies, First Nations and other service providers to use in the interim, when seeking funding for necessary major capital projects.

25. In the circumstances, while the Commission does not itself seek any particular orders with respect to capital funding at this time, it would welcome any remedies aimed at attaching enforceable timelines around next steps in this regard – including a deadline for Canada to provide a detailed response to the findings and recommendations of the IFSD Final Report.

III. Downward Adjustments for Small Agencies

26. As explained further below, the Commission does not itself ask that the Tribunal make any orders with respect to small First Nations agencies at this time. It also takes no position in response to the Caring Society's request for an order requiring Canada to reimburse small agencies for past

reductions related to the application of downward adjustments based on population thresholds. Instead, the Commission simply proceeds below to provide some background and general comments, in the hope this might be of some assistance to the Tribunal.

(A) Background

(i) Past Rulings

27. At the time of the initial Decision on liability (2016 CHRT 2), Canada's funding approach contained downward adjustments for small agencies.[34] The adjustments were pegged to a small number of sizeable population thresholds – meaning that slight increases or decreases in child population could lead to huge increases or decreases in available funding.[35]

28. The Tribunal found that the Directive 20-1 and EPFA funding approaches had discriminatory impacts, due in part to their reliance on flawed population thresholds that did not reflect actual services needs, and provided inadequate fixed funding for operation and prevention costs.[36] It ordered Canada to cease and desist from continuing its discriminatory practices, based on evidence that included the following:

a) All the agencies that participated in the *Wen:De Report Two* found the existing population thresholds to be an inadequate means of benchmarking operations funding levels.[37] Further, 75% of the participating small agencies said their salary and benefits levels for staff were not comparable with other child welfare organizations.[38]

b) *Wen:De Report Three* found that the fixed amounts and provisions for overhead for small agencies did not provide realistic administrative support, and recommended changes to the overhead funding and downward adjustment thresholds.[39]

c) The *2008 Report of the Auditor General* found that funding practices were not adapted to small agencies, meaning that 55 of the 108 agencies funded by Canada did not always have the funding and capacity to provide the required range of child welfare services. The Auditor General further found that the shortcomings of the funding had been known to Canada for years.[40]

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[34] 2016 CHRT 2 at para. 130.
[35] 2016 CHRT 2 at para. 279.
[36] 2016 CHRT 2 at para. 458.
[37] 2016 CHRT 2 at para. 165.
[38] 2016 CHRT 2 at para. 165.
[39] 2016 CHRT 2 at paras. 179-180.
[40] 2016 CHRT 2 at para. 187.

29. In a subsequent implementation ruling (2018 CHRT 4), the Tribunal noted that Canada had made an interim change to its approach for small agencies, pending further engagement with agencies and other partners.[41] However, the Tribunal found this failed to comply with earlier orders directing Canada to immediately eliminate population thresholds and levels, and to immediately address adverse impacts for small agencies.[42] As a result, the Tribunal ordered Canada to:

a) analyze the results of the First Nations agencies needs assessment, and do a cost-analysis of the real needs of small First Nations agencies related to child welfare, and report to the Tribunal;[43]

b) develop an alternative system for funding small First Nations agencies based on actual needs, which operates by fully reimbursing the actual costs of services determined by the agencies to be in the best interests of the child;[44] and

c) cease its practice of not fully funding the costs of small First Nations agencies, and "…provide funding on actual costs small first nations agencies, to be reimbursed retroactive to January 26, 2016 within 15 business days after receipt of documentation of expenses."[45] *[sic]*

(ii) Current State of Affairs

30. Canada has made progress in implementing the Tribunal's Rulings with respect to small agencies. It funded the First Nations agencies needs assessment that the IFSD completed in mid-December of 2018.[46] It established a go-forward process for small agencies to obtain funding for the actual cost of service delivery, and states that it encourages small agencies to contact their regional ISC offices as soon as possible if they feel they have unmet needs.[47] After consultation with the parties, Canada also published Nation and Ontario-specific Guides setting out the procedures that First Nations agencies (including small agencies serving less than 800 children)

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[41] 2018 CHRT 4 at para. 8. The interim change was that Canada stopped reducing funding for agencies serving less than 251 children.
[42] 2018 CHRT 4, at para. 247.
[43] 2018 CHRT 4, at para. 418. The First Nations agency needs assessment is that which later came to be conducted by the IFSD.
[44] 2018 CHRT 4, at para. 420.
[45] 2018 CHRT 4 at para. 421 (as amended by "Schedule B – Annex to Ruling 2018 CHRT 4", found at Joint Record, Vol. 2, Tab 20). The "Schedule B – Annex" amended para. 421 by, among other things, adding the language specifying that reimbursement would be provided "…within 15 business days after receipt of documentation of expenses." Although it deals with the same subject matter, no similar amendment was made to para. 252 of 2018 CHRT 4. The Commission believes this was likely an oversight at the material time.
[46] *IFSD Report*, *supra*.
[47] Affidavit of Paula Isaak affirmed June 21, 2018, at para. 8 (Joint Record, Vol. 5, Tab 37).

are to use in claiming retroactive reimbursement for eligible expenses during the retroactive claims period (i.e., back to January 26, 2016).[48]

31. Canada's approach to retroactive reimbursement of actual costs for small agencies has been the subject of discussion at the CCCW. Among other things, the Caring Society has stated its view that the Tribunal's rulings require Canada to do more than just reimburse expenses that were actually incurred during the eligibility period. It has said that Canada should instead pay to small agencies the full value of the additional funding that they would have received in the eligibility period, but for Canada's application of the discriminatory downward adjustments.[49] To date, Canada appears to have responded by saying that (i) it does not agree that the past rulings require such reimbursement, which in its view would be contrary to the *FAA*, and (ii) it remains willing to discuss issues relating to the provision of actual costs through the CCCW.[50]

(B) Questions before the Tribunal

32. As the Commission understands it, the issues currently before the Tribunal are:

c. has Canada's approach to retroactive redress of the past application of downward adjustments fully addressed the adverse discriminatory impacts identified by the Tribunal?; and

d. if not, what further orders (if any) are appropriate?

(C) Submissions

33. The Commission would like to acknowledge that Canada has taken steps forward with respect to the funding of small agencies, for example by funding the IFSD needs assessment, creating a process for reimbursing past expenses actually incurred, and discussing these matters with members of the CCCW, all while paying actual costs of small agencies on an interim basis.

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[48] Affidavit of Paula Isaak, affirmed May 24, 2018, at para. 11(j), and Exhibits "N" ("National Recipient Guide for Reimbursement of Retroactive First Nations Child and Family Services (FNCFS) Actual Costs resulting from the Canadian Human Rights Tribunal Orders (Jan. 26, 2016, April 26, 2016, September 14, 2016, and February 1, 2018") and "O" ("Ontario Region Recipient Guide for Reimbursement of Retroactive First Nations Child and Family Services (FNCFS) Prevention and Operations (Legal Fees, Intake and Investigation and Building Repairs) Actual Costs resulting from the Canadian Human Rights Tribunal Orders (Jan. 26, 2016, April 26, 2016, September 14, 2016, and February 1, 2018)" (Joint Record, Vol. 3, Tab 33).

[49] Affidavit of Doreen Navarro, affirmed June 7, 2018, at Exhibit "C" (letter from David Taylor dated June 7, 2018, at pp. 4-5).

[50] Affidavit of Paula Isaak, affirmed June 21, 2018, at paras. 6 and 8 (Joint Record, Vol. 5, Tab 37).

The Commission also acknowledges that Canada has said it is still open to continued discussions. These are all positive developments.

34. Despite this progress, it does appear that an impasse has developed at the CCCW with respect to restitution for past downward funding adjustments. The Commission does not take a position on this question, but looks forward to receiving any additional clarification the Tribunal may give regarding its previous Orders in this regard.

35. In addition, the Commission notes that the Tribunal has stressed the need to develop a compliant long-term funding approach for small agencies. This work was to be based in part on the outcomes of new studies, including the First Nations agencies needs assessment (completed by the IFSD in December 2018), and the remoteness study (final report delivered to the parties and Tribunal on March 29, 2019). The Commission continues to hope that a meaningful discussion of these reports will take place at the CCCW, and would be open to any remedies aimed at attaching enforceable timelines in that regard – including deadlines for Canada to provide responses to the findings and recommendations in the IFSD and Remoteness final reports.

IV. Financial Compensation

(A) Introduction

36. In its Decision on liability, the Tribunal noted that the Caring Society and the AFN had each requested financial remedies in respect of the victims of the discriminatory practices identified therein. The Tribunal did not rule on the requests at that time, instead indicating that it had questions for the parties about their submissions, and would return to the issue and make a ruling at a later date.[51] Since that time, the Tribunal has sent the parties written questions about the requests, and said that it would receive further written submissions on the subject, before hearing oral argument during the hearing dates set for April 23-26, 2019.[52]

37. As explained further below, the Commission does not itself ask the Tribunal to make any financial remedies, and takes no position on the specifics of any financial remedies that may be sought by the other parties. However, based on the 2014 submissions of the Caring Society and

[51] 2016 CHRT 2, at para. 490.
[52] See "Questions on Compensation from the Panel Chair," which the Registry sent to the parties by e-mail dated March 15, 2019.

the AFN, and Canada's 2014 response thereto, the Commission does wish to make a few general points about the nature and scope of the Tribunal's remedial authority under the *CHRA*. These points are set out below, after a brief description of the positions taken to date.

(B) Positions Taken by the Parties to Date

38. The Commission's focus in this proceeding has been on the eradication of discriminatory practices. The only remedies sought in its Amended Statement of Particulars dated January 29, 2013, were aimed at program reform.[53] The Commission did not request any financial remedies, either in its pleadings, or in its closing written or oral arguments in 2014 – nor did it take a position on the specifics of the financial remedies sought by others.[54] Instead, the Commission asked in its written reply submissions that the Tribunal consider certain remedial principles in making its eventual ruling.[55] Effectively, the Commission left it to the Caring Society and the AFN – as the complainants – to articulate and claim any financial remedies that might be sought in respect of the First Nations children and families at the heart of the proceeding.

39. In that regard, the Caring Society and the AFN each made arguments to the Tribunal about the financial remedies they considered appropriate, on the evidence and the law. Canada responded by arguing that financial compensation was not appropriate on the facts of the case. The Tribunal described the 2014 positions of the parties as follows:

a) The Caring Society asked that Canada pay financial compensation into an independent trust to fund healing activities for the benefit of First Nations children who suffered discrimination under the FNCFS Program. It asked that the amount of compensation be set by reference to s. 53(3) of the *CHRA*, by awarding payment of $20,000 on behalf of each First Nations child taken into care since February 2006 to the date of the award.[56]

b) The AFN asked that financial compensation be paid directly to First Nations children affected by the discriminatory practices from 2006 to the date of the award, and to their siblings, and their parents. It sought the statutory maximums for pain and suffering (s. 53(2)(e)) and special compensation for wilful and reckless discrimination (s. 53(3)), and

[53] Amended Statement of Particulars of the Commission dated January 29, 2013, at para. 26.
[54] Closing Submissions of the Canadian Human Rights Commission dated August 25, 2014, at para. 628.
[55] Reply Submissions of the Canadian Human Rights Commission dated October 14, 2014, at paras. 59-69.
[56] 2016 CHRT 2, at para. 486.

proposed that the Tribunal order Canada, the AFN, the Caring Society and the Commission to form an expert panel to determine who would be eligible to be compensated.[57]

c) Canada argued there was insufficient evidence to award the requested compensation. Among other things, it said that financial compensation could not be based solely on the fact of apprehension, as individual evidence would be needed in order to determine whether any particular apprehension was or was not linked to a discriminatory practice. Canada also argued that the Complainants' abilities to receive and/or distribute funds on behalf of victims had not been established.[58]

40. The Commission understands that the Caring Society, the AFN and Canada are all likely to update and expand upon their 2014 submissions regarding financial compensation. However, assuming their positions remain roughly as they were, the Commission respectfully asks that the Tribunal consider the general principles set out below, in its consideration of the Complainants' requests.

(C) Legal Principles regarding Financial Remedies

(i) Statutory Provisions

41. The Federal Court of Appeal has held that complainants are limited to the remedies that the *CHRA* has empowered the Tribunal to grant.[59] In that regard, the Tribunal's remedial authority is set out in ss. 53(2), (3) and (4) of the *CHRA*, which read as follows:

> **Complaint Substantiated**
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> **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:
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> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the

[57] 2016 CHRT 2, at para. 487. See also: Final Written Submissions of the Assembly of First Nations dated August 29, 2014, at para. 524(viii).
[58] 2016 CHRT 2, at para. 489.
[59] *Chopra v. Canada (Attorney General)*, 2007 FCA 268 at para. 36 ("*Chopra*").

measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including

(i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

(ii) making an application for approval and implementing a plan under section 17;

(b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;

(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;

(d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

Special Compensation

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member of panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

Interest

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

(ii) The Tribunal must Exercise its Remedial Discretion on a Principled Basis

42. As indicated earlier, in keeping with the quasi-constitutional nature of the *CHRA*, the Tribunal's remedial powers under s. 53 are to be interpreted in a purposive fashion that promotes

the objectives of the statute. Consistent with those purposes, the aim in making orders under s. 53 is not to punish the respondent, but rather to (i) meaningfully vindicate any losses suffered by victims of discrimination, and (ii) eliminate and prevent discrimination. The task of fashioning remedies is an intricate one, demanding innovation and flexibility on the part of the Tribunal.[60]

43. The Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented.[61] Sufficiency of evidence will always be a material consideration.

(iii) Burden of Proof

44. As a general rule, human rights claimants bear the onus of proving their entitlements to receive the remedies they seek, on a balance of probabilities.[62]

45. This rule is not absolute. There may be occasions where the burden of proof will shift to a respondent, for example where there is a significant imbalance of access to evidence on a particular point that would be material to the question before the Tribunal. Whether the burden has shifted in any particular case is a matter for the Tribunal to determine, based on the evidence and issues, and applying its specialized expertise under the *CHRA*.[63]

46. If the Tribunal does find evidence that a compensable loss has probably been suffered, difficulties in determining the amount of the loss cannot be used as a reason to refuse to make an award. Instead, the Tribunal must do the best it can, with the material available. If a claimant has not adduced evidence on remedies that might have been expected to be adduced, that might tell against the claimant, for example by causing the Tribunal to award less than the compensation claimed, due to uncertainties in the evidence.[64]

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[60] 2016 CHRT 10, at paras. 10-17.
[61] *Tanner v. Gambler First Nation*, 2015 CHRT 19 at para. 161 (citing *Chopra*, *supra* at para. 37; and *Hughes v. Elections Canada*, 2010 CHRT 4 at para. 50).
[62] *Walden FCA*, *supra* at paras. 16 and 29; *Canada Post (Evans JA.)*, *supra* at para. 302.
[63] *Walden FCA*, *supra* at paras. 29-30.
[64] *Canada Post (Evans JA.)*, *supra* at paras. 302-303; *Canadian Human Rights Commission and Walden v. Attorney General of Canada et al.*, 2010 FC 1135 at paras. 61-63 ("*Walden FC*").

(iv) Section 53(2)(e) – Pain and Suffering

47. As stated above, the AFN's 2014 submissions asked the Tribunal to order, pursuant to s. 53(2)(e) of the *CHRA*, that Canada pay financial compensation to victims for pain and suffering experienced as a result of the discriminatory practices. The Commission takes no position on the merits of that request in this case, but asks the Tribunal to consider and apply the following general principles in making its eventual ruling.

48. Awards for pain and suffering under the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization.[65] The award rightly includes compensation for harm to a victim's dignity interests.[66] The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim.[67] Medical evidence is not needed in order to claim compensation for pain and suffering[68], although such evidence may be helpful in determining the amount, where it exists.

49. The Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment.[69] The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions[70], and (ii) Supreme Court of Canada case law recognizing that children are a highly vulnerable group.[71]

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[65] *Panacci v. Attorney General of Canada*, 2014 FC 368 at para. 34.
[66] *Jane Doe*, *supra* at paras. 13 and 28.
[67] *Jane Doe*, *supra* at para. 12.
[68] *Hicks v. Human Resources and Skills Development Canada*, 2013 CHRT 20 at paras. 92-96 and 98, aff'd *Attorney General of Canada v. Hicks*, 2015 FC 599 at para. 80.
[69] *Opheim v. Gagan Gill & Gillco Inc.*, 2016 CHRT 12 at para. 43.
[70] See, for example: *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 59-62 (finding that relevant factors when awarding damages under the Ontario *Human Rights Code* can include: the immediate and ongoing impacts of discrimination on a complainant's emotional and/or physical health; the complainant's vulnerability; objections to the offensive conduct; the respondent's knowledge that conduct was not only unwelcome but viewed as discriminatory; the degree of anxiety the conduct caused; and the frequency and intensity of the conduct).
[71] For example, see: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 per McLachlin CJ. (for the majority, at para. 56: "Children are a highly vulnerable group"), Arbour J. (dissenting, at para. 185: "This Court has recognized that children are a particularly vulnerable group in

50. Consistent with the general principles discussed earlier in these Submissions, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.[72]

51. Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario *Human Rights Code*, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [*Code*] by effectively setting a 'licence fee' to discriminate."[73]

(v) Section 53(3) – Special Compensation

52. As stated above, the Caring Society and the AFN each made submissions in 2014 that asked the Tribunal to consider and apply s. 53(3), and order special compensation for wilful or reckless discrimination. The Commission takes no position on the merits of their respective requests, but asks the Tribunal to consider and apply the following general principles in making its eventual ruling.

53. As the Tribunal has recently stated, "A finding of wilfulness requires that the discriminatory act and the infringement of the person's rights under the Act is intentional. A finding of recklessness generally denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly."[74]

54. The Federal Court has described s. 53(3) as "…a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate."[75] The Commission agrees the provision is designed to secure compliance with the *CHRA*, but submits that the label "punitive"

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society…"), and Deschamps J. (dissenting, at para. 225: "Children as a group face pre-existing disadvantage in our society. They have been recognized as a vulnerable group time and again by legislatures and courts").

[72] *Jane Doe*, *supra* at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc.*, 2012 CHRT 10 at para. 115); and *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, 2017 CHRT 36 at para. 213).

[73] *Strudwick*, *supra* at para. 59.

[74] *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.*, *supra* at para. 214.

[75] *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155 (affirmed 2014 FCA 110, but without comment on this point).

must be read in light of subsequent guidance provided by the Federal Court of Appeal in *Lemire v. Canadian Human Rights Commission*. In that case, the Court of Appeal held that wilful and reckless damages under the *CHRA* are not penal in nature, and are not intended to convey society's moral opprobrium for the wilful or reckless discriminatory conduct of a respondent.[76] Indeed, even the financial penalties that could formerly be imposed in hate speech cases were intended not to punish, but rather to ensure compliance with the statutory scheme, and deter future infringements.[77] That purpose was entirely consistent with the statutory objectives set out in s. 2 of the *CHRA*, which include giving effect to the principle that individuals should have opportunities equal to those of others to lead the lives that they are able and wish to have, without being hindered by discriminatory practices based on prohibited grounds.[78]

55. As the Court of Appeal noted in *Lemire*, the wording of s. 53(3) does not require proof of loss by a victim.[79] In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.[80]

(vi) Remedies are for "Victims," not "Complainants"

56. Sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

57. In most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim

[76] *Lemire v. Canadian Human Rights Commission*, 2014 FCA 18 at para. 90 ("*Lemire*").
[77] *Lemire*, *supra* at para. 91.
[78] *Lemire*, *supra* at para. 91.
[79] *Lemire*, *supra* at para. 85.
[80] *Lemire*, *supra* at para. 85.

consents.[81] The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

58. In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

(vii) Financial Compensation for Victims who did not Testify

59. As mentioned above, awards of remedies always need to be supported by evidence. In some past cases, Tribunals have declined to award compensation for pain and suffering (s. 53(2)(e) or its predecessors) in respect of victims who had not testified about the personal impacts of the discriminatory practices found by the Tribunal. For example, such conclusions were reached in pay equity cases decided in 1998 and 2005, in which Tribunals noted the impracticality of potentially requiring thousands of individual complainants to testify, but held that it was nonetheless unable to award compensation for hurt feelings en masse.[82]

60. The Commission agrees that any award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member of panel sees fit, whether or not that evidence

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[81] *CHRA*, s. 40(2): "If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto."

[82] *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991 (although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not). In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1998 CanLII 3995 (C.H.R.T.) at paras. 496-498. The Canada Post case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims.

or information is or would be available in a court of law."[83] As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses.

61. In *Walden et al. v. Attorney General of Canada* (2010), the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering.[84] Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.[85]

62. At issue in *Walden* was a Tribunal decision finding that 413 victims had been subjected to discrimination, but that compensation for pain and suffering could only be paid to two victims who had actually testified about their subjective experiences.[86] The Federal Court set aside the decision on pain and suffering, for procedural fairness reasons.[87] It sent that issue back to a different panel of the Tribunal, which was "…to indicate to the applicants the type of evidence that it requires in order to properly determine pain and suffering damages, bearing in mind issues such as fairness and allocation of court time and resources."[88] The question was eventually resolved through a settlement agreement that included compensation for pain and suffering, and was incorporated into a consent Order of the Tribunal.[89]

63. In the end, whether there is sufficient evidence in this case to justify awards of financial compensation – for pain and suffering, special compensation, or both – will be for the Tribunal to decide, based on the entirety of the record, the applicable legal principles, and the submissions of all parties.

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[83] The only qualification put on this broad discretion is set out in s. 53(4), which clarifies that the member or Panel may not accept as evidence anything that would be inadmissible in a court by reason of privilege.
[84] *Canadian Human Rights Commission v. Attorney General of Canada*, 2010 FC 1135 at para. 73 ("*Walden FC*"). Although some aspects of this decision were appealed (without success), the Court's findings with respect to compensation for pain and suffering were not appealed.
[85] *Walden FC*, *supra* at para. 73.
[86] *Walden et al. v. Social Development Canada, Treasury Board of Canada and Public Service Human Resources Management Agency of Canada*, 2009 CHRT 16 at paras. 155-166.
[87] *Walden FC*, *supra* at para. 71.
[88] *Walden FC*, *supra* at para. 75.
[89] *Walden et al. v. Attorney General of Canada*, 2016 CHRT 19 at paras. 6-9.

(viii) The AFN's Request that the Tribunal Establish an Expert Panel

64. As indicated above, the AFN's 2014 submissions asked the Tribunal to order the creation of an expert panel, to be composed of representatives of Canada, the AFN, the Caring Society and the Commission, to determine appropriate financial compensation for individual victims.

65. In questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.[90]

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

67. Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

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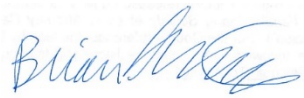
[90] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 65.

V. Order Sought

68. The Commission does not itself seek any specific orders at this time with respect to the three matters discussed in these Submissions (i.e., major capital, downward adjustments, and financial compensation). Instead, it respectfully asks the Tribunal to consider the principles outlined above, as it weighs the requests for relief made by the other parties, and Canada's responses thereto.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 3, 2019



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