

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N :

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

Complainants

– and –

CANADIAN HUMAN RIGHTS COMMISSION

Commission

– and –

**ATTORNEY GENERAL OF CANADA
(representing the Minister of Aboriginal Affairs and Northern
Development Canada)**

Respondent

– and –

**CHIEFS OF ONTARIO and AMNESTY INTERNATIONAL
CANADA**

Interested Parties

**CLOSING SUBMISSIONS of the
CANADIAN HUMAN RIGHTS COMMISSION**

CANADIAN HUMAN RIGHTS COMMISSION

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OVERVIEW

1. This case deals with fundamental principles of human rights law and access to justice for Aboriginal peoples and in particular, First Nations children, one of the most vulnerable and disadvantaged groups in Canada.¹ This case is unique and of great significance,² and calls us all to live up to our collective social responsibility to care for, support and give all children an equal chance to succeed.³
2. The Assembly of First Nations (the “AFN”) and the First Nations Child and Family Caring Society of Canada (the “Caring Society”) filed a complaint with the Canadian

¹ Auditor General of Canada’s Report to the House of Commons, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada (2008), Canadian Human Rights Commission’s Book of Documents [“CHRC BOD”], Exhibit [“Ex.”] HR-03, Tab 11 at p. 5 [“OAG Report 2008”].

² *APTN v. Canada (Human Rights Commission)*, 2011 FC 810, at para. 3; see also *Canada (Attorney General) v. FNCFCs and AFN*, unreported, November 24, 2009, T-1753-08 at p. 2024.

³ *Wen:De The Journey Continues* (2005), CHRC BOD, Ex. HR-01, Tab 6 at p. 19 [“Wen:De Report Three”].

Human Rights Commission (the “Commission”) on February 23, 2007, alleging that Aboriginal Affairs and Northern Development Canada’s (“AANDC”)⁴ First Nations Child and Family Services Program and corresponding on reserve funding formulas result in inequitable levels – and in some cases a complete denial – of child welfare services⁵ for First Nations children ordinarily resident on reserve.⁶

3. The Complainants allege that this amounts to discrimination in the provision of services customarily available to the public on the grounds of race and national or ethnic origin, contrary to section 5 of the *Canadian Human Rights Act* (the “CHRA”).⁷
4. The Commission participates in the hearing of this complaint before the Canadian Human Rights Tribunal (the “Tribunal”) in accordance with its public interest mandate pursuant to section 51 of the *CHRA*.⁸
5. Over the course of a year, the Commission led evidence establishing that AANDC’s FNCFS Program and on reserve funding formulas, including Directive 20-1, the Enhanced Prevention Focused Approach (“EPFA”), and Ontario’s “Memorandum of Agreement Respecting Welfare Programs for Indians” (the “1965 Agreement”), constitute a service under section 5 of the *CHRA*, as they provide a benefit conferred in the context of a public relationship.
6. The evidence also established that AANDC denies and/or differentiates adversely against First Nations children and families on reserve in the provision of this service based on prohibited grounds of discrimination, namely race and national or ethnic origin, in that AANDC’s FNCFS Program and on reserve funding formulas: (i) are based on assumptions and not the actual needs of First Nations communities; (ii) create perverse incentives which contribute to the overrepresentation of First Nations children in care;

⁴ At the time of the complaint, the Respondent was the Department of Indian Affairs and Northern Development Canada (otherwise known as “INAC”). As of June 13, 2011, the Respondent’s new applied title is Aboriginal Affairs and Northern Development Canada (otherwise known as “AANDC”). For the purposes of these submissions and in order to be consistent, the Commission will refer to the Respondent as AANDC throughout.

⁵ Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3: Child welfare refers to “a set of government and private services designed to protect children and encourage family stability. The main aim of these services is to safeguard children from abuse and neglect. Child welfare agencies will typically investigate allegations of abuse and neglect, supervise foster care and arrange adoptions. They also offer services aimed to support families so that they can stay intact and raise children successfully and to remedy risks in families where the child has been removed so reunification can occur.”

⁶ Complaint Form, CHRC BOD, Ex. HR-01, Tab 1 at pp. 1-3.

⁷ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 5 [“CHRA”].

⁸ *CHRA*, *supra*, s. 51.

(iii) lack funding for prevention services and least disruptive measures, despite the fact that these services are critical to address the greater needs of First Nations on reserve; and
(iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

7. In its response, AANDC led evidence with respect to its FNCFS Program and funding formulas, but failed to establish a *bona fide* justification for the discriminatory practice. Furthermore, AANDC led no evidence to demonstrate that remedying or preventing the discrimination would cause undue hardship on the basis of health, safety or cost.
8. As a result, the Commission submits that the complaint has been substantiated and that a systemic remedy should be granted pursuant to section 53 of the *CHRA*,⁹ in order to ensure that First Nations children have equitable and meaningful access to child welfare services on reserve, and that they can “make for themselves the lives they are able and wish to have” without discrimination.¹⁰

⁹ *CHRA, supra*, s. 53.

¹⁰ *CHRA, supra*, s. 2.

PART I – STATEMENT OF FACTS

A) History of First Nations in Canada: Impact of Early Federal Government Policies and Actions

9. While the allegations in this complaint deal with present day funding and programs involving First Nations child welfare services on reserve, it is necessary to consider the issue in the full historical context, in particular the legacy of Indian Residential Schools (“IRS”). As was stated by the Royal Commission on Aboriginal Peoples (“RCAP”):

In this respect, the past is more than something to be recalled and debated intellectually. It has important contemporary and practical implications, because many of the attitudes, institutions and practices that took shape in the past significantly influence and constrain the present. This is most obvious when it comes to laws such as the *Indian Act*,¹¹ but it is also evident in many of the assumptions that influence how contemporary institutions such as the educational, social services and justice systems function.¹²

i) The Indian Residential Schools System as an Early Form of Child Welfare

a. Management of the Schools: Chronic Neglect and Underfunding

10. The IRS system was initially built on partnerships between the federal government and various churches that lasted until 1969.¹³ While the churches would remain involved to a certain extent after 1969, they were no longer managing the IRS system. The last federally funded residential school was closed in 1986. While some residential schools¹⁴ would continue to operate after 1986, federal funding would cease.¹⁵
11. The overall purpose of the IRS system was to “kill the Indian in the child”.¹⁶ As Dr. John Milloy,¹⁷ an expert witness for the AFN, stated in his book, *A National Crime*:

¹¹ *Indian Act*, R.S.C. 1985, c. I-5 [“*Indian Act*”].

¹² Report of the Royal Commission on Aboriginal Peoples (Vol. 2), CHRC BOD, Ex. HR-02, Tab 7 at p. 56 [“RCAP Report”].

¹³ Statement of Apology to Former Students of Indian Residential Schools by the Right Honourable Stephen Harper, CHRC BOD, Ex. HR-03, Tab 10 [“Statement of Apology”]; see also RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at pp. 442, 443, 493.

¹⁴ Testimony of Dr. John Milloy, Transcript Volume [“Vol.”] 33 at pp. 107-108: “Residential schools” include boarding schools, industrial schools, and, if one goes back to the 1840’s, manual labour schools. Boarding schools were typically small and close to the children’s communities, while industrial schools were generally large and centrally-located.

¹⁵ Dr. John Milloy’s Expert Report, “A National Crime”, Ex. AFN-1 at pp. xvii, 238 [“A National Crime”]; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 11, 16.

¹⁶ RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 476; see also A National Crime, Ex. AFN-1 at p. xv; see also Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.

¹⁷ Dr. John Milloy’s Curriculum Vitae, CHRC BOD, Ex. HR-12, Tab 265. Dr. Milloy was qualified as an expert before the Tribunal in the history of Indian Residential Schools (“IRS”), including the origin and vision of the IRS

The Canadian Government and the Residential School System, 1879 to 1986, in this way the IRS system “was, even as a concept, abusive.”¹⁸

12. The federal government began funding IRS in 1883.¹⁹ On August 22, 1895, the Acting Deputy Superintendent General of AANDC requested a “warrant for the committal of an Indian child to an Industrial School”, the purpose of which was to remove Indian children that were, in the view of Indian Agents,²⁰ “not being properly cared for or educated”.²¹
13. Many of the schools were located in western Canada, with some in Ontario and Québec and only one in eastern Canada.²² Dr. Milloy estimates that there were approximately 135 IRS in total.²³ While it is impossible to determine exactly how many children attended these schools based on the limited information available,²⁴ Dr. Milloy estimates that at any given time approximately 15% of all Indian children were attending IRS.²⁵
14. Dr. Amy Bombay,²⁶ an expert witness for the AFN, testified about the number of First Nations people on reserve today who attended IRS:

DR. BOMBAY: [...] So, first, looking at the proportion of First Nations adults on reserve who attended themselves, we found that 19.5 percent of adults living on reserve attended residential school. Just to point out that, because I just spoke about the negative effects of early life adversity, 58.1 percent of the survivors attended between the ages of 5 and 10, and there were actually a smaller proportion who actually started attending residential school at an earlier age than 5, and also a smaller proportion who attended after the age of 10, but the majority

system, the policies upon which it is based, as this evolved through time from the beginning until the closure of the IRS, the role of the federal government with regard to the establishment and operations of the IRS and the children attending, the operation of the IRS system, the funding of the IRS, the problems with the IRS and its impacts and the closure of the IRS and the transition to and relationship with the child welfare system.

¹⁸ A National Crime, Ex. AFN-1 at p. xv; see also testimony of Chief Robert (Bobby) Joseph, Transcript Vol. 42 at p. 83.

¹⁹ Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 102.

²⁰ A National Crime, Ex. AFN-1 at p. 68: Indian Agents, who represented AANDC in the communities, were “to assist” in the recruitment of Indian children for IRS, which was seen as “vital to attain the goal of civilization”.

²¹ Department of Justice Warrant for the Committal of Indian Children and Corresponding Regulations Relating of the Education of Indian Children (1895), CHRC BOD, Ex. HR-13, Tab 278 at pp. CHRC639/1-CHRC639/2, CHRC639/7, CHRC639/11.

²² Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 102-104; see also A National Crime, Ex. AFN-1 at p. 307 (list of schools in 1931).

²³ Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 103.

²⁴ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 119; Vol. 41 at pp. 9-12.

²⁵ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 12-13; see also Dr. John Milloy’s Chart: Number of Children in Indian Residential Schools from 1930 – 1980, CHRC BOD, Ex. HR-12, Tab 267.

²⁶ Dr. Amy Bombay’s Curriculum Vitae, CHRC BOD, Vol. 13, Tab 312. Dr. Bombay was qualified as an expert before the Tribunal on the psychological effects and transmission of stress and trauma on wellbeing, including the intergenerational transmission of trauma among the offspring of IRS survivors and the application of the concepts of collective and historical trauma.

of these individuals attended between the age of 5 and 10 when the brain is undergoing rapid development, and that these childhood adversities would be expected to have significant effects.²⁷

15. Soon after their establishment, the schools began running deficits. The federal government set funding for the IRS system based on a per capita amount, which quickly proved to be insufficient.²⁸ Despite efforts to increase the number of students in the system, it was consistently and chronically underfunded until after the Second World War.²⁹ In order to address the deficits, children were forced to work at the schools running farming and dairy operations.³⁰

16. Dr. Milloy testified about the impact of persistent funding shortfalls in the IRS system:

DR. MILLOY: [...] So, it's a litany of bad food and bad nutrition, a litany of inadequate clothing, a litany of inadequate teachers and it all runs back to the same cause, the system is starved for resources. And, to the extent to which the system is starved for financial resources and it is allowed to remain so, then it is starved of moral resources as well. People who say they are caring for children are not doing so and they know they're not doing so and they refuse to stop doing what they're doing, which is inadequate. There's an RCMP inspector that returns a child to a residential school. It's in the text. And he says to his superior, having seen the inside of the school, "If this was a white school, I'd have the principal in court tomorrow." It wasn't a white school, it was an Indian residential school and so he let it pass. So, there was a wider neglect than what the Department was practising, right? [...]³¹

17. The per capita funding, which remained in existence until 1957, also led to overcrowding in the schools.³² This in turn affected the children's health and wellbeing.³³

18. For instance, many of the children's communities were "rife with tuberculosis".³⁴ As a result of the overcrowding in the schools, the rate of sickness amongst the children was very high. It is estimated that approximately 42% of the children who attended IRS were

²⁷ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 120-121; see also Dr. Bombay's Power Point Presentation: Intergenerational Effects of Indian Residential Schools, CHRC BOD, Ex. HR-14, Tab 337 at p. 21 ["Dr. Bombay's Power Point"].

²⁸ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 111-114, 125-129.

²⁹ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 110-114, 125-129, 179-180.

³⁰ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 170-172; see also A National Crime, Ex. AFN-1 at pp. 120-121.

³¹ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 174-175.

³² Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.

³³ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.

³⁴ Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 130.

affected by tuberculosis, and that many were simply sent home to die.³⁵ Dr. Milloy testified about the disproportionate impacts tuberculosis had on children who attended IRS:

DR. MILLOY: [...] We know that the tuberculosis rates amongst the Aboriginal population in Canada and therefore the Aboriginal children in residential schools far outstrips any other rates. It's really easy to be an Aboriginal historian because you just have to multiply everything by five. You have to multiply all the bad stuff by five, right?

Tuberculosis five times, right? Death by suicide at least five times. You go on and on and on that they are at the head of every line you don't want to be at the head of and in the back of every line you don't want to be at the back of and usually five times more grievous than anything else.³⁶

19. In 1938, the federal government finally began providing funding to the schools in order to address the alarming rates of tuberculosis after it came to light that the City of Ottawa was actually spending more money to combat the disease than AANDC.³⁷
20. The schools also had difficulty attracting qualified teachers as a result of their remote locations and the nature and purpose of the schools generally.³⁸ In 1911, the federal government was ready to take hold of the IRS system and impose standards for the care and education of the children (including cleanliness, food, clothing, etc.). Therefore, the federal government included such standards in their contracts with the churches; these contracts were never re-negotiated after 1911.³⁹
21. As Dr. Milloy testified, notwithstanding the serious problems with the IRS system, it continued to exist year after year without ever being reformed:

DR. MILLOY: [...] When the Bryce Report first came out, or the second Bryce Report came out, there was a – and it's in the text again an editorial in the "Saturday Night," you know, that magazine that died a few years ago, saying, "This is worse than the death toll during the First World War, but we needn't worry about it because it's the scandal of the day, and next week we'll be on to something else and we'll forget all about it." Well, of course, next week we were on to something else and there was no reform in the system. So it was impervious to critique from the outside. It was incapable of improvement from the inside. I

³⁵ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 129-135.

³⁶ Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 142.

³⁷ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 144-145.

³⁸ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 136-139.

³⁹ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 136-141.

mean, what they needed was budgets and they weren't getting them. So it just drifted along, right?⁴⁰

b. Integration

22. Post-1946, attempts were made to integrate Indian children into provincial school systems.⁴¹ AANDC sought to “integrate” (as opposed to assimilate) children by placing them in provincial schools. However, this movement did not account for the cultural shock that took place when these children found themselves in provincial institutions.
23. In order to integrate Indian children, the federal government approached provincial school boards and built roads connecting reserves to more centrally-located communities.⁴²
24. Dr. Milloy testified that as a result of this policy shift, residential schools were to be closed; however, even as the number of schools in existence decreased, the number of IRS students increased.⁴³ In fact, residential schools continued to exist for more than four decades as the move toward integration carried on:

Integration and closure was a long and difficult process: nearly four decades. During those forty years, children still left their homes to attend a residential school. Many never returned. They died or were lost to culture and community in an extensive system of fostering and out-adoption by non-Aboriginal families. Many who did return were unable, because of their residential school experience, to contribute to the life and health of their communities. That experience, despite [AANDC’s] intentions and administrative and financial reforms, remained what it had been before the war – one of neglect and abuse.⁴⁴

25. Around the same time, the federal government began to integrate other social services, including child welfare services.⁴⁵ As some residential schools closed down, many of the children, having nowhere else to go, were taken into child welfare care.⁴⁶ AANDC also began to hire social workers in order to deal with the increasing number of Indian children in care.⁴⁷

⁴⁰ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 176-177.

⁴¹ A National Crime, Ex. AFN-1 at p. 190; see also testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 180-188.

⁴² Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 194-202.

⁴³ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 186, 200.

⁴⁴ A National Crime, Ex. AFN-1 at pp. 190-191.

⁴⁵ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 187-204.

⁴⁶ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 15-16, 187-204.

⁴⁷ Testimony of Dr. John Milloy, Transcript Vol. 33 at pp. 188-192.

26. The RCAP report described the child welfare system in place at the time as follows:

Children who entered the [child welfare] system were generally lost to family and community — or were returned with there having been little input to change the situation from which they were taken in the first place [...].

Every facet of the system examined by [RCAP] revealed evidence of a program rooted in antiquity and resistant to change.

An abysmal lack of sensitivity to children and families was revealed. Families approached agencies for help and found that what was described as being in the child's "best interest" resulted in their families being torn asunder and siblings separated. Social workers grappled with cultural patterns far different than their own with no preparation and no opportunities to gain understanding. It was expected that workers would get their training in the field.

The agencies complained of a lack of adequate resources, and central directorate staff complained of a lack of imaginative planning for children by agencies [...].

The funding mechanisms perpetuated existing service patterns and stifled, even prevented, innovative approaches. There was little statistical data and, what there was, was next to useless for program planning purposes. There was no follow-up on adoptions and thus no way to gather the data upon which any kind of evaluation of the adoption program could be based [...].

The appalling reality is that everyone involved believed they were doing their best and stood firm in their belief that the system was working well [...]. The miracle is that there were not more children lost in this system run by so many well-intentioned people. The road to hell was paved with good intentions and the child welfare system was the paving contractor.⁴⁸

27. However, integration proved to be a challenge. As Dr. Milloy noted, Indians "[lived] in the wrong place" – spread out across the country in "over 600 communities" – which made it very difficult for them to access centrally-located existing social services.⁴⁹

⁴⁸ RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 989 (footnotes omitted).

⁴⁹ Testimony of Dr. John Milloy, Transcript Vol. 33 at p. 188.

c. History of Abuse

28. Many of the children who attended residential schools were mentally, emotionally and/or physically abused. Dr. Milloy testified about the purpose of the IRS system, which manifested itself in the day-to-day operation of the schools:

DR. MILLOY: [...] The system was Savage, the system itself, this sort of flip-flop, right, because I thought when I first looked at it, when you read the discourse, that the Indians were the savages, right, to be civilized in this process. But if you think about it, there was a savagery [or] violence in the very idea of residential schools.

It wasn't only about separating children from their parents and communities and putting them in the schools, it was about cutting the artery of culture that flowed between parents, children and community. That was to be destroyed willy-nilly.⁵⁰

29. For many of the children who suffered abuse at residential schools, suicide was their only escape.⁵¹ For others, the effects of their abuse followed them back to their communities.⁵²
30. In addition to the rampant abuse at IRS, the children lived in institutions devoid of any real parenting, nurturing or cultural influences. Those in charge of residential schools, including principals and teachers, were not always qualified for the positions they held, a situation which was exacerbated by the chronic underfunding of the IRS system.⁵³
31. The federal government and the churches that ran the schools were aware that children were being abused.⁵⁴ However, very little was done to address the issue. As Dr. Milloy testified, the IRS system essentially operated on inertia:

DR. MILLOY: [...] It seemed that the best way to define the system and its relationship with the students was to simply say – and this is a very ill – this is a word which is not – I think which is undervalued, and that is that the system was careless. It just was a shrug of the shoulders, right, it became routine. It just sort of marched on. [...] ⁵⁵

⁵⁰ Testimony of Dr. John Milloy, Transcript Vol. 34 at p. 42.

⁵¹ Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 2-4.

⁵² Testimony of Chief Bobby Joseph, Transcript Vol. 42 at pp. 48-58, 83-87; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 122-124.

⁵³ A National Crime, Ex. AFN-1 at pp. 129-132; see also testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 71-87.

⁵⁴ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 44 and following, 103-109; see also A National Crime, Ex. AFN-1 at pp. 109-156.

⁵⁵ Testimony of Dr. John Milloy, Transcript Vol. 34 at p. 51.

32. The federal government “virtually came to the end of the residential school road by 1986”, although some residential schools remained in existence until 1996.⁵⁶ The IRS system was a lived reality for thousands of Indian children for more than a century, many of whom endured adverse treatment at the schools, including: the loss of their families; the loss of their culture and traditions; a lack of parenting, nurturing and care; physical, mental and emotional abuse; malnutrition; and illness.
33. In his apology on behalf of Canada, Prime Minister Stephen Harper described the IRS system as follows:

The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities. Many were inadequately fed, clothed and housed. All were deprived of the care and nurturing of their parents, grandparents and communities. First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools. Tragically, some of these children died while attending residential schools and others never returned home.⁵⁷

d. The Legacy of Residential Schools: Intergenerational Impact and Collective Trauma

34. The IRS system represents a shameful and traumatic legacy that still affects Aboriginal peoples and communities today. Some children who attended residential schools had parents and/or grandparents who also attended. Dr. Bombay studied the link(s) between generations in order to determine the intergenerational impact of IRS, and the extent to which these impacts are compounded depending on a family’s history of attendance at IRS:

DR. BOMBAY: [... The] 20.2 percent who attended themselves and the 31.1 percent who had at least one parent who attended, 12.9 percent had at least one grandparent who went to residential school. This leaves only 35.8 percent of First Nations on reserve who were not themselves or who were not intergenerationally affected by residential schools.

So it really seems to be a very large proportion of the on reserve population that has been either directly or indirectly affected by residential schools. And I would also just like to point out that within this 35.8 percent that had not been affected intergenerationally by residential schools, they still could have had uncles or aunts or other close family members or other close family friends who maybe had a role

⁵⁶ A National Crime, Ex. AFN-1 at p. 238.

⁵⁷ Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.

in their caregiving, and so these individuals still could have been indirectly affected by residential schools.

And also, even if they didn't have these kind of close connections, if they lived in a community which was severely impacted by residential schools, they also could have had indirect effects from the communitywide effects as well.⁵⁸

35. As Dr. Milloy explained, the impact that the IRS system had and continues to have on Aboriginal peoples is marked and evident:

DR. MILLOY: [... If] you go to the [Truth and Reconciliation Commission] hearings and speak to those people, they talk about the transgenerational impact. [... T]here are some concrete transgenerational impacts, for example:

The scourge of fetal alcohol syndrome is a physical transference; right? We have those people who are excessive drinkers, they may have given birth to [children with fetal alcohol syndrome], but the transgenerational survivors, as they call themselves, survivors being children who didn't go to residential schools, but whose parents or grandparents did, said that they were raised in homes that, as the young people in that British Columbia case said, we can't live with them; this was not a proper way of being brought up.

[...]

[... They] talk very seriously about the extent to which their lives were disrupted by parents who had been in the schools.⁵⁹

[...]

[... So]when you're trying to create an explanation, yet again this discriminatory factor: why is it that they're at the bottom of every list you don't want to be on the bottom of and at the top of every list you don't want to be at the top of? Why [are] our Aboriginal people in this special place?

But you're right, it's got to do with the workings of all of those factors particular to that particular group, but I think you've put your finger on one of the big differences and that is, as you said an hour ago or so, that was the attempt to cut the artery of culture. That's really something special and I think something that has been could be [...] under estimated in terms of the way in which you write out the larger narrative about this group compared to other poor ethnic groups in the country.⁶⁰ (emphasis added)

⁵⁸ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 123-126; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 21-24.

⁵⁹ Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 113-115.

⁶⁰ Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 175-177; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at p. 2 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).

36. Dr. Bombay has conducted research on the intergenerational impacts of the IRS system.⁶¹ In her testimony, she noted that it is “generally accepted that adverse conditions early in life can impact the developing brain and increase vulnerability to mood disorders and other disorders as well.”⁶²
37. One commonly cited study examined the effects of early childhood adversity on children who grew up in orphanages in Romania.⁶³ These children displayed measurable differences in both the functionality and structure of their brain and brain activity.⁶⁴ The study therefore concluded that early life experiences can result in greater risk and vulnerability to the consequences of future stress, and that the nature of the environment in which the children are raised can exacerbate the severity of these impacts, putting them at even greater risk.⁶⁵
38. Dr. Bombay also testified about how constant exposure to stress can affect the development of a person’s brain:
- DR. BOMBAY: [...] So if a person is exposed to continual stress, this person would be expected to be at risk for a number of a range of outcomes as [...] the different brain regions are developing at different times, and if there is stress going on throughout these periods we would expect a range of negative outcomes. So in addition to the timing of the exposure to stress, the chronicity of the exposure to stress is also important to consider. [...]⁶⁶
39. Other studies have shown that early life adversity can lead to negative health and social outcomes later in life. For example, the Adverse Childhood Experience Study (the “ACE Study”) asked 17,000 middle-class Americans to indicate what, if any, adverse childhood experiences they had endured before the age of 18, including: emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, domestic violence, household

⁶¹ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 11 and following; see also see also Dr. Bombay’s Expert Report, “The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma (2013), CHRC BOD, Ex. HR-13, Tab 314 [“Dr. Bombay’s Expert Report”]; see also Letter from Amy Bombay to the AFN re: Expert Report, CHRC BOD, Ex. HR-13, Tab 313.

⁶² Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 97 and following.

⁶³ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 97 and following.

⁶⁴ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 98-100.

⁶⁵ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 98-100.

⁶⁶ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 101; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 10-11.

substance abuse, household mental illness, parental separation/divorce, and/or incarcerated household member.⁶⁷

40. The ACE Study found that one in eight participants (or 12.5%) had experienced four or more of the adverse childhood experiences, and that these adversities “tend to be interrelated and tend to be typically experienced on a chronic basis.”⁶⁸ Therefore, exposure to one adverse childhood experience increases a person’s risk of being exposed to another.⁶⁹ Additionally, the ACE Study found that these experiences had cumulative effects, meaning that “the more adversity you are exposed to, the greater the effects” on the person.⁷⁰
41. Dr. Bombay testified about the statistical relationships between adverse childhood experiences and a person’s behaviour, health and social outcomes later in life:

DR. BOMBAY: [...] So this is just one of the findings from one of the published reports coming out of this study which showed graded relationships between the number of childhood adversities and the number of comorbid health outcomes and health problems that they experienced. So on the bottom axis is their adverse childhood experience score, which is just the number of childhood adversities they experienced and, as you can see, we see this linear relationship, that the more childhood adversities they are exposed to, the more health problems they have.

And not only did they find this relationship with a number of health outcomes and health problems that these people had, but they found the same linear graded and cumulative relationships with a number of physical health outcomes, including heart disease, liver disease, pulmonary disease, and even sexually transmitted diseases, as well as linear relationships with mental health outcomes, so depression, suicide attempts and fetal [alcohol syndrome] – and those aren’t health outcomes, but as well as other health outcomes, mental health outcomes as well.

Not only did they find these linear relationships with health outcomes, but they also found relationships with social outcomes and behavioural outcomes. So just to list a couple of these, those with greater childhood adversity were at greater risk for intimate partner violence, both being a victim and perpetrating intimate partner violence.

⁶⁷ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-104; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.

⁶⁸ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.

⁶⁹ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.

⁷⁰ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 103-105; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 12.

It was associated with impaired worker performance, so those who had higher levels of childhood adversity missed more days [at] work, which of course would impact their functioning and their socioeconomic status, and it was also associated with a number of other outcomes such as adolescent and unintended pregnancy, smoking, as well as sexual activity [...].⁷¹ (emphasis added)

42. Therefore, Dr. Bombay concluded that “early life adversity has really long-term potential negative effects on the brain and we see how this is manifested in the increased risk of being exposed to a range of mental and physical health outcomes that we see into adulthood and that begin to manifest themselves early in life.”⁷²
43. These findings are significant because many of the adverse childhood experiences in these studies were lived realities for Aboriginal children who attended residential schools. In her testimony, Dr. Bombay noted that IRS survivors, like the participants in the Romanian orphanage and ACE studies, were subjected to high levels of early life adversity, the negatives impacts of which are evident:

DR. BOMBAY: [...] So this is a graph from my chapter that I prepared for the most recent First Nations Regional Longitudinal Health Survey⁷³ on Adult Personal Wellness, and these survivors were presented with this list of potential adversities experienced in residential schools, which was derived based on historical research that has documented that many survivors experienced this range of adverse childhood experiences.

The majority spoke about how isolation from family negatively impacted them, we see the same things that were measured in that adverse childhood experience study, like different forms of abuse, physical abuse, as well as additional forms of childhood adversity like witnessing abuse, which virtually all residential school survivors were subjected to, as well as bullying from other children and as well as things like having a lack of food, so physical neglect, a lack of clothing, as well as emotional neglect because these children were separated from their parents and did not grow up with a loving parent, which is exactly what we saw in the children who grew up in the Romanian orphanages. So we would expect that. [...] ⁷⁴ (emphasis added)

⁷¹ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 105-107; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 13-15.

⁷² Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 107.

⁷³ First Nations Information Governance Centre, “First Nations Regional Health Survey (RHS) 2008/10” (2012), CHRC BOD, Ex. HR-14, Tab 344.

⁷⁴ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 108-109; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 16-17.

44. Dr. Bombay also described how these early childhood adversities have impacted IRS survivors and future generations:

DR. BOMBAY: [...] Just to give you some example statistics, residential school survivors report higher levels of psychological distress compared to those who did not attend and they are also more likely to be diagnosed with a chronic physical health condition. This was from the most recent Regional Health Survey that reported that 76.1 percent of survivors had at least one chronic health condition versus 59.1 percent of First Nations adults who did not attend.

So in addition to these negative effects on health outcomes, research has also looked at certain social outcomes in residential school survivors, with a lot of the research focusing on how their experiences have affected – has affected their parenting, because numerous qualitative research studies have shown that the lack of traditional parental role models in residential schools impeded the transmission of traditional positive childrearing practices that they otherwise would have learned from their parents, and that seeing – being exposed to the neglect and abuse and the poor treatment that a lot of the caregivers in residential schools – how they treated the children, actually instilled negative – a lot of negative parenting practices, as this was the only models of parenting that they were exposed to. [...] ⁷⁵ (emphasis added)

45. Dr. Bombay also noted that studies have shown that 43% of First Nations adults on reserve perceive that their parents' attendance at residential schools negatively affected the parenting they received, and 73.4% believe that their grandparents' attendance at residential school negatively affected the parenting that their parents received.⁷⁶
46. Testifying about the importance of identifying the links (or pathways) between a person's involvement with the IRS system and consequent negative health and social outcomes, Dr. Bombay stated:

DR. BOMBAY: [...] So before we actually started to do this in our research, experts in the field of aboriginal health had already provided hypotheses about these pathways based on various anecdotal evidence from personal stories and books that have outlined the people's experiences in residential schools. And so this list is from a publication by, again, Dr. Laurence Kirmayer in discussing suicide, and because he suggests that residential schools is an important predictor of health and of suicide.

So before we carried out our research, they suggested a range of pathways by which children of survivors are at an increased risk. Just to name a few, these

⁷⁵ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 109-110; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 16-17.

⁷⁶ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 110-111; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 17.

included models of parenting and child rearing practices based on their experiences in residential school, it included the repetition of physical and sexual abuse that happened in residential school.

They suggested that the loss of cultural knowledge, language and tradition that happened as a result of residential schools is one mechanism that contributes to the intergenerational transmission of these negative effects, the undermining of individual and collective identity and esteem, as well as damage to the relationship with the larger society.

So while these proposed pathways provided a really important starting point, there had been no empirical research to confirm these mechanisms, so there was a need for quantitative data to really measure and identify the differences between children of residential school survivors and controls, and to identify the pathways that are putting these individuals at a greater risk. [...] ⁷⁷ (emphasis added)

47. There have been qualitative studies on the intergenerational impacts of the IRS system, which have “revealed that many children of residential school survivors struggled with issues, mental health issues, as well as issues related to cultural identity, so how they feel about being aboriginal, and again, parenting in this second generation”. ⁷⁸

48. Similarly, quantitative research on the intergenerational impacts of IRS has found that:

DR. BOMBAY: [...] 37.2 percent of First Nations adults whose parents attended residential school had contemplated suicide in their life, so they have higher levels of suicidal ideation compared to those whose parents did not attend, and their levels were lower at 25.7 percent.

This report also reported that the children – the grandchildren of survivors are also at an increased risk for suicide, as 28.4 percent of the grandchildren attempted suicide versus only 13.1 percent of those whose families – whose parents – grandparents did not attend residential school. [...] ⁷⁹

49. These findings are consistent among other measurements of health and wellbeing. For example, children of IRS survivors report higher levels of depressive symptoms. ⁸⁰ They also report higher levels of psychological distress, and are at greater risk for chronic physical health conditions as compared to those who have not been affected by

⁷⁷ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 127-129; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 24.

⁷⁸ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 113; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 18.

⁷⁹ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 114-115; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 19.

⁸⁰ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 115-118; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 19.

residential schools.⁸¹ This pattern extends to drug use, learning disabilities, skipping a grade and even the likelihood of contracting Hepatitis C.⁸²

50. Overall, these studies confirmed that the offspring of IRS survivors experienced “higher levels of adverse childhood experiences based on their parents’ time in residential school and their parents’ lack of exposure to proper parental role models”.⁸³ In her article entitled, “The Impact of Stressors on Second Generational Indian Residential School Survivors”, Dr. Bombay summarized the findings of her research as follows:

Summarizing, it appears that depressive symptoms are elevated among First Nations adults who had at least one parent who attended IRS, and that their parent’s Survivor status moderated the effects of later stressor encounters to promote depressive symptoms. Furthermore, the present findings are the first to verify some of the mediators of the intergenerational transmission of IRS effects, as the increased depressive symptoms observed in children of IRS Survivors were shown to be mediated by greater exposure to different types of stressors (adverse childhood experiences, adult traumas, and perceived discrimination). Despite several limitations to the conclusions, including issues of directionality of effects, self selection of the sample, and the relatively small number of participants, the present investigation demonstrates that the impact of [IRS] is not limited to those who attended, but is also manifested in second generation offspring of Survivors. These data also make it clear that government, institutional, and medical services, as well as those originating from First Nations communities and organizations, aimed at promoting mental health and healing for First Nations peoples should not be limited to the direct victims of forced assimilation, but should also be offered to their offspring. Clearly, the past cannot be undone with respect to parenting practices and other factors that may potentially contribute to the intergenerational effects observed. However, the findings raise the possibility that strategies focusing on coping with stressors and on changing conditions that favour stressor exposure in future generations may diminish the otherwise ongoing intergenerational effects of trauma.⁸⁴ (emphasis added)

51. The IRS system and its legacy represent a “collective” or “historical” trauma.⁸⁵ As Dr. Bombay noted, in addition to the cumulative effects of the individual traumas

⁸¹ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 116.

⁸² Testimony of Dr. Amy Bombay, Transcript Vol. 40 at p. 118; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 19-20.

⁸³ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 127-140; see also Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 24-37; see also “The Impact of Stressors on Second Generational Indian Residential School Survivors”, CHRC BOD, Ex. HR-14, Tab 340 [“Impact of Stressors”].

⁸⁴ Impact of Stressors, CHRC BOD, Ex. HR-14, Tab 340 at pp. 367-391.

⁸⁵ Dr. Bombay’s Power Point, CHRC BOD, Ex. HR-14, Tab 337 at pp. 38-46.

suffered at residential schools, there are collective traumas at the family and community level that impact and modify social dynamics, processes, structures, and functioning.⁸⁶

52. This is not the only collective trauma that has impacted Aboriginal people in Canada. For example, the forced relocation and displacement of Aboriginal peoples has been linked to higher levels of substance abuse and depression.⁸⁷ It is also important to note that the intergenerational effects of collective trauma are not unique to Aboriginal peoples. The same effects have been shown in other groups/populations that have experienced similar collective race-based trauma that affected a large proportion of the population. Research has consistently found that collective trauma results in greater risk and greater needs amongst these groups.⁸⁸
53. Many of the Commission and Complainants' witnesses testified about the impact of the IRS system on First Nations communities across the country.⁸⁹ Chief Robert (Bobby) Joseph, an Elder and IRS survivor, testified about how the system eroded long-standing First Nations' traditions and perspectives on child-rearing.⁹⁰ Theresa Stevens, Executive Director of Anishinaabe Abinoojii Family Services in Kenora, Ontario ("Anishinaabe Abinoojii"), testified about the impact IRS continues to have in the communities she serves:

MS. STEVENS: [...] So if the majority of our on-Reserve families, their parents or grandparents attended residential school and there was that family breakdown or the knowledge of parenting and traditional child-rearing practices, if that knowledge was broken or severed because parents or grandparents were sent to residential school [...], it definitely had and continues to have an impact on the children and families.

⁸⁶ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 28-30, 82-85, 94, 127-129, 133, 178-190; see also testimony of Chief Bobby Joseph, Transcript Vol. 43 at p. 50.

⁸⁷ Testimony of Dr. Amy Bombay, Transcript Vol. 41 at pp. 13-14, 67-68; see also RCAP Report, CHRC BOD, Ex. HR-02, Tab 7 at p. 184.

⁸⁸ Testimony of Dr. Amy Bombay, Transcript Vol. 40 at pp. 28-30, 82-85, 94, 111-112, 127-129, 133, 178-190; see also Dr. Bombay's Power Point, CHRC BOD, Ex. HR-14, Tab 337 at p. 18.

⁸⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 119, 127, 135, 172-176; Vol. 2 at pp. 108, 111; Vol. 3 at p. 136; Vol. 46 at pp. 57, 58, 87, 172, 255, 256; Vol. 47 at pp. 53, 91-92, 307-308; see also testimony of Dr. Nicolas (Nico) Trocmé, Transcript Vol. 7 at pp. 175-176; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 60-61; see also testimony of Elsie Flette, Transcript Vol. 21 at p. 66; see also testimony of Theresa Stevens, Transcript Vol. 25 at pp. 29, 68, 80-84, 89-90; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 70-71; see also testimony of Raymond Shingoose, Transcript Vol. 31 at p. 160; see also testimony of Chief Bobby Joseph, Transcript Vol. 42 at pp. 16, 28, 29, 34-37, 48, 70, 107; Vol. 43 at pp. 34, 40, 44-46, 49, 50, 57, 58-63; see also testimony of Barbara D'Amico, Transcript Vol. 53 at p. 26; see also testimony of Sheilagh Murphy, Transcript Vol. 54 at pp. 50-51; Vol. 55 at p. 75; see also testimony of Phil Digby, Transcript Vol. 59 at p. 149.

⁹⁰ Testimony of Chief Bobby Joseph, Transcript Vol. 42 at p. 64.

We are seeing now the third and fourth generation of those families, so it was like a double impact [...].⁹¹

54. In his Apology, the Prime Minister himself acknowledged the collective trauma and the intergenerational impacts that the IRS system has had on Aboriginal peoples:

To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.⁹²

ii) The Federal Government Takes Over the Provision of Child Welfare on Reserve: the “Sixties Scoop” and Residential Schools as Child Welfare Institutions

a. The “Sixties Scoop”

55. Another example of collective trauma is the large-scale removal of Aboriginal children from their homes in the 1960’s and placement in foster care, which is commonly referred to as the “Sixties Scoop”.⁹³ Ms. Stevens stated that many of the communities she serves in northern Ontario were deeply affected by the Sixties Scoop. She described how traumatic it was for First Nations families and communities when “buses would drive into the communities and take all the children away.”⁹⁴

⁹¹ Testimony of Theresa Stevens, Transcript Vol. 25 at p. 90.

⁹² Statement of Apology, CHRC BOD, Ex. HR-03, Tab 10.

⁹³ Testimony of Dr. Amy Bombay, Transcript Vol. 41 at pp. 15-16; see also testimony of Theresa Stevens, Transcript Vol. 25 at pp. 28-29.

⁹⁴ Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 28-30, 80-84, 90; see also testimony of Tom Goff, Transcript Vol. 23 at p. 161; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 17; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 20; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 114-115; Vol. 48 at pp. 91-92.

b. Residential Schools as Child Welfare Institutions

56. After 1969, with integration proving to be a challenge, the federal government began to emphasize residential school enrolment for children who could not integrate. Specifically, it was encouraged for children who, in the opinion of AANDC social workers, the provincial Children’s Aid Societies and/or the local Indian agent, could not be properly cared for at home.⁹⁵
57. In other words, residential schools were used to house “neglected” children,⁹⁶ who were enrolled on a priority basis.⁹⁷ As Dr. Milloy noted, the fact that children were being neglected had in part, ironically, been caused by IRS: “[T]he dysfunction created by children who had been to residential school [and] who then [became] parents [was that they found] that their parenting skills [were] lacking, or who suffer[ed] from disabilities, as with the first two parents who [were] excessive drinkers, now separated [...]”.⁹⁸ Indeed, subsequent studies confirmed that neglect is the most common reason that First Nations children are brought into care.⁹⁹
58. Nevertheless, the federal government apprehended “neglected” children and placed them in residential schools, which had effectively become child welfare institutions:

DR. MILLOY: [...] And when I talk about apprehensions, I talk about a definition of neglect made by someone who has the power to remove a child, right, so there is the apprehension process that you are familiar with, which is a court process, right, and there is the apprehension process which is an informal process that the department uses to remove children and place them in residential schools.

[...]

These applications for admission to residential school were often not filled out by parents, they were often filled out by the Indian agent who says this child has to go to residential school because the parents are excessive drinkers and incapable of filling out this form, let alone raising their children.

⁹⁵ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 85-86.

⁹⁶ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 85-86.

⁹⁷ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 19-26; Vol. 35 at pp. 149-151, 162-163.

⁹⁸ Testimony of John Milloy, Transcript Vol. 35 at pp. 88-89.

⁹⁹ *Wen:De We Are Coming to the light of Day* (2005), CHRC BOD, Ex. HR-01, Tab 5 at p. 8 [*“Wen:De Report Two”*]; see also Mesnmimk Wasatek: *Catching a drop of light, Understanding the Overrepresentation of First Nations Children in Canada’s Child Welfare System: An Analysis of the CIS-2003*, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24 [*“FNCIS Report 2003”*]; see also *CIS-2008 Major Findings Supplementary Tables*, CHRC BOD, Ex. HR-07, Tab 92; see also *Centre of Excellence for Child Welfare*, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

So there is that sort of informal departmental system which will fade away and become a very formal system of apprehension, within the laws of the given province. White children and First Nations children will be dealt with in the same fashion.¹⁰⁰

59. As a result, the number of “neglected” children who were placed in residential schools post-1960 was quite high, representing approximately 75% by 1966.¹⁰¹ A 1967 research study of nine residential schools in Saskatchewan found that approximately 80% of the children in those schools had been placed there for child welfare reasons, and called for more in-home supports for families in order to avoid having to remove so many children from their homes.¹⁰²
60. Notwithstanding the fact that the IRS system had transitioned from an educational institution to a repository for children taken into child welfare care, it was still chronically underfunded.¹⁰³ The lack of federal funding, coupled with the fact that children had to work more and more to produce revenue in order for the schools to survive, had a serious detrimental effect on their education, health and wellbeing.¹⁰⁴
61. In 1951, the federal government amended the *Indian Act* to extend the application of provincial legislation to First Nations on reserve, including child welfare legislation.¹⁰⁵ The impact of provincial involvement in the provision of child welfare services on reserve is explored further below.

¹⁰⁰ Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 91-93; see also A National Crime, Ex. AFN-1 at pp. 212-213; see also testimony of Chief Bobby Joseph, Transcript Vol. 42 at p. 45; Vol. 43 at p. 49.

¹⁰¹ Testimony of Dr. John Milloy, Transcript Vol. 35 at p. 95; see also A National Crime, Ex. AFN-1 at pp. 215-217.

¹⁰² George Caldwell, “Indian Residential Schools: A Research Study of the Child Care Programs of Nine Residential Schools in Saskatchewan” (1967), CHRC BOD, Ex. HR-12, Tab 268 at pp. 57-69, 148-149.

¹⁰³ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 36-37.

¹⁰⁴ Testimony of Dr. John Milloy, Transcript Vol. 34 at pp. 143-149.

¹⁰⁵ Testimony of Dr. John Milloy, Transcript Vol. 35 at pp. 97-102; see also A National Crime, Ex. AFN-1 at pp. 216-217; see also *Indian Act, supra*, s. 88.

B) First Nations Child Welfare Policies and Funding on Reserve: A History

62. Pursuant to subsection 91(24) of the *Constitution Act, 1867*,¹⁰⁶ the federal government has exclusive legislative authority over “Indians and Lands reserved for Indians”. Subsection 92(7) of the *Constitution Act, 1867* indicates that provincial legislatures have authority over the establishment, maintenance, and management of hospitals, asylums, charities, etc.¹⁰⁷
63. Section 88 of the *Indian Act* states that laws of general application apply on reserve unless and to the extent that such laws conflict with the *Indian Act* and its treaties.¹⁰⁸
64. Therefore, the child welfare services that exist for First Nations people living on reserve result from the interplay of both federal and provincial heads of power.
65. Child welfare services are generally defined as a “mandatory service, directed by provincial and territorial child welfare statutes [... the purpose of which is to investigate] reports of alleged maltreatment, provid[e] various types of counselling and supervision, and [look] after children in out-of-home care”.¹⁰⁹ More generally, child welfare refers to “a set of government and private services designed to protect children and encourage family stability” through the provision of child maltreatment prevention services and least disruptive measures, the aim of which is to “safeguard children from abuse and neglect.”¹¹⁰
66. Allegations of abuse and neglect are generally investigated by child welfare agencies, both on and off reserve, which often offer “services aimed to support families so that they can stay intact and raise children successfully and to remedy risks in families where the child has been removed so reunification can occur.”¹¹¹
67. The following is a summary of the federal government’s on reserve First Nations child welfare policies and funding formulas.

¹⁰⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in R.S.C. 1985, App. II, No 5, s. 91(24) [“*Constitution Act, 1867*”].

¹⁰⁷ *Constitution Act, 1867*, *supra*, s. 92(7). The decision in *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, [2010] 2 S.C.R. 696, 2010 SCC 45 clarified provincial jurisdiction over child and family services.

¹⁰⁸ First Nations Child and Family Services National Program Manual (2005), CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.2.3 [“Program Manual 2005”]; see also *Indian Act*, *supra*, s. 88.

¹⁰⁹ Canadian Incidence Study 2008 – Major Findings Report, CHRC BOD, Ex. HR-05, Tab 46 at p. 9 [“CIS-2008”].

¹¹⁰ Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3

¹¹¹ Glossary of Social Work Terms, CHRC BOD, Ex. HR-06, Tab 74 at p. 3

i) AANDC Reimburses Provinces to Deliver Child Welfare Services on Reserve and *Ad Hoc* First Nation Agencies Develop

68. Notwithstanding its legislative authority over Indians and their lands, the federal government has never enacted child welfare legislation.¹¹² Instead, in the mid-20th century it entered into agreements with provincial governments to deliver child welfare services to First Nations people on reserve.¹¹³
69. Each province has its own child welfare legislation and standards,¹¹⁴ so practices varied from region to region.¹¹⁵
70. The services provided by the provincial governments were minimal and not delivered in a culturally-appropriate manner.¹¹⁶ There was also an alarming number of First Nations children being taken into care and removed from their communities.¹¹⁷ By the early 1980's, First Nation peoples began voicing their concerns and desire to take over the provision of child welfare services on reserve.¹¹⁸ As a result, *ad hoc* First Nations child welfare agencies began operating on some reserves funded by the federal government; however, funding was inconsistent, unregulated and unclear.¹¹⁹
71. The federal government put a moratorium on these *ad hoc* arrangements in 1986, wanting instead to develop a set funding model for First Nations child welfare agencies.¹²⁰

ii) AANDC's First Nations Child and Family Services Program ("FNCFS Program")

72. On July 27, 1989, Cabinet approved a new policy and management framework for a "First Nation Child and Family Service Program" ("FNCFS Program") on reserve.¹²¹
73. There are two types of agreements that AANDC has developed to "facilitate the provision of child and family services to First Nations children" on reserve: agreements

¹¹² NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.

¹¹³ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.

¹¹⁴ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 78.

¹¹⁵ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 11.

¹¹⁶ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.

¹¹⁷ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.

¹¹⁸ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24.

¹¹⁹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 4, section 1.1.6.

¹²⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 24; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 4, section 1.1.6.

¹²¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20.

with provincial and territorial governments, and comprehensive funding agreements with First Nations child and family services agencies.¹²² They are detailed in turn below.

a. Creation of the FNCFS Program

74. The purpose and scope of the FNCFS Program are described in AANDC's "National Social Program Manual" (the "Program Manual").¹²³ At the time of the complaint, the Program Manual stated that the primary objective of the Program was to "support culturally appropriate child and family services for Indian children and families resident on reserve or [ordinarily resident on] reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province."¹²⁴
75. Since that time, the language of the Program Manual has been amended.¹²⁵ The stated purpose of the FNCFS Program is now to provide child welfare services to First Nations on reserve "in accordance with the legislation and standards of the province or territory of residence and in a manner that is reasonably comparable to those available to other provincial residents in similar circumstances within Program Authorities".¹²⁶
76. The principle of "reasonable comparability" is not otherwise defined in the Program Manual.¹²⁷
77. AANDC states that "culturally appropriate services are ones which "acknowledge and respect the values, beliefs and unique cultural circumstances" of First Nations peoples and the communities served."¹²⁸
78. For the purpose of the FNCFS Program, "ordinarily resident on reserve" is defined as an individual who lives: (i) at a civic address on reserve, or (ii) on reserve more than 50% of

¹²² NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 43.

¹²³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 5-6, section 1.3; see also National Social Programs Manual (2012), CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1 ["Updated Programs Manual 2012"].

¹²⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2.

¹²⁵ To the extent there are inconsistencies between versions of documents entered into evidence before the Tribunal, the Commission submits that the Tribunal ought to give more weight to versions which pre-date the complaint. For example, see e-mail from Barbara D'Amico to Beverly Lavoie dated June 11, 2010, CHRC BOD, Vol. 14, Tab 386; see also e-mail from Joel Dei to William McArthur dated October 15, 2013, CHRC BOD, Ex. HR-15, Tab 455.

¹²⁶ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.

¹²⁷ House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 3, 6-8 (Sheila Fraser, Auditor General of Canada).

¹²⁸ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.3.

the time.¹²⁹ Therefore, the residency of a child's parent or guardian at the time they are taken into care determines whether they are "ordinarily resident on reserve", and therefore a federal government responsibility.¹³⁰ First Nations children who are living off reserve in order to access educational, medical or other social services not otherwise available on reserve are still considered to be "ordinarily resident on reserve".¹³¹ Additionally, all children in the Yukon Territory are considered to be eligible for the purposes of the FNCFS Program.¹³²

79. The Program Manual sets out AANDC's responsibilities for the social development programs it offers, including the FNCFS Program, as follows:

- to provide funding to eligible funding recipients as authorized by approved policy and program authorities;
- to lead the development of policy and provide policy clarification to eligible funding recipients;
- to provide oversight to ensure programs operate according to authorities and Canada's financial management requirements, by ensuring reporting and accountability requirements are met; and
- to further articulate regional processes and procedures necessary to implement the national manual.¹³³

80. In carrying out its responsibility to oversee, manage and monitor First Nations' social development programs, AANDC conducts compliance reviews to ensure that "activities and expenditures comply with the program terms and conditions."¹³⁴ Compliance activities can involve on-site reviews of children in care and foster home files, employee interviews and discussions with individuals responsible for making decisions and or

¹²⁹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.

¹³⁰ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.

¹³¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.16.

¹³² Funding Agreement – Government of Yukon 2011-2012, CHRC BOD, Ex. HR-13, Tab 305 at pp. CAN012193_0021-CAN012193_0024.

¹³³ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2.

¹³⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also AANDC, "Contributions to support culturally appropriate prevention and protection services for Indian children and families resident on reserve – Renewal" (2007-2012), CHRC BOD, Ex. HR-11, Tab 236; see also AANDC, "Contributions to support culturally appropriate prevention and protection services for Indian children and families resident on reserve – Renewal" (2007-2012), CHRC BOD, Ex. HR-13, Tab 324.

approving program expenditures.¹³⁵ According to the Program Manual, failure to “comply with these requirements constitutes a default of the funding agreement”, and may result in “immediate cash flow restrictions [or] denial to renew an agreement or program activity”.¹³⁶

81. The Program Manual also describes the limitations of its social development programs, specifically that eligible expenditures are restricted to those within AANDC’s authorities and mandate, as well as by provincial/territorial legislation, guidelines and rates.¹³⁷
82. Funding is flowed from AANDC Headquarters to AANDC regional offices, and then to First Nations child and family service agencies and/or the province/territory, respectively.¹³⁸ Each region is “responsible for managing [its FNCFS Program] budget and prioritizing how funds are allocated.”¹³⁹

b. AANDC Designs and Implements Directive 20-1

83. AANDC implemented the FNCFS Program on reserve by issuing “Directive 20-1”, which came into effect on April 1, 1991.¹⁴⁰ Its stated purpose is to set out AANDC’s “policy regarding the administration of the [FNCFS Program]”.¹⁴¹
84. The underlying principle of Directive 20-1 is a commitment to the “expansion of First Nations Child and Family Services on reserve to a level comparable to the services provided off reserve in similar circumstances.”¹⁴² In addition, services are to be provided in accordance with the applicable provincial child and family services legislation in each region.¹⁴³

¹³⁵ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 97-113, Appendix C; see also letter from AANDC to Mi’kmaw Family and Children’s Services dated February 28, 2011, CHRC BOD, Ex. HR-12, Tab 258.

¹³⁶ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0.

¹³⁷ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 7, section 5.0.

¹³⁸ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 5.4.1.

¹³⁹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 5.4.1.

¹⁴⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20; see also Program Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 9, section 16.0 [“Directive 20-1”].

¹⁴¹ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 1, section 1.0.

¹⁴² Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 2, section 6.1.

¹⁴³ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 3, section 6.5.

85. Directive 20-1 was designed in 1988, and has not been significantly modified since that time.¹⁴⁴ It continues to apply in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory.¹⁴⁵
86. Directive 20-1 provides funding to First Nations child and family service agencies in two separate streams: “operations” and “maintenance”.¹⁴⁶

b.i. Operations

87. Operations funding, which “covers all aspects of the agency’s operations” or administrative costs,¹⁴⁷ is provided annually to First Nations child and family service agencies using a formula created by AANDC and set out in Directive 20-1.¹⁴⁸ AANDC “provides a fixed level of funding for [an agency’s] operational costs based primarily on the previous year’s” on reserve child population aged 0 to 18 years.¹⁴⁹
88. The Program Manual sets out that the following activities are to be funded out of an agency’s fixed operations budget:
- salaries and benefits;
 - travel expenses;
 - staff training and other professional development service (i.e., workshops, conferences);
 - fee for service, including foster and adoption home assessments;
 - legal services related to both agency operations and court costs incurred as a result of a child’s apprehension;
 - insurance;
 - rent, utilities and/or mortgage;

¹⁴⁴ Updated Program Directive 20-1 (2005), CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1 [“Updated Directive 20-1”]; see also Comparison of Program Directives, CHRC BOD, Ex. HR-07, Tab 96; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.

¹⁴⁵ AANDC Power Point, “AANDC’s Role as a Funder in FNCFS” (May 2013), CHRC BOD, Ex. HR-12, Tab 246; see also e-mail from Mary Quinn to Michael Wernick dated March 25, 2009, CHRC BOD, Ex. HR-13, Tab 317; see also AANDC Briefing Note, “How First Nation Child and Family Services (FNCFS) Works in Each Region”, Respondent’s Book of Documents [“Respondent’s BOD”], Ex. R-13, Tab 5.

¹⁴⁶ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.4.1.

¹⁴⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

¹⁴⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

¹⁴⁹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 88-89.

- IT equipment, rentals and supports;
- janitorial services;
- expenses related to Board of Directors and other committee operations;
- off-hour emergency services;
- special needs assessment and testing for children;
- audits, monitoring and evaluation (i.e., the cost of preparing agency evaluations); and
- para-professional, family support and prevention services, including in-home services.¹⁵⁰

89. AANDC has fixed the costs associated with the above-noted services in Directive 20-1.¹⁵¹ For example, legal services for First Nations child and family service agencies are capped at \$5,000 per year under Directive 20-1.¹⁵²

90. The above-noted list is not exhaustive,¹⁵³ and over time AANDC has added certain activities to the list as “eligible operations costs” without providing a corresponding increase in operations funding for First Nations child and family services agencies to cover those costs.¹⁵⁴ For example, insurance, IT equipment and janitorial services were not included in an earlier iteration of the Program Manual, but are listed in the latest version from AANDC.¹⁵⁵

91. AANDC’s formula to determine the amount of operations funding per First Nations child and family service agency is “based on the on reserve population of children from 0 – 18 as reported annually by [AANDC’s] Lands Revenues and Trusts” based on the

¹⁵⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 83.

¹⁵¹ Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered).

¹⁵² Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 6.

¹⁵³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2.

¹⁵⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33, 88-92; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 83 (see original list of items included under Directive 20-1’s operations funding stream).

¹⁵⁵ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5.

population data of each band across Canada as of December 31 for the preceding year.¹⁵⁶ Each agency's operational funding amount is calculated by AANDC Headquarters' Finance Branch.¹⁵⁷

92. There are four (4) components to AANDC's operations funding formula: (i) an administrative allocation; (ii) an allocation per member band; (iii) an allocation per child; and (iv) a remoteness adjustment.¹⁵⁸ The calculation of these funding components is detailed below.

93. First, agencies are eligible to receive an administrative allocation based on the size of their child population.¹⁵⁹ The maximum possible administrative allocation is \$143,158.84.¹⁶⁰ This figure has remained unchanged since April 1, 1991, when Directive 20-1 first came into effect.¹⁶¹ As an agency's total on reserve child population (aged 0 to 18 years) decreases, so too does their administrative allocation:

- a child population of 801 to 1,000 results in \$143,158.84 administrative allocation;
- a child population of 501 to 800 results in \$71,579.43 administrative allocation;
- a child population of 251 to 500 results in \$35,789.10 administrative allocation; and
- a child population of 0 to 250 results in \$0.00 administrative allocation.¹⁶²

94. Second, agencies are eligible to receive a fixed allocation of \$10,713.59 for each member band in their catchment area, which is defined as the "geographic area for which the

¹⁵⁶ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-13, sections 19.0, 20.0.

¹⁵⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.

¹⁵⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.2.4; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1.

¹⁵⁹ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1.

¹⁶⁰ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1.

¹⁶¹ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1.

¹⁶² Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2.

reference province or territory grants a mandate” to a First Nations child and family service agency.¹⁶³

95. Third, agencies are eligible to receive an allocation of \$726.91 per child aged 0 to 18 years in their catchment area.¹⁶⁴
96. Fourth, and finally, agencies are eligible to receive an adjustment based on the remoteness factor of each member band, which is then averaged and used to adjust funding as follows:
- the adjustment factor for remoteness is multiplied by \$9,235.23;
 - the remoteness factor is multiplied by \$8,865.90 times the number of bands within the agency’s catchment area;
 - the child population (0 to 18 years) is multiplied by \$73.65 times the remoteness factor.¹⁶⁵
97. Taken together, these four components make up an agency’s operations funding under Directive 20-1, which is provided to First Nations child and family service agencies as a “Flexible Transfer Payment”. In other words, agencies have “full authority to set [their own] priorities to be funded (within the sphere of the [FNCFS Program] so long as the mandate to protect children from neglect and abuse is met.”¹⁶⁶
98. The Program Manual states that First Nations child and family services agencies are “required to provide reports [on their operations] twice per year, effective September 30 and March 31”, which “clearly indicate that the terms and conditions of the agreement have been met and that the [agency] continues to provide the service for which it is mandated.”¹⁶⁷ These reports can include the following:
- a list of protection and prevention services provided;
 - the number of families for whom protection services have been provided;
 - the number of families in which child protection intervention resulted in the placement of children in alternate care;

¹⁶³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 48, section 7.

¹⁶⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.2.

¹⁶⁵ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 22-23, section 3.2.3.

¹⁶⁶ Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 60, section 19.1(f).

¹⁶⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.6.

- the number of families in which parent aide services were used for child protection purposes;
- the average length of stay for children in alternate care by age;
- reasons for children coming into care (neglect or abuse);
- the current number of trained or approved foster homes;
- the number of children placed in off-reserve resource;
- the number of approved adoption homes;
- the amount being spent on prevention as compared to protection;
- the number of children included in the families served (per service provided);
- the number of community-based child and family services committees active;
- the number of Elders committees currently operating;
- the number of public information, education-related sessions and workshops held during the period in question; and
- the types of workshops held and the number of attendees.¹⁶⁸

b.ii. Maintenance

99. Maintenance funding is provided to First Nations child and family service agencies to “cover costs related to maintaining a child in alternate care out of the parental home, within AANDC authorities.”¹⁶⁹
100. AANDC does not apply a formula to determine maintenance funding under Directive 20-1.¹⁷⁰ Rather, it reimburses agencies based on the actual costs of eligible expenditures on a “dollar-for-dollar basis.”¹⁷¹

¹⁶⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 40-41, sections 6.2.2, 6.2.4.

¹⁶⁹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2.

¹⁷⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.

¹⁷¹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.

101. Items AANDC deems “eligible” for reimbursement under maintenance are outlined in the Program Manual,¹⁷² and include:

- the full costs of foster, group, institutional and kinship care¹⁷³ in accordance with provincially established rates “up to a maximum daily per diem allowable as set by AANDC authorities”;¹⁷⁴
- non-medical services to children in care with behavioural problems and specialized needs;
- purchases on behalf of children in care;
- other provincially-approved purchases not covered by other federal/provincial funding sources;
- post-adoption subsidies and supports; and
- professional services not covered by other jurisdictions or by Health Canada’s Non-Insured Health Benefits Program.¹⁷⁵

102. When provincial or territorial rates for foster, group and institutional care increase or decrease, AANDC is responsible to adjust an agency’s maintenance funding accordingly.¹⁷⁶

103. As soon as a child is taken into care (either by apprehension or by voluntary agreement with the child’s guardian), the First Nations child and family service agency must notify AANDC of their action “in accordance with established regional practice”¹⁷⁷ in order to verify whether the child is a “federal responsibility” (i.e., if the child is registered or eligible to be registered as a Status Indian, is under the age of majority in the reference province/territory and whose custodial parent was ordinarily resident on reserve at the time).¹⁷⁸ The information AANDC requires is as follows:

- the child and his/her parents along with the relevant Indian Status number(s);

¹⁷² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 15-18, 23, sections 2.3, 3.3.1.

¹⁷³ Kinship care is defined in the Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.15: “An alternate residence for a Child in Care, regulated in accordance with the standards of the reference province of territory, similar to a foster home but involving the use of the extended family of the Child in Care.”

¹⁷⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2.

¹⁷⁵ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at pp. 35-36, section 3.4.1.

¹⁷⁶ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.3.

¹⁷⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 42, section 6.4.1.

¹⁷⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 42-43, section 6.4.2.

- whether or not the custodial parent/guardian was ordinarily resident on reserve at the time of the apprehension;
 - the birth date and gender of the child;
 - whether the placement is an apprehension, a voluntary placement or a private placement under provincial or territorial legislation and standards;
 - the level of care which the child is deemed to require; and
 - if the rate for foster, group or institutional care is above the basic provincial/territorial rate, a statements signed by a qualified social workers confirming the level and rate required.¹⁷⁹
104. The federal government has placed conditions and limits on maintenance funding under Directive 20-1. For example, the Program Manual states that AANDC will only reimburse maintenance expenses if the placement (i.e., foster home, group home and/or institution) is “licensed or regulated and monitored in accordance with provincial legislation and standards.”¹⁸⁰
105. AANDC also explicitly prohibits certain items from being eligible for reimbursement under the maintenance component of Directive 20-1.¹⁸¹ For example, the Program Manual defines the following items as “non-eligible expenditures for maintenance”:
- insured health services under the authority of provincial/territorial guidelines; and
 - program areas which fall under the authority of other jurisdictions such as another AANDC Program, other federal departments, provinces or territories.¹⁸²
106. Finally, the continuation of AANDC funding under Directive 20-1 is contingent upon its verification of an agency’s maintenance expenditures through “monthly reconciliations”.¹⁸³ The Program Manual states that agencies must submit monthly invoices (otherwise known as “monthly maintenance reports”) to AANDC regional offices “within 15 calendar days of month end.”¹⁸⁴ The items listed in the invoice are then reviewed by AANDC and deemed “eligible” or “ineligible” maintenance expenses.

¹⁷⁹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 42, section 6.4.1.

¹⁸⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 15, section 2.3.3.

¹⁸¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4.

¹⁸² Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.4.2.

¹⁸³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 15, section 2.3.1.

¹⁸⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.4.

107. The purpose of these reports is to “review expenditures paid for services provided for eligible children [...] to verify eligible expenses for billing purposes and to provide activity level indicators which AANDC uses for trend analysis.”¹⁸⁵ The information required by AANDC includes: the child’s name and province/territory of residence; the child’s Indian Registry System number; the child’s gender and date of birth; the child’s child welfare and/or legal status (i.e., type of care); the number of days the child has been in care; the child’s placement type; the applicable placement rates; the cost of “additional” services, including child care support, clothing, therapy/assessment, etc.; and a description of each expense and associated cost.¹⁸⁶
108. In reconciling monthly maintenance invoices, AANDC examines the charges and, according to the Program Manual, will approve them so long as they are “in line with the provincial or territorial [per diem] rates for the level of care for which the child has been assessed”.¹⁸⁷
109. If the charges exceed the provincial or territorial per diem rates, AANDC requires First Nations child and family service agencies to “itemize the additional charges and justify them.”¹⁸⁸ AANDC then ultimately determines whether “these additional costs are in line with [its FNCFS Program] authorities.”¹⁸⁹ If AANDC decides that the charges as “excessive”, they “must reject that portion of the claim that is in dispute and advise the [agency] accordingly”.¹⁹⁰
110. Maintenance funding under Directive 20-1 is provided to First Nations child and family services agencies as a “Contribution Payment”. In other words, it is a “conditional transfer payment to an [agency] for a specified purpose pursuant to a Contribution Agreement that is subject to being accounted for and audited.”¹⁹¹
111. AANDC develops an agency’s maintenance budget at the beginning of each fiscal year “based on verified expenses from the previous fiscal year and anticipated expenses for

¹⁸⁵ AANDC Website, “Child and Family Services Maintenance Report – Form Instructions”, CHRC BOD, Ex. HR-14, Tab 358 at pp. 1-4.

¹⁸⁶ AANDC Website, “Child and Family Services Maintenance Report – Form Instructions”, CHRC BOD, Ex. HR-14, Tab 358 at pp. 2-4.

¹⁸⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.

¹⁸⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.

¹⁸⁹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.

¹⁹⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 6.4.3.

¹⁹¹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 43, section 5.2.3.

the new fiscal year.”¹⁹² Funding is then advanced to the agency on a “monthly basis taking into consideration the level of expenses claimed in the [agency’s monthly maintenance] reports”.¹⁹³

112. According to the Program Manual, once AANDC has verified an agency’s monthly maintenance report, “adjustments [are] made to the subsequent month’s advance to bring the total amount advanced in line with the year to date actual eligible expenses.”¹⁹⁴

b.iii. Assumptions in the Calculation of Funding under Directive 20-1

113. Directive 20-1 was designed by AANDC in 1988.¹⁹⁵ Inherent in the formula are two assumptions. First, that each First Nations child and family service agency has an average of 6% of the on reserve total child population in care.¹⁹⁶ Second, that each agency has an average of 20% of on reserve families requiring services (or “classified as multi-problem families”).¹⁹⁷
114. The 6% assumption operates all across Canada with the exception of Manitoba, where the assumption is that 7% of on reserve First Nations children are in care.¹⁹⁸
115. The formula has not been significantly modified since 1988, and still operates based on these assumptions.¹⁹⁹

¹⁹² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.2.

¹⁹³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.3.

¹⁹⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8.3.

¹⁹⁵ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 1.

¹⁹⁶ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 97-98; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 23.

¹⁹⁷ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.

¹⁹⁸ Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 19.

¹⁹⁹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 14-16.

b.iv. Scale of First Nations Child and Family Service Agencies

116. AANDC's Program Manual states that Directive 20-1 is designed "based on an economy of scale whereby each eligible funding recipient should serve at least 801 children (0-18 years of age)."²⁰⁰ In contrast, AANDC's updated version of Directive 20-1 states that each agency "should serve at least 1,000 children (0-18 years of age)."²⁰¹
117. However, both the Program Manual and the updated version of Directive 20-1 state that AANDC recognizes that "in exceptional circumstances this may be impossible and consideration for funding may be given for funding a smaller [agency] should [they] demonstrate the need based on" the following considerations:
- geographic reasons why they cannot belong to a larger agency, noting that isolation and remoteness may impede operational efficiency and effectiveness;
 - the existence of cultural contrasts and extreme differences that would not support effective working relationships; and
 - existing groupings and administrative arrangements for the service delivery of other social programs that could be used to deliver FNCFS services in a cost-effective manner.²⁰²
118. Notwithstanding the fact that AANDC explicitly allows for exceptions to its set minimum of 801 (or 1,000) children served, in at least some provinces it has decided not to permit the creation of any more small agencies.²⁰³

b.v. Children's Special Allowance

119. The Children's Special Allowance (the "CSA") is a "federal benefit paid [by the Canada Revenue Agency] on behalf of children who are in the care of provincial, territorial, or First Nation child welfare authorities."²⁰⁴
120. Directive 20-1 requires that First Nations child and family service agencies apply for the CSA within 30 days of bringing a child into care.²⁰⁵ AANDC also requires that agencies

²⁰⁰ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4.

²⁰¹ Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 55, section 8.1; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 5-6, section 9.1(a).

²⁰² Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 35, section 3.3.4; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 56, section 8.1(a).

²⁰³ AANDC Briefing Note "1016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280 at p. 3 (unnumbered).

²⁰⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 32, section 2.1.7.

apply the amount of CSA received per child against the eligible maintenance expenses for that child, and that they “document the use of these funds”.²⁰⁶

b.vi. Comprehensive Funding Agreements

121. In order to flow funds to First Nations child and family service agencies under Directive 20-1, AANDC enters into comprehensive funding agreements (a requirement of the Treasury Board Policy on Transfer Payments).²⁰⁷ These agreements are legal documents that cover a one-year period, and set out the components, conditions and terms of funding.²⁰⁸
122. For example, the agreements set out that under Directive 20-1, agencies are required to absorb any deficits they may incur, and use all surplus money for activities related to the FNCFS Program.²⁰⁹

b.vii. AANDC’s Reporting Requirements and Compliance Activities

123. AANDC’s Program Manual and comprehensive funding agreements also set out the “deliverables” or reporting requirements of the agencies, including monthly maintenance reports and bi-annual operations reports, as previously described.²¹⁰
124. In addition, AANDC requires First Nations child and family service agencies to provide “annual financial statements”, conducted by an independent auditor, within 120 calendar days of the end of the fiscal year.²¹¹
125. The Program Manual also states that a requirement of funding is that AANDC conducts “on-site reviews” at least “once every three years”, and more frequently than that if

²⁰⁵ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 62, section 20.1(e).

²⁰⁶ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 62, section 20.1(f); see also letter from AANDC (Manitoba Region) to Executive Directors of First Nation Child and Family Service Agencies in Manitoba (undated), CHRC BOD, Ex. HR-14, Tab 347; see also e-mail from Debbie Graham to Carol Schimanke et al. dated April 18, 2008, CHRC BOD, Ex. HR-15, Tab 450: At one time, AANDC reduced a First Nations child and family service agency’s maintenance budget by the amount of Children’s Special Allowance they received.

²⁰⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 26, section 4.4.1.

²⁰⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 27, section 4.4.7.

²⁰⁹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 26, section 4.4.1.

²¹⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 36, section 5.8; see also Funding Agreement National Model 2012-2013, CHRC BOD, Ex. HR-09, Tab 152 at pp. 3-4, sections 7, 11; see also Funding Agreement Saskatchewan Regional Model 2012-2013, CHRC BOD, Ex. HR-09, Tab 181 at pp. 3-4, sections 7, 11; see also Funding Agreement for Mi’kmaq Family & Children’s Services of Nova Scotia 2013-2014, CHRC BOD, Ex. HR-10, Tab 197 at pp. 3-7, sections 7, 11.

²¹¹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 39, section 6.1.1.

agencies “show large variances” in their maintenance reporting.²¹² A review team including officials from AANDC and/or the province/territory and First Nations child and family service agency conduct the on-site reviews, the purpose of which is to:

- confirm client (i.e., children and/or families’) eligibility;
- enable AANDC to meet its accountability responsibilities for the expense of public funds; and
- determine and ensure compliance with provincial rates and the FNCFS Program’s maximum allowable amounts.²¹³

126. In order to satisfy the above requirements, the on-site review team will review case files, foster parent files, the administrative office practices (including accounting for payments), and the licensing and regulation of group homes and institutions.²¹⁴ Failure to comply with these reporting requirements can result in the delay or termination of funding by AANDC.²¹⁵

iii) AANDC Reviews its FNCFS Program and Directive 20-1

127. Since it came into effect over twenty years ago, the FNCFS Program and Directive 20-1 have been reviewed many times by AANDC as well as external third parties. The following is a summary of the reviews of the FNCFS Program and Directive 20-1 in which AANDC participated.

a. The National Policy Review (2000) finds that AANDC’s FNCFS Program and Directive 20-1 are Flawed and Inequitable

128. After “several years of experience” implementing the FNCFS Program and Directive 20-1, First Nations child and family service agencies “became increasingly critical” of various financial and policy aspects of the Program.²¹⁶

129. Therefore, in the fall of 1999, AANDC and the AFN jointly undertook to carry out a review of the FNCFS Program and Directive 20-1.²¹⁷ The result of that research, which

²¹² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 41, section 6.3.4.

²¹³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 44-45, sections 6.5.3, 6.5.4.

²¹⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 45, section 6.5.5.

²¹⁵ Notification of Overdue Reporting Requirements, CHRC BOD, Ex. HR-08, Tab 131; see also testimony of William McArthur, Transcript Vol. 64 at pp. 43-48.

²¹⁶ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81.

²¹⁷ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 7, 82.

was conducted between March 1, 1999 and March 31, 2000, was the Joint National Policy Review Final Report (the “NPR”), dated June 2000.²¹⁸

130. The principal objectives of the NPR were to examine legislation and standards, agency governance, funding and communication issues, and to: (i) identify and record areas of concern with respect to required changes to AANDC’s FNCFS Program; (ii) prepare a report presenting an analysis of the issues and making recommendation for changes to the FNCFS Program; and (iii) recommend an action plan and timeline to address the concerns.²¹⁹
131. Ultimately, the NPR found that AANDC’s FNCFS Program and Directive 20-1 were flawed and inequitable, for the reasons that follow, and recommended that a new policy and funding formula be developed jointly by AANDC and First Nations to replace Directive 20-1 and address the many areas of concern.²²⁰
132. The NPR found a number of flaws specifically related to AANDC’s funding of First Nations child and family service agencies.²²¹
133. First, the Directive 20-1 funding formula “provides the same level of funding to agencies regardless of how broad, intense or costly” the range of services are, making it difficult for agencies to provide a comparable range of services on reserve due to, among other things, insufficient funding for agency staff.²²² Further, Directive 20-1 “does not provide enough flexibility for agencies to adjust to changing conditions.”²²³
134. Second, AANDC’s failure to define eligible maintenance expenditures in Directive 20-1 results in “considerable variance in the definition of maintenance from region to region”, and an inability to link funding to “provincial legislation, policies and practice standards” directly.²²⁴ As a result, agencies reported that AANDC rejected maintenance expenses claimed for First Nations children in care that ought to have been reimbursed in accordance with provincial/territorial legislation and standards, including: “parent aide,

²¹⁸ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 7.

²¹⁹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 8.

²²⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 18.

²²¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 98-99.

²²² NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13, 65.

²²³ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 70.

²²⁴ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

legal fees/court appearance, counselling/therapy assessments, travel, special needs, regular maintenance, services for families (respite), foster parent training, services to the disabled, repatriation, youth services, etc.”²²⁵ Furthermore, the NPR found that an earlier evaluation conducted by AANDC in 1995 had also “concluded that the definition of maintenance should be clarified”, but that “no national changes” had been made since that time.²²⁶

135. Third, AANDC’s funding formula is too “rigid and unilateral” and does not allow for adjustments for: increases in the number of children coming into care (i.e., escalating maintenance expenditures); cost-sensitive items; the development of new provincial/territorial programs; or routine price adjustments for remoteness and/or the cost of living.²²⁷
136. Fourth, there is considerable variance in how Directive 20-1 is implemented from region to region, resulting in the inequitable and inconsistent application of the FNCFS Program and funding formula. Furthermore, the NPR concluded that these regional deviations do not “always support sound social work practice.”²²⁸
137. Fifth, Directive 20-1 “does not provide a realistic amount of per organization funding” for small agencies.²²⁹ This impacts an agency’s “ability to deliver a range of services”, and is often compounded by remoteness: “The smaller the agency, the more difficult it is to have the staff size, or level of expertise to provide a full range of services.”²³⁰
138. Sixth, the funding available under the FNCFS Program is limited because of the maximum annual budgetary increase of 2%, which falls far short of the annual increases in First Nations child and family service expenditures.²³¹ In fact, the research conducted by AANDC and the AFN concluded that as of March 31, 1999, the “average per capita per child in care expenditure of the [AANDC] funded system is 22% lower than the average of the selected provinces.”²³² This is alarming given that “studies suggest that

²²⁵ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 84.

²²⁶ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 13.

²²⁷ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.

²²⁸ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

²²⁹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

²³⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 14, 97.

²³¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

²³² NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 14, 94.

the need for child welfare services on reserve is 8 to 10 times [greater] than off reserve.”²³³

139. Finally, with respect to legislation and standards, the NPR concluded that while First Nations child and family service agencies are required to “comply with the same administrative burden created by change in provincial legislation”, they have “not received any increased resources from [AANDC] to meet those responsibilities.”²³⁴ This contradicts the stated objective of the FNCFS Program to expand services on reserve to a level comparable to the services provided off reserve in similar circumstances.²³⁵
140. As a result of the findings of its review, the NPR made 17 recommendations to AANDC on how to address the flaws and inequities in the FNCFS Program and Directive 20-1.²³⁶
141. The three key recommendations of the NPR were as follows:
- that AANDC investigate the funding formula in Directive 20-1 because it is not flexible and is outdated, and that a new methodology be developed considering and addressing the following factors:
 - gaps in the operations formula;
 - adjustments for remoteness;
 - establishment of national standards;
 - establishment of an average cost per caseload;
 - establishment of caseload/workload measurement models;
 - ways of funding a full service model;
 - liability issues;
 - developmental costs;
 - development and maintenance of information system and technological capacity;
 - national demographics;
 - the impact on large and small agencies;
 - economies of scale;
 - that AANDC seek funding to support prevention programming in accordance with provincial/territorial legislation, which is not adequately funded under Directive 20-1; and
 - that AANDC immediately undertake a tripartite review of the provision of child and family services on reserve in the province of Ontario, pursuant to the 1965 Agreement.²³⁷

²³³ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95.

²³⁴ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 12.

²³⁵ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 12.

²³⁶ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

142. In response, AANDC noted that the NPR was “useful in highlighting a number of areas that need further work”, and promised to “take a more in-depth look” at the issues of concern raised in the report.²³⁸
143. The NPR led to the establishment of the Joint National Policy Review National Advisory Committee (the “NAC”) in 2001.²³⁹ The NAC was comprised of officials from AANDC, the AFN and First Nations child and family service agencies.²⁴⁰ One of the tasks of the NAC was to “explore how to change parts of [Directive 20-1] in line with the NPR recommendations.”²⁴¹

b. The *Wen:De* Reports (2005) find that AANDC’s FNCFS Program and Directive 20-1 are Flawed and Inequitable

144. Following the release of the NPR final report in 2000 and the creation of the NAC in 2001, AANDC and other members of the NAC commissioned further research in order to establish that revisions to the FNCFS Program and Directive 20-1 were warranted. The NAC had the ability to review and approve the content of the report.²⁴²
145. Therefore, in May 2004 the NAC requested that the Caring Society “engage a skilled team of econometricians and related experts to identify at least three funding formula options for First Nations child and family service agencies”.²⁴³ AANDC provided “funding support” for the work,²⁴⁴ and the result was three reports which were released over the course of a year and a half, collectively referred to as the “*Wen:De* reports”:
- (i) Bridging Econometrics and First Nations Child and Family Service Agency Funding:

²³⁷ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121; see also Memorandum of Agreement Respecting Welfare Programs for Indians, CHRC BOD, Ex. HR-11, Tab 214 at p. 1 [“1965 Agreement”].

²³⁸ Letter from the Honourable Robert D. Nault to AFN National Chief Mr. Matthew Coon Come dated August 7, 2001, CHRC BOD, Ex. HR-06, Tab 76.

²³⁹ Bridging Econometrics and First Nations Child and Family Service Agency Funding: Phase One Report (2004), CHRC BOD, Ex. HR-01, Tab 4 at p. 4 [“*Wen:De* Report One”]; see also Final Terms of Reference: Joint AFN/INAC National Advisory Committee on the Implementation of the First Nations Child and Family Services Policy Review (2001), CHRC BOD, Ex. HR-07, Tab 91.

²⁴⁰ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4; see also testimony of Jonathan Thompson, Transcript Vol. 6 at p. 10.

²⁴¹ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4.

²⁴² Testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 9, 12-13.

²⁴³ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 4.

²⁴⁴ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at p. 5.

Phase One Report (2004);²⁴⁵ (ii) *Wen:De We Are Coming to the Light of Day* (2005);²⁴⁶ and (iii) *Wen:De The Journey Continues* (2005).²⁴⁷

146. An “interdisciplinary research team including experts in economics, First Nations child and family services, sociology, substance misuse, community development, management, public administration, management information systems, psychology and law” was assembled in order to carry out the work and prepare the reports.²⁴⁸

b.i. The First Wen:De Report (2004)

147. The first *Wen:De* report found that Directive 20-1 was flawed and inequitable, and that funding provided to First Nations child welfare agencies was not based on “a determination of need but rather on population levels”, resulting in “significant regional variation in [its] implementation”.²⁴⁹
148. The report also confirmed that the “concerns and challenges expressed by the agencies reflected the [17] recommendations made in the [NPR]”, including lack of funding for: prevention services, legal services, price adjustments, remoteness adjustments, management information systems, capital costs, culturally based programs, caregivers, staff salaries and training opportunities, as well as a general lack of comparability to programs and services offered by the provinces.²⁵⁰
149. In conclusion, the report stated that the “immediate redress of inadequate funding [is] necessary to support good social work practice”, and set out three options for re-designing Directive 20-1.²⁵¹

Option One:

AANDC could re-design the existing structure of Directive 20-1 to address the shortcomings and concerns noted in the NPR and through interviews with agencies conducted by the *Wen:De* research team.²⁵²

²⁴⁵ *Wen:De Report One*, CHRC BOD, Ex. HR-01, Tab 4.

²⁴⁶ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5.

²⁴⁷ *Wen:De Report Three*, CHRC BOD, Ex. HR-01, Tab 6.

²⁴⁸ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 9.

²⁴⁹ *Wen:De Report One*, CHRC BOD, Ex. HR-01, Tab 4 at p. 5.

²⁵⁰ *Wen:De Report One*, CHRC BOD, Ex. HR-01, Tab 4 at pp. 6, 8.

²⁵¹ *Wen:De Report One*, CHRC BOD, Ex. HR-01, Tab 4 at pp. 6-14.

²⁵² *Wen:De Report One*, CHRC BOD, Ex. HR-01, Tab 4 at pp. 7-11.

Option Two:

AANDC could provide funding in the same manner and at the same level as is done in each province/territory.²⁵³

Option Three:

AANDC could support the development of a First Nations funding model “based on community needs and assets [...] rooted in the particular socio-economic and cultural characteristics of the communities and Nations which the agencies serve.”²⁵⁴

b.ii. The Second Wen:De Report (2005)

150. The second *Wen:De* report delved into an analysis of each of the three options for re-designing Directive 20-1 and concluded that option three – a First Nations funding model – was “the most promising” because it would allow AANDC and First Nations to re-conceptualize the “pedagogy, policy and practice in First Nations child welfare in a way that better supports sustained positive outcomes for First Nations children.”²⁵⁵
151. The report also examined a number of issues with respect to the overrepresentation of First Nations children in the child welfare system²⁵⁶ and the shortcomings of the funding formula itself, all of which will be dealt with in turn below.
152. Overrepresentation of First Nations Children in Care: The report examined the overrepresentation of First Nations children in care and the underlying factors that bring them into contact with the child welfare system.²⁵⁷ As of 2005, there were “approximately three times the numbers of First Nations children in state care than there were at the height of residential schools in the 1940’s.”²⁵⁸ Furthermore, First Nations children are “removed at disproportionate rates due to neglect”, which is primarily a result of “poverty, poor housing and substance misuse”.²⁵⁹

²⁵³ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 11-12.

²⁵⁴ *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4 at pp. 12-13.

²⁵⁵ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8.

²⁵⁶ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 1-14.

²⁵⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 13-15.

²⁵⁸ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8.

²⁵⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8; see also National Aboriginal Economic Development Board, “Recommendations on Financing First Nations Infrastructure” (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also AANDC Briefing Note, “Comparability of Provincial and AANDC Social Programs Funding” (2008), CHRC BOD, Ex. HR-14, Tab 351; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 5

153. Ultimately, the report found that the “present funding formula provides more incentives for taking children into care than it provides support for preventative, early intervention and least intrusive measures.”²⁶⁰ This is compounded by “existing service deficits within the government and voluntary sector” on reserve make it more difficult to provide an “adequate range of neglect focused services”.²⁶¹ There are also “far fewer provincial or municipal government services” available on reserve as compared to off reserve, meaning that on reserve “First Nations families are less able to access child and family support services”.²⁶²
154. The report concluded that the serious lack of AANDC funding for prevention services and least disruptive measures under Directive 20-1 also contributed to the “unfavourable conditions” that exist for First Nations families and children on reserve.²⁶³
155. As a result of these factors and the greater needs of First Nations children on reserve, the report found that “First Nations children on reserve were [2.5] times more likely to be placed in child welfare care than non Aboriginal children”, experiencing “placement rates of 15% as compared to 6% for non Aboriginal children.”²⁶⁴ As well, Aboriginal children were found to be “more likely to require on-going child welfare services” and “more likely to be brought to child welfare court.”²⁶⁵
156. Therefore, the report concludes that “it is apparent that one should expect the cost of providing services to Aboriginal children to be significantly higher given that these cases involve a significantly higher rate of intervention at every point of contact.”²⁶⁶ Furthermore, the “disproportionate need for services amongst First Nation children and families coupled with the under-funding of the First Nations child and family service agencies that serve them has resulted in an untenable situation.”²⁶⁷ (emphasis added)

(Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, Aboriginal Affairs and Northern Development Canada [“AANDC”]).

²⁶⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 114.

²⁶¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 62-63.

²⁶² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14.

²⁶³ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 14.

²⁶⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15.

²⁶⁵ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 84.

²⁶⁶ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15.

²⁶⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 7.

157. Lack of AANDC Funding for Prevention Services: The report identified “best practices” in the area of prevention and/or least disruptive measures, and considered the adequacy of funding for these services under Directive 20-1.²⁶⁸
158. There are three types of prevention services and/or least disruptive measures: (i) primary prevention, which is “defined as the range of population based or community development services provided to prevent child maltreatment”; (ii) secondary prevention, which are “services provided to children at risk of experiencing child maltreatment”; and (iii) tertiary prevention, which are services provided to “children who are at significant risk or are experiencing child maltreatment.”²⁶⁹ Generally, provincial child welfare legislation requires that primary, secondary and tertiary prevention services must “be exhausted prior to considering the removal of [a] child from her/his family.”²⁷⁰ In other words, removing a child from their family home should be the absolute last resort.²⁷¹
159. However, the report found that AANDC’s Directive 20-1 “inadequately invests in prevention and least disruptive measures.”²⁷² In fact, the report concluded that the structure and design of the funding formula creates a perverse incentive for First Nations child and family service agencies to remove First Nations children from their homes because it provides dollar-for-dollar reimbursement of “maintenance” expenditures (or the costs for services required after a child is taken into care).²⁷³ As a result, there “are more resources available to children who are removed from their homes than for children to stay safely in their homes.”²⁷⁴
160. In addition, First Nations child and family service agencies reported AANDC having “disallowed prevention based expenditures” that were billed as maintenance.²⁷⁵ AANDC’s view is that funding for prevention services is provided under the fixed operations budget in Directive 20-1.²⁷⁶ However, the report notes that this puts agencies

²⁶⁸ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at pp. 18-21.

²⁶⁹ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 18.

²⁷⁰ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 18.

²⁷¹ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.

²⁷² *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.

²⁷³ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.

²⁷⁴ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 19.

²⁷⁵ *Wen:De Report Two*, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

²⁷⁶ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 13-14, sections 2.2.2, 2.2.3; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1,

in an impossible situation because “they have inadequate funds in the operations pool to pay for these services”, but AANDC will “disallow the expenditure if it [is] billed under maintenance.”²⁷⁷

161. As a result, the report concludes, First Nations children served by these agencies “are denied an equitable chance to stay safely at home due to the structure and amount of funding under [Directive 20-1]. In this way, [Directive 20-1] really does shape practice – instead of supporting good practice.”²⁷⁸
162. In the end, the report found that First Nations child and family service agencies required flexibility and “sustainability in funding [...] to support prevention programs which respond to the range of risk factors affecting child safety”, and called on AANDC to provide a “separate budget for least disruptive measures” and prevention services.²⁷⁹
163. Jurisdictional Disputes: The second *Wen:De* report also found that “jurisdictional disputes continue to have significant impacts on the lived experiences of First Nations children – particularly those with special needs.”²⁸⁰ According to the research conducted in the preparation of this report, “12 agencies had experienced 393 jurisdictional disputes [in 2004-2005] requiring an average of 54.25 person hours to resolve each incident.”²⁸¹
164. These disputes arise when “there is a gap between what the federal government will fund on reserve and what the provincial statute requires”, forcing the involvement of the provinces, who often have to “step in and fund” services that AANDC refuses to fund.²⁸²
165. In essence, the report argues that in “far too many cases [AANDC] puts its needs before the needs of the child”,²⁸³ and that a paradigm shift is required in order to ensure that the “well being and safety of the child [are the] paramount consideration[s] in resolving

CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 4-5.

²⁷⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21; see also AANDC Briefing Note, “First Nation Child and Family Services (FNCFS) – Media Coverage” (2002), CHRC BOD, Ex. HR-15, Tab 467 at p. 4.

²⁷⁸ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

²⁷⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 20, 21.

²⁸⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 16.

²⁸¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

²⁸² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 16-17.

²⁸³ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

jurisdictional disputes”.²⁸⁴ In the end, First Nations children suffer the “most profound impact” of these “gaps in services and funding”.²⁸⁵

166. Therefore, the report calls for the adoption of a “child first principle” whereby the government of first contact (i.e., “who first receives a request for payment of services for a First Nations child”) will “pay without disruption or delay when these services are otherwise available to non Aboriginal children in similar circumstances.”²⁸⁶
167. Lack of Funding under AANDC’s Directive 20-1: The report concluded that “current funding levels are inadequate” for “human resources, capital costs, standards/evaluation, culturally appropriate services, records management and information technology.”²⁸⁷ Specific concerns identified by First Nations child and family service agencies in these areas are detailed below.
168. Capital costs include office space, workplace vehicles, funding for workplace vehicle travel, as well as computers, photocopies, office furniture and other equipment.²⁸⁸ The agencies sampled in the preparation of the second *Wen:De* report noted “significant difficulty funding capital expenditures within [Directive 20-1].”²⁸⁹
169. With respect to human resources, the report found that “overtime compensation for staff working after hours on child protection matters was a critical area of concern”.²⁹⁰ There was also “variation in caseload size and case composition”, with some social workers being left to “perform all duties”, which poses real challenges given that “First Nations children and families [have been found] to require more service and thus more staff resources.”²⁹¹ As well, two thirds of the First Nation agencies surveyed for the report felt their salaries and benefits were not competitive or comparable, contributing to high staff turnover rates.²⁹²

²⁸⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

²⁸⁵ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 91.

²⁸⁶ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

²⁸⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 40-41.

²⁸⁸ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 32-33.

²⁸⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 33.

²⁹⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 36.

²⁹¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 37.

²⁹² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 37.

170. Culturally based operations and standards were found to be “a key element in the delivery of culturally based services”, and yet the report concluded that there was “no funding in the current formula [i.e., Directive 20-1] to support policy development.”²⁹³ In addition, the report concluded that many First Nations child and family service agencies were “in the process of developing their own child welfare laws”, highlighting the need to consider finally implementing the first NPR recommendation to “expand the range of fundable child welfare authority beyond provincial delegation.”²⁹⁴
171. Lack and/or Inadequacy of Remoteness Adjustments: The second *Wen:De* report also followed up on another NPR recommendation: that the remoteness factors used in Directive 20-1 be reviewed to “ensure it adequately reflected the additional costs to child and family service agencies related to remoteness.”²⁹⁵ Under Directive 20-1, the “remoteness factor classifies agencies in accordance with their distance from the service centre, degrees latitude, and year round road access.”²⁹⁶ However, the report found that “no documented rationale exists” to support the factors which comprise the remoteness factor, and that the service centre used to determine the adjustment did “not necessarily reflect the place where agencies [went] to access” services.²⁹⁷
172. Lack of Cost of Living Adjustments: While Directive 20-1 contains a cost of living adjustment, “it has not been implemented since 1995.”²⁹⁸ The effect of this is that between 1995 and 2005, there was a funding shortfall of 21.21% “purely on account of inflation”.²⁹⁹ The report also found that as a result of the lack of a cost of living adjustment, First Nations child and family service agencies were given \$112 million *less* in operations funding under Directive 20-1 than they would have otherwise received.³⁰⁰ This has a cumulative effect, and the report stated that the lack of a cost of living adjustment led to “both under-funding of services and to distortion in the services funded

²⁹³ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 38.

²⁹⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 38.

²⁹⁵ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 44.

²⁹⁶ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 44.

²⁹⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.

²⁹⁸ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.

²⁹⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.

³⁰⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.

since some expenses subject to inflation must be covered, while others may be more optional”.³⁰¹

173. The Disproportionately Negative Impact that Directive 20-1 has on Small Agencies: The second *Wen:De* report also examined the impact Directive 20-1 had on small agencies, which at the time represented “55% of the total number of First Nation child and family service agencies in Canada, excluding the province of Ontario.”³⁰² The report found that small agencies “face significant challenges in terms of administrative and core staffing requirements” and delivering “services comparable to the provincial government child welfare agencies”.³⁰³ As well, the agencies surveyed in preparation of the report were unanimous that the “population policy threshold in Directive 20-1 was [...] an inadequate means of benchmarking operations funding levels”.³⁰⁴

b.iii. The Third Wen:De Report (2005)

174. The third and final *Wen:De* report expanded on how to re-design Directive 20-1, based on a national survey that was developed for First Nations child and family service agencies (excluding the province of Ontario).³⁰⁵ The report presented a number of “recommendations for policy change or clarification”, as well as economic reforms or “modifications” to Directive 20-1 based on the results of the survey.³⁰⁶
175. The report concluded that “under funding was apparent across the current funding formula components”.³⁰⁷ It also emphasized that the recommended changes to Directive 20-1 were “interdependent” and that “adoption [of these elements] in a piece meal fashion would undermine the overall efficacy of the proposed changes.”³⁰⁸
176. Recommended Policy Changes or Clarifications: Among other things, the report recommended that AANDC “clarify that legal costs related to children in care are billable under maintenance.”³⁰⁹ Since child welfare statutes across Canada “require that social

³⁰¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.

³⁰² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.

³⁰³ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 48.

³⁰⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 48.

³⁰⁵ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 9.

³⁰⁶ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.

³⁰⁷ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.

³⁰⁸ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 36.

³⁰⁹ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

workers who remove a child or apply for a warrant must notify, and often appear, before the Courts”, the report considered these costs to be essential, not discretionary.³¹⁰ These costs are not covered elsewhere under Directive 20-1, which provides only a small amount of operations funding for legal costs related to the administration of the agency itself.³¹¹

177. In addition, the report found that “support services related to reunifying children in care with their families” should be eligible maintenance expenses under Directive 20-1, since they are mandatory services according to provincial child welfare statutes.³¹² These services include counselling, “cultural and language programs, mentorship, wellness programs, specialized treatment, [and] preparation for independent living services.”³¹³
178. The report also recommended the immediate implementation of Jordan’s Principle, which will be discussed later in these submissions, in order to resolve the delays and disruptions in service to First Nations children caused by jurisdictional disputes both between and within levels of government.³¹⁴ In essence, Jordan’s Principle calls on the government of first contact (in other words, the government that first receives a request to pay for a First Nation child’s service) to pay for the service without question, and to pursue the resolution of the jurisdictional dispute *afterward*.³¹⁵
179. Finally, the report recommended that AANDC clarify the “stacking provisions” in Directive 20-1 in order to make it easier for First Nations to “access voluntary sector funding sources to augment the range of resources they can provide without a financial penalty being imposed by [AANDC].”³¹⁶ The report also noted that these types of supports are available in “mainstream society”.³¹⁷

³¹⁰ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

³¹¹ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

³¹² *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 18.

³¹³ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 18.

³¹⁴ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 16.

³¹⁵ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 16.

³¹⁶ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

³¹⁷ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

180. Recommended Economic Reforms to Directive 20-1: The third *Wen:De* report also recommended fourteen economic reforms to Directive 20-1.³¹⁸ The key recommendations are highlighted below:

- that AANDC create a new funding stream for prevention and least disruptive measures, which are critical services that are chronically underfunded under Directive 20-1;³¹⁹
- that AANDC adjust the current operations budget under Directive 20-01, which is “set at a level [that is] insufficient to cover necessary overhead costs (basic operating costs)”;³²⁰
- that AANDC reinstate the annual cost of living adjustments for First Nations child and family service agencies on a retroactive basis back to 1995;³²¹
- that AANDC modify its funding formula to address the challenges faced by small agencies by “extend[ing] overhead funding to agencies with populations of 125 and above” (as opposed to the 250 child population threshold in Directive 20-1),³²² and by abolishing the “step increases” or adjustments from 250 children to every 25 children in excess of 125;³²³
- that AANDC introduce an “across the board increase in the remoteness allowance”;³²⁴ and
- that AANDC provide sufficient capital costs in order to address the “inadequate state of repair and accessibility of [the First Nations child and family service agencies’] buildings”, as well as to accommodate the space required for new prevention programs and staff.³²⁵

181. The report recommended that the changes to Directive 20-1 be phased in over a period of seven years, the total value of which was \$109.3 million per year in order to meet the needs of First Nations child and family service agencies.³²⁶ The report also noted that the “anticipated economic, social and cultural benefits of fully implementing the recommended reforms are substantial, benefiting First Nations children, families, Nations and Canadian society at large.”³²⁷ Moreover, the report found that implementing these reforms would allow First Nations children to “have a chance to receive equitable child

³¹⁸ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 18-32.

³¹⁹ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 19-22.

³²⁰ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 24.

³²¹ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 18-19.

³²² *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.

³²³ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.

³²⁴ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 25-26.

³²⁵ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 28.

³²⁶ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 21, 33.

³²⁷ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 34.

welfare services”, and for AANDC to “send a message to First Nations children that they really do count – and the days of under funding and under valuing them are over.”³²⁸

182. After receiving the third and final *Wen:De* report, AANDC invited a number of the authors and contributors to present their findings and analysis to the Government of Canada’s Central Agencies (i.e., Treasury Board of Canada, Privy Council Office, etc.), including: Dr. Cindy Blackstock,³²⁹ Executive Director of the Caring Society, and two of the Commission’s experts: Dr. John Loxley,³³⁰ Professor of Economics at the University of Manitoba, and Dr. Nicolas Trocmé,³³¹ Professor of Social Work at McGill University.³³²
183. According to Drs. Blackstock, Loxley and Trocmé, at that meeting there was not a single question asked, and they left unsure of what impact, if any, their research, findings and recommendations would have on the FNCFS Program and Directive 20-1.³³³
184. AANDC officials testified that they use and rely on some of the findings and recommendations in *Wen:De* in their administration of the FNCFS Program.³³⁴

iv) AANDC Designs and Implements the Enhanced Prevention Focused Approach (“EPFA”) in Some Jurisdictions

185. While the *Wen:De* research and reporting process was ongoing, AANDC engaged the province of Alberta to assist in the development and design of a new funding formula. The result of this process was the announcement of EPFA on April 27, 2007.³³⁵

³²⁸ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 34.

³²⁹ Dr. Cindy Blackstock’s Curriculum Vitae, CHRC BOD, Vol. 6, Tab 75.

³³⁰ Dr. John Loxley’s Curriculum Vitae, CHRC BOD, Ex. HR-12, Tab 243; see also letter from Dr. John Loxley to the Commission dated November 2, 2009, CHRC BOD, Ex. HR-12, Tab 244. Dr. Loxley was qualified as an expert before the Tribunal on financial and budgetary analysis and funding formulas for public program spending and policy outcomes.

³³¹ Dr. Nico Trocmé’s Curriculum Vitae, CHRC BOD, Ex. HR-07, Tab 85; see also letter from Dr. Nico Trocmé to the Commission dated September 2, 2009, CHRC BOD, Ex. HR-07, Tab 104. Dr. Trocmé was put forward as an expert before the Tribunal on the epidemiology of child maltreatment and neglect, as well as child welfare service trends and policies.

³³² Testimony of Dr. Cindy Blackstock, Transcript Vol. 4 at pp. 4, 9-10; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 23-24; see also testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 15-19.

³³³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 4, 9-10; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 23-24; see also testimony of Jonathan Thompson, Transcript Vol. 6 at pp. 15-19.

³³⁴ Testimony of Barbara D’Amico, Transcript Vol. 51 at p. 77; Vol. 53 at pp. 46-47; see also testimony of Sheilagh Murphy, Transcript Vol. 54 at pp. 50-51.

³³⁵ Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0006; see also AANDC

186. Alberta had long criticized AANDC's Directive 20-1 funding formula, arguing that it had some "inherent inequities in its application with respect to the diverse and unique needs of each respective First Nation."³³⁶ Alberta had also voiced concern that AANDC's rigid and inequitable funding formula was not comparable,³³⁷ and created a "two-tier" service system for children in the province,³³⁸ representing "a systemic barrier for First Nation agencies".³³⁹
187. While the Government of Alberta approached AANDC about these issues a number of times, their concerns went unanswered.³⁴⁰
188. In 2004, the Government of Alberta tabled new legislation – the *Child, Youth and Families Enhancement Act*³⁴¹ – along with "innovative policy directions" that encouraged prevention and early intervention supports, all of which became known as the "Alberta Response Model".³⁴² However, First Nations child and family service agencies in Alberta were not provided any additional funding from AANDC for these services.³⁴³
189. On May 24, 2006, Alberta's Minister of Children's Services, Heather Forsyth, met with the Honourable Jim Prentice, Minister of AANDC to discuss, among other things, how effective the Alberta Response Model had been in reducing the number of children in care off reserve.³⁴⁴ At that meeting, the Ministers came to a "mutual understanding" that a "flexible federal funding formula for child welfare services, one that allows for federal

Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391.

³³⁶ Letter from Minister of Children's Services to the Honourable Robert Nault dated March 15, 2000, CHRC BOD, Ex. HR-14, Tab 370.

³³⁷ Services to First Nations Children and Families: Alberta Children's Services Perspective (2005), CHRC BOD, Ex. HR-14, Tab 357 at p. CAN008771/7; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 300-301.

³³⁸ Letter from Minister of Children's Services to the Honourable Jane Stewart dated March 11, 2003, CHRC BOD, Ex. HR-14, Tab 371.

³³⁹ Letter from Minister of Children's Services to the Honourable Andy Scott dated August 19, 2005, CHRC BOD, Ex. HR-14, Tab 373.

³⁴⁰ Letter from Minister of Children's Services to the Honourable Andy Scott dated August 19, 2005, CHRC BOD, Ex. HR-14, Tab 373.

³⁴¹ *Child, Youth and Families Enhancement Act*, R.S.A. 2000, c. C-12.

³⁴² Letter from Minister of Children's Services to the Honourable Andy Scott dated July 23, 2004, CHRC BOD, Ex. HR-14, Tab 372.

³⁴³ Services to First Nations Children and Families: Alberta Children's Services Perspective (2005), CHRC BOD, Ex. HR-14, Tab 357 at p. CAN008771/2; see also testimony of Darin Keewatin, Transcript Vol. 32 at pp. 33-34.

³⁴⁴ Letter from Minister of Children's Services to the Honourable Jim Prentice dated June 8, 2006, CHRC BOD, Ex. HR-14, Tab 374 at p. 1; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 35; see also AANDC Backgrounder "Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007", CHRC BOD, Ex. HR-14, Tab 391 at p. 2.

resources to be directed towards early intervention and prevention services on-reserve, should be made available to those [First Nations child and family service agencies] who wish to make positive changes to their child welfare service delivery systems.”³⁴⁵

190. Following the 2005 presentation to Central Agencies of the final recommendations of the *Wen:De* reports, there was another meeting with Central Agencies in 2006 during which “representatives from Alberta” presented the Alberta Response Model.³⁴⁶ After that meeting, Central Agencies expressed “support for prevention activities” to become part of the FNCFS Program and federal funding formula.³⁴⁷
191. AANDC, acknowledging that Directive 20-1 “does not provide sufficient funding for [First Nations child and family service agencies] to delivery culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve”,³⁴⁸ decided to develop a new funding formula in a “short time frame” based on the Alberta Response Model.³⁴⁹
192. AANDC, the province of Alberta and some First Nation agency Directors from Alberta engaged in a nine-month exercise of “examining the funding of [prevention services] and what it would look like for [First Nations child and family service agencies] in Alberta”, using Directive 20-1 as the basis for discussions.³⁵⁰ The “cost models” for EPFA were developed at AANDC Headquarters.³⁵¹
193. AANDC announced EPFA in Alberta on April 27, 2007.³⁵² Since then, AANDC has transitioned³⁵³ the following provinces from Directive 20-1 to EPFA: Saskatchewan

³⁴⁵ Letter from Minister of Children’s Services to the Honourable Jim Prentice dated June 8, 2006, CHRC BOD, Ex. HR-14, Tab 374 at p. 1.

³⁴⁶ Presentation to the Minister’s Office Staff, *Wen:De – The Journey Continues*: Overview of the Research and its Recommendations, CHRC BOD, Ex. HR-14, Tab 385 at p. 8.

³⁴⁷ Presentation to the Minister’s Office Staff, *Wen:De – The Journey Continues*: Overview of the Research and its Recommendations, CHRC BOD, Ex. HR-14, Tab 385 at p. 8.

³⁴⁸ AANDC Backgrounder “Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007”, CHRC BOD, Ex. HR-14, Tab 391 at p. 1.

³⁴⁹ Letter from the Honourable Jim Prentice to the Minister of Children’s Services dated September 18, 2006, CHRC BOD, Ex. HR-14, Tab 375 at p. 1.

³⁵⁰ Testimony of Darin Keewatin, Transcript Vol. 32 at p. 38.

³⁵¹ AANDC Internal Audit Report, “Audit of the Implementation of the Child and Family Services Enhanced Prevention Focused Approach (2012), CHRC BOD, Ex. HR-10, Tab 194 at p. 10.

³⁵² Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Vol. 13, Tab 271 at p. CAN052861_0006; also AANDC Backgrounder “Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007”, CHRC BOD, Vol. 14, Tab 391.

(2007),³⁵⁴ Nova Scotia (2008),³⁵⁵ Québec (2009),³⁵⁶ Prince Edward Island (2009),³⁵⁷ and Manitoba (2010).³⁵⁸

194. The FNCFS Program Manual states that the objectives of EPFA are to ensure:

- that families receive the support and services they need before they reach a crisis;
- that community-based services and the child and family system work together so families receive more culturally appropriate services in a timely manner;
- that First Nations children in care benefit from permanent homes (placements) sooner by, for example, involving families in planning alternative care options; and
- that services and supports are co-ordinated in a way that best helps the family.³⁵⁹

195. Under EPFA, funding for the development and operations of First Nations child and family service agencies remains the same as it was under Directive 20-1.³⁶⁰ Therefore, an agency's fixed operations funding continues to be calculated using the formula created by AANDC and set out in Directive 20-1.³⁶¹

196. The only differences between Directive 20-1 and EPFA are: (i) the addition of a third funding stream – prevention; (ii) the flexibility built into the formula; and (iii) the “block funding” approach to maintenance, whereby agencies receive a set (or block) amount of

³⁵³ House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 11 (Dr. Cindy Blackstock, Executive Directive, First Nations Child and Family Caring Society of Canada): First Nation agencies in these provinces can either transition to EPFA or continue under Directive 20-1; see also Senate of Canada, Standing Senate Committee on Human Rights, *Evidence*, 41st Parl, 1st Sess, No 24 (March 25, 2013) at p. 24:47 (Françoise Ducros, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).

³⁵⁴ AANDC Backgrounder “Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007”, CHRC BOD, Ex. HR-14, Tab 392.

³⁵⁵ AANDC Backgrounder “Nova Scotia Partnership Framework for Enhancement Focused Approach – July 2008”, CHRC BOD, Ex. HR-14, Tab 393.

³⁵⁶ AANDC Backgrounder “Quebec Partnership Framework for Enhancement Focused Approach – August 2009”, CHRC BOD, Ex. HR-14, Tab 394.

³⁵⁷ AANDC Power Point, “Better Outcomes for First Nation Children” (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 5.

³⁵⁸ AANDC News Release, “Canada, Manitoba and Assembly of Manitoba Chiefs Reach Agreement on Child Welfare Framework”, CHRC BOD, Ex. HR-08, Tab 119; see also AANDC Backgrounder “Children and Families First: Manitoba First Nations Early Intervention and Prevention Services Enhancement Framework – July 2010”, CHRC BOD, Ex. HR-14, Tab 395.

³⁵⁹ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.2.

³⁶⁰ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.

³⁶¹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.1.

funding for maintenance based on their expenditures the previous year.³⁶² This process is referred to as the “re-basing of maintenance costs”, and takes place annually.³⁶³

197. If maintenance costs the following year are greater than the set amount of maintenance funding an agency has received from AANDC, they must recover the deficit from their operations and/or prevention funding streams.³⁶⁴ If there is a surplus, the agency can keep it and re-apply it to their child welfare program (i.e., operations, prevention, etc.), so long as the activity is AANDC-approved.³⁶⁵
198. Prevention services are “designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children into Alternate Care of the amount of time a child remains in Alternate Care.”³⁶⁶ Ultimately, the goal of EPFA is to “reduce the number of [First Nations] children being brought into care” in order to achieve “cost containment” of maintenance expenditures under the FNCFS Program.³⁶⁷
199. Funding for prevention services under EPFA is “based on a cost-model” and fixed, much like operations funding.³⁶⁸ The cost model assumes that First Nation families on reserve have on average three (3) children, and that 20% of families on reserve are in need of prevention services.³⁶⁹ Thus, in order to calculate prevention funding, AANDC takes the total on reserve First Nations child population and divides it by three (3), and then multiplies that number by 20.³⁷⁰

³⁶² Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98; Vol. 62 at pp. 122-123; see also testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 174-181.

³⁶³ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98; Vol. 62 at pp. 122-123; see also testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 174-181; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 8 (Odette Johnston, Director, Social Programs Reform Directorate, AANDC).

³⁶⁴ Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 393; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 96-98, 132-133; see also testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 174-181.

³⁶⁵ Testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 155-156, 174-175.

³⁶⁶ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 33, section 2.1.17.

³⁶⁷ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 1.

³⁶⁸ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.

³⁶⁹ Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 22.

³⁷⁰ Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 22.

200. Under EPFA, AANDC allows First Nations child and family service agencies to move funding from one stream (i.e., operations, maintenance and prevention) to another “in order to address needs and circumstances facing individual communities”.³⁷¹
201. In order to be eligible to receive funding under EPFA (as opposed to Directive 20-1) in one of the provinces that has transitioned to the new funding formula, AANDC requires First Nations child and family service agencies to: (i) “provide an initial five year business plan, subject to AANDC review and acceptance by the province, prior to receiving any funding under EPFA”; and (ii) “provide annual updates of the five year business plan to continue receiving program funding under [EPFA].”³⁷² In addition, AANDC requires agencies to submit “detailed financial budgets” each fiscal year.³⁷³
202. This new approach “represents a major transition for First Nations agencies, and a more robust role for [AANDC] in supporting effective reform.”³⁷⁴ Under EPFA, First Nation agencies’ business plans are submitted annually and subject to AANDC’s “approval and regular monitoring”.³⁷⁵ As well, AANDC “meets quarterly with agencies [...] to assess progress in shifting programming [...] and] also conducts increased compliance reviews” of agencies.³⁷⁶
203. EPFA has been reviewed a number of times by AANDC, the Auditor General of Canada (the “Auditor General”), the House of Commons’ Standing Committee on Public Accounts (the “PAC”) and other independent auditors since its implementation in 2007. The findings of these reviews are described later in these submissions.
204. To date, EPFA has not yet been implemented in New Brunswick, British Columbia, Newfoundland and Labrador and the Yukon Territory, despite commitments from AANDC that its goal was to have all remaining jurisdictions transitioned to EPFA by 2013,³⁷⁷ and then again by 2014,³⁷⁸ as well as repeated requests by provincial

³⁷¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.

³⁷² Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.3.

³⁷³ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.3.

³⁷⁴ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at pp. 4-5.

³⁷⁵ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.

³⁷⁶ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.

³⁷⁷ Letter from the Honourable Chuck Strahl to Mr. Nathan Cullen, MP, dated July 3, 2009, CHRC BOD, Ex. HR-06, Tab 71; see also House of Commons, Standing Committee on the Status of Women, *Evidence*, 40th Parliament, 3rd Sess, No 56 (February 15, 2011) at pp. 12, 16 (Sheilagh Murphy, Director General, Social Policy and Programs, AANDC).

governments and First Nation representatives.³⁷⁹ At this point, AANDC cannot “predict when [it] will transition to EPFA in the five remaining jurisdictions.”³⁸⁰

v) Provincial Agreements for the Provision of Child Welfare Services to First Nations on Reserve

205. As previously stated, there are two types of agreements that AANDC has developed pursuant to the FNCFS Program to “facilitate the provision of child and family services to First Nations children” on reserve: agreements with provincial and territorial governments, and comprehensive funding agreements with First Nations child and family service agencies.³⁸¹
206. Specifically, AANDC has entered into agreements with the provinces of Ontario, British Columbia and Alberta for the provision of First Nations child welfare services on reserves. These agreements, which are distinctly different from the comprehensive funding agreements First Nations child and family service agencies are subject to, are described below.

a. Ontario’s 1965 Agreement

207. The provision of child and family services to First Nations on reserve in Ontario is unique. In 1965, the Federal Government entered into an agreement with the province of Ontario “to enable social services to be extended to First Nations communities on an equal basis to what was provided for other provincial residents.”³⁸² This agreement is

³⁷⁸ AANDC Power Point, “Better Outcomes for First Nation Children” (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 8; see also AANDC Briefing Note, “Action Plan for Implementation of Enhanced Prevention Focused Approach in British Columbia” (2012), CHRC BOD, Ex. HR-13, Tab 284.

³⁷⁹ Letter from Minister of Children and Family Development to the Honourable Chuck Strahl dated February 17, 2009, CHRC BOD, Ex. HR-14, Tab 367; see also letter from B.C. Minister of Children and Family Development to the Honourable Chuck Strahl dated November 17, 2009, CHRC BOD, Ex. HR-06, Tab 69; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70; see also letter from Bill Zaharoff to Nita Walkem dated November 20, 2009, CHRC BOD, Ex. HR-06, Tab 73; see also letter from the First Nations Directors Forum to the Honourable John Duncan dated May 8, 2012, CHRC BOD, Ex. HR-13, Tab 318; see also letter from the Honourable John Duncan to Nita Walkem dated July 24, 2012, CHRC BOD, Ex. HR-13, Tab 319; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365; see also letter from British Columbia’s Minister of Children and Family Development to AANDC dated February 5, 2014, CHRC BOD, Ex. HR-15, Tab 416.

³⁸⁰ Master Qs & As: First Nations Child and Family Services, CHRC BOD, Ex. HR-13, Tab 329 at p. 17.

³⁸¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 43.

³⁸² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3.

called the “Memorandum of Agreement Respecting Welfare Programs for Indians”, and is otherwise known as the “1965 Agreement”.³⁸³

208. Pursuant to the 1965 Agreement, the Government of Ontario extends services to First Nations people living on reserve, which are cost-shared by the federal government.³⁸⁴ These services include social assistance, child and family services, child care and homemaking.³⁸⁵ The principal objective of the 1965 Agreement is the “provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable in other communities”.³⁸⁶
209. The specific statutes and types of services covered under the 1965 Agreement are described in the Schedules to the Agreement.³⁸⁷ The child welfare sections of the 1965 Agreement “have not been updated since 1981”,³⁸⁸ and the Schedules to the Agreement have not been updated since 1998.³⁸⁹ Consequently, some programs have been “legally de-listed” because AANDC is not responsible for cost-sharing any new services or programs that Ontario provides to First Nations on reserve that are not explicitly accounted for in the Schedules to the Agreement.³⁹⁰
210. In other words, if Ontario decides to “put an emphasis on prevention by making whatever legislative changes [are] necessary in order to bolster those programs, both on and off Reserves”,³⁹¹ AANDC could refuse to fund or reimburse the province for these programs or services on the grounds that they are not “eligible” for cost-sharing under or specifically included in the 1965 Agreement.³⁹² For example, AANDC does not consider mental health services, which are mandatory services under Ontario’s *Child and Family*

³⁸³ 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/1.

³⁸⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3.

³⁸⁵ Judith Rae, *The 1965 Agreement: Comparison & Review* (2009), CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/3. [“Judith Rae Report”].

³⁸⁶ 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/1; see also testimony of Phil Digby, Transcript Vol. 59 at p. 15.

³⁸⁷ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/15 – COO-102/37 (Schedule A).

³⁸⁸ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 14, section 4.28.

³⁸⁹ 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/37.

³⁹⁰ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 66-75.

³⁹¹ Testimony of Phil Digby, Transcript Vol. 59 at p. 74.

³⁹² Testimony of Phil Digby, Transcript Vol. 59 at pp. 54-55, 69-72, 93-94, 128-129; Vol. 60 at pp. 82-83, 88-98, 101-102, 148-164, 200-203; see also AANDC Briefing Note, “1965 Agreement Overview” (2007), CHRC BOD, Ex. HR-11, Tab 239 at pp. 4-5; see also Ontario Regional Directive, Respondent’s BOD, Ex. R-14, Tab 58 at p. 3, section 5.6.

Services Act (the “*CFSA*”),³⁹³ to be eligible expenditures under the 1965 Agreement since the Schedule to the Agreement does not include the *CFSA*, which came into force in 1984.³⁹⁴ Therefore, AANDC avoids having to cost-share these expenditures under the 1965 Agreement.³⁹⁵

211. The province of Ontario “pays for [the eligible] programs up front and invoices Canada” for the costs of the programs, which are then subject to the cost-sharing formula in order to determine the federal share.³⁹⁶ At the beginning of each fiscal year, “Ontario provides [AANDC] a cash flow forecast”, which, once approved by AANDC, allows them to pay Ontario “a one-month case advance, followed by monthly instalments”, all of which is subject to a “10% holdback, which is paid out (with any adjustments) after the annual provincial audit.”³⁹⁷ AANDC flows funding to Ontario through an annual administrative process arrangement.³⁹⁸
212. The cost-sharing formula is set out in clause 3 of the 1965 Agreement.³⁹⁹ It is “based on two elements, provincial per capita costs of financial assistance [to which funding for all programs is indexed] and per capita costs for First Nations specifically.”⁴⁰⁰
213. The baseline for the federal share of costs under the 1965 Agreement is set at a minimum of 50%, on the understanding that there will likely be “additional cost[s] due to the higher cost on-reserve” of social programs, including the FNCFS Program, for which AANDC would be largely responsible.⁴⁰¹

³⁹³ *Child and Family Service Act*, R.S.O. 1990, c. C-11.

³⁹⁴ Briefing Note: Abinoojii Mental Health Services Mandate (2011), CHRC BOD, Ex. HR-11, Tab 224 at pp. 1-2; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 69-71.

³⁹⁵ Briefing Note: Abinoojii Mental Health Services Mandate (2011), CHRC BOD, Ex. HR-11, Tab 224 at pp. 1-2; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 69-71; see also letter from AANDC to Ontario’s Ministry of Community and Social Services dated May 26, 2009, CHRC BOD, Ex. HR-15, Tab 433.

³⁹⁶ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18.

³⁹⁷ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at p. COO-102/9 – COO-102/11; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 32-33.

³⁹⁸ Testimony of Phil Digby, Transcript Vol. 59 at pp. 106-108; see also Administrative Process Arrangement 2010-2011, Respondent’s BOD, Ex. R-14, Tab 59.

³⁹⁹ 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/5-COO-102/8.

⁴⁰⁰ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18.

⁴⁰¹ Testimony of Phil Digby, Transcript Vol. 59 at p. 28.

214. The calculation of the cost-sharing formula was explained by Phil Digby, Manager of Social Programs at AANDC's Ontario Regional Office, as follows:

MR. TARLTON: And so with those two, I guess definitions or terms in mind, can you explain how the federal contribution to Ontario is calculated, and I'm specifically referring to clause 3.2 of the 1965 Agreement?

MR. DIGBY: Yes. It's a little opaque when you're reading the Agreements, but I think it's simpler than it might appear because it really is just a cost-sharing formula that the governments agreed to back in 1965 and remains to this day.

I think the context is that the federal government and provincial government at that time were trying to determine how should Canada reimburse, what should be the principles that Canada reimburses Ontario for extending these programs into First Nation communities.

I think they looked at Social Assistance as the area where there was the best data, it gave a good proxy for the proportionate share of costs and relative share of costs in First Nation communities vis-à-vis the rest of Ontario.

[...]

So the first half of the formula, if you like, I call it the 50 percent half, which is essentially look at – you take the average cost of Social Assistance in Ontario for everybody off-Reserve in the province, and let's say that's \$200 per capita, and you take 50 percent of that number, so that would be \$100 and then you divide that – so if the rate or welfare dependency on-Reserve was the same as off-Reserve – let's say that on-Reserve there was a much lower rate of welfare dependency and the costs there were also \$200 per capita, then it would be a very simple ratio of \$100 over \$200, 50 percent, so then the claims that Ontario would make under the 1965 Agreement Canada would reimburse at 50 percent [...].

But at the time, of course, the formula also recognized, and I think Ontario negotiated this as part of the Agreement, that given that the costs were so much higher per capita in First Nation communities it was agreed that Canada would take the financial responsibility for most of that additional cost.

So the second half of the formula essentially works like this, that you would do some simple math. Let's say that the cost per capita in First Nation communities is \$1,000 per person, you do some simple math, you're trying to get the ratio, so you take \$1,000 per person and then you subtract \$200 per person, so the numerator would be \$800 and the denominator would be the cost per person in Aboriginal communities, \$1,000. So that portion of the formula would be 800 over 1,000 or 80 percent.

If you apply that then to the first half of the equation where we were taking 50 percent and the numerator in that equation was, you put the total cost in Ontario of \$200 and you multiply that by 50 percent, so that's \$100 and the denominator would be \$1,000, that would result in 100 over 1,000 or 10 percent.

So you add the first portion of the formula which is 1/10 or 10 percent plus 8/10 or 80 percent and that would result in a federal cost-sharing ration of 10 plus 80, is 90 percent.

[...]

And I think the example provided, although I used – so \$200 a case is reasonably - \$200 per person in Ontario is approximately the current cost; in First Nation communities I use the example of \$1,000 a case, it's actually about \$1,200 per person on-Reserve in Ontario.

So the formula currently generates a figure of about 92 percent. The most recent audited figure from 2011-'12 was 91.897 something, so it's to the fourth decimal place.⁴⁰²

215. Therefore, the effect of the 1965 Agreement's cost-sharing formula is that as Ontario's expenditures for child welfare on reserve increase, so too does AANDC's share of those costs.⁴⁰³
216. In order to be eligible for "federal funding under the cost-sharing formula, program recipients must be: (1) registered Indians, and (2) resident on reserve, on Crown land, or off reserve less than 12 months."⁴⁰⁴
217. First Nations child and family service agencies are funded for the provision of child protection services according to the same funding model as provincial child welfare agencies in Ontario.⁴⁰⁵ There are seven (7) fully-mandated "Native child and family service agencies in Ontario", including: Anishinaabe Abinoojii Family Services, Weechi-it-te-win Family Services, Dilico Anishinabek Family Care, Tikinagan Child and Family Services, Payukotayno Family Services, Akwesasne Child and Family Services and Native Child and Family Services of Toronto.⁴⁰⁶
218. There are two mechanisms used by the province of Ontario to provide a full range of child welfare services on reserve: (i) funding to fully-mandated child welfare societies, including provincial Children's Aid Societies and First Nations child and family service

⁴⁰² Testimony of Phil Digby, Transcript Vol. 59 at pp. 24-28; see also Ontario Regional Directive, Respondent's BOD, Ex. R-14, Tab 58 at pp. 5-7, 9-10, Appendix A.

⁴⁰³ Briefing Note, "Child and Family Services 2011-12 Budget Requirements – Ontario Region" (March 21, 2012), CHRC BOD, Ex. HR-11, Tab 228.

⁴⁰⁴ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/24.

⁴⁰⁵ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/26.

⁴⁰⁶ Testimony of Phil Digby, Transcript Vol. 59 at p. 86; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/21 – CHRC650/22.

agencies for protection services; and (ii) service contracts for prevention services on reserve.⁴⁰⁷

219. Prevention programs targeted to First Nations on reserve began in Ontario in the late 1970's.⁴⁰⁸ There are "three types of organizations that receive funding for prevention services", including: (i) fully-mandated Native child and family service agencies (listed above); (ii) individual First Nation communities; and (iii) pre-mandated Native Agencies.⁴⁰⁹
220. Fully-mandated Native child and family service agencies: Funding for the provision of prevention services by fully-mandated Native child and family service agencies can "range from \$900,000 to \$1.5 million."⁴¹⁰
221. Individual First Nation communities: There are approximately "25 individual First Nations" in southern Ontario that receive prevention funding via service contract.⁴¹¹ There are also some First Nation communities in southern Ontario that do not have service contracts and therefore receive no prevention funding.⁴¹²
222. Pre-mandated Native agencies: There are presently six pre-mandated Native agencies in Ontario, meaning that they do not yet have "the full protection mandate" and are in the process of "develop[ing] their capacity to become a fully-mandated First Nations Child and Family Services Agency".⁴¹³
223. Ontario receives approximately \$17 million in prevention funding for First Nations on reserve annually,⁴¹⁴ which is reimbursed by AANDC in accordance with "protocols" that

⁴⁰⁷ Testimony of Phil Digby, Transcript Vol. 59 at p. 82.

⁴⁰⁸ Testimony of Phil Digby, Transcript Vol. 59 at p. 97.

⁴⁰⁹ Testimony of Phil Digby, Transcript Vol. 59 at p. 98.

⁴¹⁰ Testimony of Phil Digby, Transcript Vol. 59 at p. 98.

⁴¹¹ Testimony of Phil Digby, Transcript Vol. 59 at p. 98.

⁴¹² Testimony of Phil Digby, Transcript Vol. 60 at pp. 113-118.

⁴¹³ Testimony of Phil Digby, Transcript Vol. 59 at pp. 98-101; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/24-CHRC650/25 (Note: Akwasasne Child and Family Services is now fully delegated).

⁴¹⁴ Testimony of Phil Digby, Transcript Vol. 59 at p. 111.

both levels of government have adopted.⁴¹⁵ These protocols vary depending on the agency or community in question.⁴¹⁶

224. For the fully-mandated Native child and family services agencies in northern Ontario, AANDC uses the “ratio of Status Indian days of care to the total days of care as a proxy for how many people would be receiving the prevention service.”⁴¹⁷ Mr. Digby provided the following example in his testimony:

MR. DIGBY: [...] So, for example, if one Agency had a budget of \$1.5 million and two-thirds of their days of care are Status Indian days of care, then the province would only claim for reimbursement of \$1 million, which would be two-thirds of the total, and then that would get reimbursed at the 92 percent cost-sharing.⁴¹⁸

225. For the fully-mandated Native child and family services agencies in southern Ontario, AANDC relies on a “Convention” whereby Ontario agreed that approximately 80% of the recipients of prevention services “would be Status Indian on-Reserve, eligible for cost-sharing.”⁴¹⁹ Therefore, Ontario submits a claim to AANDC for “80 percent of the total expenditure under that service contract.”⁴²⁰
226. Ontario’s invoices for on reserve child and family services are audited annually in accordance with the terms of the administrative process arrangement.⁴²¹ Audits are conducted and financed jointly by Ontario and AANDC, each of whom is responsible for 50% of the cost, and are meant to “verify the monthly claims and the payments” under the 1965 Agreement.⁴²² The auditors then “prepare a report of the findings”, identify “ineligible claims” and “do a recalculation of all the funding factors in the formula on the 92 percent”.⁴²³
227. The final invoice submitted by Ontario is therefore revised based on the findings of the audit. AANDC will only reimburse those expenditures deemed by the auditors to be

⁴¹⁵ Testimony of Phil Digby, Transcript Vol. 59 at p. 103.

⁴¹⁶ Testimony of Phil Digby, Transcript Vol. 59 at p. 103. For example, at Anishinaabe Abinoojii, AANDC assumes that 100% of the people accessing prevention services are Status Indians; however, a proxy is used for the remaining northern Native agencies.

⁴¹⁷ Testimony of Phil Digby, Transcript Vol. 59 at pp. 103-104.

⁴¹⁸ Testimony of Phil Digby, Transcript Vol. 59 at p. 104.

⁴¹⁹ Testimony of Phil Digby, Transcript Vol. 59 at p. 104.

⁴²⁰ Testimony of Phil Digby, Transcript Vol. 59 at p. 104.

⁴²¹ Testimony of Phil Digby, Transcript Vol. 59 at p. 117.

⁴²² Testimony of Phil Digby, Transcript Vol. 59 at pp. 117-118.

⁴²³ Testimony of Phil Digby, Transcript Vol. 59 at p. 119.

“eligible”, and does “not reimburse Ontario for [items identified as ineligible for cost-sharing] by the auditors.”⁴²⁴

228. If AANDC “ever terminated [the 1965 Agreement], the federal government would be obliged to assume direct service delivery once again or, more likely, arrange some alternative model.”⁴²⁵
229. The 1965 Agreement has never been the subject of a formal review by AANDC. In 2000, the NPR Report recommended that AANDC “immediately undertake a tripartite review of the provision of child and family services on reserve in the province of Ontario [...] pursuant to the 1965 Agreement”.⁴²⁶ This recommendation was reiterated in the *Wen:De* reports.⁴²⁷
230. However, to date these recommendations remain outstanding because AANDC has not undertaken any such review.⁴²⁸
231. The 1965 Agreement has been reviewed by various First Nation and other independent organizations, which have identified a number of shortcomings with the cost-sharing formula enshrined therein. First, and most importantly, the provincial funding model that is applied to Native child and family service agencies “does not reflect the needs of these [First Nations] communities and agencies.”⁴²⁹ Therefore, the development of an “Aboriginal funding model” that includes “adequate funding to support culturally appropriate programs” has been recommended.⁴³⁰
232. Second, the 1965 Agreement’s cost-sharing formula does not include realistic “northern costs” because “[f]unding is based on provincial averages and benchmarks, and does not

⁴²⁴ Testimony of Phil Digby, Transcript Vol. 59 at pp. 119-120.

⁴²⁵ Affidavit of Tom Goff, sworn February 12, 2010, CHRC BOD, Ex. HR-11, Tab 216 at p. 4, para. 121; see also Transcript of the Cross-Examination of Tom Goff dated February 25, 2010, CHRC BOD, Ex. HR-11, Tab 216.

⁴²⁶ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

⁴²⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

⁴²⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 89; Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

⁴²⁹ Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7.

⁴³⁰ Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 5; see also AANDC Briefing Note, “1965 Welfare Agreement in Ontario” (2000), CHRC BOD, Ex. HR-15, Tab 447.

account for [...] the higher cost of services in northern and remote communities”.⁴³¹ For example, in remote and northern First Nation communities in Ontario, the following are major challenges: transportation; staff recruitment and retention; access to suitable housing; limited access to court; lack of other surrounding health and social services; lack of available foster care homes; and the high cost of living.⁴³²

233. On average, Native child and family service agencies are servicing a geographic area that is 6.5 times greater than a provincial child welfare agency,⁴³³ and have “significantly larger case volumes per thousand” and “significantly higher expenditures per capita” than provincial child welfare agencies off reserve.⁴³⁴ As a result, Native agencies’ “capacity to deal with growing demand and associated costs is limited [...] and they find it] more difficult to cope with even small fluctuations in service demands or unanticipated case-related costs.”⁴³⁵
234. Thirdly, the 1965 Agreement “fails to account for the lack of surrounding health and social services in most First Nations communities [...] which] are absolutely essential to providing preventive, supportive, and rehabilitative services to children and families at risk”, whereas provincial child welfare agencies already “have the benefit of these programs in their communities”.⁴³⁶ As well, some prevention programs offered by the

⁴³¹ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also e-mail from Phil Digby to Steven Singer dated October 10, 2012, CHRC BOD, Ex. HR-15, Tab 428; see also e-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434.

⁴³² Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/28-CHRC650/30; see also Northern Remoteness Study and Analysis of Child Welfare Funding Model and Implications on Tikinagan Child and Family Services and Payukotayno Family Services, CHRC BOD, Ex. HR-11, Tab 219 at pp. 3-17; see also A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at p. CHRC649/39; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-6, 11, 14-15, 23.

⁴³³ Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at p. CHRC650/30.

⁴³⁴ A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at pp. CHRC649/38, CHRC649/84.

⁴³⁵ Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at p. CHRC650/39.

⁴³⁶ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-5; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 10; see also e-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434.

province of Ontario to residents off reserve have not yet been extended to First Nations children and families on reserve.⁴³⁷

235. Fourth, and finally, the 1965 Agreement does not provide for any funding for capital costs.⁴³⁸
236. In addition to the flaws that have been identified in the 1965 Agreement and the cost-sharing formula itself, First Nations and the province of Ontario have criticized AANDC's decision to cut funding for Band Representatives in 2003. In response to concerns raised by First Nations regarding the delivery of child welfare services to First Nations living off reserve, Ontario included in the *CFSA* a provision stating that Band Representatives are to be "given full party status in child protection proceedings before the court, involving a First Nations' child."⁴³⁹
237. As a result, AANDC agreed in 1988 to fund Ontario directly for Band Representatives up to \$300,000 per year "on a claim by claim basis".⁴⁴⁰ This recognized the "importance of participation by First Nations' representatives in child protection proceedings",⁴⁴¹ which is particularly important in southern Ontario where many First Nations are not served by a child and family service agency.⁴⁴² However, in 2003, AANDC announced that as a "result of a review of departmental social development program and spending authorities and to align with practices in other regions," funding for the Band Representatives program would be cut as of April 1, 2003.⁴⁴³ The program was also considered to be "outside the scope" of the 1965 Agreement.⁴⁴⁴

⁴³⁷ E-mail from Phil Digby to Geraldine Cullingham dated October 19, 2005, CHRC BOD, Ex. HR-15, Tab 434; see also AANDC Briefing Note, "Child and Family Services in Ontario" (2010), CHRC BOD, Ex. HR-15, Tab 435; see also e-mail from Phil Digby to Barbara D'Amico dated November 29, 2013, CHRC BOD, Ex. HR-15, Tab 436.

⁴³⁸ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19, COO-95/64; see also testimony of Phil Digby, Transcript Vol. 59 at p. 93.

⁴³⁹ Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.

⁴⁴⁰ Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.

⁴⁴¹ Letter from the Minister of Children and Youth Services to the Honourable Jim Prentice dated February 23, 2007, CHRC BOD, Ex. HR-14, Tab 362 at p. 1.

⁴⁴² Briefing Note: Band Representative Funding in Child and Family Services, CHRC BOD, Ex. HR-15, Tab 432 at p. CAN092868/1.

⁴⁴³ Letter from the Minister of Children and Youth Services and the Chiefs of Ontario ["COO"] to the Honourable John Duncan dated March 25, 2011, CHRC BOD, Ex. HR-11, Tab 222 at p. 1; see also letter from AANDC to Government of Ontario (undated), CHRC BOD, Ex. HR-15, Tab 445.

⁴⁴⁴ Briefing Note: Band Representative Funding in Child and Family Services, CHRC BOD, Ex. HR-15, Tab 432 at p. CAN092868/2.

238. AANDC's decision to terminate the Band Representatives program limits First Nations' "ability to respond effectively and in accordance with legislated time frames for action", and "erod[es their] ability to participate as intended" in the provincial legislation.⁴⁴⁵
239. For the foregoing reasons, notwithstanding the fact that the 1965 Agreement is largely considered to be "the best available [model or means by which AANDC] fulfill[s] its responsibility for child welfare programming on reserve",⁴⁴⁶ many feel that the "financial benefit of the 1965 Agreement is diminishing".⁴⁴⁷

b. Alberta's Administrative Reform Agreement (1991)

240. In 1991, AANDC entered into an agreement with the province Alberta for the provision of child and family services to First Nations on reserve entitled, "Arrangement for the Funding and Administration of Social Services" (otherwise known as the "Administrative Reform Agreement").⁴⁴⁸
241. The Administrative Reform Agreement sets out that AANDC will "arrange for the delivery of Social Services comparable to those provided by Alberta to other residents of the Province, directly or through negotiated agreements with Indian Bands, Indian agencies, Indian organizations, or with Alberta, to persons ordinarily residing on a reserve".⁴⁴⁹ It also establishes that AANDC will "fund" comparable services and will "reimburse Alberta for those Social Services which Alberta delivers to Indians and Indian Families ordinarily residing on a Reserve."⁴⁵⁰
242. In Alberta, there are six (6) First Nations that are not served by a First Nations child and family service agency.⁴⁵¹ Therefore, the province of Alberta provides child protection and prevention services to those communities,⁴⁵² and then submits an invoice to AANDC

⁴⁴⁵ Letter from the Minister of Children and Youth Services and the COO to the Honourable John Duncan dated March 25, 2011, CHRC BOD, Ex. HR-11, Tab 222 at pp. 1-2; see also letter from the Honourable John Duncan to the Minister of Children and Youth Services and the COO (undated), CHRC BOD, Ex. HR-11, Tab 223 at pp. 1-2.

⁴⁴⁶ Affidavit of Tom Goff, sworn February 12, 2010, CHRC BOD, Ex. HR-11, Tab 216 at p. 3.

⁴⁴⁷ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/7.

⁴⁴⁸ Arrangement for the Funding and Administration of Social Services (1991), CHRC BOD, Ex. HR-13, Tab 270 ["Administrative Reform Agreement"].

⁴⁴⁹ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3.

⁴⁵⁰ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3.

⁴⁵¹ Testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.

⁴⁵² Testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.

for reimbursement in accordance with the formula set out in Schedule A to the Administrative Reform Agreement.⁴⁵³

243. AANDC's share of the costs for the child and family services delivered to the six First Nations that do not have a First Nations child and family service agency are calculated according to the formula set out at clause 2 of Schedule A to the Administrative Reform Agreement.⁴⁵⁴ This formula accounts for maintenance expenditures (A), operations expenditures (B, C and D), and prevention services (E, F, G and D).⁴⁵⁵
244. At the beginning of each fiscal year, a cost estimate is prepared based on the actual year-end costs of the preceding fiscal year, and AANDC makes adjustments accordingly throughout the year.⁴⁵⁶ In other words, if the costs of maintenance, operations or prevention increase for whatever reason in a given year, there's an "adjustment built into the formula".⁴⁵⁷
245. This built-in adjustment also makes the Administrative Reform Agreement distinct from both Directive 20-1 and EPFA, pursuant to which child and family services were and are funded for the remaining First Nations communities in Alberta, neither of which provides an adjustment "on an omnibus basis like that."⁴⁵⁸
246. Between fiscal years 2006/07 and 2010/11, costs for First Nations child and family services under the Administrative Reform Agreement increased from \$8,266,615 to \$14,437,782.⁴⁵⁹
247. The Administrative Reform Agreement remains in effect to this day.⁴⁶⁰

⁴⁵³ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3; Schedule A; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.

⁴⁵⁴ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 2.

⁴⁵⁵ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 2.

⁴⁵⁶ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A, section 1.

⁴⁵⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 285-286.

⁴⁵⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 286.

⁴⁵⁹ Administrative Reform Agreement Costs – 5 Year Trend, CHRC BOD, Ex. HR-13, Tab 307 at p. 1.

⁴⁶⁰ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 280.

c. British Columbia's Memorandum of Understanding (1996) and Service Agreements (2012/13)

248. In 1996, AANDC entered into an agreement with British Columbia for the provision of child protection services to First Nations on reserve in that province entitled, "Memorandum of Understanding for the Funding of Child Protection Services for Indian Children" (the "B.C. MOU").⁴⁶¹ There are 72 First Nation communities that receive services from the province of British Columbia.⁴⁶²
249. The B.C. MOU states that the province will "administer [their provincial child welfare legislation] for the benefit of Indian persons under the age of nineteen and [that] Canada shall reimburse [the province] for the cost of Child Protection Services for any Eligible Child."⁴⁶³ Eligible children are those "registered as an Indian".⁴⁶⁴
250. Pursuant to the B.C. MOU, the province is reimbursed by AANDC according to a "per diem system", which is set out in Appendices B and C to the MOU.⁴⁶⁵ The per diem formula is based on two sets of costs: (i) administration and supervision – which is similar to "operations" funding under Directive 20-1 and EPFA, and (ii) maintenance.⁴⁶⁶
251. In order to calculate the per diem amounts owed to the province, AANDC takes a "percentage of all costs under a particular category".⁴⁶⁷ The per diem system was meant to provide a "degree of flexibility to manage [the] total maintenance budget to cover off extra costs for some children and to provide universal services to all children."⁴⁶⁸ In other words, the province and First Nation agencies were able to take any "unexpended maintenance" funding and use it to "support wages, benefits and administrative costs to

⁴⁶¹ Memorandum of Understanding for the Funding of Child Protection Services for Indian Children (1996), CHRC BOD, Ex. HR-13, Tab 274 ["1996 B.C. MOU"].

⁴⁶² Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 5.

⁴⁶³ 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 4, section 4.1.

⁴⁶⁴ 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 2, section 2.2 i).

⁴⁶⁵ 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at p. 4, section 5.1; pp. 8-9, Appendix B.

⁴⁶⁶ 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274 at pp. 8-9, Appendix B.

⁴⁶⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 21.

⁴⁶⁸ Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 2 (pages unnumbered).

offset operational deficits.”⁴⁶⁹ This was considered to be an “especially critical component for the sustainability of [British Columbia’s] many small agencies.”⁴⁷⁰

252. The per diem funding for provincial reimbursement under the B.C. MOU is more fluid and not nearly as “prescriptive” as Directive 20-1, pursuant to which child and family services are funded for the remaining First Nations communities in the province.⁴⁷¹ For example, there are no limits placed on funding for legal costs under the B.C. MOU.⁴⁷²
253. Additionally, the B.C. MOU does not impose “population thresholds”; therefore, the province can receive funding from AANDC for the provision of services to a First Nations community with a child population threshold below 251, whereas First Nations child and family service agencies would receive \$0 operational funding to serve the same community.⁴⁷³
254. The province of British Columbia also receives a rate adjustment for its administrative (or operational costs) each fiscal year based on a “recalculation of the per diem rates [...] due to inflation” for the previous fiscal year.⁴⁷⁴ This adjustment results in revision to not only the costs for children in care (i.e., direct or maintenance costs), but also to “administration” costs (i.e., operations costs) for the province.⁴⁷⁵
255. Both the province of British Columbia and First Nations child and family service agencies in that province receive an adjustment for maintenance rates (i.e., foster care and group care bed days); however, only the province receives an administrative adjustment.⁴⁷⁶ For example, in fiscal year 2006-2007, as a result of rate adjustments, the

⁴⁶⁹ Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at p. 2.

⁴⁷⁰ Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 1 (pages unnumbered).

⁴⁷¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 21-22.

⁴⁷² Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 21-22.

⁴⁷³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 22.

⁴⁷⁴ Letter from B.C. to AANDC dated June 22, 2007, CHRC BOD, Ex. HR-13, Tab 281; see also letter from B.C. to AANDC dated May 28, 2010, CHRC BOD, Ex. HR-13, Tab 308; see also Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.

⁴⁷⁵ Letter from B.C. to AANDC dated June 22, 2007, CHRC BOD, Ex. HR-13, Tab 281; see also letter from B.C. to AANDC dated May 28, 2010, CHRC BOD, Ex. HR-13, Tab 308; see also Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.

⁴⁷⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 49 at pp. 32-53.

administration rate for the province was retroactively increased by AANDC by 37.5%.⁴⁷⁷ However, First Nations child and family service agencies in British Columbia do not receive any concordant administrative (or operational) rate adjustment, nor do they receive inflation adjustments pursuant to Directive 20-1.⁴⁷⁸

256. On April 1, 2011, AANDC transitioned both the province of British Columbia and First Nation agencies in that province from a per diem system to an “actual costs” system.⁴⁷⁹ At the time, both the province and First Nations child and family service agencies were concerned about the effect this “move to actuals” would have on small agencies in particular,⁴⁸⁰ which are “vulnerable to any reduction in operations or maintenance budgets.”⁴⁸¹ There was also concern about whether AANDC had the “infrastructure or capacity to assess and approve costs in an efficient manner to meet the needs” of First Nations child and family service agencies.⁴⁸²
257. AANDC’s stated purpose for imposing a “move to actuals” in British Columbia was to bring its FNCFS Program “funding into strict compliance with program authorities”, notwithstanding the fact that it would “result in a significant decrease” in funding for both the province and First Nations agencies, and in some cases concern about the financial viability and potential closure of agencies.⁴⁸³ In fact, AANDC’s cost-savings as a result of the move to actuals were estimated to be “\$3.5 million at the First Nations agency level, and [between] \$2.5 to \$3.5 million at the provincial level.”⁴⁸⁴
258. The province of British Columbia has told AANDC that they invest more than \$100 million annually in Aboriginal child welfare, and argue that the funding they are currently

⁴⁷⁷ Invoice: Ministry of Children and Family Development Retroactive Adjustment – Indian and Northern Affairs Canada for Fiscal Year 2006/07, CHRC BOD, Ex. HR-13, Tab 322.

⁴⁷⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43.

⁴⁷⁹ Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at pp.1-6.

⁴⁸⁰ Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 3 (pages unnumbered).

⁴⁸¹ Briefing Note: BC Region First Nation Child and Family Services Transition Plan, CHRC BOD, Ex. HR-14, Tab 368 at p. 2.

⁴⁸² Briefing Note: BC Region Response to Office of the Auditor General Report on CFS, CHRC BOD, Ex. HR-14, Tab 366 at p. 2 (pages unnumbered).

⁴⁸³ Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at pp.1-2; see also letter from the First Nations Directors Forum to the Honourable John Duncan dated May 25, 2012, CHRC BOD, Ex. HR-13, Tab 320.

⁴⁸⁴ Profile of First Nations Child and Family Services in British Columbia, CHRC BOD, Ex. HR-14, Tab 348; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 165-166.

receiving for the services they provide on reserve is inadequate.⁴⁸⁵ Of note is that when AANDC's other funding formulas – Directive 20-1 and EPFA – are hypothetically applied to the provision of services on reserve by the province of British Columbia, they both result in significantly less funding for the province.⁴⁸⁶

259. On April 1, 2012, the B.C. MOU was replaced by what is called the “Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve” (the “B.C. Service Agreement”).⁴⁸⁷ This Service Agreement is between the province of British Columbia and Her Majesty the Queen in Right of Canada, and sets out the new terms of funding for the provision of child protection services by the province to 72 First Nations.⁴⁸⁸
260. AANDC's role is described in the B.C. Service Agreement as “fund[ing] or reimburs[ing], within its authorities, [the province of British Columbia] to deliver child welfare services to First Nations children and families ordinarily resident on reserve.”⁴⁸⁹ It also explains that maintenance “will be reimbursed based on actual expenditures”, as opposed to per diem rates (i.e., the move to actuals).⁴⁹⁰
261. According to the B.C. Service Agreement, operations funding is to be “provided annually” by AANDC to “deliver comprehensive (prevention and protection) child and family services, and covers all activities that support the service delivery of child and family services not covered by maintenance and development funding.”⁴⁹¹ However, unlike the FNCFS Program Manual for Directive 20-1, the B.C. Service Agreement does not include a restrictive list of what constitutes an “eligible” operations expenditure.
262. Of significance, the B.C. Service Agreement includes at Appendix B a chart describing the “results of the [provincial] costing exercise”, which determined that in fiscal year

⁴⁸⁵ Briefing Note: First Nations Child and Family Services British Columbia Transition Plan, CHRC BOD, Ex. HR-13, Tab 285 at p. 3; see also Profile of First Nations Child and Family Services in British Columbia, CHRC BOD, Ex. HR-14, Tab 348; see also Potential Reduction in Costs in British Columbia FNCFS, CHRC BOD, Ex. HR-13, Tab 282 at pp. CAN016292_0002-CAN01629_0003.

⁴⁸⁶ British Columbia – Provincial Funding Formula for FNCFS Options for Discussion, CHRC BOD, Ex. HR-13, Tab 283 at pp. 1-3; see also testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 163-167.

⁴⁸⁷ Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2012), CHRC BOD, Ex. HR-13, Tab 275 [“B.C. Service Agreement”].

⁴⁸⁸ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 3, section 4.2.

⁴⁸⁹ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 3, section 4.1.

⁴⁹⁰ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.3.

⁴⁹¹ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 4, section 5.3.

2010/11 the province spent approximately \$42 million to deliver child protection, family supports, special needs and children in care services on reserve – well above the \$28 million they were provided in this 2012/13 Agreement.⁴⁹² AANDC “acknowledge[d] the results” of this exercise in the B.C. Service Agreement, and has agreed to “continue to collaborate on the articulation of costs.”⁴⁹³

263. The 2012 B.C. Service Agreement was for a term of one year only, and AANDC acknowledged that it was a “first step in transitioning to a new funding arrangement” with the province of British Columbia, and recognized that “further steps will be undertaken as [they] move forward with the implementation” of EPFA.⁴⁹⁴

264. On April 1, 2013, the B.C. Service Agreement was renewed for another one year term.⁴⁹⁵ AANDC enters into funding arrangements with the province of British Columbia in order to flow funding to them for the provision of these services on reserve, and continues to provide a cost of living adjustment to the province pursuant to the Agreement.⁴⁹⁶

C) **Independent Canadian Reviews of AANDC’s FNCFS Program and Funding Formulas find Inequities**

i) **Auditor General’s Report (2008) finds that AANDC’s FNCFS Program and on Reserve Funding Formulas are Inequitable**

265. Following a written request from the Caring Society,⁴⁹⁷ the Auditor General initiated a review of AANDC’s FNCFS Program and on reserve funding formulas, and reported her findings to the House of Commons in 2008.⁴⁹⁸ The purpose of the review was to examine the “management structure, the processes, and the federal resources used to implement the federal policy” on reserve.⁴⁹⁹

⁴⁹² B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at pp. 5 (section 7.2, 7.6), 10 (Appendix B).

⁴⁹³ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.6.

⁴⁹⁴ B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5, section 7.5.

⁴⁹⁵ Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-14, Tab 399 [“Updated B.C. Service Agreement”]; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).

⁴⁹⁶ Funding Agreement for Use with Provincial Governments (British Columbia Version) 2011-2012, CHRC BOD, Ex. HR-13, Tab 310; see also BC 2013-2014 Arrangement Routing, CHRC BOD, Ex. HR-14, Tab 400; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁴⁹⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 21.

⁴⁹⁸ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 1.

⁴⁹⁹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 1.

266. The Auditor General concluded that AANDC's current "funding practices do not lead to equitable funding among Aboriginal and First Nations communities", the effect of which is that First Nations children on reserve are taken into child welfare care at a disproportionate rate (almost eight times that of children in care residing off reserve).⁵⁰⁰ As a result, the report made ten recommendations for clarification and reform of the funding formula and FNCFS Program generally.⁵⁰¹
267. The Auditor General found that AANDC's "use of [Directive 20-1] has led to inequities"⁵⁰² because the funding formula itself was "inequitable"⁵⁰³ for the reasons that follow. First, the formula is outdated and "does not take into account any costs association with modifications to provincial legislation or with changes in the way services are provided."⁵⁰⁴
268. Second, Directive 20-1 fails to address the needs of First Nations children because of the assumptions built into the structure of the formula.⁵⁰⁵ For instance, the "formula is based on the assumption that each First Nations agency has [6%] of on-reserve children placed in care", which "leads to funding inequities [...] because, in practice, the percentage of children that they bring into care varies widely."⁵⁰⁶ In fact, in the provinces surveyed by the Auditor General in 2007, the percentage of children brought into care "ranged from 0 to 28 percent".⁵⁰⁷
269. In addition, the Auditor General concluded that AANDC's funding is "not responsive to factors that can cause wide variations in operating costs, such as differences in community needs or in support services available, in the child welfare services provided to on-reserve First Nations children, and in the actual work performed by First Nations agencies."⁵⁰⁸

⁵⁰⁰ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 2.

⁵⁰¹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 32-35.

⁵⁰² OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 6.

⁵⁰³ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 19.

⁵⁰⁴ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp.41-42.

⁵⁰⁵ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

⁵⁰⁶ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

⁵⁰⁷ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

⁵⁰⁸ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

270. Thirdly, the report found that Directive 20-1 is “not adapted to small agencies”, and that AANDC has taken little action to address concerns about the “funding and capacity [of small agencies] to provide the required range of child welfare services”.⁵⁰⁹
271. The Auditor General also found that AANDC’s funding of First Nations child and family service agencies is “not properly coordinated” and can be inconsistent between regions, particularly with respect to the CSA.⁵¹⁰
272. In addition, the report recommended that AANDC clarify and define key policy requirements, including what is meant by “reasonably comparable services” and “culturally appropriate services”.⁵¹¹ It also recommended that AANDC “find ways to know whether the services that the [FNCFS Program] supports are in fact reasonably comparable”,⁵¹² noting the challenges many First Nations child and family service agencies have in accessing necessary health and social services on reserve.⁵¹³
273. The Auditor General also found that AANDC “pre-determines the level of funding it will provide to a First Nations agency without regard” to the services the agency is bound to provide under their provincial delegation agreement in accordance with provincial legislation and standards.⁵¹⁴ In fact, the report concluded that AANDC had “limited assurance that child welfare services delivered on reserves by First Nations agencies comply with provincial legislation and standards.”⁵¹⁵
274. With respect to jurisdictional disputes, the Auditor General found that there were “fundamental differences between the views of [AANDC] and Health Canada on responsibility for funding Non-Insured Health Benefits for First Nations children who are placed in care”, which impacts the “availability, timing and level of services to First Nations children.”⁵¹⁶ Moreover, the report concluded that for “First Nations children with a high degree of medical need”, it may be that “placing these children in care

⁵⁰⁹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 21, sections 4.55, 4.56.

⁵¹⁰ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 22, section 4.58.

⁵¹¹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 11-13.

⁵¹² OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 13, section 4.25.

⁵¹³ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 12, section 4.20.

⁵¹⁴ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 14, section 4.30.

⁵¹⁵ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 15, section 4.34.

⁵¹⁶ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 16-17, section 4.39.

outside of their” communities is the only way to ensure they have “access to the medical services they need.”⁵¹⁷

275. Looking at the budget of the FNCFS Program as a whole, the Auditor General concluded that AANDC’s “budgeting approach” was “not sustainable” because the Program’s “expenditures are growing faster than the Department’s overall budget”.⁵¹⁸ In order to address these funding shortfalls, AANDC was re-allocating funding from other programs such as “community infrastructure and housing”.⁵¹⁹
276. As well, the report concluded that given the importance of the FNCFS Program and the impact it has on the lives of First Nations children and families across Canada, it was alarming that AANDC collected so little “information on the actual services funded through its [Program and] funding formula”. The Auditor General called on AANDC to define performance indicators and collect information on the results and outcomes of its funding formulas, since this information is critical to “[assess] the need for child welfare services in a particular First Nations community and [provide] guidance to determine the funding needed.”⁵²⁰
277. The Auditor General also analyzed AANDC’s new funding formula, EPFA, and found that “it will provide more funds for the operations of First Nations agencies [and] also offers them more flexibility to allocate resources to different types of child welfare services.”⁵²¹
278. However, the report ultimately concludes that EPFA “does not address the inequities [the Auditor General has] noted under [Directive 20-1]” because it “still assumes that a fixed percentage of First Nations children and families in all the First Nations served by an agency need child welfare services.”⁵²² Therefore, EPFA still does not respond to or address the needs of First Nations, and pressures to “fund exceptions will likely continue to exist under the new formula” as a result.⁵²³

⁵¹⁷ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 17, section 4.40.

⁵¹⁸ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 25, sections 4.72, 4.73.

⁵¹⁹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 25, section 4.72.

⁵²⁰ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 27, sections 4.83, 4.85.

⁵²¹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.53.

⁵²² OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.54.

⁵²³ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.54.

279. Overall, the Auditor General found that Directive 20-1 and EPFA do “not treat First Nations or provinces in a consistent or equitable manner”, the result of which is that “many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.”⁵²⁴ Therefore, the report called on AANDC to design a funding formula that is “more than a means of distributing the [FNCFS Program’s] budget”, noting that the “shortcomings of the funding formula have been known to [AANDC] for years”.⁵²⁵

280. In response to the Auditor General’s 2008 report, AANDC stated that they “agree[d] with all [the report’s] recommendations”⁵²⁶ and had “developed an action plan to address the concerns”.⁵²⁷

ii) Public Accounts Committee’s Report (2009) finds that AANDC’s FNCFS Program and on Reserve Funding Formulas are Inequitable

281. Following the Auditor General’s report in 2008, and in light of the “disturbing findings of the audit,” the PAC held a hearing on February 12, 2009 with “officials from the Office of the Auditor General [...] and [AANDC]” to examine the report and the FNCFS Program.⁵²⁸ The PAC subsequently issued its own findings in a report dated March 2009.⁵²⁹

282. At the time, the PAC noted that they were “very concerned” that at the hearing AANDC was only able to provide ‘vague generalities’, and that there was “no evidence of an action plan currently in place” to address the concerns and recommendations in the Auditor General’s 2008 report.⁵³⁰ The PAC requested that AANDC provide them with a “detailed action plan” by April 30, 2009.⁵³¹

⁵²⁴ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 23, section 4.66.

⁵²⁵ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 21, 23, sections 4.57, 4.66.

⁵²⁶ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 6.

⁵²⁷ Briefing Note: Auditor General (OAG) Chapter 4: Child and Family Services (Information for Deputy Minister) dated August 27, 2008, CHRC BOD, Ex. HR-03, Tab 12 at p. 2 (pages unnumbered).

⁵²⁸ Report of the Standing Committee on Public Accounts, Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General of Canada (2009), CHRC BOD, Ex. HR-03, Tab 15 at p. 1 [“PAC Report 2009”].

⁵²⁹ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15.

⁵³⁰ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 3-4.

⁵³¹ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 4.

283. The report noted that at the PAC hearing in February 2009, AANDC “acknowledged the flaws in [Directive 20-1]”.⁵³² However, the PAC stated that they failed to “understand why [Directive 20-1] is still in place”, and remained “quite concerned that the majority of First Nations children on reserves continue to live under a funding regime which numerous studies have found is not working and should be changed.”⁵³³ As a result, the report called on AANDC to “immediately modify Directive 20-1” and report back on its progress by June 30, 2009.⁵³⁴
284. Analyzing EPFA, the PAC agreed with the Auditor General’s stated concerns that the new formula does not address the inequities of Directive 20-1, and noted that they were “very disturbed that [AANDC] would take a bureaucratic approach to funding agencies, rather than making efforts to provide funding where it is needed” when they have known about the shortcomings of the funding formula for years.⁵³⁵ Therefore, the report recommended that AANDC ensure that EPFA is “based upon need rather than an assumed fixed percentage of children in care”, and report back to the Committee on its progress by December 31, 2009.⁵³⁶
285. The PAC also reiterated the Auditor General’s concerns about the lack of a definition of “reasonable comparability”, stating that “at the very least, [AANDC] should be able to compare [the level of] funding” provided to First Nations child and family service agencies to similar provincial agencies, in order to determine whether its funding is sufficient to ensure reasonable comparability.⁵³⁷ Therefore, the PAC recommended that AANDC conduct a “comprehensive comparison of its funding” by December 31, 2009 and provide the results to the Committee.⁵³⁸
286. In addition, the PAC repeated the Auditor General’s concern with AANDC’s failure to define “culturally appropriate services”, and called on AANDC to provide the Committee

⁵³² PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 8.

⁵³³ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 9.

⁵³⁴ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.

⁵³⁵ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.

⁵³⁶ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 10.

⁵³⁷ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 5-6.

⁵³⁸ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 6.

with a “clear indication of [what] progress [has been] made in defining ‘culturally appropriate services’”.⁵³⁹

287. Finally, the PAC report noted concern with AANDC’s re-allocation of funding from programs such as infrastructure and housing in order to keep pace with the FNCFS Program’s growing expenditures, and recommended that AANDC “determine the full costs of meeting all of its policy requirements and develop a funding model to meet those requirements.”⁵⁴⁰

288. AANDC issued its response to the PAC report on September 19, 2009, and generally agreed with all of the Committee’s recommendations.⁵⁴¹ Before the Standing Committee on Aboriginal Affairs and Northern Development in 2009, AANDC stated that it “recognize[d] the seriousness of the matters raised in [the OAG and PAC reports].”⁵⁴²

iii) Auditor General’s Follow-up Status Report (2011) finds that AANDC’s FNCFS Program and on Reserve Funding Formulas Remain Inequitable

289. Three years after the release of the Auditor General’s report and recommendations on AANDC’s FNCFS Program, the Auditor General released a follow-up report in 2011.⁵⁴³ The report “found progress to be unsatisfactory on several recommendations [...] that are important for the lives and well-being of First Nations people”, and concluded that this was in large part because of structural impediments in the programs themselves which “severely limit the delivery of public services to First Nations communities and hinder improvements in living conditions on reserve”.⁵⁴⁴

290. For example, the Auditor General concluded that AANDC needs to: clarify service levels; create a legislative basis for the programs; ensure funding mechanisms are

⁵³⁹ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at pp. 6-7.

⁵⁴⁰ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15 at p. 11.

⁵⁴¹ Government of Canada Response to the Report of the Standing Committee on Public Accounts on Chapter 4: First Nations Child and Family Services Program – Indian and Northern Affairs Canada of the May 2008 Report of the Auditor General, CHRC BOD, Ex. HR-03, Tab 16, pp. 1-6 (pages unnumbered) [“AANDC Response to PAC Report 2009”].

⁵⁴² House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 1 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).

⁵⁴³ Status Report of the Auditor General of Canada to the House of Commons, Chapter 4: Programs for First Nations on Reserves (2011), CHRC BOD, Ex. HR-05, Tab 53 [“OAG Status Report 2011”].

⁵⁴⁴ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 2.

appropriate; and encourage organizations to support local service delivery.⁵⁴⁵ The Auditor General also noted concern about the AANDC's reporting requirements, and the burden that compliance activities places on First Nations.⁵⁴⁶

291. With respect to the FNCFS Program, the Auditor General found that AANDC had still not “defined [its] policy commitment to provide comparable services”, absent which it is difficult to “demonstrate that [EPFA] provides services to children and families living on reserves that are reasonably comparable to provincial services.”⁵⁴⁷
292. Overall, the follow-up report noted that services “available on reserves are often not comparable to those provided off reserves by provinces and municipalities”, and that change “is needed if First Nations are to experience more meaningful outcomes from the services they receive.”⁵⁴⁸
293. AANDC responded to the Auditor General's 2011 follow-up report, agreeing with the recommendations contained therein.⁵⁴⁹

iv) Public Accounts Committee's Follow-up Report (2012) finds that AANDC's FNCFS Program and on Reserve Funding Formulas Remain Inequitable

294. Following the Auditor General's 2011 status report, the PAC held two hearings on October 19 and 24, 2011 respectively, and issued its own follow-up report in February 2012.⁵⁵⁰ At these hearings, the PAC heard witnesses from the Office of the Auditor General, AANDC and Health Canada.⁵⁵¹
295. The PAC follow-up report supported the findings and recommendations in the Auditor General's 2011 report, and called on AANDC to address the “structural impediments to making meaningful, lasting improvements” for First Nations on reserve,⁵⁵² and to

⁵⁴⁵ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 2.

⁵⁴⁶ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 34, sections 4.83, 4.85.

⁵⁴⁷ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 23, sections 4.49, 4.51.

⁵⁴⁸ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 5.

⁵⁴⁹ OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53 at p. 8.

⁵⁵⁰ Report of the Standing Committee on Public Accounts, Chapter 4: Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada (2012), CHRC BOD, Ex. HR-05, Tab 45 at p. 1 [“PAC Status Report 2012”].

⁵⁵¹ PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 1.

⁵⁵² PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 3.

“specify the level of services on reserve required for comparability to the services provided by provinces and territories”.⁵⁵³

296. With respect to AANDC’s progress in implementing the recommended reforms to the FNCFS Program, notwithstanding AANDC’s testimony at the hearing that they had “fixed the funding formula”, the PAC reiterated the Auditor General’s concern that “AANDC had not yet defined culturally appropriate services, nor had it defined comparability or conducted a review to ensure that services available on reserve were reasonably comparable to those available off reserves.”⁵⁵⁴
297. In response, AAANDC recognized that “many of the problems faced by First Nations are due to the structural impediments identified” by the Auditor General and PAC reports, and that these impediments “must be addressed before conditions on reserves will approach those existing elsewhere across Canada.”⁵⁵⁵

v) Parliament Adopts “Jordan’s Principle” in an Attempt to Address Jurisdictional Disputes

298. On October 13, 2007, Member of Parliament Jean Crowder (Nanaimo-Cowichan, NDP) tabled Private Member’s Motion “M-296” in the House of Commons for the immediate adoption by the Government of Canada of a “child first principle, based on Jordan’s Principle, to resolve jurisdictional disputes involving the care of First Nations children.”⁵⁵⁶
299. Jordan’s Principle is defined as:

[... A] child first principle to resolving jurisdictional disputes within and between federal and provincial/territorial governments. It applies to all government services available to children, youth and their families.

[...]

Where a jurisdictional dispute arises around government services to a Status Indian or Inuit child, Jordan’s Principle requires that the government department

⁵⁵³ PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at p. 2.

⁵⁵⁴ PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45 at pp. 8-9.

⁵⁵⁵ Government of Canada Response to the Report of the Standing Committee on Public Accounts, Chapter 4: Programs for First Nations on Reserves, of the 2011 Status Report of the Auditor General of Canada, CHRC BOD, Ex. HR-05, Tab 54 (pages unnumbered).

⁵⁵⁶ 39th Parliament, 2nd Session, Hansard of Private Members’ Business: October 31, 2007, CHRC BOD, Ex. HR-03, Tab 20 at p. 2 (pages unnumbered) [“Jordan’s Principle Motion 296”].

of first contact pays for the service to the child without delay or disruption. The paying government can then refer the matter to inter-governmental processes to pursue repayment of the expense.⁵⁵⁷

300. The principle is named in memory of the late Jordan River Anderson of Norway House Cree Nation in Manitoba, who was born in 1999 with a “complex set of genetic disorders.”⁵⁵⁸ Due to the “lack of services on reserve”, Jordan’s family made the “difficult decision” to place him in the provincial child welfare system so that he could access the “medical care he needed.”⁵⁵⁹ As a result, Jordan “spent the first two years of his life in [a Winnipeg] hospital.”⁵⁶⁰
301. Jordan’s health eventually stabilized, and his doctors advised that he could leave the hospital and go to a “specialized foster home”⁵⁶¹ close to the hospital with appropriate supports, including “medical equipment” and caretakers.⁵⁶² However, the federal and provincial governments “argued over who should pay for Jordan’s foster home costs” for more than two years.⁵⁶³ In the meantime, neither level of government paid for the service(s), so Jordan remained in hospital.⁵⁶⁴
302. His doctors wrote letters to both governments calling on them to pay for Jordan to move to a specialized foster home because a “hospital is no place for a child to grow up in”.⁵⁶⁵ However, neither the federal nor the provincial government took responsibility for the situation.⁵⁶⁶

⁵⁵⁷ Fact Sheet: Jordan’s Principle, CHRC BOD, Ex. HR-03, Tab 19; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 147, 151-153.

⁵⁵⁸ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 141.

⁵⁵⁹ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered).

⁵⁶⁰ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 141; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 9.

⁵⁶¹ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered).

⁵⁶² Testimony of Corinne Baggley, Transcript Vol. 57 at pp. 10, 12.

⁵⁶³ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 142; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 10.

⁵⁶⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 142-143, 146.

⁵⁶⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 143.

⁵⁶⁶ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 143.

303. Sadly, after a two-year long jurisdictional dispute, Jordan passed away at the age of five, never having left the hospital.⁵⁶⁷ His family and First Nations community created “Jordan’s Principle” in his name not only to honour his legacy, but to “make sure that this never happens again to another child.”⁵⁶⁸
304. Parliament passed motion M-296 calling on the Government of Canada to immediately adopt a child-first principle based on Jordan’s Principle unanimously on December 12, 2007.⁵⁶⁹
305. Following the vote in the House of Commons, the Ministers of AANDC, Health Canada and the Federal Interlocutor for Métis and Non-Status Indians issued the following statement:

[...] Our Government is committed to putting children first and is proud to support motion 296, ‘Jordan’s Principle.’

This Government believes that the health and safety of all children must always triumph over any issues of jurisdiction.

[AANDC] is working closely with Health Canada as well as provincial and First Nations partners to ensure that jurisdictional issues do not impact a child’s quality of care.⁵⁷⁰

306. The purpose of Jordan’s Principle is to ensure that “First Nation[s] children [are not] denied access to government services or delayed receipt of access for government services because of additional barriers related to them being a First Nations child.”⁵⁷¹ In the context of First Nations child and family services, Jordan’s Principle is a mechanism through which to address existing gaps in jurisdiction and service delivery on reserve in

⁵⁶⁷ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 3 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 146.

⁵⁶⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 146-147.

⁵⁶⁹ Jordan’s Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 15 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 148-149.

⁵⁷⁰ Statement from the Federal Minister of Health and Minister of [AANDC] and Federal Interlocutor for Métis and Non-Status Indians regarding Motion 296, Jordan’s Principle (December 12 ,2007), CHRC BOD, Ex. HR-03, Tab 22.

⁵⁷¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 153-154.

order to ensure that the services being provided are reasonably comparable to those available to children living off reserve.⁵⁷²

307. AANDC was given the lead to respond to motion M-296 and Jordan's Principle.⁵⁷³ On June 24, 2009, AANDC entered into a Memorandum of Understanding (the "MOU") with Health Canada setting out each department's roles and responsibilities with respect to the implementation of Jordan's Principle.⁵⁷⁴ The MOU states that if a "dispute over funding responsibility arises between the federal and provincial governments, [Health Canada and AANDC] will work together to engage and collaborate with the provinces and First Nations representatives to resolve the dispute through a multi-party case management approach".⁵⁷⁵ This MOU was updated in January 2013.⁵⁷⁶
308. AANDC's definition of and response to Jordan's Principle focuses on cases "involving a jurisdictional dispute between a provincial government and the federal government" for a First Nations child living on reserve "who has been assessed by health and social service professionals and [has] been found to have multiple disabilities requiring multiple service providers."⁵⁷⁷ This is considered to be the first stage of a "two-pronged approach", the second stage of which would "including discussions on important issues that relate to services for First Nation children with disabilities".⁵⁷⁸
309. After its unanimous adoption by Parliament, AANDC wrote to the provinces and territories in May 2008 indicating that it was "fully committed to honouring Jordan's Principle and [was] taking action to make sure that children with multiple disabilities

⁵⁷² Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 154-155; see also AANDC Briefing Note, "Jordan's Principle" (2008), CHRC BOD, Ex. HR-14, Tab 352; see also AANDC, "Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302 at pp. 12-15.

⁵⁷³ Testimony of Corinne Baggley, Transcript Vol. 57 at p. 24.

⁵⁷⁴ Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2009), Respondent's BOD, Ex. R-14, Tab 41; see also testimony of Corinne Baggley, Transcript Vol. 57 at pp. 24-26.

⁵⁷⁵ Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2009), Respondent's BOD, Ex. R-14, Tab 41 at p. 1.

⁵⁷⁶ Memorandum of Understanding on the Federal Response to Jordan's Principle between Indian and Northern Affairs Canada and Health Canada (2013), Respondent's BOD, Ex. R-14, Tab 42.

⁵⁷⁷ AANDC Questions & Answers re: Jordan's Principle, CHRC BOD, Ex. HR-14, Tab 377 at pp. 1-2; see also letter from the Honourable Chuck Strahl to the First Nations Leadership Council (undated), CHRC BOD, Ex. HR-14, Tab 379 at p. 1; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70.

⁵⁷⁸ Letter from the Honourable Chuck Strahl to the First Nations Leadership Council (undated), CHRC BOD, Ex. HR-14, Tab 379 at pp. 1-2; see also testimony of Corinne Baggley, Transcript Vol. 58 at pp. 43-44; see also letter from the Honourable Chuck Strahl to the B.C. Minister of Children and Family Development dated January 21, 2010, CHRC BOD, Ex. HR-06, Tab 70.

receive the services they need quickly.”⁵⁷⁹ In the letter, AANDC proposed “case conferencing as a method to assist all parties involved in a child’s care to work collaboratively and efficiently to provide services that are comparable to those provided to other children living in similar geographic locations”.⁵⁸⁰ To that end, AANDC requested that each province and territory identify a “lead official” who could serve as a point of contact.⁵⁸¹

310. In response, the provinces of Saskatchewan, Alberta, British Columbia, Ontario and Prince Edward Island, along with the Northwest Territories wrote to AANDC voicing support for Jordan’s Principle generally.⁵⁸² However, some provinces voiced concern with the federal government’s definition of Jordan’s Principle and called for a broader response that more closely aligns with the spirit and wording of the Principle itself.⁵⁸³ AANDC has also been criticized by “[a]dvocacy groups, First Nation leadership and provinces” for its narrow approach to Jordan’s Principle.⁵⁸⁴
311. Despite the adoption of Jordan’s Principle and governments’ efforts to date, a 2012 study found that “First Nations children continue to be the victims of administrative impasses.”⁵⁸⁵

⁵⁷⁹ Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent’s BOD, Ex. R-14, Tab 40.

⁵⁸⁰ Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent’s BOD, Ex. R-14, Tab 40; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 22.

⁵⁸¹ Letter from AANDC to Provincial/Territorial Minister of Health and Aboriginal Affairs and Child Welfare dated May 16, 2008, Respondent’s BOD, Ex. R-14, Tab 40.

⁵⁸² Letters from Provincial Governments to AANDC re: Jordan’s Principle, CHRC BOD, Ex. HR-14, Tab 364; see also letter from Province of Ontario to AANDC dated December 16, 2008, CHRC BOD, Ex. HR-15, Tab 438.

⁵⁸³ AANDC & British Columbia, “Joint Process for the Continued Implementation of Jordan’s Principle in British Columbia” (2011), Respondent’s BOD, Ex. R-14, Tab 45 at p. 6, Appendix A; see also AANDC & New Brunswick, “Joint Statement on the Implementation of Jordan’s Principle in New Brunswick”, Respondent’s BOD, Ex. R-14, Tab 46 at p. 7, Schedule One.

⁵⁸⁴ Deputy Ministers’ Recognition Award Nomination Form (2011), CHRC BOD, Ex. HR-13, Tab 327 at p. 4; see also letter from the First Nations Leadership Council to the Honourable Chuck Strahl dated November 14, 2008, CHRC BOD, Ex. HR-14, Tab 378 at p. 1; see also testimony of Corinne Baggley, Transcript Vol. 57 at p. 28.

⁵⁸⁵ Canadian Paediatric Society, “Are We Doing Enough? A status report on Canadian public policy and child and youth health” (2012), CHRC BOD, Ex. HR-06, Tab 83 at pp. 28-29; see also AANDC, “Jordan’s Principle Dispute Resolution: Preliminary Report” (2009), CHRC BOD, Ex. HR-13, Tab 302; see also AANDC Briefing Note, “Jordan’s Principle and Children with Life Long Complex Medical Needs” (2007), CHRC BOD, Ex. HR-14, Tab 380; see also Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 390.

D) United Nations Committee on the Rights of the Child (UNCRC) Reviews AANDC's FNCFS Program and on Reserve Funding Formulas and Finds Inequities

312. In addition to the independent domestic reviews and reports on the inequities in AANDC's FNCFS Program and on reserve funding formulas, there has also been international attention shone on the issues of inequality among Aboriginal children in Canada. The Government of Canada signed and ratified the *United Nations Convention on the Rights of the Child* ("the *Convention*"),⁵⁸⁶ and is therefore obligated to respect and ensure the rights and requirements enunciated by the *Convention* are fulfilled.
313. Pursuant to Article 44 of the *Convention*, each State Party undertakes to submit reports on the measures they have adopted which give effect to the rights recognized and the progress made on the enjoyment of those rights.⁵⁸⁷ The United Nations Committee on the Rights of the Child (the "UNCRC"), which oversees the implementation of the *Convention*, reviews these reports and issues recommendations, filed its first "Concluding Observations" in response to Canada's 2001 second periodic report in October 2003 (the "October 2003 Report").⁵⁸⁸
314. In its October 2003 Report, the UNCRC made several recommendations, many of which dealt specifically with Aboriginal children in Canada, including:
- Article 22 recommended that Canada "continue to strengthen its legislative efforts to fully integrate the right to non-discrimination in all relevant legislation concerning children". In particular, this "right is to be effectively applied to all political, judicial and administrative decisions and in projects, [programs] and services that have an impact on all children belonging to minority and other vulnerable groups such as children with disabilities and Aboriginal children".⁵⁸⁹
 - Article 25 recommended that the principle of "best interests of the child" contained in article 3 be appropriately analysed and objectively implemented with regard to individual and groups of children in various situations (e.g. Aboriginal children) [...].⁵⁹⁰
 - Article 58 welcomed "the Statement of Reconciliation made by the Federal Government expressing Canada's profound regret for historical injustices

⁵⁸⁶ *Convention on the Rights of the Child*, 44/25 of 20 November 1989, (entered into force 2 September, 1990) ["UNCRC"].

⁵⁸⁷ *UNCRC*, Art. 44.

⁵⁸⁸ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, CHRC BOD, Ex. HR-03, Tab 23 ["UNCRC Report 2003"]; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 146.

⁵⁸⁹ UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at pp. 5-6, Art. 22.

⁵⁹⁰ UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 6, Art. 25.

committed against Aboriginal people, in particular within the residential school system”. It also noted “the priority accorded by the Government to improving the lives of Aboriginal people across Canada and by the numerous initiatives, provided for in the federal budget, that have been embarked upon since the consideration of the initial report”. Further, the UNCRC expressed concern “that Aboriginal children continued to experience many problems, including discrimination in several areas, with much greater frequency and severity than their non-Aboriginal peers”.⁵⁹¹

- Article 59 urged the Government to pursue its efforts to address the gap in life chances between Aboriginal and non-Aboriginal children.⁵⁹²

315. In January 2009, the UNCRC released “General Comment 11”,⁵⁹³ which arose out of a discussion with members of indigenous communities around the world concerning particular issues of concern to them. The objective of the General Comment was to provide States with guidance on how to implement their obligations under the *Convention* with respect to indigenous children. In its General Comment, the UNCRC highlighted the following concerns:

- Article 5 states that “the specific references to indigenous children in the *Convention* are indicative of the recognition that they require special measures in order to fully enjoy their rights”. The UNCRC acknowledged that “indigenous children face significant challenges in exercising their rights and that they continue to experience serious discrimination contrary to article 2 of the *Convention* in a range of areas, including in their access to health care and education”,⁵⁹⁴ which prompted the need for this general comment.⁵⁹⁵
- Articles 46, 47 and 48 discussed the family environment and “alternate care”, which Dr. Blackstock indicated was the international term used to describe children who are removed from the home.⁵⁹⁶ Article 47 articulated the need to maintain “the best interests of the child” and insisted that “the integrity of indigenous families and communities should be primary considerations in development, social services, health and educational programs affecting indigenous children”.⁵⁹⁷
- Article 48 referenced situations where indigenous children are removed from their homes. The UNCRC emphasized the need for “States to ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20(3) of the

⁵⁹¹ UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 13, Art. 58.

⁵⁹² UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at p. 13, Art. 59.

⁵⁹³ Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, CHRC BOD, Ex. HR-03, Tab 24 [“UNCRC General Comment 2009”].

⁵⁹⁴ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.

⁵⁹⁵ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.

⁵⁹⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 160.

⁵⁹⁷ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at p. 10, Art. 47.

Convention, pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background". Furthermore, the UNCRC spoke to the overrepresentation "among indigenous children separated from the family environment"⁵⁹⁸ and identified the need to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity.⁵⁹⁹

316. As part of its obligations as a State Party, in November 2009, the Government of Canada filed its Third and Fourth Reports in anticipation of its 2012 UNCRC review.⁶⁰⁰ The following sections were highlighted during the hearing:⁶⁰¹

- Section 96 discussed the reality that "half of the Aboriginal population in Canada is less than 25 years old, whereas 30 percent of all Canadians are under the age of 25".⁶⁰² Further, they stated that projections for growth in "the Aboriginal population would continue to out-pace that of the general population over the next two decades."⁶⁰³
- Section 97 described the funding provided by the Government of Canada "to First Nations and Inuit communities to deliver evidence-based programs and services to support the development of children in an effort to address the gaps in life chances between Aboriginal and non-Aboriginal children".⁶⁰⁴
- Section 98 addressed the "disproportionately high number of Aboriginal children in state care as part of a broader social challenge of life on reserves, such as poverty, poor housing conditions, substance abuse and exposure to family violence".⁶⁰⁵ The Government of Canada acknowledged a shift in its child welfare programs for Aboriginal children to a prevention-focused approach.

317. On October 5, 2012, the UNCRC provided its final observations concerning the reports filed by the Government of Canada.⁶⁰⁶ The main points addressed during the hearing were as follows:

- Section 32, falling under the heading, "Non-discrimination", indicates the UNCRC's concerns regarding "the continued prevalence of discrimination on the basis of ethnicity, gender, socio-economic background, national origin, and other

⁵⁹⁸ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 10-11, Art. 48.

⁵⁹⁹ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, Art. 5.

⁶⁰⁰ Convention on the Rights of the Child, "Third and Fourth Reports of Canada", CHRC BOD, Ex. HR-03, Tab 25 ["Canada's 3rd and 4th Reports to UNCRC"].

⁶⁰¹ Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 164-166.

⁶⁰² Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 96.

⁶⁰³ Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 96.

⁶⁰⁴ Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 97.

⁶⁰⁵ Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25 at p. 20, section 98.

⁶⁰⁶ Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties under Article 44 of the Convention*, CHRC BOD, Ex. HR-05, Tab 57 ["UNCRC Report 2012"].

grounds”. In particular, subsection (a) refers to the “significant overrepresentation of Aboriginal and African-Canadian children in the criminal justice system and out-of-home care”.⁶⁰⁷

- At subsection 32(d), the UNCRC notes their concern with the lack of action following the “Auditor General’s finding that less financial resources are provided for child welfare services to Aboriginal children than to non-Aboriginal children”. Subsection 32(e) also refers to the “economic discrimination resulted from direct or indirect social transfer schemes and other social/tax benefits, such as the authorization given to provinces and territories to deduct the amount of social assistance received by parents on welfare”.⁶⁰⁸
- At section 33, the UNCRC provided its recommendations to address its concerns about discrimination identified in the Government of Canada’s Reports:
 - Under subsection (a), the UNCRC urged the Government to “take urgent measures to address the overrepresentation of Aboriginal and African-Canadian children in the justice system and out of home care”.
 - Following, subsection (d) urged the Government of Canada to “take immediate steps to ensure that in law and in practice, Aboriginal children have full access to all government services and receive resources without discrimination”.
 - Subsection (e) recommended the State Party “undertake a detailed assessment of the direct or indirect impact of the reduction of social transfer schemes and other social/tax benefit schemes on the standard of living of people depending on social welfare, including the reduction of social welfare benefits linked to the National Child Benefit Scheme, with particular attention to women, children, older persons, persons with disabilities, Aboriginal people, African Canadians and members of other minorities”.⁶⁰⁹

E) AANDC’s Internal Evaluations, Audits and Reviews of the FNCFS Program and on Reserve Funding Formulas Find Inequities

318. In addition to the above-mentioned independent and international reviews, AANDC has conducted its own reviews of the FNCFS Program and on reserve funding formulas, which have identified and acknowledged the shortcomings with, and inequities caused by, the Program and funding formulas.⁶¹⁰

⁶⁰⁷ UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, section 32.

⁶⁰⁸ UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, section 32.

⁶⁰⁹ UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57 at p. 7, Art. 32.

⁶¹⁰ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at pp. ii; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. v-

i) Shortcomings and Inequities with AANDC's FNCFS Program and Funding Formulas

319. AANDC is aware of the “dire” circumstances of First Nations on reserve, and of the real administrative and operational difficulties its inadequate funding has on First Nations child and family service agencies on reserve.⁶¹¹ An internal AANDC document explained why the FNCFS Program and funding formulas, particularly the fixed operations budgets, have not allowed First Nations child and family service agencies to provide a comparable level of service on reserve:

Although the national formula was intended to ensure comparability of services with other Canadians, the disregard for the scope and content of provincial legislation in the formula perpetuated inequity of service in many provinces.

[...]

While [FNCFS Program] expenditures have increased, the budgets [for First Nations child and family service agencies] continue to be woefully inadequate.⁶¹² (emphasis added)

a. Directive 20-1

320. AANDC has acknowledged that “Directive 20-1 does not provide sufficient funding for [First Nations child and family service agencies] to deliver culturally based and statutory child welfare services on reserve to a level comparable to that provided to other children and families living off reserve.”⁶¹³

viii, 29-31; see also Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 1-16; see also Mid-Term National Review for the Strategic Evaluation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program (2011), CHRC BOD, Ex. HR-08, Tab 113 at pp. v-vii, 18-20, 43; see also Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247; see also Evaluation of the First Nations Child and Family Services (FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303; see also Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359; see also Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38.

⁶¹¹ First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Q's & A's, CHRC BOD, Ex. HR-11, Tab 233 at p. 1.

⁶¹² Vince Donoghue Briefing Note, “Comparability of First Nations Child Welfare On Reserve” (undated), CHRC BOD, Ex. HR-11, Tab 234 at pp. 1-3.

⁶¹³ AANDC Backgrounder “Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007”, CHRC BOD, Ex. HR-14, Tab 391 at p. 1; see also AANDC Backgrounder “Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007”, CHRC BOD, Ex. HR-14, Tab 392 at p. 1.

321. Furthermore, AANDC acknowledged in 2007 that the funding and subsequent level of services provided to First Nations children and families on reserve pursuant to AANDC's FNCFS Program and Directive 20-1 funding formula are inferior to those received by children and families living off reserve who are served by the provinces and territories:

[T]he current federal funding approach to child and family services [i.e., Directive 20-1] has not let First Nations Child and Family Services Agencies keep pace with the provincial and territorial policy changes, and therefore, the First Nations Child and Family Services Agencies are unable to deliver the full continuum of services offered by the provinces and territories to other Canadians.⁶¹⁴ (emphasis added)

322. AANDC is aware of these “weaknesses” and that they have “likely been a factor in increases in the number of children in care [... because Directive 20-1] has had the effect of steering agencies towards in-care options – foster care, group homes and institutional care because only these agency costs are fully reimbursed” and “resources for prevention outreach”.⁶¹⁵

b. EPFA

323. AANDC's internal reviews of EPFA have found that while the funding formula is “regarded as appropriate for meeting its intended outcomes”, there are “challenges” that need to be addressed, including: “provincial requirements, human resource shortages, salary, support from government/agency management, community linkages, training, and geographical isolation”.⁶¹⁶
324. In 2010, AANDC evaluated the implementation of EPFA in Alberta and found that 75% of the First Nations child and family service agencies interviewed “felt that funding for the EPFA is not sufficient to achieve intended outcomes”, and that “the funding model [was not], as currently designed, flexible enough to accommodate the varying needs of

⁶¹⁴ Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38 at p. 2 (pages unnumbered).

⁶¹⁵ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at p. ii; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii.

⁶¹⁶ Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. vi, 13, 16-17, 21-24.

the agencies”.⁶¹⁷ However, the EPFA funding model in Alberta has not been modified since its implementation in 2007.⁶¹⁸

325. Similarly, in a 2012 audit of Nova Scotia’s Mi’kmaw Children and Family Services Agency (the “Mi’kmaw Agency”), AANDC found the following with respect to the adequacy of EPFA funding:

The management and staff of the [Mi’kmaw] Agency are having significant challenges in providing services and managing operations effectively. Opportunities exist to improve the effectiveness of Operations, but real and perceived shortfalls in financial and human resources require a focus on crisis management with little or no opportunities to adequately plan, monitor and improve operations. [...]⁶¹⁹ (emphasis added)

326. Specifically, the audit noted that fixed funding levels under EPFA “preclude the capacity to hire additional case workers to help meet the demand for services”, and provide limited or no funding for capital requirements and legal costs.⁶²⁰

327. These findings were reiterated in AANDC’s evaluation of the implementation of EPFA in Saskatchewan and Nova Scotia in 2012.⁶²¹ That evaluation also found that “[m]ore than half of agencies believe that funding is insufficient to meet their needs, particularly around salaries, training, the rising costs of institutional care, and the need for capital infrastructure”.⁶²²

328. Overall, AANDC concluded that there is “concern that the EPFA funding mechanism will not allow [First Nations child and family service] agencies to keep up with provincial

⁶¹⁷ Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. 26-27.

⁶¹⁸ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 109-110; Vol. 62 at pp. 48-54.

⁶¹⁹ Internal Audit Report on Mi’kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at p. 1; see also AANDC Briefing Note, “Province of Nova Scotia’s Audit of the Mi’kmaw Family and Children’s Services” (2011), CHRC BOD, Ex. HR-12, Tab 252; see also letter from Mi’kmaw Family and Children’s Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261.

⁶²⁰ Internal Audit Report on Mi’kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 11-12; see also AANDC Briefing Note, “Province of Nova Scotia’s Audit of the Mi’kmaw Family and Children’s Services” (2011), CHRC BOD, Ex. HR-12, Tab 252

⁶²¹ Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 6; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247.

⁶²² Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 7; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at p. 31.

changes without negatively impacting their ability to provide consistent and quality programming.”⁶²³

329. AANDC has also identified the evaluations of the FNCFS Program and EPFA funding model as “very high risk” in Nova Scotia, Saskatchewan, Québec and Prince Edward Island.⁶²⁴

ii) AANDC’s FNCFS Program and on Reserve Funding Formulas are not Comparable to the Services and Funding it Provides to the Provinces

330. AANDC has noted that many First Nations “children and families are not receiving services reasonably comparable to those provided to other Canadians”,⁶²⁵ and that “First Nations are not receiving a fair level of services as compared to non-First Nations in Canada.”⁶²⁶

331. AANDC has also found that the reason for the lack of comparability is that FNBCFS Program funding is insufficient “to permit First Nation communities to effectively and efficiently meet the needs of their communities and their statutory obligations under provincial legislation.”⁶²⁷

332. Furthermore, AANDC is aware that the FNCFS Program is unable “to ‘keep up’ with provincial investments [in child welfare], creating a growing gap in investments on versus off-reserve”.⁶²⁸ According to internal AANDC documents, the inequitable levels of funding and services for the FNCFS Program are a result of the “2% cap on funding allocated to [AANDC] by Parliament” which has been in place since 1996.⁶²⁹ This cap

⁶²³ Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 14; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at pp. 30-31.

⁶²⁴ Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359.

⁶²⁵ AANDC Power Point, “Social Programs” (2006), CHRC BOD, Ex. HR-14, Tab 354; see also AANDC Briefing Note, “Meeting with the Honourable Iris Evans, Alberta Minister of Children’s Services” (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2.

⁶²⁶ AANDC Power Point, “Overview of Progress Report” (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 7.

⁶²⁷ AANDC Power Point, “Overview of Progress Report” (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 10.

⁶²⁸ AANDC Power Point, “Sustainability of Funding: Options for the Future” (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, “Social Programs” (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 3; see also AANDC Power Point, “Sustainability of Programming” (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 11-12, 17-18.

⁶²⁹ AANDC Power Point, “Sustainability of Funding: Options for the Future” (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 6; see also AANDC Briefing Note, “Costs Associated with the Income Assistance and First Nations Child and Family Services Programs” (2007), CHRC BOD, Ex. HR-14, Tab 349.

has resulted in growing “A-base shortfalls [... because the 2%] lags inflation and demographic-driven demand”.⁶³⁰

333. Given AANDC’s constitutional responsibility for Indians and their lands, if First Nations child and family service agencies were forced to close their doors as a result of underfunding, AANDC would either have to provide those services directly, or fund the provinces to provide them on reserve.⁶³¹
334. Senior government officials at AANDC have recognized that the Department provides less funding to First Nations child and family service agencies than it would have to provide the provinces and territories if they were to take over responsibility for child welfare on reserve.⁶³² Since eligible maintenance costs are reimbursed dollar-for-dollar, the amount of funding for operations and prevention, which AANDC has fixed for First Nations child and family service agencies on reserve, is where costs would likely increase if these services were provided by the provinces and territories:

Within the social development programs, there are several areas where [AANDC] funding does not match provincial standards (e.g. [...] operations-related funding for [First Nation] child and family services agencies). The cost of matching provincial standards [for social development programs as of 2006] would be at least \$200 [million] annually.⁶³³

335. Notwithstanding the fact that the services would be provided to the same group of people (i.e., First Nations children and families ordinarily resident on reserve), AANDC has found that if the provinces were to take over the provision of child welfare services on

⁶³⁰ AANDC Power Point, “Sustainability of Funding: Options for the Future” (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, “Is 2% Enough: AANDC Funding for First Nations Basic Services” (2007), CHRC BOD, Ex. HR-14, Tab 383 at pp. 2, 4, 8; see also AANDC Power Point, “First Nations Basic Services: Cost Drivers Project” (2005), CHRC BOD, Ex. HR-15, Tab 472 at pp. 3-4, 11, 18, 23, 32-37.

⁶³¹ *Constitution Act, 1867*, *supra*, s. 91(24).

⁶³² First Nations Child and Family Services (FNCFS): Q’s and A’s, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Power Point, “First Nations Child and Family Services (FNCFS)” (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4; see also AANDC Briefing Note, “Explanations on Expenditures of Social Program” (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 2; see also AANDC Briefing Note, “Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement” (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3.

⁶³³ E-mail from John Dance to Johann Gauthier et al. dated February 1, 2006, CHRC BOD, Ex. HR-15, Tab 477 at p. 1.

reserve, it would likely result in “higher cost[s]” for the Department:⁶³⁴

If current social programs were to be administered by [the] provinces, this would result in a significant increase in costs for [AANDC]. For example, in Alberta, a joint 18 month review of Kasohkewew Child Wellness Society, indicates that based on the current Federal/Provincial agreement, if services are reverted back to the province of Alberta, it would cost [AANDC] an additional \$2.2 [million] beyond what [AANDC] currently funds the First Nation Child and Family Services agency.⁶³⁵ (emphasis added)

336. This is also the case in New Brunswick, where AANDC has found that if “responsibility for [FNCFS Program] delivery [were to] revert to the Province, it is likely that they will seek reimbursement of costs consistent with their provincial [legislation] which is in excess of the current agencies operations budget amounts”.⁶³⁶

The cost of [the province providing child welfare services on reserve] would be higher as the full provincial program would be delivered. [AANDC] would only fund the [First Nations child and family service agencies] on [Directive] 20-1, and the resulting shortfall would be borne by the [First Nations], increasing the deficit level of the New Brunswick [First Nations]. The province has expressed concern with signing any agreement that would result in less service to [First Nations] children than to other residents in the province.⁶³⁷ (emphasis added)

337. Additionally, in fiscal year 2008-2009, AANDC compared its expenditures per child in care to those in the provinces of Alberta, Manitoba and British Columbia. There was a difference of more than \$10,000 per child in care in both Manitoba and British Columbia, and of almost \$4,000 per child in care in Alberta.⁶³⁸
338. As recently as 2012, senior AANDC officials noted that if the provision of child welfare services to First Nations on reserve was transferred from First Nations child and family

⁶³⁴ First Nations Child and Family Services (FNCFS): Q’s and A’s, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Power Point, “First Nations Child and Family Services (FNCFS)” (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4.

⁶³⁵ AANDC Briefing Note, “Explanations on Expenditures of Social Program” (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 2.

⁶³⁶ AANDC Briefing Note, “Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement” (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3.

⁶³⁷ AANDC Briefing Note, “New Brunswick First Nation Child and Family Services” (2002), CHRC BOD, Ex. HR-15, Tab 468 at p. CAN112546_0002.

⁶³⁸ AANDC, “Comparison of Manitoba, British Columbia, Alberta, AANDC Child and Family Services Expenditures per Child in Care out of the Parental Home” (undated), CHRC BOD, Ex. HR-13, Tab 306.

service agencies to the provinces and territories, it could result in “dramatic increases in [FNCFS Program] costs”.⁶³⁹

339. Moreover, given the greater needs of First Nations people, it would likely require even greater financial investment from AANDC in order for the funding and services provided to First Nations children and families on reserve to be comparable to those offered by the provinces and territories off reserve.⁶⁴⁰

PART II – QUESTIONS AT ISSUE

340. The Commission submits the questions at issue before the Tribunal in the present matter are whether the Commission and Complainants have demonstrated a *prima facie* case of discrimination in establishing: (i) that AANDC provides a “service” within the meaning of section 5 of the *CHRA*; (ii) that AANDC denies access to, or adversely differentiates against, First Nations on reserve in the provision of this service; and (iii) that the denial or adverse differentiation is in whole or in part based on the prohibited grounds of race and national or ethnic origin.
341. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under the *CHRA*. In the absence of such a justification, a discriminatory practice will have been established.⁶⁴¹

⁶³⁹ AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 32; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 22, 2012), CHRC BOD, Ex. HR-09, Tab 144 at p. 18; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248 at pp. 13-17.

⁶⁴⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 15; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 9 (Dr. Cindy Blackstock, Executive Directive, First Nations Child and Family Caring Society of Canada).

⁶⁴¹ *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

A) **Have the Commission and Complainants Established a *Prima Facie* Case of Discrimination?**

342. The Commission submits that AANDC's FNCFS Program and corresponding on reserve funding formulas constitute a service pursuant to section 5 of the *CHRA*. Additionally, the Commission submits that AANDC denies and/or differentiates adversely in the provision this service based on race, national and ethnic origin. Specifically, AANDC's FNCFS Program and funding formulas: (i) are based on assumptions and not the actual needs of First Nations communities; (ii) create perverse incentives which contribute to the overrepresentation of First Nations children in care; (iii) lack funding for prevention services and least disruptive measures, despite the fact that these services are critical to address the greater needs of First Nations on reserve; and (iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

343. Moreover, AANDC has failed to correct the known flaws and inequities in Directive 20-1, EPFA and the 1965 Agreement.

344. In the alternative, the Commission submits that even if the services on reserve are found to be comparable to those offered by the provinces and territories off reserve, they are nevertheless inadequate given the greater needs of First Nations people.

i) ***Does AANDC Provide a Service Pursuant to Section 5 of the Canadian Human Rights Act (CHRA)?***

345. The Commission submits that AANDC's FNCFS Program is a service pursuant to section 5 of the *CHRA* because it offers a benefit to First Nations children and families on reserve that is held out as a service and offered in a public context.

ii) Does AANDC Deny and/or Differentiate Adversely in the Provision of a Service Pursuant to Section 5 of the CHRA based on a Prohibited Ground?

346. The Commission submits that AANDC denies services and generally differentiates adversely in the provision of services based on race and national or ethnic origin. Specifically, the FNCFS Program, which only applies to registered Indians ordinarily resident on reserve, adversely differentiates against First Nations children and families on reserve by virtue of the fact that the Program and funding formulas:

- (i) are based on assumptions and not the real or actual needs of First Nations children, families and communities;
- (ii) create perverse incentives toward the removal and apprehension of First Nations children, thereby contributing to their overrepresentation in the child welfare system;
- (iii) lack funding for prevention services and least disruptive measures, which are critical (and in some provinces mandatory) services to ensure that the greater needs of First Nations on reserve are met; and
- (iv) lack funding for key elements of providing child welfare services on reserve, including salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

B) Has AANDC Justified the Discrimination?

347. The Commission submits that AANDC has failed to meet the burden of establishing a *bona fide* justification under section 15(1)(g) of the *CHRA*, and has led no evidence to demonstrate undue hardship on the basis of health, safety or cost.

C) If Not, Which Remedies Should Flow?

348. The Commission seeks a remedy pursuant to subsection 53(2) of the *CHRA* that AANDC cease the discriminatory practice, and take measures to redress the practice and to prevent it or a similar practice from occurring in the future, in consultation with the Commission on the general purposes of the measures. This request for remedy will be further developed below.

PART III – SUBMISSIONS

A) The Legal Test for a *Prima Facie* Case of Discrimination

349. The initial onus is on the Complainants and Commission to make out a *prima facie* case of discrimination. A *prima facie* case consists of evidence that covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. If a *prima facie* case is established, a complainant is entitled to relief, in the absence of justification.⁶⁴²
350. In the context of the present complaint, the onus is on the Complainants and Commission to establish a *prima facie* case of discrimination, contrary to section 5 of the *CHRA*,⁶⁴³ which states:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :

- a) d'en priver un individu;
- b) de la défavoriser à l'occasion de leur fourniture.

351. The Supreme Court of Canada has confirmed that human rights legislation has a fundamental and quasi-constitutional status. As such, it should be interpreted in a broad, liberal and purposive manner that best advances its broad underlying policy considerations.⁶⁴⁴

⁶⁴² *McAllister-Windsor v. Canada (Human Resources Development)*, [2001] C.H.R.D. No. 4 at para. 27 [“*McAllister-Windsor*”], citing *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at p. 558.

⁶⁴³ *CHRA*, *supra*, s. 5

⁶⁴⁴ *CN v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at paras. 28-29, 32 [“*Actions Travail*”]; see also *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at paras. 33-34 (per Bastarache J. for the majority).

352. Section 2 of the *CHRA* states that the purpose of the Act is:

2. [... To] extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have, and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. (emphasis added)

2. [... De] compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.⁶⁴⁵ (emphasis added)

353. As the Supreme Court stated in *Andrews v. Law Society of British Columbia*,⁶⁴⁶ and later confirmed in *Canada (Attorney General) v. Mossop*,⁶⁴⁷ “[d]iscrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality”.⁶⁴⁸ The *CHRA*, by prohibiting certain forms of discrimination, has the express purpose of promoting the value of equality which lies at the centre of a free and democratic society. Canadian society is one of rich diversity, and the *CHRA* fosters the principle that all members of the community deserve to be treated with dignity, concern, respect and consideration, and are entitled to a community free from discrimination.⁶⁴⁹

354. The Supreme Court has stressed that the “powerful language”⁶⁵⁰ of section 2 of the *CHRA* must be kept in mind when interpreting the Act. In order to succeed in a true purposive approach, the Supreme Court has found that it is incumbent on decision-

⁶⁴⁵ *CHRA*, *supra*, s. 2.

⁶⁴⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [“*Andrews*”].

⁶⁴⁷ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [“*Mossop*”].

⁶⁴⁸ *Andrews*, *supra* at p. 172; see also *Mossop*, *supra* at para. 97.

⁶⁴⁹ *Mossop*, *supra* at para. 97.

⁶⁵⁰ *Actions Travail*, *supra* at para. 25.

makers to “breathe life, and generously so, into the particular statutory provisions”.⁶⁵¹ Often described as “the final refuge of the disadvantaged and disenfranchised”,⁶⁵² in order to protect those most vulnerable in our society, human rights laws must be interpreted broadly and any exceptions should be narrowly construed.

355. Indeed, the Federal Court of Appeal has emphasized the public policy importance of ensuring that the test for *prima facie* discrimination under the *CHRA* does not become unduly precise, detailed or “legalised”, stating:

“A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the Canadian Human Rights Act, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in Shakes.

To make the test of a *prima facie* case more precise and detailed in an attempt to cover different discriminatory practices would unduly “legalise” decision-making and delay the resolution of complaints by encouraging applications for judicial review [...].”⁶⁵³ (emphasis added)

356. One consequence of the broad and flexible approach to the *CHRA* is that a strict or formal comparator group analysis is not a necessary component of a finding of *prima facie* discrimination under section 5 of the *CHRA*.⁶⁵⁴ Although an analysis of comparator groups can be a useful evidentiary tool, it is not a part of the definition of a discriminatory practice under the *CHRA*.⁶⁵⁵
357. The Federal Court has found that the test for *prima facie* discrimination under section 5 of the *CHRA* is broad enough to allow the Tribunal to have regard for all the factors that may be relevant in a given case, including “historic disadvantage, stereotyping, prejudice,

⁶⁵¹ *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 7 [“*Gould*”].

⁶⁵² *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321 at para. 18.

⁶⁵³ *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras. 27-29; see also *Canada (Attorney General) v. Walden*, 2010 FC 490 at paras. 105-107 (quoted in *Hendershott v. Ontario (Minister of Community and Social Services)*, 2011 HRTO 482, [2011] O.H.R.T.D. No. 482 at para. 67 [“*Hendershott*”]).

⁶⁵⁴ *First Nation Child and Family Caring Society v. Canada (Attorney General)*, 2012 FC 445 at para.283 [“*FNCFCSC – FC Decision*”].

⁶⁵⁵ *FNCFCSC – FC Decision*, *supra* at para. 290.

vulnerability, the purpose or effect of the measure in issue, and any connection between a prohibited ground of discrimination and the alleged adverse differential treatment.”⁶⁵⁶

358. With all this in mind, the Commission proceeds below to submit that a *prima facie* case of discrimination has been established, since:

- AANDC provides a “service” within the meaning of section 5 of the *CHRA*;
- AANDC denies access to or adversely differentiates in the provision of this service; and
- the denial or adverse differentiation is in whole or in part based on the prohibited grounds of race and national or ethnic origin.

B) Important Contextual Considerations

359. As a specialized Tribunal with “experience, expertise and interest in, and sensitivity to, human rights”, it is open to this Tribunal to take notice of relevant contextual considerations without requiring additional proof.⁶⁵⁷ Examining the broader context in which a complaint arises can help the analysis by identifying relevant factors for consideration that might otherwise appear neutral, without an awareness of broader societal phenomena.⁶⁵⁸

360. The Commission submits that the following are among the contextual considerations that the Tribunal should take into account in this case.

i) Relevant International Human Rights Law Principles

361. As previously discussed, Canada has ratified the *Convention on the Rights of the Child*, and is therefore obligated to respect and ensure the rights and requirements enunciated by the *Convention* are fulfilled. Specifically, it is appropriate to recognize that since 2003, the UNCRC has consistently recommended that Canada “strengthen [... its] efforts to fully integrate the right to non-discrimination in all” of its projects, programs and

⁶⁵⁶ *FNCFCSC – FC Decision, supra* at para. 338.

⁶⁵⁷ *Knoll North America Corp. v. Adams*, 2010 ONSC 3005 at paras. 29-30 (Div. Ct.); see also *Abbott v. Toronto Police Service Board*, 2010 HRTO 1314 at paras. 29-30; see also *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302 at para. 493.

⁶⁵⁸ *Nassiah v. Peel Regional Police Services Board*, 2007 HRTO 14 at para. 131.

“services that have an impact on” children belonging to a minority group, including “Aboriginal children”.⁶⁵⁹

362. In addition, the Commission submits that the Tribunal should consider the *United Nations Declaration on the Rights of Indigenous Peoples* (“*UNDRIP*”),⁶⁶⁰ which Canada endorsed in 2010. Among other things, *UNDRIP*: (i) expresses concern that Indigenous peoples have suffered from historic injustices as a result of the colonization and dispossession of their lands;⁶⁶¹ (ii) affirms that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin and identity”;⁶⁶² and (iii) calls on states to “take measures, in conjunction with [I]ndigenous peoples, to ensure that [I]ndigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”⁶⁶³

ii) The Unique Status of Aboriginal Peoples in Canada

363. The Commission submits that the Tribunal should also bear in mind established jurisprudence recognizing the specific circumstances of Aboriginal peoples in Canada. The Supreme Court has found that courts and tribunals should take a “purposive and contextual approach to discrimination analysis”,⁶⁶⁴ and established “contextual factors” that bear on this analysis, including, among other things: pre-existing disadvantage, stereotyping, prejudice or vulnerability, and the nature and scope of the interest affected by the impugned government activity, including the “economic, constitutional and societal significance of the interest adversely affected by the program in question”.⁶⁶⁵

⁶⁵⁹ UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23 at pp. 5-6, Art. 22.

⁶⁶⁰ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295* [“*UNDRIP*”].

⁶⁶¹ *UNDRIP*, *supra*, Annex.

⁶⁶² *UNDRIP*, *supra*, Art. 2.

⁶⁶³ *UNDRIP*, *supra*, Art. 22; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 4 (National Chief Shawn A-in-chut Atleo, Assembly of First Nations [“AFN”]).

⁶⁶⁴ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88 [“*Law*”].

⁶⁶⁵ *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950 at paras. 68, 88 [“*Lovelace*”], citing *Law*, *supra* at para. 74; see also *Egan v. Canada*, 2 S.C.R. 513 at paras. 63-64.

364. In *R. v. Ipeelee*,⁶⁶⁶ the Supreme Court found that the “disadvantage of [A]boriginal people is indisputable”.⁶⁶⁷ The Court has also taken note of the “legacy of stereotyping and prejudice against Aboriginal peoples”, and acknowledged that “Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing”.⁶⁶⁸ Further, in a recent case concerning sentencing principles for Aboriginal offenders, the Court stated:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offenders. These matters [...] provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.⁶⁶⁹ (emphasis added)

365. Given the foregoing, the Commission submits that the Tribunal ought to consider the discrimination alleged in the present complaint in the context of: (i) the legacy of IRS and historical prejudice as previously described in these submissions; and (ii) the fundamental importance of the interest affected which is, ultimately, the safety and wellbeing of First Nations children, who are one of the most vulnerable and disadvantaged groups in Canada.

366. Finally, with respect to the concept of “fiduciary duty”, the Commission submits that to the extent the federal government has a fiduciary duty to First Nations children and families on reserve, such duty ought to be interpreted and fulfilled in a non-discriminatory manner.

⁶⁶⁶ *R. v. Ipeelee*, 2012 SCC 13 [“*Ipeelee*”].

⁶⁶⁷ *Ipeelee*, *supra* at para. 60.

⁶⁶⁸ *R. v. Kapp*, 2008 SCC 41 at para. 59, citing *Corbière v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, and *Lovelace*, *supra* at para. 69.

⁶⁶⁹ *Ipeelee*, *supra* at para. 60.

C) **A Prima Facie Case Has Been Established**

i) **AANDC Provides a Service Pursuant to Section 5 of the CHRA**

367. The Commission submits that AANDC, in its control, administration and execution of the FNCFS Program and corresponding funding formulas, is providing a service pursuant to section 5 of the *CHRA*.

368. In *Canada (Attorney General) v. Davis*,⁶⁷⁰ the Federal Court confirmed that a service under section 5 of the *CHRA* “contemplates “something of benefit being ‘held out’ as services and ‘offered’ to the public’ and involves something that is “the result of a process which takes place ‘in the context of a public relationship’””,⁶⁷¹ citing the Federal of Appeal’s decision in *Canada (Attorney General) v. Watkin*.⁶⁷² (emphasis added)

369. Courts and tribunals have found widely varying activities to be considered “services” under the *CHRA*, including:

- consideration of applications for landed immigrant status by Citizenship and Immigration Canada;⁶⁷³
- access to and participation in the big game hunting licence system;⁶⁷⁴
- courses offered by the military;⁶⁷⁵
- advance income tax rulings by Canada Revenue Agency;⁶⁷⁶
- the encouragement to increase physical activities by Health Canada;⁶⁷⁷
- publicity of weather and road conditions by Environment Canada;⁶⁷⁸
- mayoral proclamations of gay and lesbian pride days;⁶⁷⁹ and
- examination at a port of entry by the Canada Border Services Agency.⁶⁸⁰

⁶⁷⁰ *Canada (Attorney General) v. Davis*, 2013 FC 40 [“*Davis*”].

⁶⁷¹ *Davis*, *supra* at paras. 32-33, citing *Canada (Attorney General) v. Watkin*, 2008 FCA 170 at para. 31 [“*Watkin*”].

⁶⁷² *Watkin*, *supra* at para. 31.

⁶⁷³ *Gould*, *supra* at para. 59.

⁶⁷⁴ *Gould*, *supra* at para. 59.

⁶⁷⁵ *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 at para. 20.

⁶⁷⁶ *Watkin*, *supra* at para. 28.

⁶⁷⁷ *Watkin*, *supra* at para. 28.

⁶⁷⁸ *Watkin*, *supra* at para. 28.

⁶⁷⁹ *Okanagan Rainbow Coalition v. Kelowna (City)* 2000 BCHRT 21 [“*Okanagan*”]; see also *Oliver v. Hamilton (City)* (1995), 24 C.H.R.R. D/298 (Ont. Bd. Inq.) [“*Oliver*”]; see also *Hudler v. London (City)* (1997), 31 C.H.R.R. D/500 (Ont. Bd. Inq.) [“*Hudler*”]; see also *Hill v. Woodside* (1998), 33 C.H.R.R. D/349 (N.B. Bd. Inq.) [“*Hill*”].

370. The concept of “services” covers a broad range of activities. Dictionaries define a “service” as follows:

- a “good turn, assistance, help, advantage, benefit”,⁶⁸¹ and
- “the act of helping or doing work for another or for a community, etc. [...] work done this way [...] assistance or benefit given to someone [...] the provision or system of supplying a public need, e.g. transport, or (often in pl) the supply of water, gas, electricity, telephone, etc. (...)”⁶⁸²

371. What constitutes a service varies and is not limited to a traditional definition of the word. The Supreme Court has found that a number of activities that fall outside the classical definition of the word can nonetheless be considered “services” in the human rights context.⁶⁸³ Services are not restricted to “market place” activities, but can extend to the provision of services by government officials in the performance of their functions.⁶⁸⁴ Additionally, while a service involves the provision of a benefit, the beneficiaries are often unknown or considered to be the general public.⁶⁸⁵

372. Ultimately, whether an activity constitutes a service, or not, will turn on the facts of a particular case.⁶⁸⁶ In making this determination, courts and tribunals can consider whether the clients or beneficiaries of the service in question would obtain some improvement, benefit or assistance from the activities to be performed.⁶⁸⁷ In other words, whether the activity in question meets a need or want that people have in society, or assists them in accomplishing a goal.⁶⁸⁸

373. Therefore, the Commission submits that in order for an activity to be considered a service pursuant to section 5 of the *CHRA*, one must establish that the service in question: (i) confers a benefit, and (ii) takes place in the context of a public relationship.⁶⁸⁹

⁶⁸⁰ *Davis, supra* at paras. 39-44.

⁶⁸¹ Betty Kirkpatrick, *The Concise Oxford Thesaurus*, (New York: Oxford University Press, 1995) s.v. “service”.

⁶⁸² Katherine Barber, *The Canadian Oxford Dictionary*, (Don Mills, Ontario: Oxford University Press, 1998) s.v. “service”.

⁶⁸³ *Gould, supra* at para. 59.

⁶⁸⁴ *Watkin, supra* at para. 26; see also *Public Service Alliance of Canada and Cathy Murphy v. Canada Revenue Agency*, 2010 CHRT 9 at para. 42; see also *Singh (Re)*, [1989] 1 F.C. 430 at paras. 14-18.

⁶⁸⁵ *Watkin, supra* at para. 28; see also *Okanagan, supra*; see also *Oliver, supra*; see also *Hudler, supra*; see also *Hill, supra*.

⁶⁸⁶ *Gould, supra* at para. 59.

⁶⁸⁷ *Dreaver v. Pankiw*, 2009 CHRT 8 at paras. 16-17, aff’d 2010 FC 555 [“*Dreaver*”].

⁶⁸⁸ *Watkin, supra* at para. 31; see also *Dreaver, supra* at paras. 14, 16, 24, aff’d 2010 FC 555.

⁶⁸⁹ *Watkin, supra* at para. 31; see also *Davis, supra* at paras. 32-33.

374. The Commission submits that in the present case, AANDC meets these requirements in that, through its FNCFS Program and on reserve funding formulas, it funds, enables, coordinates, manages and controls the availability and quality of First Nations child welfare services on reserve in Canada.

a. AANDC Provides a Benefit

375. AANDC provides a benefit to First Nations children on reserve in that it funds and manages the FNCFS Program in order to ensure that these children have access to culturally appropriate child and family services that are comparable to those available to other children living in similar circumstances off reserve in the province of reference. The name of the Program itself includes the word “services”.

376. In effect, the benefit AANDC offers is set out in the stated purpose of the FNCFS Program, as described in the Program Manual at the time of the complaint:

... [To]support culturally appropriate child and family **services** for Indian children and families resident on reserve or Ordinarily Resident On Reserve, in the best interest of the child, in accordance with the legislation and standards of the reference province.⁶⁹⁰ (emphasis added)

377. Today, the stated purpose of the FNCFS Program is as follows:

The FNCFS program provides funding to assist in ensuring the safety and well-being of First Nations children ordinarily resident on reserve by supporting culturally appropriate prevention and protection services for First Nations children and families.⁶⁹¹ (emphasis added)

378. The Program Manual also sets out AANDC’s responsibilities for the FNCFS Program, which include funding eligible recipients, leading the development of policy, and providing oversight.⁶⁹² Therefore, the objective of AANDC’s FNCFS Program is to support the provision of services to First Nations children and families on reserve. The beneficiaries of the service are First Nations children and families on reserve, and funding and programming are the mechanisms through which AANDC confers this

⁶⁹⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2.

⁶⁹¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1; see also e-mail from Barbara D’Amico to Beverly Lavoie dated June 11, 2010, CHRC BOD, Ex. HR-14, Tab 386.

⁶⁹² Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2; see also AANDC, “Child and Family Services Program: Logic Model” (undated), CHRC BOD, Ex. HR-13, Tab 304.

benefit. It is the means by which First Nations children and families get meaningful access to the FNCFS Program and services they require.

379. Similarly, the objectives of EPFA are to ensure that families receive the support and services they need; that community-based services and the child and family services system work together so families receive more culturally appropriate services in a timely manner; that First Nations children in care benefit from permanent homes (placements) sooner by, for example, involving families in planning alternative care options; and that services and supports are co-ordinated in a way that best helps the family.⁶⁹³

380. At the time of the complaint, the FNCFS Program Manual stated:

Protecting children from neglect and abuse is the main objective of child and family services. [The] FNCFS [Program] also provide[s] services that increase the ability and capacity of First Nations families to remain together and to support the needs of First Nations children in their parental homes and communities.⁶⁹⁴

381. This demonstrates the fundamental importance of child welfare and the FNCFS Program, the purpose of which is to protect First Nations children from abuse and neglect, and to address the risk factors at play in order to prevent having to bring them into care so that families can remain intact. It is an essential and necessary benefit that the federal government provides to First Nations children and families on reserve, for whom it can only be seen as a benefit.

382. In the circumstances, the Commission submits that by performing functions in furtherance of the stated purpose and objectives of the FNCFS Program, including the funding, management and oversight of the Program nationally, and by facilitating and enabling the delivery of child welfare services to First Nations children and families ordinarily resident on reserve, AANDC is providing a benefit.

⁶⁹³ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 37, section 4.2.

⁶⁹⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 6, section 1.3.6.

b. The Benefit is Conferred in the Context of a Public Relationship

383. The Commission submits that in the present case, AANDC is providing a benefit in the context of a public relationship. As previously noted, AANDC is the sole funder of child welfare services for First Nations children and families on reserve. The purpose of the FNCFS Program, as described in both versions of the Program Manual, also connotes a public relationship.⁶⁹⁵

384. There can be multiple “clients” or beneficiaries of a service. In *University of British Columbia v. Berg*,⁶⁹⁶ the Supreme Court held:

[...] The idea of defining a "client group" for a particular service or facility focuses the inquiry on the appropriate factors of the nature of the accommodation, service or facility and the relationship it establishes between the accommodation, service or facility provider and the accommodation, service or facility user, and avoids the anomalous results of a purely numerical approach to the definition of the public. Under the relational approach, the "public" may turn out to contain a very large or very small number of people.⁶⁹⁷ (emphasis added)

385. In the present case, the beneficiaries are the First Nations children and families themselves, and/or the First Nations communities that benefit from the child welfare services provided on reserve pursuant to AANDC’s FNCFS Program.

386. In *Attawapiskat First Nation v. Canada*,⁶⁹⁸ the Federal Court examined the nature of funding agreements, similar to the ones at issue in the present complaint. The Attawapiskat First Nation had filed a judicial review application of a decision to appoint a Third Party Manager after its decision to declare a state of emergency over housing. The Court found that a public relationship existed and that there was a power imbalance between the First Nation and the federal government in that case:

[... The Attawapiskat First Nation] relies on funding from the government through the [Comprehensive Funding Agreement (the “CFA”)] to provide essential services to its members and as a result, the CFA is essentially an adhesion contract imposed on the [Attawapiskat First Nation] as a condition of receiving funding despite the fact that the [Attawapiskat First Nation] consents to the CFA. There is no evidence of real negotiation. The power imbalance

⁶⁹⁵ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 5, section 1.3.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.

⁶⁹⁶ *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 [“*Berg*”].

⁶⁹⁷ *Berg*, *supra* at para. 57.

⁶⁹⁸ *Attawapiskat First Nation v. Canada*, 2012 FC 948 at paras. 29 and 47 [“*Attawapiskat*”].

between government and this band dependent for its sustenance on the CFA confirms the public nature and adhesion quality of the CFA.⁶⁹⁹

387. The Commission submits that a similar public relationship and power imbalance exists between the federal government and First Nations child and family service agencies in the case at hand.
388. Finally, as discussed above, to the extent the federal government has a fiduciary duty to First Nations peoples, the Commission submits this would be further evidence of the “public” nature of the relationship between the federal government and First Nations people.
389. Based on the foregoing, the Commission submits that the benefit at issue in the present case is provided in the context of a public relationship.

c. AANDC Controls the Provision of Services on Reserve

390. A number of other considerations also support a conclusion that AANDC generally performs functions that constitute a “service” pursuant to section 5 of the *CHRA*.
391. The Commission submits that AANDC controls the provision of child welfare services to First Nations children and families on reserve, including: (i) the existence of these services; (ii) the extent and manner in which these services are provided; and (iii) the ongoing nature of these services by virtue of its role as manager and overseer of the FNCFS Program, which includes the conduct of compliance reviews. These administrative and enforcement activities are further evidence that AANDC is providing a “service” within the meaning of section 5 of the *CHRA*.

c.i. AANDC Controls the Existence of Child Welfare Services on Reserve

392. AANDC is the sole funder of child welfare services for First Nations children and families ordinarily resident on reserve. AANDC’s funding of the FNCFS Program, in accordance with its funding formulas, determines an agency’s budget. But for AANDC’s

⁶⁹⁹ *Attawapiskat*, *supra* at paras. 29, 59.

funding, these agencies would not exist and would not be able to provide culturally appropriate child welfare services to First Nations children and families on reserve.⁷⁰⁰

393. William McArthur, Manager of the Social Program at AANDC's British Columbia Office, testified about how dependent First Nations child and family service agencies are on AANDC's FNCFS Program and funding:

MS. PENTNEY: Pending receipt and approval of the work plan. And is that because it's a reporting requirement under the Agency's funding agreement?

MR. McARTHUR: That's correct.

MS. PENTNEY: That's right. So would there be any consequences if an Agency did not comply with the reporting requirement?

MR. McARTHUR: If an Agency didn't comply, you know, we do have the approval to halt funding. There are automatic halts in our system, everything is electronic.

When reports come in they're uploaded to our financial system, it's called GSIMS, another acronym, and so everything's automated.

So once that's received, the recipient gets an acknowledgement it's been received and it then goes through the process of -- you know, that electronic process. (...) And the system will automatically halt anything over a certain period of time, so it could be 30 days, 45 days or 60 days. If that report is not submitted, it will halt funding automatically and then I would need to do a manual override which is very difficult to do. Typically it has to deal with a health and safety issue which, depending on what the billing is for, would determine whether it's a health and safety issue.

Now, obviously children in care is somewhat of an essential service, so that would be a rationale to override. The operations, that's a little more difficult because, you know, the rationale is you have to keep the doors open in order to provide the service.

[...]

MR. McARTHUR: So within CFS it isn't as difficult to do that, but we don't want to sort of get into the habit of -- we want that to be the exception, not the rule and then I work with our Funding Services folks to make sure funding doesn't stop.

MS. PENTNEY: Okay. Because the impact on the Agency if operational funding was halted would be, as you said, they would have to --

⁷⁰⁰ Letter from Michael Wernick to Carcross Tagish First Nation (undated), CHRC BOD, Ex. HR-13, Tab 323; see also AANDC Briefing Note "1016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280; see also letter from AANDC to Okanagan Nation Alliance dated March 7, 2014, CHRC BOD, Ex. HR-15, Tab 409.

MR. McARTHUR: Exactly.

MS. PENTNEY: -- possibly close their doors?

MR. McARTHUR: I mean, there's some Agencies who are affiliated with, you know, large Nations, do have the ability to cash manage. So, you know, all of that is taken into consideration. But the bottom line is, you want to make sure that, you know, staff get paid, services are provided and then we can deal with the reporting outside of the priority of getting money to the Nation or to the Agency.⁷⁰¹ (emphasis added)

394. Therefore, if AANDC did not fund First Nations child and family service agencies, they would likely not exist. If AANDC halts funding to an agency, they may have to close their doors, which would in turn make it impossible for them to provide services to First Nations children and families on reserve.
395. Another example of the extent to which AANDC's funding impacts the very existence of culturally appropriate child welfare services on reserve are the communities across the country that are "too small or remote to operate a First Nations child and family service agency".⁷⁰² As previously noted, both Directive 20-1 and EPFA funding models include downward adjustments for agencies serving communities with a child population of less than 1,000.⁷⁰³ For communities with less than 250 children on reserve, they receive \$0 operations funding from AANDC; therefore, the children and families in those communities are denied culturally based services as a direct result of AANDC's prescriptive funding formulas.⁷⁰⁴

⁷⁰¹ Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252.

⁷⁰² *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 25.

⁷⁰³ AANDC Briefing Note "1016 Okanagan Nation Alliance Application for FNCFS", CHRC BOD, Ex. HR-13, Tab 280; see also letter from AANDC to Okanagan Nation Alliance dated March 7, 2014, CHRC BOD, Ex. HR-15, Tab 409.

⁷⁰⁴ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 25; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2; see also AANDC, "Atlantic Region Allocations by Agency 2009-2010", CHRC BOD, Ex. HR-13, Tab 331; see also Letter from New Brunswick's Minister of Family and Community Services to AANDC dated March 26, 2007, CHRC BOD, Ex. HR-14, Tab 356; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397.

c.ii. AANDC Controls the Extent and Manner in which Child Welfare Services are Provided on Reserve

396. AANDC is responsible for the design of the funding formulas (Directive 20-1, EPFA and the 1965 Agreement), which ultimately determine the amount of funding available for operations, prevention and maintenance.⁷⁰⁵ By controlling the funding available to agencies, AANDC determines the extent and manner in which child welfare services are provided to First Nations children and families on reserve.⁷⁰⁶
397. For example, AANDC's funding is conditional upon terms that it sets out in its funding and other administrative agreements with the agencies.⁷⁰⁷ These terms impose reporting and other requirements on agencies, which, if not met, can result in serious financial consequences for the agency that in turn affect their ability to provide culturally appropriate child welfare services to First Nations children and families on reserve.⁷⁰⁸
398. In addition, the FNCFS Program Manual sets out that an agency's expenditures are restricted to those within AANDC's authorities and mandate, as well as by the applicable provincial/territorial legislation, guidelines and rates.⁷⁰⁹ Therefore, AANDC determines: which services are "eligible" to be reimbursed under maintenance; which services/activities are "eligible" operational expenses, and the maximum amount that can be spent on certain activities (for example, legal costs); and which services/activities are "ineligible" under both maintenance and operations.⁷¹⁰

⁷⁰⁵ AANDC Briefing Note, "Reform of FNCFS Program in Quebec" (2008), CHRC BOD, Ex. HR-15, Tab 404.

⁷⁰⁶ E-mail from Mary Quinn to Christine Cram dated August 5, 2010, CHRC BOD, Ex. HR-15, Tab 401.

⁷⁰⁷ Memorandum of Understanding between the Province of Manitoba and AANDC (2011), CHRC BOD, Ex. HR-08, Tab 130 at pp. 8-9; see also letter from Mamowe Opikihawasowin Tribunal Chief Child & Family Services (West) Society to AANDC dated April 23, 2012, CHRC BOD, Ex. HR-13, Tab 294; see also letter from AANDC to Mamowe Opikihawasowin Tribunal Chief Child & Family Services (West) Society dated July 23, 2012, CHRC BOD, Ex. HR-13, Tab 295.

⁷⁰⁸ Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261; see also AANDC Briefing Note, "Province of Nova Scotia's Audit of the Mi'kmaw Family and Children's Services" (2011), CHRC BOD, Ex. HR-12, Tab 252.

⁷⁰⁹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 7, section 5.0.

⁷¹⁰ Eligible Maintenance Expenditures as per Provincial Policy in Alberta (2013), CHRC BOD, Ex. HR-15, Tab 451.

399. Dr. Blackstock testified about the impact AANDC's funding formulas had on her as a social worker providing child and family services on reserve:

DR. BLACKSTOCK: But, when I was on reserve, I felt that almost the [Directive 20-1] was my supervisor because it just seemed to – it seemed to, unfortunately, always be there when I was making practice decisions.⁷¹¹

400. In addition to funding, AANDC controls the quality and quantity of child and family services available to First Nations children on reserve in other ways. For example, AANDC's decision to stop providing a cost of living adjustment in 1995 has had and continues to have considerable impacts on agencies' purchasing power, and thus on the availability and quality of culturally appropriate services on reserve.⁷¹²

c.iii. AANDC Controls the Ongoing Nature of Child Welfare Services on Reserve by Virtue of its Role as Manager in Overseeing the FNCFS Program and Designing the Funding Formulas

401. The Program Manual sets out that AANDC is responsible for the management and oversight of the FNCFS Program.⁷¹³ As a result, AANDC conducts compliance reviews of First Nations child and family service agencies in order to ensure that “activities and expenditures comply with the program terms and conditions.”⁷¹⁴
402. Compliance reviews can involve on site reviews, employee interviews and discussions with individuals responsible for making decisions and/or approving program expenditures.⁷¹⁵ AANDC's monitoring and oversight of the FNCFS Program therefore involves regular contact and routine face-to-face interactions with First Nations child and family agencies.⁷¹⁶ Relationships of this kind are ones that properly fall within the scope of reviewable “services” under section 5 of the *CHRA*.

⁷¹¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 5 at p. 119; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 147.

⁷¹² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 45-46.

⁷¹³ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 8, section 6.2; see also AANDC, “Child and Family Services Program: Logic Model” (undated), CHRC BOD, Ex. HR-13, Tab 304.

⁷¹⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also AANDC Power Point, “FNCFS Program: Moving Towards and Enhanced Prevention Focused Approach” (2013), Respondent's BOD, Ex. R-14, Tab 81 at p. 13.

⁷¹⁵ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also letter from AANDC to Mi'kmaw Family and Children's Services dated February 28, 2011, CHRC BOD, Ex. HR-12, Tab 258.

⁷¹⁶ AANDC, “Social Development Programs: Risk-based Audit Framework” (2003), CHRC BOD, Ex. HR-14, Tab 396 at p. 18.

403. Moreover, section 34 of the *Financial Administration Act* (the “*FAA*”)⁷¹⁷ states:

34. (1) No payment shall be made in respect of any part of the federal public administration unless, in addition to any other voucher or certificate that is required, the deputy of the appropriate Minister, or another person authorized by that Minister, certifies

(a) in the case of a payment for the performance of work, the supply of goods or the rendering of services,

(i) that the work has been performed, the goods supplied, or the service rendered, as the case may be, and that the price charged is according to the contract, or if not specified by the contract, is reasonable,

[...]

34. (1) Tout paiement d’un secteur de l’administration publique fédérale est subordonné à la remise des pièces justificatives et à une attestation de l’adjoint ou du délégué du ministre compétent selon laquelle :

a) en cas de fournitures, de services ou de travaux :

(i) d’une part, les fournitures ont été livrées, les services rendus ou les travaux exécutés, d’autre part, le prix demandé est conforme au marché ou, à défaut, est raisonnable,

[...] (emphasis added)

404. Therefore, AANDC, as manager of the FNCFS Program, is accountable for the funds it spends and must ensure that the services for which funding has been provided have in fact been delivered in accordance with section 34 of the *FAA*. In this way, public funding and the provision of services are inextricably linked, and AANDC is ultimately responsible, and should be held accountable, for the services provided to First Nations on reserve.

405. AANDC’s control of FNCFS Program under EPFA has been described as “more robust [... order to support] effective reform.”⁷¹⁸ Internal AANDC documents state that First Nations child and family service agencies and their expenditures are subject to AANDC’s

⁷¹⁷ *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 34.

⁷¹⁸ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at pp. 4-5.

“approval and regular monitoring”.⁷¹⁹ In addition, under EPFA, AANDC “meets quarterly with agencies [...] to assess progress in shifting programming [...] and] also conducts increased compliance reviews” of agencies.⁷²⁰

406. According to the Program Manual, failure to “comply with these requirements constitutes a default of the funding agreement”, and may result in “immediate cash flow restrictions [or] denial to renew an agreement or program activity”.⁷²¹ These measures are terms and conditions that AANDC has imposed in order to facilitate funding and enable First Nations child and family service agencies to provide services.
407. Mr. McArthur testified about the impact any such restrictions or denial of funding could have on an agency – in many cases, it would result in an agency having to close its doors.⁷²² This demonstrates the extent of AANDC’s control of FNCFS Program, agencies, and ultimately the services provided to First Nations children and families on reserve.
408. Pursuant to its constitutional responsibility, AANDC “acts as a province in the provision of” social programs on reserve, including the FNCFS Program.⁷²³ Sheilagh Murphy, who was the Director General of the Social Policy and Programs Branch at AANDC at the time of her testimony, testified that AANDC’s involvement in child welfare services on reserve in British Columbia, which is still under Directive 20-1, goes beyond mere funding:

MR. CHAMP: But at the end of the day your work and your negotiations and your costing models and your discussions all really mean nothing if Cabinet doesn’t decide to approve that [EPFA] rollout [in B.C.]; correct?

MS. MURPHY: I wouldn't say that, I would say that there are other things that have been identified as part of our discussions with the province and with First Nation Agencies that we can actually work on that aren't necessarily connected to funding that would improve outcomes for children in B.C.

[...]

⁷¹⁹ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.

⁷²⁰ Key Questions and Answers – FNCFS, CHRC BOD, Ex. HR-14, Tab 369 at p. 5.

⁷²¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 11, section 13.0; see also Notification of Overdue Reporting Requirements, CHRC BOD, Ex. HR-08, Tab 131.

⁷²² Testimony of William McArthur, Transcript Vol. 64 at pp. 45-47.

⁷²³ AANDC Briefing Note, “Explanations on Expenditures of Social Program” (undated), CHRC BOD, Ex. HR-13, Tab 330 at p. 1.

MS. MURPHY: It's not just – it wouldn't necessarily all be about funding.

MR. CHAMP: But yes, it's not just about funding; right. So, I mean, you're participating and [AANDC] officials are participating in those tripartite groups to assist those [First Nations child and family service agencies] in coming up with a different way to deliver the services; right?

MS. MURPHY: Yes. [...] ⁷²⁴

409. The extent of AANDC's involvement in child welfare services on reserve, through the FNCFS Program, is also evident in Ms. Murphy's curriculum vitae, which states that in her role as Director General she is responsible for:

[... D]esigning and delivering a comprehensive reform framework for the on reserve Income Assistance program (including alternative delivery); coordinating major reform of the child welfare program with First Nations and provinces; designing and delivering a comprehensive management control framework and performance measurement strategy for all 5 programs that incentivises improved management practices, mitigates risks, generates better outcomes information and reduces recipient reporting burden; and partnering with other departments on key reform issues and improved horizontality. ⁷²⁵ (emphasis added)

ii) AANDC Denies and/or Differentiates Adversely in the Provision of a Service Pursuant to Section 5 of the CHRA based on a Prohibited Ground

410. The evidence led has shown that AANDC's funding formulas deny and/or differentiate adversely against First Nations children on reserve in the provision of a service based in whole or in part on the prohibited grounds of race and national or ethnic origin, contrary to section 5 of the CHRA.

a. The Prohibited Grounds of Discrimination are Race and National or Ethnic Origin

411. In denying or adversely differentiating against First Nations with respect to the provision of child and family services on reserve, AANDC has engaged in *prima facie* discrimination based in whole or in part on the prohibited grounds of race and national or ethnic origin, and/or some intersecting combination thereof.

⁷²⁴ Testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 246-252.

⁷²⁵ Sheilagh Murphy's Curriculum Vitae, Respondent's BOD, Ex. R-13, Tab 17.

412. The division of legislative powers between the federal and provincial governments is set out in sections 91 and 92 of the *Constitution, 1867*. Pursuant to section 91(24), the federal government has exclusive legislative authority over “Indians and lands reserved for Indians”.⁷²⁶
413. Aboriginal peoples therefore occupy a unique, *sui generis*, position in Canada’s constitutional and legal structure.⁷²⁷ As a result, in particular when residing on reserve, they may receive a combination of services from both the provincial and federal governments.
414. As the Supreme Court stated in *NIL/TU O Child and Family Services Society v. B.C. Government and Service Employees’ Union*,⁷²⁸ “today’s constitutional landscape is painted with the brush of co-operative federalism [... which] accepts the inevitability of overlap between the exercise of federal and provincial competencies”.⁷²⁹
415. Presently, the FNCFS Program Manual defines “Eligible First Nation Child” as an “Indian Child that is registered or eligible to be registered” under the *Indian Act*.⁷³⁰ The *Indian Act* defines “Indian” as a “person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.”⁷³¹ The *Indian Act* also defines “registered” as being “registered as an Indian in the Indian Register”.⁷³²
416. Therefore, in order to be eligible under AANDC’s FNCFS Program, one must be a registered Status Indian or eligible to be registered as a Status Indian. In this sense, a First Nation child’s entitlement, or disentitlement, to services and benefits is influenced by the effects of both statutory provisions and federal government policies that are based on their race and national or ethnic origin.
417. It bears emphasizing that AANDC has stated that Indian registration is used directly in the FNCFS Program in order to “identify and define eligibility to a service, benefit or

⁷²⁶ *Constitution Act, 1867, supra*, s. 91(24).

⁷²⁷ See as examples: *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 44; see also *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at para. 104.

⁷²⁸ *NIL/TU O Child and Family Services Society v. B.C. Government and Service Employees Union*, [2010] 2 S.C.R. 696 [“*NIL/TU*”].

⁷²⁹ *NIL/TU, supra* at para. 42.

⁷³⁰ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 32, section 2.1.10.

⁷³¹ *Indian Act, supra*, s. 2.

⁷³² *Indian Act, supra*, s. 2.

funding.”⁷³³ Eligibility for the services and benefits provided under the FNCFS Program is “predicated on registration in that [AANDC] funds services for registered [Indian] children on reserve (and their families)”.⁷³⁴

418. Thus, the benefits, services and funding First Nations are eligible to receive under the FNCFS Program are entirely dependent on their particular identity as registered Status Indians or as Indians eligible to be registered under the *Indian Act*. As a result, if the Tribunal agrees that there has been denial of, or adverse differentiation in the provision of services, such denial or adverse differentiation will be on the grounds of race and national or ethnic origin.

b. AANDC Denies and/or Adversely Differentiates in the Provision of Child Welfare Services on Reserve

419. First Nations children on reserve have been denied the child and family services and benefits they seek and/or require from AANDC within the meaning of section 5(a) of the *CHRA*. Specifically, First Nations children on reserve are precluded from accessing, or have limited access to, child and family services because of AANDC’s prescriptive FNCFS Program and funding formulas, including Directive 20-1, EPFA and the 1965 Agreement.

420. Further, or in the alternative, First Nations children on reserve have been subjected to adverse differentiation with respect to a service within the meaning of section 5(b) of the *CHRA*. As described above, while a comparator group analysis is not required under section 5 of the *CHRA*, examining the position of an appropriate comparator can help to establish *prima facie* discrimination. In this regard, an appropriate comparator for First Nations children on reserve is First Nations or non-First Nations children resident off reserve in similar circumstances. Indeed, the mandate of AANDC’s FNCFS Program, which is to provide services on reserve that are “reasonably comparable to those available to other provincial residents”,⁷³⁵ supports this choice of comparator.

⁷³³ Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector (2005), CHRC BOD, Ex. HR-13, Tab 321 at p. 6.

⁷³⁴ Indian Registration and Band Membership in the Socio-Economic Policy and Regional Operations Sector (2005), CHRC BOD, Ex. HR-13, Tab 321 at p. 6; see also e-mail from Sheilagh Murphy to Nicole Kennedy dated October 22, 2012, CHRC BOD, Ex. HR-15, Tab 407.

⁷³⁵ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 30, section 1.1.

421. The Commission submits that First Nations children receive an inferior level of funding and quality of service than children resident off reserve in similar circumstances, or that in the alternative, even if the services provided on reserve are found to be comparable, they are nevertheless inequitable given the greater needs of First Nations people.

b.i. Directive 20-1 and EPFA are Designed with Flawed Assumptions and Include Perverse Incentives that Contribute to the Overrepresentation of First Nations Children in Care

422. AANDC is responsible for the design and implementation of the FNCFS Program's funding formulas, including Directive 20-1 and EPFA. The structures of both funding formulas include flawed assumptions about the levels of need in First Nations communities that are not based on, and do not reflect, the real needs of all First Nations communities or the best interests of children. The formulas are also designed with a perverse incentive toward the removal and apprehension of First Nations children on reserve. These structural deficiencies in AANDC's funding formulas are described in turn below, and are compared to those used by the provinces and territories off reserve.

b.i.i. Flawed Assumptions

On Reserve

423. Inherent in both Directive 20-1 and EPFA are two assumptions. First, that each First Nations child and family services agency has an average of 6% of the on reserve total child population in care.⁷³⁶ The only exception to this assumption is the province of Manitoba, where it was modified in 2010 to an assumption that 7% of on reserve First Nations children are in care.⁷³⁷ Second, that each agency has an average of 3 children per household, and 20% of on reserve families requiring services (or "classified as multi-problem families").⁷³⁸

⁷³⁶ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 41-42; see also testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 24-34; Vol. 52 at pp. 8-9; see also testimony of Raymond Shingoose, Transcript Vol. 31 at p. 254.

⁷³⁷ Manitoba Child and Family Services Agency Funding Guidelines (2013), CHRC BOD, Ex. HR-08, Tab 114 at p. 19; see also testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 8-9; see also testimony of Elsie Flette, Transcript Vol. 21 at p. 4; see also AANDC Briefing Note, "Reform of FNCFS Program in Quebec" (2008), CHRC BOD, Ex. HR-15, Tab 404: AANDC would not negotiate the 6% assumption in developing EPFA in Québec.

⁷³⁸ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.

424. These assumptions were initially developed by AANDC during its design of Directive 20-1 in 1988.⁷³⁹ Directive 20-1 has not been significantly modified since that time, and still operates based on these assumptions.⁷⁴⁰ EPFA preserves and adopts the structure of operations funding in Directive 20-1, including the assumptions upon which funding is largely based.⁷⁴¹
425. In her 2008 report, the Auditor General concluded that these assumptions lead “to funding inequities [...] because, in practice, the percentage of children that [First Nations child and family service agencies] bring into care varies widely.”⁷⁴² In other words, these assumptions (and therefore funding formulas upon which they are based) do not necessarily reflect the real and greater needs of First Nations communities.⁷⁴³
426. While some First Nations child and family service agencies benefit from these assumptions because their percentage of children in care is at or below 6%, others struggle to provide adequate services to First Nations children on reserve because their numbers of children in care exceed the 6% assumption.⁷⁴⁴

⁷³⁹ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.

⁷⁴⁰ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.51; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 81: Directive 20-1 was revised marginally in April 1, 1995 to reflect price increases in the operational formula.

⁷⁴¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-25.

⁷⁴² OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52.

⁷⁴³ Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 7, 11; see also Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 392; see also AANDC Briefing Note, “Meeting with the Honourable Iris Evans, Alberta Minister of Children’s Services” (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 24-25; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 3 (Sheila Fraser, Auditor General of Canada).

⁷⁴⁴ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 9; see also testimony of Carol Schimanke, Transcript Vol. 61 at pp. 112-114; Vol. 62 at p. 32; see also Briefing Note: Kasohkewew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at p. 5 (pages unnumbered); see also letter from the Leadership of the First Nations of New Brunswick to the Honourable Ron Irwin dated June 3, 1996, CHRC BOD, Ex. HR-08, Tab 137; see also AANDC Briefing Note, “Meeting with the Honourable Iris Evans, Alberta Minister of Children’s Services” (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 10 (Mary Quinn, Director General, Social Policy and Programs, AANDC).

427. As Dr. Blackstock testified, there is “no accounting for those differences in the formula”.⁷⁴⁵ She went on to say:

DR. BLACKSTOCK: [...] I would agree with the [Auditor General’s] assessment, that an across the board 6 percent assumption of children in care is not a good idea. It might be a good idea as a minimum standard, but there should be upward adjustments for communities of greater needs. And it does not take into full account the needs of the children themselves in the context of that particular community.⁷⁴⁶

428. Elsie Flette, the Chief Executive Officer of the First Nations of Southern Manitoba Child and Family Services Authority (since retired), also described the practical effects of these assumptions on First Nations child and family service agencies:

MS. FLETTE: [...] If you're an Agency that has, you know, five percent of its child population in care, you benefit from that assumption, you're being paid by [AANDC] as if seven percent of your kids were in care. So, you're getting more money and you don't have the cases, you don't have the children in care that you have to spend that money on and, so, you have some flexibility for how else to use that money.

But if you're an Agency that has more than seven percent of its children in care, you have a problem. And we have in the [Southern Authority] I believe right now four Agencies that exceed those assumptions. And one of them in particular, they have -- 14 percent of their child population is in care, so, they have exactly half of the kids in care for which they receive no money.

When we look at the families [and prevention services], I believe there's about five Agencies that exceed that 20 percent. The same Agency that has the 14 percent children has a 40 percent families, so, 40 percent of their families on-Reserve are getting service.

They're funded for 20 percent. So, half their workload both for families and for kids is completely unfunded, they get no money. So, anything they might have for prevention they can't do because all their money has to go -- they have these kids, they need workers, they have to service that pop -- that workload and there's no way -- under the funding model itself, there's no way to adjust for that.

[...]

[...] So, it's not an accurate -- it is an accurate average percent, but for individual Agencies it's often inaccurate, you can have lower numbers or, in particular, if

⁷⁴⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 43.

⁷⁴⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 135.

you have higher than seven percent you have unfunded workload.⁷⁴⁷ (emphasis added)

429. Dr. Loxley testified that these assumptions are perpetuated under EPFA, and noted that even as the new funding model was being developed in Alberta, the 6% assumption did not reflect the real needs of all First Nations communities in that province.⁷⁴⁸

DR. LOXLEY: [... T]here are a range of numbers for children in care in different provinces and, as I mentioned, in 2005 there were I think almost -- there were a large number of Agencies, should I say, in Alberta that were well in excess of 6 percent and there would be other Agencies which would be less than 6 percent.⁷⁴⁹

430. The NPR and *Wen:De* reports, as well as the Auditor General's reviews of Directive 20-1 and EPFA, have found the assumption model to be flawed and inequitable.⁷⁵⁰ Three years after EPFA was announced, AANDC contracted T.K. Gussman Associates Inc. to conduct a review of its implementation in Alberta in 2010.⁷⁵¹ The report cited the concerns of both the Auditor General and PAC that "continuing to use a fixed percentage as the basis for funding under the new (EPFA) formula will leave some agencies still underfunded to provide needed services to children and families."⁷⁵² Thus, the final report recommended that the "amount of funding and the formula used to determine overall FNCFS funding must be changed, as per the recommendation of the Office of the Auditor General's 2008 report."⁷⁵³
431. Notwithstanding the known shortcomings with the fixed percentage model, AANDC has not modified these assumptions in its funding formulas in any province except for Manitoba, where the assumption was adjusted by a single percentage, but nevertheless

⁷⁴⁷ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 143-144.

⁷⁴⁸ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 63; see also AANDC Briefing Note, "Meeting with the Honourable Iris Evans, Alberta Minister of Children's Services" (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at p. 41; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada).

⁷⁴⁹ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 9.

⁷⁵⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 121; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 20, section 4.52; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.

⁷⁵¹ Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0005 ["DPRA Report"].

⁷⁵² DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0024.

⁷⁵³ DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at p. CAN052861_0036.

remains inflexible and unable to respond to situations where agencies have in excess of 7% of their children in care.⁷⁵⁴

432. AANDC recognizes that funding for First Nations child and family service agencies is “based on an average of 6% of children in care” and that “[a]djustments are not made for agencies with a higher proportion of children in care”, which constrains their ability to respond to the child and family services requirements in their communities.⁷⁵⁵ AANDC’s reluctance to modify the assumption or provide “additional funding for [agencies with] numbers of children in alternate care beyond” the 6% is in part because it would “set a precedent that other agencies may wish to pursue” and “create expectations in the rest of the country that would be difficult for [AANDC] to meet given the current fiscal environment.”⁷⁵⁶
433. With respect to the assumptions that each First Nation household on reserve has an average of 3 children, and that 20% of on reserve families require prevention services, the rationale for these assumptions is unknown.⁷⁵⁷ Once again, these assumptions, which determine the amount of funding a First Nations child and family service agency receives for prevention services, do not necessarily reflect the real and greater needs of First Nations communities.⁷⁵⁸
434. While some agencies may enjoy a benefit as a result of these assumptions, others struggle to provide adequate prevention services to First Nations children and families because they have more than 20% of families on reserve accessing these services.⁷⁵⁹ Yet, neither Directive 20-1 nor EPFA have built-in adjustments to allow funding (and therefore the agencies themselves) to better respond to situations where the number of children and/or

⁷⁵⁴ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 143-144; see also testimony of Darin Keewatin, Transcript Vol. 32 at pp. 43-47.

⁷⁵⁵ Briefing Note: Kasohkowew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at p. 5 (pages unnumbered).

⁷⁵⁶ Briefing Note: Kasohkowew Child Wellness Society (2004), CHRC BOD, Ex. HR-14, Tab 398 at pp. 5-6 (pages unnumbered).

⁷⁵⁷ Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5; see also testimony of Elsie Flette, Transcript Vol. 20 at pp. 129-130; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 90-91, 106-107.

⁷⁵⁸ Letter from the Leadership of the First Nations of New Brunswick to the Honourable Ron Irwin dated June 3, 1996, CHRC BOD, Ex. HR-08, Tab 137; see also see also AANDC Briefing Note, “Meeting with the Honourable Iris Evans, Alberta Minister of Children’s Services” (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2, Annex A; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 182.

⁷⁵⁹ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 129-130.

families accessing these services is in excess of the assumptions upon which the formulas are based.⁷⁶⁰

Off Reserve

435. Provincial funding for child welfare services off reserve is based on the actual number of children in care, and not on assumptions, like AANDC's funding formulas for First Nations child welfare on reserve.⁷⁶¹ This is true even where the province provides services on AANDC's behalf to First Nations children and families on reserves where there are no First Nations agencies.
436. For example, Alberta provides child and family services to six First Nations in that province that are not served by a delegated agency, and invoices AANDC for the actual number of children they have in care – not an assumed average number of children in care.⁷⁶²

b.i.ii. Perverse Incentives

On Reserve

437. In addition to the assumptions inherent in AANDC's FNCFS Program funding formulas, the design of Directive 20-1 and EPFA also creates an incentive towards the removal of First Nations children on reserve from their homes and communities.
438. As stated above, Directive 20-1, which came into effect on April 1, 1991 all across Canada,⁷⁶³ includes two streams of funding: operations and maintenance.⁷⁶⁴ Operations funding is meant to cover a First Nations child and family service agency's administrative costs, and is based on a fixed formula that accounts for the size of a First Nation's child population.⁷⁶⁵

⁷⁶⁰ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 104-105, 118, 129-130; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 29; see also Elsie Flette's Speaking notes for presentation of the Standing Committee on Aboriginal Affairs and Northern Development (2011), CHRC BOD, Ex. HR-08, Tab 127.

⁷⁶¹ Testimony of Carol Schimanke, Transcript Vol. 62 at p. 42; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 102.

⁷⁶² Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 42, 47.

⁷⁶³ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 20; see also Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at p. 9, section 16.0.

⁷⁶⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.4.1.

⁷⁶⁵ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

439. There is a small amount of funding provided in the operations stream for “prevention” services under Directive 20-1; however, these costs are extremely limited and fixed.⁷⁶⁶
440. Maintenance funding, on the other hand, is intended to cover the actual costs of maintaining a child in care.⁷⁶⁷ In other words, First Nations child and family service agencies receive “dollar-for-dollar” reimbursement of eligible maintenance costs.⁷⁶⁸
441. This illustrates how the very structure and design of Directive 20-1 creates a perverse incentive for First Nations child and family service agencies to remove First Nations children from their homes. Pursuant to Directive 20-1, AANDC is willing to cover the actual costs of the services and benefits a First Nations child on reserve requires once they are removed from their family home and are taken into child welfare care.⁷⁶⁹
442. However, AANDC will not provide funding for the actual cost of those same services as a preventative or early intervention measure in order to keep that child safely in his or her family home.⁷⁷⁰ Dr. Blackstock testified about her experience with AANDC’s funding formulas and the perverse incentives they have towards the removal of First Nations children on reserve:

DR. BLACKSTOCK: As long as you brought the kids into care, in child welfare care, you would get reimbursed by [AANDC]. Now, we talked – there are situations where the department would disallow expenses on maintenance, but as a general rule, if you got a child into care they could pay you for the child being in care. So you could get some funds to provide services for the family, like bringing the child into care, but it was more difficult to provide prevention services to keep the child safely in their homes.

⁷⁶⁶ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 33.

⁷⁶⁷ Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 31, section 1.5.2; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.

⁷⁶⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 23, section 3.3.1.

⁷⁶⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 99; see also AANDC Briefing Note, “Meeting of the Forum of Ministers Responsible for Social Services” (2002), CHRC BOD, Ex. HR-15, Tab 466 at Annex B; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent’s BOD, Ex. R-13, Tab 30 at p. 2.

⁷⁷⁰ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 19; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 9 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC); see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada); see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at pp. 2, 9 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).

So you couldn't say, for example, I might get \$150 for bringing a child into care, under one of the care rates. I couldn't provide that same amount of money to keep the child in the family home because that wouldn't be considered maintenance under the definition. So it provided an incentive, really, that drove workers out of – not a desire, but under a practical reality where you would be removing children because you didn't have the range of services available that could have kept them in their homes. And there wasn't flexibility in the formula to be able to keep them in the family homes.⁷⁷¹

443. Ms. Flette also testified about the sad irony of the situation created by AANDC's funding formulas, using the example of an overwhelmed mother of four with a new baby who requires prevention services in order to keep her children safely in the family home:

MS. FLETTE: [...] For me, the irony or the -- what I believe is an imperative thing that we need to be doing is looking for ways in which funding will address those types of situations, because if I end up having to take those five kids into care, first of all, it's going to cost me a whole lot more for each child for every day of care, and if I try to keep that sibling group together in a foster home, I will be providing that foster home with respite, with a homemaker, and I will have no trouble really finding that because I can bill that through the child maintenance budget because those children are now in care.⁷⁷²

444. The EPFA funding model, which was introduced in Alberta in 2007 and currently operates in six provinces, includes the structure of operational funding under Directive 20-1, but adds “prevention services” as a new funding stream in an effort to address the shortcomings in Directive 20-1.⁷⁷³ However, prevention funding is still based on a costing model and is therefore fixed under EPFA, much like operations funding.⁷⁷⁴
445. Additionally, the reliability of prevention funding is unknown for a First Nations child and family service agency because EPFA funding is set for a five-year term, and AANDC “re-bases” an agency's maintenance budget each year during that term.⁷⁷⁵ That is to say that if there is a decrease in maintenance expenditures in the first year, an agency's maintenance budget will be decreased by that amount moving forward into the second year.⁷⁷⁶

⁷⁷¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 99-100.

⁷⁷² Testimony of Elsie Flette, Transcript Vol. 20 at pp. 64-65.

⁷⁷³ Program Manual, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.

⁷⁷⁴ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 38, section 4.4.

⁷⁷⁵ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 96; Vol. 62 at pp. 122-123; see also testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 174-181.

⁷⁷⁶ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98.

446. Therefore, if as a result of AANDC's re-basing, an agency's maintenance budget has decreased in the second year of EPFA funding, and if they are suddenly faced with an onslaught of child protection cases, they may need to use their operations and/or prevention dollars in order to offset their deficit in maintenance.⁷⁷⁷

447. Ms. Carol Schimanke, Manager of the Social Development Child and Family Services Program in the AANDC Alberta Regional Office, testified about this situation:

MS. McCORMICK: [...] In your experience, how common is it that an Agency is unable to provide prevention programs because the prevention dollars are used, for example, in operations or maintenance?

MS. SCHIMANKE: [...] I guess those Agencies who are showing a deficit at the end of the year may have difficulty doing those...⁷⁷⁸

448. Independent reviews of Directive 20-1 and EPFA have come to similar conclusions. A 2007 evaluation of the FNCFS Program by PRA Inc., conducted at AANDC's request, concluded that "Directive 20-1 creates financial incentives for using out-of-home care".⁷⁷⁹ A separate evaluation of the FNCFS Program, also conducted in 2007, likewise found that the funding formula (which was Directive 20-1 at the time) was likely "a factor in increases in the number of children in care and Program expenditures because it has the effect of steering agencies towards in-care options [...] because only these agency costs are fully reimbursed."⁷⁸⁰

449. Similarly, the *Wen:De* reports concluded that AANDC's funding formula provided "more incentives for taking children into care than it provides support for preventative, early intervention and least intrusive measures."⁷⁸¹ As a result, First Nations children "are denied an equitable chance to stay safely at home due to the structure and amount of funding under [Directive 20-1]. In this way, [Directive 20-1] really does shape [the] practice [of child welfare] – instead of supporting good practice."⁷⁸²

⁷⁷⁷ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 132-133.

⁷⁷⁸ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 132.

⁷⁷⁹ Evaluation of the First Nations Child and Family Services (FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303 at p. 55.

⁷⁸⁰ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii.

⁷⁸¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 114.

⁷⁸² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 21.

450. Furthermore, the perverse incentive toward the removal of First Nations children also contributes to a loss of community and culture, since children are often placed outside of their home communities. This contributes to a loss of culture, tradition, identity and language.⁷⁸³

Off Reserve

451. Off reserve, provincial social workers apprehend and remove a child from his or her family home only as a measure of last resort when “absolutely necessary”.⁷⁸⁴ Provincial child welfare legislation often includes language requiring that prevention services or early intervention measures be provided to children and families on a mandatory basis in order to try and address the risk factors at play and avoid having to remove a child from his or her home.⁷⁸⁵

452. In Saskatchewan, for example, section 14 of the *Child and Family Services Act*⁷⁸⁶ requires child welfare agencies to provide in-home family services.⁷⁸⁷ The province reimburses agencies for the cost of those prevention services “one hundred percent”.⁷⁸⁸ However, AANDC’s funding formulas do not allow those services to be provided to First Nations children on reserve in the same way because prevention funding is fixed.⁷⁸⁹

453. First Nations are bound to comply with provincial legislation in accordance with the terms and conditions of AANDC’s FNCFS Program.⁷⁹⁰ However, AANDC’s FNCFS Program and funding formulas do not provide adequate funding for prevention services

⁷⁸³ UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24 at pp. 1-2, 10-11, Arts. 5, 48; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 41 (December 8, 2010) at p. 9 (National Chief Shawn A-in-chut Atleo, AFN).

⁷⁸⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 150.

⁷⁸⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 57-58; see also Saskatchewan’s *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98; see also Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83; see also letter from Saskatchewan Social Services to Derald Dubois dated December 19, 1996, CHRC BOD, Ex. HR-07, Tab 102; see also letter from AANDC to Saskatchewan Social Services dated March 19, 1997, CHRC BOD, Ex. HR-07, Tab 103; see also Manitoba’s *The Child and Family Services Act*, CHRC BOD, Ex. HR-08, Tab 112 at pp. 28-31; see also Alberta’s *Child, Youth and Family Enhancement Act*, CHRC BOD, Ex. HR-09, Tab 150 at p. 13; see also Nova Scotia’s *Children and Family Services Act*, CHRC BOD, Ex. HR-10, Tab 199 at p. 6, section 9.

⁷⁸⁶ S.S. 1989-90, c. C-7.2; see also Saskatchewan’s *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98.

⁷⁸⁷ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83.

⁷⁸⁸ Testimony of Raymond Shingoose, Transcript Vol. 31 at p. 83.

⁷⁸⁹ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-81.

⁷⁹⁰ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2, p. 3, section 6.5.

or in-home supports.⁷⁹¹ First Nations child and family service agencies are therefore required to provide services for which they receive at best a limited and fixed amount of funding under EPFA, or at worst almost no funding under Directive 20-1.

454. Testifying about her experience as a social worker for the province of British Columbia, Dr. Blackstock stated that the “province would do a lot of the primary prevention” work with children and families, and that she would simply “decide what [a] child needed and then [the province] would provide that service.”⁷⁹² She went on to say that concerns about the cost of necessary services or other funding issues were dealt with by the province and were “not the concern of those of us at the front line.”⁷⁹³
455. In this way, the provinces adhere to the generally accepted principle that the removal of a child is meant to be a measure of last resort.⁷⁹⁴ The United Nations and “every provincial statute in the country on child welfare, they all understand one thing and that is, that the best place for children is growing up in their families.”⁷⁹⁵ As a result of this deeply held universal truth, social workers are required by law to “undertake all measures to ensure that children can grow up [with their families].”⁷⁹⁶
456. Only where it is absolutely not possible for a child to remain safely in their home is the apprehension of a child to be considered – and there are certainly circumstances where the removal of a child is the best option.⁷⁹⁷ However, it should always be the choice of last resort – not the option that provides the best opportunity for the provision of necessary services.

⁷⁹¹ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-81; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 178-183.

⁷⁹² Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 157-158.

⁷⁹³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 158.

⁷⁹⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.

⁷⁹⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.

⁷⁹⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.

⁷⁹⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 112-113.

b.ii. AANDC's Funding Formulas do not Provide Sufficient Funding for Prevention Services and Least Disruptive Measures as Compared to the Funding Available off Reserve

457. As previously noted, the structure and design of AANDC's funding formulas (Directive 20-1, EPFA and the 1965 Agreement) at best limit, and at worst preclude entirely, the availability of prevention services and least disruptive measures for First Nations children on reserve. As a result, First Nations children on reserve are deprived of the benefit of these services, and/or are subject to adverse differentiation in accessing these services.

b.ii.i. The Importance of Prevention Services for First Nations Children and Families

458. It is well documented that First Nations children are overrepresented in child welfare all across Canada.⁷⁹⁸ In fact, First Nations children are disproportionately represented at each stage of the child welfare process, from the initial investigation, to the substantiation of risk, to being placed in care.⁷⁹⁹

459. As a result, it is "estimated that there are three times as many First Nations children placed in out-of-home care today" than were placed in IRS "at the height" of that movement.⁸⁰⁰ Therefore, the overrepresentation of First Nations children in care today has been described as the extension of the "historic pattern of removal of First Nations children from their homes which is grounded in colonial history".⁸⁰¹

460. By far, the most "common form of substantiated maltreatment in First Nations child investigations" is neglect.⁸⁰² This includes "situations in which children have suffered

⁷⁹⁸ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 1; see also FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. x; see also Canadian Incidence Study of Reported Child Abuse and Neglect (1998), CHRC BOD, Ex. HR-07, Tab 86 at pp. 85-87 ["CIS Report 1998"]; see also AANDC Power Point, "First Nations Child and Family Services (FNCFS)" (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 2; see also see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at pp. 36-42.

⁷⁹⁹ Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 72-73; see also FNCIS Report, CHRC BOD, Ex. HR-04, Tab 33 at p. 2; see also Canadian Incidence Study of Reported Child Abuse and Neglect (2003), CHRC BOD, Ex. HR-07, Tab 105 at pp. 9, 70-71 ["CIS Report 2003"].

⁸⁰⁰ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 16.

⁸⁰¹ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. 5; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 3.

⁸⁰² FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24; see also CIS-2008 Major Findings Supplementary Tables, CHRC BOD, Ex. HR-07, Tab 92; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

harm, or their safety of development has been endangered as a result of the caregiver's failure to provide for or protect them.”⁸⁰³

461. Neglect takes on many forms; however, the most common form of “substantiated neglect” in First Nations communities is “physical neglect”.⁸⁰⁴ This means that the “child has suffered or was at substantial risk of suffering physical harm caused by the caregiver(s) failure to care and provide for the child adequately”, and includes “inadequate nutrition/clothing, and unhygienic dangerous living conditions.”⁸⁰⁵
462. Many of these risk factors stem from the fact that First Nations families often have “limited resources” and “complex” needs.⁸⁰⁶ The First Nations children in these families often “live in environments shaped by chronic difficulties, which research indicates can have devastating long term effects for children.”⁸⁰⁷
463. Overall, First Nations children and families “continue to lag behind non-Aboriginal Canadians on most major economic indicators”, and the “situation is worse [on] reserve”.⁸⁰⁸ For First Nations on reserve, poor economic conditions, high rates of unemployment, lack of housing, poor housing conditions and overcrowding in houses are all risk factors which contribute to the overrepresentation of children in care.⁸⁰⁹ These risks are “compounded by the [lasting] intergenerational effects of colonial policies which dislocated entire communities, suppressed languages and cultures, disrupted functioning communal support systems, and separated generations of children from their families”.⁸¹⁰

⁸⁰³ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 29.

⁸⁰⁴ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 30; see also Journal Article, “Keeping First Nations children at home” A few Federal policy changes could make a big difference” (2007), CHRC BOD, Ex. HR-05, Tab 52.

⁸⁰⁵ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 29; see also National Aboriginal Economic Development Board, “Recommendations on Financing First Nations Infrastructure” (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9.

⁸⁰⁶ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. xiv-xv.

⁸⁰⁷ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. xix.

⁸⁰⁸ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 10-11; see also AANDC Briefing Note, “Comparability of Provincial and AANDC Social Programs Funding” (2008), CHRC BOD, Ex. HR-14, Tab 351.

⁸⁰⁹ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 10-11; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0010; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 18; see also National Aboriginal Economic Development Board, “Recommendations on Financing First Nations Infrastructure” (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also AANDC Power Point, “Social Programs” (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 2.

⁸¹⁰ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. 11.

464. However, research shows that the primary risk factors driving First Nations children and families into the child welfare system can be addressed early and avoided through appropriate and targeted “prevention programs” and services.⁸¹¹ AANDC’s Program Manual defines prevention services as those “designed to reduce the incidence of family dysfunction and breakdown or crisis and to reduce the need to take children” into care “or the amount of time a child remains” in care.⁸¹²
465. For example, in order to address neglect, prevention programs may focus on “helping parents get better organized, helping them develop better habits around supervision, giving them access to services and support so that they have access to more food, better clothing, [and] better housing”.⁸¹³
466. Dr. Trocmé testified about the different types of prevention services in the child welfare context:

DR. TROCMÉ: In child welfare the word prevention ends up being used several different ways, but I think the most important distinction to keep in mind is there’s preventative services designed to prevent children from coming into the child welfare system, and then once they’re in the system, there’s preventative services to keep them from coming into foster care. And so the word prevention services sometimes ends up confounding the two.

So prevention services to prevent children from coming in to the child welfare system are the kind of community based services designed to provide supports to children and families, and they can range from something as simple as summer camp programs [... to] parenting program[s] to help parents develop their parenting skills, [to] maybe a more targeted one that might target new parents, young parents, and help them develop some of the skills to avoid situations escalating to the point where child welfare interventions would be required. So there’s those type[s] of prevention services.

Once you come into contact with the child welfare system and you’ve – a decision is made to provide on-going services, you can either provide home-based services, so services to the child living in their home, or if you end up removing the child, you provide services then through their placement.

⁸¹¹ Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 163-164, 167-170; see also FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 14; see also FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at p. xii; see also The Royal Society of Canada & the Canadian Academy of Health Sciences Expert Panel, “Early Childhood Development Report (2012), CHRC BOD, Ex. HR-07, Tab 87 at pp. 85-105; see also Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at pp. 350-351.

⁸¹² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 51; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 33, section 2.1.17.

⁸¹³ Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at p. 160.

The word prevention services is often used to refer to these home-based services. So one of the objectives of these home-based services is to prevent placement, and those services would be along the lines of, again, parent education, help with child management, maybe some therapeutic work with the children themselves, maybe some advocacy work to help them get better housing, to help them stabilize their situation, a range of services at that level that are designed to stabilize the home situation, improve parenting capacity and avoid having to place the child in out-of-home care.⁸¹⁴ (emphasis added)

467. The value and efficacy of prevention services at reducing the risk of maltreatment for First Nations children on reserve is evident in the success of Manitoba's West Region Child and Family Services' ("West Region") block funding arrangement. In 1992, West Region entered into a Memorandum of Understanding ("Block Funding MOU") with AANDC in which they agreed to accept a pre-determined block of funding for maintenance.⁸¹⁵ If their maintenance costs exceeded the block funding, the deficit would be the responsibility of West Region; however, AANDC agreed to allow the agency to keep any surplus maintenance funds they had.⁸¹⁶
468. West Region was therefore able to take their surplus maintenance funding and use it to create and develop prevention services and programs to address the needs of the First Nations communities they served, and the risk factors that were driving children on reserve into care.⁸¹⁷ At the time they entered into the Block Funding MOU, West Region had 10% of their First Nations children in care; the increased prevention funding, services and programs ultimately helped the agency to reduce this number to 6%.⁸¹⁸
469. A preliminary analysis of the Block Funding MOU found that West Region had been able to develop "holistic and community-based programs", such a "therapeutic foster family care [...] treatment support services [...] family counselling and reunification".⁸¹⁹ This innovative approach was later examined by Brad McKenzie, an independent researcher,

⁸¹⁴ Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 132-134.

⁸¹⁵ Memorandum of Understanding between West Region Child and Family Services Inc. and AANDC, CHRC BOD, Ex. HR-08, Tab 126.

⁸¹⁶ Memorandum of Understanding between West Region Child and Family Services Inc. and AANDC, CHRC BOD, Ex. HR-08, Tab 126.

⁸¹⁷ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 145-155; see also AANDC Briefing Note, "Meeting of the Forum of Ministers Responsible for Social Services" (2002), CHRC BOD, Ex. HR-15, Tab 466 at Annex B.

⁸¹⁸ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 145-155, 169-170; Vol. 21 at pp. 48-49.

⁸¹⁹ Preliminary Analysis of the Pilot Project on Block Funding for Child Maintenance at West Region Child and Family Services, CHRC BOD, Ex. HR-08, Tab 128.

who evaluated the Block Funding MOU at West Region.⁸²⁰ Mr. McKenzie prepared three reports examining block funding, and found that the approach was achieving the objective of preventing children from coming into care, reducing the high numbers of children that were already in care, and ensuring predictability of funding for AANDC. Therefore, the reports recommended the expansion of block funding to other agencies.⁸²¹

470. West Region quite successfully kept their number of children in care down under the Block Funding MOU; however, as a result of the implementation of EPFA in Manitoba, their funding was reduced.⁸²² They are now being forced to cut prevention programs and services which they can no longer afford to offer.⁸²³
471. Sylvain Plouffe, Director General of the Centre Jeunesse de l’Abitibi-Témiscamingue in Québec, testified that he uses his agency’s “enveloppe globale” (i.e., block funding) in order to address the greater needs of the First Nations children and families in the communities he serves.⁸²⁴ Mr. Plouffe testified that the difference between AANDC’s funding under EPFA and the actual cost of providing services based on the needs of First Nations children and families on reserve is estimated at over \$3.5 million. Therefore, as a result of the inadequate funding his agency receives under EPFA, Mr. Plouffe uses provincial funding and the “enveloppe globale” to maintain a level of services on reserve comparable to those his agency provides to neighbouring off reserve communities.⁸²⁵

⁸²⁰ Brad McKenzie, “Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services” (1994), CHRC BOD, Ex. HR-09, Tab 182; see also Brad McKenzie, “Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services: A Second Look” (1999), CHRC BOD, Ex. HR-10, Tab 183 at pp. 61-63; see also Brad McKenzie, “Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review” (date unknown), CHRC BOD, Ex. HR-10, Tab 184.

⁸²¹ Brad McKenzie, “Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services” (1994), CHRC BOD, Ex. HR-09, Tab 182; see also Brad McKenzie, “Evaluation of the Pilot Project on Block Funding for Child Maintenance West Region Child and Family Services: A Second Look” (1999), CHRC BOD, Ex. HR-10, Tab 183 at pp. 61-63; see also Brad McKenzie, “Block Funding Child Maintenance in First Nations Child and Family Services: A Policy Review” (date unknown), CHRC BOD, Ex. HR-10, Tab 184.

⁸²² Southern First Nations Annual Report 2011/2012, CHRC BOD, Ex. HR-08, Tab 129 at p. 94; see also testimony of Elsie Flette, Transcript Vol. 20 at pp. 155-157.

⁸²³ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 155-157; see also testimony of Carolyn Bohdanovich, Transcript Vol. 21 at pp. 197-199; see also Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 395.

⁸²⁴ Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 49 and following.

⁸²⁵ Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 76-77.

472. Therefore, the greater the emphasis on prevention and early intervention, the more likely a policy or program is to be successful in addressing the primary risk factors which drive First Nations children into care.⁸²⁶

b.ii.ii. Directive 20-1

473. Directive 20-1 does not include explicit funding for prevention services.⁸²⁷ AANDC's Program Manual states that "prevention services, including in-home services" are activities eligible to be funded out of a First Nations child and family service agency's fixed operations budget.⁸²⁸

474. Operations funding is a fixed formula-based amount⁸²⁹ that is intended to cover "all aspects of the agency's operations" or administration.⁸³⁰ It is primarily based on a First Nation's child population aged 0 to 18 years.⁸³¹

475. As previously noted, in addition to prevention services, an agency's fixed operations budget must also cover a number of other costs, including salaries, benefits, rent and insurance, many of which are "fixed costs" themselves.⁸³²

476. Ms. Schimanke, Manager of Social Development at AANDC's Alberta Region, testified about the impact the fixed operations budget has on agencies and their ability to provide prevention services:

MR. POULIN: Okay. And so – but there needs to be money available and there is a limit as to how much money is available [in operations], and if the limit has been hit then you cannot do anything.

MS. SCHIMANKE: Yeah, the First Nation sets their budgets on that. I mean, that's the amount that's in the formula. If the First Nation Agency wants to create

⁸²⁶ FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at p. 14.

⁸²⁷ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 33; see also testimony of Derald Dubois, Transcript Vol. 9, pp. 56-60; see also AANDC Power Point, "Social Programs" (2006), CHRC BOD, Ex. HR-14, Tab 354 at p. 13.

⁸²⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also Evidence before the Standing Committee on Aboriginal Affairs and Northern Development (February 15, 2011), CHRC BOD, Ex. HR-10, Tab 195 at pp. 4-5.

⁸²⁹ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

⁸³⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

⁸³¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 88-89.

⁸³² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 61-62.

their own budget and adjust that amount, that is their prerogative to do so; right?
So there have been cases –

MR. POULIN: I'm sorry, "prerogative to do so" –

MS. SCHIMANKE: Yes.

MR. POULIN: – let me jump in. I mean, if you don't have any money there is nothing you can do. You can't print it, sadly.

MS. SCHIMANKE: Yes, exactly.

[...]

MS. SCHIMANKE: But I'm just saying that this is in a formula that we come up with an amount and then they can make – they can adjust that formula or use that amount to set their budgets. We don't change [the b]udget or dictate that budget. Yes, we just give them an amount of money to work with.

MR. POULIN: So for an Agency that is over 6 percent, where you need more [child] protection workers, that component, all that component will be eaten up, that operations budget will be eaten up with what is essential to meet your immediate needs, and so that leaves very little for anything like brief services [otherwise known as prevention services and in-home supports].

MS. SCHIMANKE: It could be. It depends how they set their budget and how they set their salary grids. Like, again, that is the Agencies that decide that, right, and how they manage that.

MR. POULIN: That means paying – you know, that means in effect paying your workers less than what the province does.

MS. SCHIMANKE: It could be, yes. That could be one example of things, yes.⁸³³

477. As a result of the fixed nature of the operations budget, which is inadequate to cover the real administrative costs of First Nations child and family service agencies,⁸³⁴ there is effectively no funding available under Directive 20-1 to provide prevention services to First Nations children and families on reserve.⁸³⁵

⁸³³ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 50-52.

⁸³⁴ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 24, 40-41, 45; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.

⁸³⁵ Testimony of Barbara D'Amico, Transcript Vol. 50 at p. 154; see also testimony of Carol Schimanke, Transcript Vol. 61 at p. 33; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 183-184; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at pp. 20-22; see also Journal Article, "Keeping First Nations children at home" A few Federal policy changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52; see also AANDC Methodology Report, "Implementation Evaluation of the Enhanced Prevention Focused Approach in Quebec and Prince Edward Island for the First Nations Child and Family services Program (2012)", CHRC BOD,

478. AANDC's FNCFS Program Manual also acknowledges the fact that the "level of [prevention] funding [in Directive 20-1] may not provide enough resources to meet current trends."⁸³⁶
479. This situation is exacerbated in agencies where the percentage of children in care is greater than the 6% assumed average. In those circumstances, agencies are required to either sacrifice their staffing, salaries or caseloads in order to continue to provide prevention programs while addressing their pressing and immediate child protection requirements, or cut prevention services in order to better address their community's needs.
480. Barbara D'Amico, Senior Policy Manager for the FNCFS Program at AANDC Headquarters, testified about AANDC's failure to provide sufficient prevention funding under Directive 20-1:

MS. D'AMICO: So, under Directive 20-1, it is operational funding, so operational funding, and then there is a clause in here that part of that – you could use some of that operational funding for what was termed in Directive 20-1 as least disruptive measures, which is another term for prevention, but there was no funding line for prevention and so what we found was most agencies were just using their operations dollars for operations and there wasn't enough to cover off prevention [...].⁸³⁷ (emphasis added)

481. Thus, the structure and design of Directive 20-1 prevents and/or strictly limits a First Nations child and family service agency's ability to provide prevention services and least disruptive measures to First Nations children.⁸³⁸ As a result, First Nations children on reserve are denied or seriously deprived of the services necessary to address their greater needs and the risk factors they face, which causes them to be apprehended from their families and removed from their homes at a disproportionately high rate.⁸³⁹

Ex. HR-09, Tab 166 at p. 3; see also e-mail from Nuu-chah-nulth Tribal Council to AANDC dated December 20, 2013, CHRC BOD, Ex. HR-15, Tab 412.

⁸³⁶ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 14, section 2.2.3.

⁸³⁷ Testimony of Barbara D'Amico, Transcript Vol. 50 at p. 154.

⁸³⁸ AANDC Briefing Note, "First Nation Child and Family Services (FNCFS) – Media Coverage" (2002), CHRC BOD, Ex. HR-15, Tab 467 at p. 4; see also AANDC Power Point, "Social Development Progress Report" (2004), CHRC BOD, Ex. HR-15, Tab 475 at p. 11.

⁸³⁹ FNCIS Report 2011, CHRC BOD, Ex. HR-05, Tab 47 at pp. 18-19; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 2 (Christine Cram, Assistant Deputy Minister, Education and Social Development Programs and Partnerships Sector, AANDC).

482. Directive 20-1 remains in effect in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory today.⁸⁴⁰

b.ii.iii. EPFA

483. AANDC claims to have designed and implemented EPFA in six jurisdictions across Canada in an effort to provide the prevention funding that is so desperately lacking under Directive 20-1. To that end, AANDC has added a new stream of funding for prevention services in the provinces it has transitioned to EPFA.⁸⁴¹

484. However, like operations funding, prevention funding under EPFA is based on a fixed formula that assumes that First Nations child and family service agencies have an average of 3 children per household, and 20% of on reserve families requiring services (or “classified as multi-problem families”).⁸⁴² Ms. D’Amico testified that prevention funding under EPFA is fixed and final:

MR. CHAMP: [...] What about the operations and prevention streams, though?

MS. D’AMICO: For the operations and prevention stream, it is based on one formula –

MR. CHAMP: Yes.

MS. D’AMICO: – and that number doesn’t change.⁸⁴³

485. Moreover, the fixed amount of prevention funding First Nations child and family service agencies receive is set for a term of at least five years under EPFA, and perhaps even longer. In Alberta, where EPFA was first implemented in 2007, Ms. Schimanke testified that the funding model has been fixed since that time and has not been adjusted.⁸⁴⁴

486. Another issue that impacts the amount of funding that First Nations agencies have available for prevention under EPFA is the re-basing of yearly maintenance costs. As

⁸⁴⁰ AANDC Briefing Note, “How First Nation Child and Family Services (FNCFS) Works in Each Region”, Respondent’s BOD, Ex. R-13, Tab 5; see also AANDC Power Point, “AANDC’s Role as a Funder in FNCFS” (May 2013), CHRC BOD, Ex. HR-12, Tab 246; see also e-mail from Steven Singer to Barbara D’Amico dated March 21, 2011 re: British Columbia EPFA Calculations, CHRC BOD, Ex. HR-15, Tab 405: As of 2011, B.C. would have been entitled to an additional \$16,101,042 in FNCFS Program funding had AANDC decided to transition them to EPFA.

⁸⁴¹ Updated Program Manual 2012, CHRC BOD, Ex. HR-14, Tab 272 at p. 37, section 4.1.

⁸⁴² Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 5.

⁸⁴³ Testimony of Barbara D’Amico, Transcript Vol. 53 at p. 16.

⁸⁴⁴ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 160; Vol. 62 at p. 49.

previously stated, AANDC “re-bases” an agency’s maintenance budget each year during the five-year EPFA term.⁸⁴⁵ For example, if an agency’s maintenance budget is \$100 in year one, but their expenditures for that year total only \$80, AANDC will reduce their maintenance budget in the second year to \$80.⁸⁴⁶

487. If, for example, in the second year of EPFA that agency’s number of children in care increases unexpectedly, or if a First Nations child with high-cost special needs comes into care, the agency must work within their existing budget to manage those costs in the interim. This often means that agencies have to take funds from either operations or prevention in order to meet their immediate and critical child protection needs.⁸⁴⁷
488. This situation illustrates the difficulties agencies face in trying to develop and maintain prevention programs given the structure of EPFA. The re-basing of maintenance costs can create a “perverse negative cycle” that contributes to the increasing number of First Nations children in care, since agencies in situations like the one described above are forced to cut either operations or prevention services in order to meet their child protection needs, consequently placing First Nations children at greater risk of coming into care due to the fact that these prevention services are lacking. Ms. D’Amico testified about this phenomenon:

MR. CHAMP: [... Did] you ever look at models or consider what the problem might be if the opposite starts happening, the opposite of the virtuous cycle, where children in care are going up in the Agencies are stuck because they have a block of maintenance funding from the year before that was based on a lower number, but the [number of] children [in care] are going up and so, to pay for that increase in maintenance they are taking it from other streams, their prevention stream perhaps –

MS. D’AMICO: M’hmm.

MR. CHAMP: – and then it becomes a perverse negative cycle because then they have less money for prevention which leads to more children in care. That is a possibility under [EPFA]?

⁸⁴⁵ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 96; Vol. 62 at pp. 122-123; see also testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 174-181.

⁸⁴⁶ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 96-98.

⁸⁴⁷ Testimony of Carol Schimanke, Transcript Vol. 61 at pp. 91, 132-133; see also Kasohkewew Child Wellness Society Business Plan 2012 to 2017, CHRC BOD, Ex. HR-09, Tab 154 at pp. 45-48: The high number of children being placed in care at Kasohkewew in Alberta has put the agency in a “financial crisis”, and impacted their ability to provide prevention services to the First Nation communities they serve.

MS. D'AMICO: Yes, it is.⁸⁴⁸

489. Ms. D'Amico went on to say that out of the six jurisdictions in which EPFA has been implemented by AANDC, it is working as intended in only one province.⁸⁴⁹
490. Given the foregoing, the structure and design of EPFA also limits the availability of prevention funding and services for First Nations children on reserve, who are thus deprived of the benefit of these essential services and/or subject to adverse differentiation in accessing them.⁸⁵⁰

b.ii.iv. Ontario's 1965 Agreement

491. Ontario's 1965 Agreement, while different in structure and design from both Directive 20-1 and EPFA, also does not provide adequate prevention funding for First Nations children and families on reserve in that province.
492. As previously described, prevention services were introduced in Ontario in the late 1970's, and are provided by fully-mandated Native child and family service agencies, pre-mandated First Nation agencies, and First Nation communities themselves.⁸⁵¹ AANDC provides approximately \$17 million in prevention funding to the province of Ontario.⁸⁵²
493. There are a number of issues with respect to the prevention funding provided to First Nations children and families under the 1965 Agreement.
494. First, given the cost-sharing design of the 1965 Agreement, AANDC has ultimate decision-making authority with respect to which services it agrees to cost-share. In other words, if Ontario decides to "put an emphasis on prevention by making whatever legislative changes [are] necessary in order to bolster those programs, both on and off Reserves",⁸⁵³ AANDC could refuse to fund or reimburse these programs or services.⁸⁵⁴

⁸⁴⁸ Testimony of Barbara D'Amico, Transcript Vol. 53 at p. 79.

⁸⁴⁹ Testimony of Barbara D'Amico, Transcript Vol. 52 at p. 151.

⁸⁵⁰ Touchwood Child and Family Services Inc. Prevention Business Plan, CHRC BOD, Ex. HR-07, Tab 108 at p. 5.

⁸⁵¹ Testimony of Phil Digby, Transcript Vol. 59 at p. 98.

⁸⁵² Testimony of Phil Digby, Transcript Vol. 59 at pp. 58-59, 111.

⁸⁵³ Testimony of Phil Digby, Transcript Vol. 59 at p. 74.

⁸⁵⁴ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/23; see also testimony of Phil Digby, Transcript Vol. 59 at pp. 54-55, 66-75, 93-94, 128-129; Vol. 60 at pp. 82-83, 88-98, 101-102, 148-164, 200-203; see also AANDC Briefing Note, "1965 Agreement Overview" (2007), CHRC BOD, Ex. HR-11, Tab 239 at pp. 4-5.

495. Second, the amount of prevention funding available depends on the nature of the “protocol” that operates in a given area within the province of Ontario, and does not reflect the real or greater needs of First Nations.⁸⁵⁵
496. For instance, in determining the prevention budget for fully-mandated Native child and family service agencies in northern Ontario, AANDC uses the “ratio of Status Indian days of care to the total days of care as a proxy for how many people would be receiving the prevention service.”⁸⁵⁶ Ms. Stevens testified that Anishinaabe Abinoojii’s prevention budget has not been substantially increased since it was initially developed in the late 1970’s, and is insufficient to meet the needs of the First Nations communities she serves.⁸⁵⁷ However, for agencies in southern Ontario, AANDC assumes that approximately 80% of the First Nations population on reserve will be eligible to access services and “cost-shareable”.⁸⁵⁸
497. Finally, the 1965 Agreement does not “account for the lack of surrounding health and social services in most First Nations communities [... which] are absolutely essential to providing preventive, supportive, and rehabilitative services to children and families at risk”, whereas provincial child welfare agencies already “have the benefit of these programs in their communities”.⁸⁵⁹
498. Therefore, insofar as the availability of prevention funding under the 1965 Agreement is based on assumptions and varies from region to region as a result, it is inadequate to meet the real needs of First Nations communities in Ontario.⁸⁶⁰

⁸⁵⁵ Child Welfare Report (2012), CHRC BOD, Ex. HR-11, Tab 209 at p. 7; see also testimony of Phil Digby, Transcript Vol. 59 at p. 103. For example, at Anishinaabe Abinoojii, AANDC assumes that 100% of the people accessing prevention services are Status Indians; however, a proxy is used for the remaining northern Native agencies.

⁸⁵⁶ Testimony of Phil Digby, Transcript Vol. 59 at pp. 103-104.

⁸⁵⁷ Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 38-39, 46-47.

⁸⁵⁸ Testimony of Phil Digby, Transcript Vol. 59 at p. 104.

⁸⁵⁹ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-5.

⁸⁶⁰ Testimony of Theresa Stevens, Transcript Vol. 25 at pp. 38-41.

b.ii.v. Situation off Reserve

499. Over the past decade, the provinces have moved toward child welfare models that emphasize the importance of prevention and least disruptive measures in order to address the risk factors that make children vulnerable to being removed from their homes.⁸⁶¹ These types of prevention services are available in every province in Canada.⁸⁶²
500. As previously noted, provincial child welfare legislation has followed suit, and most now include language requiring that prevention services be provided to children and families by child welfare agencies (both on and off reserve) on a mandatory basis.⁸⁶³ Thus, the provinces ensure that agencies are funded accordingly in order to provide these services to children and families off reserve. Dr. Blackstock testified about her experience as a social worker with the province of British Columbia:

DR. BLACKSTOCK: [... And] it wasn't, like, a free-for-all in the province, I don't want to leave you [with] that impression, but certainly if you had to invest, for the safety and wellbeing of the child, then you spent that money, in collaboration with your supervisor, to get the family the services that they needed.

And if that overspent the [child welfare] budget, then that overspent the budget, the [provincial] ministry went to [their] Treasury Board.⁸⁶⁴

501. Ms. D'Amico testified that the amounts First Nations child and family service agencies receive in those jurisdictions still under Directive 20-1 may not be comparable to what is provided by the province in those regions:

MEMBER LUSTIG: Okay. So is it fair to say then that while your best efforts are underway and you are attempting to address on various front [the

⁸⁶¹ Testimony of Barbara D'Amico, Transcript Vol. 51 at p. 66; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii; see also AANDC Power Point, "Better Outcomes for First Nation Children" (2012), CHRC BOD, Ex. HR-05, Tab 59 at p. 5; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 2nd Sess, No 31 (October 20, 2009) at p. 7 (Mary Quinn, Director General, Social Policy and Programs, AANDC).

⁸⁶² Testimony of Dr. Nico Trocmé, Transcript Vol. 7 at pp. 137-138.

⁸⁶³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 57-58; see also Saskatchewan's *Child and Family Services Act*, CHRC BOD, Ex. HR-07, Tab 98; see also Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 44-49, 80-83; see also letter from Saskatchewan Social Services to Derald Dubois dated December 19, 1996, CHRC BOD, Ex. HR-07, Tab 102; see also letter from AANDC to Saskatchewan Social Services dated March 19, 1997, CHRC BOD, Ex. HR-07, Tab 103; see also Manitoba's *The Child and Family Services Act*, CHRC BOD, Ex. HR-08, Tab 112 at pp. 28-31; see also Alberta's *Child, Youth and Family Enhancement Act*, CHRC BOD, Ex. HR-09, Tab 150 at p. 13; see also Nova Scotia's *Children and Family Services Act*, CHRC BOD, Ex. HR-10, Tab 199 at p. 6, section 9.

⁸⁶⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 273.

shortcomings in the funding formulas], there isn't comparability yet; this is something you are trying to attain?

MS. D'AMICO: [...] In the other jurisdictions, because we haven't moved to EPFA, the amounts that they are receiving [...] I could not tell you definitively that it is comparable with the province in terms of the funding ratios because 20-1, even with the added dollars, we have run most of the formulas with the remaining jurisdictions and they would receive more under EPFA...⁸⁶⁵

502. The situation is similar in the jurisdictions that have already been transitioned to EPFA. In Saskatchewan, for example, where some First Nations child and family service agencies serve children both on and off reserve, and receive "one hundred percent" reimbursement from the provincial government for the prevention services they provide to off reserve children, as compared to the AANDC's fixed amount of prevention funding for First Nations children on reserve.⁸⁶⁶
503. AANDC commissioned an independent review of EPFA in Nova Scotia in 2012, focusing on the Mi'kmaw Family and Children's Services (the "Mi'kmaw Agency"). Analysing the responsiveness of EPFA, the review concluded that the "demand for protection services is so high that the [Mi'kmaw Agency] does not have the resources needed to deliver prevention services."⁸⁶⁷ Therefore, the First Nations children and families in Nova Scotia were deprived of the benefit of prevention services because of the structure of EPFA, which does not account or adjust for the real and greater needs of First Nations.

b.iii. AANDC's Funding Formulas do not Provide Sufficient Funding for Key Elements of Child Welfare Service Delivery on Reserve

504. As was noted by the NPR,⁸⁶⁸ the *Wen:De* reports,⁸⁶⁹ the OAG reports⁸⁷⁰ and the PAC reports,⁸⁷¹ AANDC's funding formulas, including Directive 20-1, EPFA and the 1965

⁸⁶⁵ Testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 179-180.

⁸⁶⁶ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 80-83.

⁸⁶⁷ Auguste Solutions Report, "Implementation Evaluation of the Enhanced Prevention Focused Approach: Nova Scotia Case Study Technical Report" (2012), CHRC BOD, Ex. HR-10, Tab 204 at pp. 6-7 ["Auguste Solutions Nova Scotia Report"].

⁸⁶⁸ NPR, CHRC BOD, Ex. HR-01, Tab 3.

⁸⁶⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6.

⁸⁷⁰ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53.

⁸⁷¹ PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45.

Agreement, do not provide adequate funding for a number of key elements necessary for the provision of child welfare services on reserve, including: salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living.

505. The lack of funding available for these essential costs is a direct result of the structure and design of AANDC's funding formulas – particularly the operations stream.⁸⁷² Consequently, many First Nations child and family service agencies find themselves in deficit and struggle to provide services to the vulnerable First Nations children and families in the communities they serve.⁸⁷³

b.iii.i. Salaries

506. AANDC's funding formulas do not provide adequate funding for staff salaries,⁸⁷⁴ and do not include adjustments for staff salaries.⁸⁷⁵ Therefore, AANDC has not kept pace with provincial social worker salaries.⁸⁷⁶
507. Under both Directive 20-1 and EPFA, staff salaries are funded out of the operations stream. As previously discussed, AANDC has a fixed and limited budget for operations, which is largely based on the size of the First Nations child population on reserve.⁸⁷⁷ Given that it is intended to cover “all aspects of the agency's operations” or

⁸⁷² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 7; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at p. 4.

⁸⁷³ Touchwood Child & Family Services Inc. Financial Statements (2012), CHRC BOD, Ex. HR-07, Tab 99 at pp. 2, 9; see also West Region Child and Family Services Committee Incorporate Financial Statements (2013), CHRC BOD, Ex. HR-11, Tab 237 at pp. 10, 12, 14; see also Kasohkewew Child Wellness Society Financial Statements (2012), CHRC BOD, Ex. HR-09, Tab 153 at pp. 2, 10; see also Anishinaabe Abinoojii Family Services Annual Report to the Communities (2012), CHRC BOD, Ex. HR-11, Tab 242 at p. 14; see also Yorkton Tribal Council Child and Family Services Incorporated Financial Statements (2012), CHRC BOD, Ex. HR-09, Tab 179 at pp. 13, 17; see also Mi'kmaw Family & Children's Services of Nova Scotia's Financial Statements (2013), CHRC BOD, Ex. HR-10, Tab 198 at pp. 23, 27-28: The Mi'kmaw Agency is using their CSA to offset their operational deficit, which is a liability that is noted as a “going concern” in their Financial Statements; see also First Nation Child and Family Services Agencies – Manitoba: Results of Financial Reviews, CHRC BOD, Ex. HR-10, Tab 208 at p. 3: Five of the eight agencies reviewed were identified as “operating in deficit positions, some of them incurring significant deficits [...] to the point where there is a question as to whether they can continue to provide services at a level that meets reasonable standards of care.”

⁸⁷⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 35-37.

⁸⁷⁵ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 114; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.

⁸⁷⁶ Testimony of Judy Levi, Transcript Vol. 30 at pp. 76-77.

⁸⁷⁷ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

administration,⁸⁷⁸ operations funding is often a source of financial pressure for many First Nation agencies.⁸⁷⁹

508. Staff salaries make up approximately 75% of an agency's operations costs, and given the fixed nature of both the operations budget and salary amounts, this can seriously constrain an agency's ability to provide competitive salaries.⁸⁸⁰ This pressure is exacerbated by the fact that over time, AANDC has added certain activities to the list of "eligible operations costs" without providing a corresponding increase in operations funding for First Nations child and family services agencies to cover those costs.⁸⁸¹ For example, insurance, information technology equipment and janitorial services were not included in an earlier iteration of the FNCFS Program Manual, but are listed in the latest version from AANDC.⁸⁸²
509. These funding pressures are felt most especially by small agencies across Canada, whose operations budgets are subject to downward adjustments based on the size of the on reserve First Nations child populations they serve.⁸⁸³
510. Under EPFA, AANDC has attempted to bring funding for staff salaries up to a level of provincial comparability; however, the FNCFS Program has fallen short of this objective because of the structure of the EPFA funding model, which is set for a period of five years and does not include an adjustment for inflation.⁸⁸⁴ Dr. Blackstock testified to this effect:

DR. BLACKSTOCK: [... This] is just echoing back to my testimony of yesterday where we talked about in EPFA there is some consideration of price matching on

⁸⁷⁸ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.1.

⁸⁷⁹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 7, 35-37.

⁸⁸⁰ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 178.

⁸⁸¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 90-92.

⁸⁸² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 90-92.

⁸⁸³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 52-53; see also letter from New Brunswick's Minister of Family and Community Services to AANDC dated March 26, 2007, CHRC BOD, Ex. HR-14, Tab 356; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365; see also AANDC Briefing Note, "Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement" (2004), CHRC BOD, Ex. HR-14, Tab 397; see also British Columbia First Nations Enhanced Prevention Services Model and Accountability Framework (August 29, 2008), Respondent's BOD, Ex. R-13, Tab 30 at p. 4; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 56 (February 8, 2011) at pp. 2, 9 (Mary Polak, Minister of Children and Family Development, Government of British Columbia).

⁸⁸⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 106; Vol. 47 at p. 40.

salary at the outset...but those are not adjusted for [inflation] going forward. And so, you can see things change for you in terms of an upward price cost, that can be quite difficult for Agencies.⁸⁸⁵

511. When EPFA was initially implemented in Alberta in 2007, AANDC based its funding for staff salaries on the provincial salary grid from 2006. Since that time, staff salaries for on reserve First Nations child and family service agencies have been fixed at that level, whereas AANDC adjusts its salary funding annually for provincial social workers who provide child and family services on reserve to six First Nations in the province pursuant to the Administrative Reform Agreement.⁸⁸⁶
512. This exemplifies the discrimination alleged in the present complaint: AANDC funds the province of Alberta more than First Nations child and family service agencies to provide the same service to the same group of people. Ms. Schimanke testified about this situation:

MR. POULIN: [...] I believe we have always said EPFA started in [Alberta in] 2007, but the [salary] grid that was used in 2006.

MS. SCHIMANKE: Correct.

MR. POULIN: Okay. So it has been set since then.

MS. SCHIMANKE: The salary component of that.

MR. POULIN: The salary component –

MS. SCHIMANKE: Yes.

MR. POULIN: – has been set since then.

But under the [provincial Administrative] Reform Agreement, when there are percentages reimbursed in the Billings – I have called them billings, the invoices or the billings – the percentage that's reimbursed, it's that of the provincial budget, so it is their provincial grid.

MS. SCHIMANKE: Exactly correct.

MR. POULIN: Again, I think you will agree with me if I were to say that it's possible that [delegated First Nations child and family service agencies] could find this [...] situation quite unfair.

⁸⁸⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 40; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.

⁸⁸⁶ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.

MS.SCHIMANKE: Agreed.⁸⁸⁷

513. This situation is not unique to Alberta. Other provinces that have transitioned to EPFA are either experiencing or anticipating funding pressures as a result of the fact that staff salaries are set for a five year period without adjustments for changes in provincial pay scales or inflation.⁸⁸⁸
514. AANDC is aware of this discrepancy, and indeed Ms. D’Amico testified that the EPFA funding model would have to be changed in order to address the situation:

MS. D’AMICO: [...] So what we have found – this is a lesson learned as we have transitioned to EPFA – is that, of course, provinces have unionized workers, unionized workers have collective agreements, salaries go up either on a yearly basis or whatever the case may be. So to allow for this we have had to look at the EPFA formula again.⁸⁸⁹

b.iii.ii. Capital Infrastructure

515. Under Directive 20-1 and EPFA, AANDC does not provide funding for capital infrastructure.⁸⁹⁰ First Nations child and family service agencies are expected to rent buildings on reserve and pay for those costs out of their fixed operations budgets.⁸⁹¹
516. This has been identified as a major weakness in Directive 20-1, and continues to be a serious shortcoming in the EPFA funding model.⁸⁹²
517. As Dr. Blackstock noted, the lack of funding for capital requirements poses a significant challenge to many First Nations child and family service agencies in light of the well-documented housing crisis on reserves across Canada:

⁸⁸⁷ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.

⁸⁸⁸ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 184-186; Vol. 21 at pp. 104, 107-108.

⁸⁸⁹ Testimony of Barbara D’Amico, Transcript Vol. 51 at p. 101; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248.

⁸⁹⁰ Testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 163-164; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 51-52; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.

⁸⁹¹ AANDC Memo, “The Use of FNCFS Funding for Capital Expenditures” (2012), CHRC BOD, Ex. HR-13, Tab 300.

⁸⁹² Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 17, 21, 53-54; see also testimony of Barbara D’Amico, Transcript Vol. 50 at pp. 163-164; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 40-41; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 28; see also NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

DR. BLACKSTOCK: [...] Now, what this is, is really things like offices, cars, sometimes equipment that you would require. And it is particularly important for First Nations because there is a severe housing crisis [in] many First Nations communities.

So, you can't just say there's a building you can rent that would be suitable. Sometimes you need to [...] build the building, particularly because, as I described yesterday, having an office for Child and Family Services requires a specific layout of the building so that we can actually support doing the work that we need to do as social workers.

And make sure that all members of the public, particularly children and persons with disabilities, have safe access into that environment.

Well, there was no funding in [Directive 20-1] for capital requirements so, for building buildings or buying cars [...].

[...]

But as a matter of course, if you work for the province, or even [AANDC], they provide good office space, which is the right thing to do for their employees and for visitors coming in to their space, but there's not that provision here [under Directive 20-1 ...].

[...]

[In *Wen:De*, we recommended] \$10.3 million to bring some of the buildings up to standard because some of the agencies were working in substandard conditions already, and one of them particularly was working in a building that had been condemned, was beyond repair. So there had to be some upgrading of those particular capital expenses that already existed and then additional investments were needed.⁸⁹³

518. Dr. Loxley confirmed this in his testimony when discussing the surveys of First Nations child and family service agencies that were conducted as part of the *Wen:De* research, which found that “capital was a problem, [and] that space was a problem in particular”, with one agency of the 12 surveyed “operating in premises that should have been condemned.”⁸⁹⁴

519. Under EPFA, the situation remains the same. Ms. Flette confirmed that AANDC's EPFA model does not include funding for capital infrastructure in Manitoba.⁸⁹⁵ Similarly,

⁸⁹³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 53-54, 67, 197; see also National Aboriginal Economic Development Board, “Recommendations on Financing First Nations Infrastructure” (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9.

⁸⁹⁴ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 53.

⁸⁹⁵ Testimony of Elsie Flette, Transcript Vol. 20 at pp. 112-113; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at pp. 23-29, 65.

Raymond Shingoose, Executive Director of the Yorkton Tribal Council Child and Family Services agency in Saskatchewan,⁸⁹⁶ testified that there is no funding for capital expenditures under EPFA in Saskatchewan, whereas the province provides funding to its child welfare agencies off reserve for capital infrastructure and actually “build[s its] own facilities”.⁸⁹⁷

520. Likewise, Brenda Ann Cope, Financial Comptroller for the Mi’kmaw Agency, stated that AANDC’s EPFA funding model does not provide funding for capital infrastructure in Nova Scotia.⁸⁹⁸ This is of particular concern in Nova Scotia because the province has found that the Mi’kmaw Agency, which serves all First Nation communities in the province, cannot meet the mandatory statutory requirements in terms of response times unless they acquire “another office in southwest Nova Scotia.”⁸⁹⁹ In response to this urgent request, AANDC has indicated that “they [will] think about it”.⁹⁰⁰
521. Similarly, Mr. Plouffe’s agency, which serves children both on and off reserve, operates a fleet of vehicles (cars rented for a period of three years) which he says have allowed his agency to save money.⁹⁰¹ He also testified that he was able to build facilities in each off reserve community he serves, and that these facilities were necessary in order to address the needs in those regions.⁹⁰²
522. Dr. Loxley also testified that lack of funding for capital infrastructure continues to be a major structural deficiency in AANDC’s EPFA funding model:

DR. LOXLEY: [...] I would say that capital – lack of capital is an issue [under EPFA]. When you look at the reviews in Nova Scotia, they could use a new building, which they don’t have, a third building, so that’s causing all kinds of problems and added costs. In Saskatchewan, according to the reviews in Saskatchewan, money is being taken out of prevention and put into capital and into vehicles, capital, and into IT, which I think, you know, emphasized what we tried to get out in [*Wen:De*], that you need to look after these items separately, you need to look at IT and capital much more systematically as a problem in and of themselves and not put Agencies in a position where you bring in a new

⁸⁹⁶ Raymond Shingoose’s Curriculum Vitae, CHRC BOD, Ex. HR-09, Tab 158.

⁸⁹⁷ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 130-132; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-20.

⁸⁹⁸ Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 19.

⁸⁹⁹ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71; see also AANDC Briefing Note, “Province of Nova Scotia’s Audit of the Mi’kmaw Family and Children’s Services” (2011), CHRC BOD, Ex. HR-12, Tab 252.

⁹⁰⁰ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.

⁹⁰¹ Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 70-71.

⁹⁰² Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 45-47.

approach, which is much better than the old approach, but you don't do it properly and therefore these items are being funded out of prevention dollars, which is kind of reminiscent [of] what happened [under Directive 20-1] to some degree, only I think it's more – I think it's somewhat sadder now that we do have this more enlightened approach.⁹⁰³ (emphasis added)

523. The situation is similar in Ontario under the 1965 Agreement, which does not provide any funding for capital costs.⁹⁰⁴ In fact, Ms. Stevens testified that her “office is in a trailer”.⁹⁰⁵
524. However, Dr. Blackstock testified that as a social worker off reserve in the province of British Columbia, she had “a very good building that was accessible to persons with disabilities, child friendly, childproof, child safety. It also had provisions for [social work], for family conferencing, two-way mirrors [...] security, secure file room.”⁹⁰⁶ In contrast, Dr. Blackstock described her working conditions as a social worker on reserve in British Columbia as follows:

DR. BLACKSTOCK: [...] When I went to my first day of work at the Squamish Nation, it was a rainy day. And the rain would drop on the high-voltage power lines above our parking lot that were strung over our office and sparks would fly.⁹⁰⁷

b.iii.iii. Information Technology

525. Independent reports have also found that AANDC's funding formulas do not provide adequate funding for information technology.⁹⁰⁸
526. Under Directive 20-1, which was developed in the late 1980's, AANDC did not provide any funding specifically for information technology.⁹⁰⁹ These costs were, once again,

⁹⁰³ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 90.

⁹⁰⁴ Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/19, COO-95/64; see also testimony of Phil Digby, Transcript Vol. 59 at p. 93.

⁹⁰⁵ Testimony of Theresa Stevens, Transcript Vol. 25 at p. 31.

⁹⁰⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 190.

⁹⁰⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 190.

⁹⁰⁸ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 21-27; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6.

⁹⁰⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 188; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.

intended to be covered under a First Nations child and family service agency's fixed operations budget, and were "very minimal".⁹¹⁰

527. Under EPFA, the situation remains the same – funding for information technology is insufficient.⁹¹¹ Carolyn Bohdanovich, Director of Operations at West Region in Manitoba,⁹¹² testified that at her agency it was only "in the past year that [they received internet] connectivity in [their First Nation] communities".⁹¹³ Prior to that, up to 2012, their communities either had "dial-up" or did not have any internet access.⁹¹⁴
528. Likewise, Ms. Cope testified that EPFA does not include "funding for capital assets" like computers, which are essential to the manner in which the Mi'kmaw Agency does business.⁹¹⁵ Judy Levi, who is currently a Consultant on First Nations child welfare in the province of New Brunswick, and was formerly the Coordinator of a First Nations federal and provincial tripartite committee on child welfare,⁹¹⁶ also testified that First Nations child and family service agencies in that province are still under Directive 20-1, and receive no funding from AANDC for capital assets or computers.⁹¹⁷ Mr. Plouffe testified about using his "enveloppe globale" in order to ensure that each worker has access to a computer terminal.⁹¹⁸
529. In Ontario, the situation is the same. AANDC does not provide funding under the 1965 Agreement for the acquisition of capital assets.⁹¹⁹
530. The lack of funding for information technology under Directive 20-1, EPFA and the 1965 Agreement has a real and significant impact on the ability of agency staff to properly carry out their roles and responsibilities, and also on the quantity and quality of services available to First Nations child and families on reserve. Dr. Loxley testified about the

⁹¹⁰ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also testimony of Dr. John Loxley, Transcript Vol. 27 at p. 51; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 71.

⁹¹¹ Testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 127-130.

⁹¹² Carolyn Bohdanovich's Curriculum Vitae, CHRC BOD, Ex. HR-08, Tab 121.

⁹¹³ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 121.

⁹¹⁴ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at p. 121.

⁹¹⁵ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 90-91.

⁹¹⁶ Judy Levi's Curriculum Vitae, CHRC BOD, Ex. HR-09, Tab 142.

⁹¹⁷ Testimony of Judy Levi, Transcript Vol. 30 at p. 52.

⁹¹⁸ Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 78-79.

⁹¹⁹ Testimony of Theresa Stevens, Transcript Vol. 25 at p. 77.

impact AANDC's underfunding has had on First Nations child and family service agencies:

DR. LOXLEY: [... If] insufficient provision is made for capital and for computer systems, then you get this kind of outcome, that Saskatchewan is spending prevention dollars on these items, which was not the intent of [EPFA] at all.

So that's one reason why we try to separate out the issues and to provide for them systematically so that you did not have that kind of encroachment on other budget hits.

[...]

The approach we took in [*Wen:De*] was that things have to move in lockstep, so if you are taking children into care and you are meeting provincial standards, or not meeting them, you have to report on that and you can't report on that if you don't have the technology to do so.

If you are increasing your staff there is going to be an additional capital cost. If you don't have the money for that, where [are] the staff going to work?⁹²⁰

531. Notwithstanding the fact that the lack of funding for information technology and computers has been identified as a shortcoming in its funding formulas for more than a decade, AANDC maintains that they are considering what the "information management requirements" are and whether "additional funding" will be required to ensure that First Nations child and family service agencies are able to access and use the systems already available in the provinces.⁹²¹

b.iii.iv. Legal Costs

532. Legal costs are an issue of contention between First Nations child and family service agencies and AANDC. Under Directive 20-1 and EPFA, agencies received a limited amount of funding for legal costs from their fixed operations budget.⁹²² According to the FNCFS Program Manual, those limited funds are intended to cover "legal services related

⁹²⁰ Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 114, 120-121.

⁹²¹ Testimony of Barbara D'Amico, Transcript Vol. 54 at p. 229.

⁹²² Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also letter from AANDC (Manitoba Region) to First Nation Child and Family Service Agencies in Manitoba dated March 28, 2002, CHRC BOD, Ex. HR-08, Tab 123; see also letter from Assembly of Manitoba Chiefs to the Honourable Paul Martin dated February 20, 2004, CHRC BOD, Ex. HR-08, Tab 125; see also letter from AANDC (Atlantic Region) to 4-Directions Agency in New Brunswick dated July 11, 2001, CHRC BOD, Ex. HR-08, Tab 139; see also letter from AANDC to Mi'kmaw Family and Children's Services dated July 31, 2003, CHRC BOD, Ex. HR-12, Tab 256.

to both agency operations and court costs incurred as a result of a child's apprehension".⁹²³

533. As previously noted, AANDC has fixed the costs associated with eligible operations services in Directive 20-1,⁹²⁴ including legal services, which are capped at \$5,000 per agency.⁹²⁵ Under EPFA, legal costs remain fixed under an agency's operations funding stream.⁹²⁶ Dr. Blackstock described her experience as a social worker on reserve in British Columbia, and the impact this fixed funding had on First Nations child and family service agencies:

DR. BLACKSTOCK: Well, the [Directive 20-1] provides for \$5,000 in legal fees per year. That does not go very far, you know...and that does not address the needs of kids. If we had an inquest or something, that could be gone in just a consultation to the inquest. So we had no specialized legal counsel.

On occasion, I would ask if we could just access the Band lawyer on occasion, but that was a person who specialized often in Aboriginal law and other areas of law, wasn't a Child and Family Service worker. And it was only available to us because the First Nation was generous enough to provide it.

It wasn't – if we weren't fortunate enough to be in a nation that had their own legal counsel, we would be without legal counsel. And [the court appearances are] a situation where lawyers are expected to be a part of the process and in court...

MR. DUFRESNE: Were you able to use [the province of B.C.'s] Attorney General counsel?

DR. BLACKSTOCK: No.

[...]

And in fact, I found myself – and I – you know, I did [this] out of desperation, but I would call Legal Aid and I'd see if there was somebody on the phone who could volunteer their time or a law student, someone who could tell me about this stuff so that I could try to do the best job I could.

⁹²³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1.

⁹²⁴ Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 30.

⁹²⁵ Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also Child Welfare and Family Services Funding Formula Development, CHRC BOD, Ex. HR-13, Tab 360 at p. 6; see also testimony of Judy Levi, Transcript Vol. 30 at pp. 62-64.

⁹²⁶ Testimony of Barbara D'Amico, Transcript Vol. 52 at pp. 59-60; Vol. 53 at pp. 55-58; see also testimony of Carol Schimanke, Transcript Vol. 62 at pp. 58-63; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 83-86.

But I never had to call Legal Aid or law students when I was working [as a social worker for the province of B.C.].⁹²⁷ (emphasis added)

534. Social workers across Canada – both on and off reserve – must adhere to the child welfare legislation and standards in their respective jurisdictions. In light of the fact that apprehending a child and removing them from their families and homes is such a serious “intervention in the freedom of a child [...] and their families”, provincial legislation generally requires a court appearance within a certain period of time after the child has been removed.⁹²⁸ Dr. Blackstock described the importance of legal counsel in the child welfare context as follows:

DR. BLACKSTOCK: As social workers we don't get a lot of legal training [...] it's a requirement in the provincial and territorial jurisdictions that you alone don't go [to the court appearance] as a social worker...And so what you want ideally is an expert lawyer in child and family services law there with you as a social worker to present the arguments to the court [with respect to the reasons for the apprehension] and to be in receipt of the arguments presented by family counsel, or in some cases, the First Nation itself might be represented, or other parties, to be able to address those concerns. It would be inappropriate for a social worker who has done a removal to show up and represent themselves.

MR. DUFRESNE: So [...] could a child welfare agency operate without legal counsel?

DR. BLACKSTOCK: Not in my view. Not within the provincial statute and territory statute framework.⁹²⁹

535. Since AANDC considers legal costs to be covered within a First Nations child and family service agency's fixed operations budget, it is also subject to major downward adjustments based on the size of a community's child population.⁹³⁰ As noted in the *Wen:De* reports, the design of AANDC's funding model means that even a “slight increase or decrease in child population can result [...] in a huge increase or decrease in

⁹²⁷ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 186-188.

⁹²⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 131-132; Vol. 2 at pp. 179-180; see also testimony of Derald Dubois, Transcript Vol. 9 at pp 69-70.

⁹²⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 131-132.

⁹³⁰ Directive 20-1, CHRC BOD, Ex. HR-01, Tab 2 at pp. 10-11, section 19.1; see also Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 22, section 3.2.1; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 61, section 19.2; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.

overhead funding available to agencies.”⁹³¹ This has a real impact on the amount of funding available for legal costs.⁹³²

536. In contrast, AANDC does not impose “population thresholds” on the provinces with whom they enter into agreements for the provision of child welfare services to First Nations on reserve. For example, the B.C. Service Agreement does not impose population thresholds.⁹³³
537. Notwithstanding AANDC’s steadfast position that “the legal line in the operational formula [is] sufficient”,⁹³⁴ First Nations child and family service agencies have long argued that the legal costs associated with the apprehension of a child should not be “fixed” under the operations budget, but rather reimbursed as part of maintenance.⁹³⁵ The *Wen:De* reports also made this recommendation.⁹³⁶
538. Ms. Cope, for example, testified that the Mi’kmaw Agency in Nova Scotia had legal fees related to children in care totalling \$2 million.⁹³⁷ The Agency contends, with the support of the province, that these types of legal costs should be considered eligible maintenance expenditures according to the provincial definition of maintenance.⁹³⁸ Indeed, Ms. D’Amico noted as an example in her testimony that unlike AANDC, the province of Nova Scotia considers these types of costs to be reimbursable maintenance expenditures.⁹³⁹
539. Dr. Loxley also described this discrepancy in his testimony:

DR. LOXLEY: [...] The focus of our work [in *Wen:De*] was on the operations side, but inevitably maintenance was an issue. It was an issue mainly because the line between maintenance and operations is a very blurred one and the First Nations Agencies argued for many years that items that should properly have been reflected in maintenance – and, of course, maintenance is fully paid and it’s a fairly automatic kind of payment and there’s little dispute there in terms of relative size of payments vis-à-vis the provinces.

⁹³¹ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 23.

⁹³² Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 17-18.

⁹³³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 22.

⁹³⁴ Testimony of Barbara D’Amico, Transcript Vol. 53 at pp. 55-58.

⁹³⁵ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 57-59, 107-108, 121.

⁹³⁶ *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6 at p. 17.

⁹³⁷ Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 58.

⁹³⁸ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 57-59, 107-108, 121.

⁹³⁹ Testimony of Barbara D’Amico, Transcript Vol. 52 at pp. 59-60.

So the idea is that if you [were] to put items in maintenance they tend to be funded fairly efficiently, fairly quickly.

Over the years it's been argued that items that should have been in maintenance were pushed over into operations. It's a complicated field, but things like certain legal aspects of taking children into care, complicated health issues related to children going into care, assessment of children going into care, travel, legal issues and so on.

So, inevitable, if items were pushed out of maintenance [and] into operations that would squeeze the operations budget.⁹⁴⁰

540. Mr. Plouffe testified that his agency has a number of lawyers who serve as both legal advisors and litigators, and who attend court as required. Part of his agency's budget for legal services is provided by the province.⁹⁴¹

541. In her testimony, Ms. D'Amico noted that AANDC's failure to include legal costs related to the apprehension of a First Nations child was a gap in the EPFA funding model:

MS. D'AMICO: [...] What is missing from the EPFA formula is a line item for legal fees related to children...so that is something we will want to add to the EPFA formula.⁹⁴² (emphasis added)

542. AANDC's FNCFS Program Manual also recognizes that "legal costs [...] have become a larger issue than planned for when [Directive 20-1] was developed."⁹⁴³

b.iii.v. Travel

543. Under Directive 20-1 and EPFA, travel costs are also fixed within a First Nations child and family service agency's operations budget.⁹⁴⁴ The challenges and problems that AANDC's fixed operations budget creates have already been explored in these submissions.

544. Travel is a necessary reality of the job for social workers, who are required to visit families and children in person within a certain period of time according to most

⁹⁴⁰ Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 7-8.

⁹⁴¹ Testimony of Sylvain Plouffe, Transcript Vol. 37 at pp. 40-42.

⁹⁴² Testimony of Barbara D'Amico, Transcript Vol. 52 at p. 88.

⁹⁴³ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 14, section 2.2.3.

⁹⁴⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 13, section 2.2.2; see also Updated Program Manual 2012, CHRC BOD, Ex. HR-13, Tab 272 at p. 36, section 3.5; see also Updated Directive 20-1, CHRC BOD, Ex. HR-13, Tab 273 at p. 59, section 19.1; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at pp. 32-33; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 17; see also testimony of Derald Dubois, Transcript Vol. 9 at p. 74.

provincial child welfare statutes.⁹⁴⁵ As Dr. Blackstock noted, depending on the number of First Nations communities an agency is serving, social workers “can spend a lot of [their] time [...] travelling to these communities”.⁹⁴⁶

545. This is especially evident in Nova Scotia, where the Mi’kmaw Agency serves all of the First Nations communities in the province.⁹⁴⁷ The province has found that as a result, the Agency cannot meet the mandated statutory response times, which they are required to do in order to maintain their delegation and satisfy the terms and conditions of AANDC’s FNCFS Program and funding.⁹⁴⁸ Therefore, the province has recommended that AANDC provide funding for the creation of a third “office in southwest Nova Scotia.”⁹⁴⁹ In response to this request, AANDC has indicated that “they [will] think about it”.⁹⁵⁰
546. Ms. Cope testified that for the Mi’kmaw Agency, the under-staffing, combined with the broad geographical area which they serve, makes it difficult to meet the response times that are provincial statutory requirements.⁹⁵¹
547. Ms. Cope also explained the importance of travel for a social worker in the performance of his or her duties:

MS. COPE: [...] I mean, certainly, one of [the] efficiencies we could see would be having a third office, which hopefully would cut down considerably on travel [...].

One of the questions we [get] asked is, well, why are people traveling so much? And, you know, the real answer to that is, well, you can’t very well have social workers sitting at their desk, it’s not very useful, they’re not doing they’re job [if that’s the case], so obviously travel is always going to – especially when we are [delivering services to] the whole province, is always going to be an issue. Most of our travel expenses are program-related and not admin-related.⁹⁵²

548. Likewise, Ms. Bohdanovich testified about the importance of travel for First Nations child and family service agencies in Manitoba, given the types of child welfare cases that come to her agency’s attention. She noted that Manitoba’s child welfare legislation

⁹⁴⁵ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.

⁹⁴⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 126.

⁹⁴⁷ Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 40.

⁹⁴⁸ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.

⁹⁴⁹ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.

⁹⁵⁰ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 69-71.

⁹⁵¹ Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 178-179.

⁹⁵² Testimony of Brenda Ann Cope, Transcript Vol. 29 at pp. 56-57.

requires that social workers “do a face-to-face visit every 30 days”, and “even more often” if the case involves a high-risk child or family.⁹⁵³

549. Practically speaking, if a social worker on reserve has 30 cases, this means that out of the approximately 20 business days in a month, they are travelling to do a face-to-face visit almost every day.⁹⁵⁴ As Ms. Bohdanovich testified, these are essential front-line services that cannot be cut and must be properly funded in order for agencies to comply with provincial legislation and standards.⁹⁵⁵
550. With respect to travel for purposes other than child protection, such as training and meetings, First Nations child and family service agencies are trying to find ways to reduce these costs.⁹⁵⁶ However, as previously noted, funding for information technology and capital assets is extremely limited under both Directive 20-1 and EPFA. Therefore, agencies’ internet connectivity has been very limited to date, making it difficult to participate in these types of activities via video conferencing or Skype.⁹⁵⁷
551. In her testimony, Ms. D’Amico acknowledged that travel is a necessary reality for First Nations child and family service agencies.⁹⁵⁸ However, AANDC’s funding formulas do not “take into account the need for [additional] staff [...] because of longer travel” times,⁹⁵⁹ even in circumstances like Nova Scotia, where Mi’kmaw Agency social workers are travelling “for up to 14 hours at a time” between communities.⁹⁶⁰ There is no adjustment included in either funding formula to address this pressing need.
552. Dr. Loxley testified about this structural deficiency in the funding formula:

DR. LOXLEY: [...] I would say, judging by the evaluations that have been [conducted] so far [on EPFA], there are areas in which, systematically, the new approach could be improved and I would say that one of those seems to be

⁹⁵³ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.

⁹⁵⁴ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 122-123.

⁹⁵⁵ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117, 122-123; see also West Region Child and Family Services Five Year Strategic Service Plan, CHRC BOD, Ex. HR-08, Tab 116 at p. 35; see also Minutes of Audit Meetings and Interviews – OAG Report 2008 (2007), CHRC BOD, Ex. HR-15, Tab 448 at p. CAN029350/1.

⁹⁵⁶ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 116-118.

⁹⁵⁷ Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 113-117; see also testimony of Raymond Shingoose, Transcript Vol. 31 at pp. 116-118.

⁹⁵⁸ Testimony of Barbara D’Amico, Transcript Vol. 51 at p. 70; Vol. 52 at pp. 64-65.

⁹⁵⁹ Testimony of Barbara D’Amico, Transcript Vol. 52 at pp. 163-164.

⁹⁶⁰ Testimony of Barbara D’Amico, Transcript Vol. 52 at pp. 163-164; see also testimony of William McArthur, Transcript Vol. 63 at pp. 87, 168.

remoteness. Lots of complaints in the Alberta review about insufficient money for remoteness and therefore for travel, staffing.⁹⁶¹

553. In contrast, provincially, the actual costs of social worker travel are generally reimbursed. Ms. Bohdanovich testified that in Manitoba, where agencies serve children both on and off reserve, they bill the province “on a monthly basis” and get reimbursed for the costs of their travel.⁹⁶² Likewise, Ms. Cope testified that the province of Nova Scotia funds the Mi’kmaw Agency directly for “a social worker’s salary and travel for every 20 kids”.⁹⁶³

b.iii.vi. Remoteness

554. There is a remoteness factor built into operations funding under both Directive 20-1 and EPFA. As previously noted, agencies are eligible to receive an adjustment based on the remoteness factor of each member band, which is then averaged and used to adjust funding as follows:

- the adjustment factor for remoteness is multiplied by \$9,235.23;
- the remoteness factor is multiplied by \$8,865.90 times the number of bands within the agency’s catchment area;
- the child population (0 to 18 years) is multiplied by \$73.65 times the remoteness factor.⁹⁶⁴

555. In his testimony, Dr. Loxley pointed out the flaws with this band-based calculation for remoteness adjustments, which does not necessarily address the real and greater needs of First Nations communities and the service deficits that so many face on reserve:

DR. LOXLEY: [...] The remoteness [adjustment has] two problems with it; one is that it [is] based on the nearest service centre, but service centres often provided no services in child welfare, so they were not centres.

So what you needed was remoteness, we thought [in *Wen:De*, but] remoteness from a more meaningful centre that could provide assistance to children. That’s the first problem.

⁹⁶¹ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 89; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48.

⁹⁶² Testimony of Carolyn Bohdanovich, Transcript Vol. 22 at pp. 23-24.

⁹⁶³ Testimony of Brenda Ann Cope, Transcript Vol. 29 at p. 142.

⁹⁶⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at pp. 22-23, section 3.2.3.

The second problem was, again, it was very jumpy, it went up in large discrete amounts that had no rationale as far as we could see, so that the gap between the most remote and the least remote was very, very high, but in the middle there was all kinds of issues that weren't well handled by the formula.⁹⁶⁵

b.iii.vii. Intake and Investigation

556. First Nations child and family service agencies are responsible for the provision of prevention services as well as child protection services. Pursuant to Directive 20-1 and EPFA, funding is flowed to the agencies based on whether a First Nations child and/or family is in one stream or the other (i.e., prevention or maintenance funding). However, AANDC does not provide funding to the agencies for the “intake and investigation” work they do.
557. Intake and investigation includes the preliminary assessment of a child and/or family that has been brought to the attention of a First Nations child and family service agency. Before a child is either removed from their home and brought into child welfare care, or receives prevention services, the agency must conduct an investigation to determine the extent of the risk to the child's safety and wellbeing, and the best way forward.⁹⁶⁶
558. Investigations into allegations of maltreatment and neglect can take a great deal of time, especially on reserve where First Nations children and families often have multiple and complex needs. Mr. Plouffe, whose agency serves children and families both on and off reserve in Québec, testified that a greater number of employees are required to address the number of reports and greater needs of the First Nations children and families on reserve. For example, Mr. Plouffe requires the same number of social workers be devoted to a First Nations community of 1,500 on reserve, as he does a community with a population of 48,000 off reserve.⁹⁶⁷
559. Intake and investigation is work that the provinces do off reserve, but AANDC does not provide funding to cover these costs for First Nations child and family service agencies

⁹⁶⁵ Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 16-17, 89; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 21, 195; Vol. 3 at pp. 120-122; Vol. 4 at p. 34; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48.

⁹⁶⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at pp. 111-114.

⁹⁶⁷ Testimony of Sylvain Plouffe, Transcript Vol. 37 at p.33.

on reserve. In her testimony, Ms. D’Amico admitted that this was one of the “major items” that AANDC had “missed” in developing the EPFA funding model:

MS. D’AMICO: One of the major items that we missed, that didn’t come out in our early tripartite discussions, was an intake and investigation [service] line.

[...]

And that has caused a caseload issue because now we have provinces that are delegating down that responsibility to agencies – it’s been happening for a while, so all of a sudden when you have, instead of a caseload of 60, because this is your children-in-care, your caseload is up in the hundreds because you are doing that preliminary piece.

So this is an issue that we are trying to address, we are looking at doing all of the calculations, and I believe some of the documentation that has been disclosed, the Way Forward deck outlines why those numbers were so high. It included – so Enhanced EPFA – or EPFA-Plus...so improving on EPFA would include a line item for intake and investigation, but we would need a source of funds for that.

MS. CHAN: Do you currently have that source of funds?

MS. D’AMICO: No, we do not.

b.iii.viii. Cost of Living Adjustment

560. When AANDC initially developed Directive 20-1 in the late 1980’s, a cost of living adjustment (otherwise known as an adjustment for inflation) was built into the funding formula.⁹⁶⁸ Rightfully so, at the time AANDC anticipated that there “were some items in the operations formula that were cost-sensitive and that would need to be adjusted over time to keep up [with] the cost of living.”⁹⁶⁹
561. However, in 1995, AANDC stopped providing a cost of living adjustment to First Nations child and family service agencies.⁹⁷⁰ Since that time – almost twenty years ago – there has been no cost of living adjustment applied as part of the FNCFS Program funding formulas to First Nations agencies.⁹⁷¹ The only exception to this was a one-time

⁹⁶⁸ Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 33.

⁹⁶⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁹⁷⁰ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 185-186.

⁹⁷¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also Journal Article, “Keeping First Nations children at home” A few Federal policy

adjustment in 2005 of 8.24%, which still fell “far short of making up for the substantial inflation losses during that period of time [between 1995 and 2005].”⁹⁷²

562. In effect, the lack of cost of living adjustment in AANDC’s funding formulas compounds the challenges they face to provide comparable levels of service to the province and territories.⁹⁷³ The cost of living back in 1995 was far less than what it is today, so First Nations child and family service agencies have effectively lost their “purchasing power” because of way AANDC has chosen to apply its funding formulas on reserve.⁹⁷⁴ The funding formulas themselves in fact call for a cost of living adjustment – AANDC has decided not to apply it to First Nations on reserve.⁹⁷⁵
563. This has a serious impact on the quantity and quality of services available to First Nations children on reserve, who are undoubtedly among the most vulnerable in the country.⁹⁷⁶ As Dr. Loxley testified, AANDC’s failure to adjust for inflation means that the “real value of the dollars going to First Nations Agencies [is] actually declining annually quite significantly”.⁹⁷⁷
564. In contrast, AANDC has continued to provide a cost of living adjustment to the province of British Columbia pursuant to the former B.C. MOU and current Service Agreement.⁹⁷⁸ First Nations child and family service agencies in British Columbia do not receive any concordant cost of living or inflation adjustment under Directive 20-1.⁹⁷⁹
565. AANDC’s decision to halt the cost of living adjustments for First Nations child and family service agencies has been the subject of criticism in reports dating back to 2000. The NPR found that AANDC’s funding formula is too “rigid and unilateral” and does not

changes could make a big difference” (2007), CHRC BOD, Ex. HR-05, Tab 52; see also Meeting Minutes – B.C. Teleconference, Respondent’s BOD, Ex. R-13, Tab 29 at p. 2.

⁹⁷² Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁹⁷³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 27, 33-35; see also e-mail from Steven Singer to Odette Johnston dated October 8, 2012, CHRC BOD, Ex. HR-13, Tab 287; see also AANDC Power Point, “Renewal of the First Nations Child and Family Services Program” (October 31, 2012), CHRC BOD, Ex. HR-13, Tab 288 at pp. 3, 5, 8-9; see also AANDC Power Point, “Renewal of the First Nations Child and Family Services Program” (November 2, 2012), CHRC BOD, Ex. HR-13, Tab 289 at pp. 3-4, 8.

⁹⁷⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁹⁷⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁹⁷⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

⁹⁷⁷ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 15.

⁹⁷⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also testimony of Barbara D’Amico, Transcript Vol. 53 at pp. 108-110; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5.

⁹⁷⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43; see also testimony of Barbara D’Amico, Transcript Vol. 53 at pp. 108-110.

allow cost of living adjustments.⁹⁸⁰ Therefore, the report recommended that AANDC “consider on a priority basis the reinstatement of the annual cost of living adjustments as soon as possible, and to redress the lack of any such adjustment between 1995 and 2000” (the date of the final report).⁹⁸¹ (emphasis added)

566. Similarly, the *Wen:De* reports concluded that the effect of AANDC’s failure to provide a cost of living adjustment to First Nations agencies was a funding shortfall of 21.21% between 1995 and 2005, “purely on account of inflation”.⁹⁸² In addition, the report found that as a result of the lack of a cost of living adjustment, First Nations child and family service agencies were given \$112 million less in operations funding under Directive 20-1 than they would have otherwise received.⁹⁸³ The cumulative effect of these losses, according to the report, led to “both under-funding of services and to distortion in the services funded since some expenses subject to inflation must be covered, while others may be more optional”.⁹⁸⁴ (emphasis added)

567. Dr. Loxley, who examined the EPFA funding formula, testified that “inflation has not been fully accounted for in the [EPFA] agreements so far.”⁹⁸⁵ As a result, and given that AANDC’s funding for the FNCFS Program is insufficient to meet the needs of First Nations children and families on reserve, Ms. Murphy testified that the Department is forced to re-allocate funds from other areas in order to cover the costs.⁹⁸⁶

568. For example, AANDC has re-allocated from on reserve housing and infrastructure in order to cover deficits in the FNCFS Program.⁹⁸⁷ This re-allocation is, at least in part,

⁹⁸⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 13-14, 92-93, 96-97.

⁹⁸¹ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121.

⁹⁸² *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46; see also testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 26-30.

⁹⁸³ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 46.

⁹⁸⁴ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45.

⁹⁸⁵ Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 129-130.

⁹⁸⁶ Testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 188-191; see also AANDC “Internal Re-allocation Requests” (2), CHRC BOD, Ex. HR-13, Tab 298; see also AANDC Power Point, “2012-13 Main Estimates – Key Area Breakdown”, CHRC BOD, Ex. HR-13, Tab 293; see also AANDC Briefing Note, “Costs Associated with the Income Assistance and First Nations Child and Family Services Programs” (2007), CHRC BOD, Ex. HR-14, Tab 349; see also AANDC Power Point, “Cost Drivers and Pressures – the Case for New Escalators” (2013), CHRC BOD, Ex. HR-15, Tab 413 at pp. 3-4, 6, 9-10, 17; see also AANDC Power Point, “Sustainability of Programming” (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 6-7, 11-12, 17-18; see also AANDC Power Point, “Cost Drivers – The Case for New Escalators” (2013), Respondent’s BOD, Ex. R-13, Tab 19 at pp. 3, 5-6, 8.

⁹⁸⁷ AANDC “Internal Re-allocation Requests” (2), CHRC BOD, Ex. HR-13, Tab 298; see also AANDC Power Point, “2012-13 Main Estimates – Key Area Breakdown”, CHRC BOD, Ex. HR-13, Tab 293; see also AANDC Briefing Note, “Costs Associated with the Income Assistance and First Nations Child and Family Services Programs” (2007), CHRC BOD, Ex. HR-14, Tab 349 at pp. 1-2; see also AANDC Power Point, “Cost Drivers and

necessary because AANDC has, since 1996, had a maximum annual budgetary increase of 2% for the FNCFS Program (otherwise known as the “2% cap”). Funding available under the program is limited because the annual increase of 2% falls far short of the actual annual increases in FNCFS Program expenditures.⁹⁸⁸ AANDC is aware that the 2% cap has resulted in growing “A-base shortfalls” because it “lags inflation and demographic-driven demand”.⁹⁸⁹

569. This impedes the ability of First Nations child and family service agencies “to ‘keep up’ with provincial investments” in child welfare on reserve,⁹⁹⁰ and the re-allocation from other essential services ultimately exacerbates the challenges First Nations children and families face on reserve. Re-allocation of funding to the FNCFS Program results in deficits and inequities in other areas, which also impacts the quality of life First Nations people enjoy on reserve. Using the example of re-allocation from housing and infrastructure, this may also impact the FNCFS Program since overcrowded and unsafe living conditions are factors that contribute to a First Nations child being identified as “at risk” and ultimately apprehended.⁹⁹¹
570. The situation is similar in Ontario. The 1965 Agreement cost-sharing formula has been criticized for its failure to account for realistic “northern costs”, including the “higher cost of services in northern and remote communities”.⁹⁹²

Pressures – the Case for New Escalators” (2013), CHRC BOD, Ex. HR-15, Tab 413 at pp. 3-4, 6, 9-10, 17; see also AANDC Power Point, “Sustainability of Programming” (2013), CHRC BOD, Ex. HR-15, Tab 414 at pp. 6-7, 11-12, 17-18; see also AANDC Power Point, “Cost Drivers – The Case for New Escalators” (2013), Respondent’s BOD, Ex. R-13, Tab 19 at pp. 3, 5-6, 8.

⁹⁸⁸ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 14.

⁹⁸⁹ AANDC Power Point, “Sustainability of Funding: Options for the Future” (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, “Is 2% Enough: AANDC Funding for First Nations Basic Services” (2007), CHRC BOD, Ex. HR-14, Tab 383 at pp. 2, 4, 8; see also AANDC Power Point, “First Nations Basic Services: Cost Drivers Project” (2005), CHRC BOD, Ex. HR-15, Tab 472 at pp. 3-4, 11, 18, 23, 32-37.

⁹⁹⁰ AANDC Power Point, “Sustainability of Funding: Options for the Future” (2012), CHRC BOD, Ex. HR-13, Tab 291 at p. 7; see also AANDC Power Point, “Cost Drivers – The Case for New Escalators” (2013), Respondent’s BOD, Ex. R-13, Tab 19 at pp. 4-6, 8, 17.

⁹⁹¹ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 8; see also National Aboriginal Economic Development Board, “Recommendations on Financing First Nations Infrastructure” (2012), CHRC BOD, Ex. HR-12, Tab 251 at pp. 4-9; see also FNCIS Report 2003, CHRC BOD, Ex. HR-04, Tab 33 at pp. 3-5, 24, 29; see also CIS-2008 Major Findings Supplementary Tables, CHRC BOD, Ex. HR-07, Tab 92; see also Centre of Excellence for Child Welfare, CHRC BOD, Ex. HR-07, Tab 94 at p. CAN004826_0006.

⁹⁹² Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/64; see also Aboriginal Child Welfare in Ontario: A Discussion Paper, CHRC BOD, Ex. HR-11, Tab 212 at pp. CHRC650/28 – CHRC650/30; see also Northern Remoteness Study and Analysis of Child Welfare Funding Model and Implications on Tikinagan Child and Family Services and Payukotayno Family Services, CHRC BOD, Ex. HR-11, Tab 219 at pp. 3-17; see also A Description of the Child Welfare System Landscape in Ontario, CHRC BOD, Ex. HR-11, Tab 220 at

b.iii.ix. Conclusion

571. The Commission submits that in failing to provide adequate funding for the foregoing key elements of child welfare service delivery on reserve, AANDC's FNCFS Program and corresponding funding formulas adversely differentiates against First Nations children and families ordinarily resident on reserve.
572. Specifically, the lack of funding for salaries, capital infrastructure, information technology, legal costs, travel, remoteness, intake and investigation and the cost of living seriously limits and constrains the ability of First Nations child and family service agencies to deliver services to First Nations children on reserve in a culturally appropriate and reasonably comparable manner to those provided to children off reserve by the provinces and territories.
573. This adverse differentiation is demonstrated not only by comparing the levels of child welfare funding and services provided by AANDC on reserve and the provinces off reserve, but also by comparing the funding AANDC provides to First Nations child and family service agencies as compared to the provincial governments of British Columbia and Alberta for the provision of child welfare services on certain reserves in those regions, which will be further described below.
574. The shortcomings in AANDC's FNCFS Program and funding formulas described above, and the impacts they have on the quality and quantity of child welfare services available to First Nations children on reserve, have been well documented for more than a decade.⁹⁹³ Yet, First Nations child and family service agencies continue to run deficits because AANDC's FNCFS Program and funding formulas are not sufficient to meet, and not flexible enough to adjust for, the greater needs of First Nations people on reserve. Ultimately, the effects of this underfunding are felt most pointedly by First Nations children on reserve.

p. CHRC649/39; see also Report on Funding Issues and Recommendations to the Ministry of Children and Youth Services, CHRC BOD, Ex. HR-11, Tab 230 at pp. 4-6, 11, 14-15, 23; see also Hand-in-Hand: A Review of First Nations Child Welfare in New Brunswick, CHRC BOD, Ex. HR-05, Tab 60 at pp. 17-20.

⁹⁹³ NPR, CHRC BOD, Ex. HR-01, Tab 3; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45.

b.iv. AANDC has Failed to Correct the Known Flaws and Inequities in both Directive 20-1 and EPFA, and to Review the 1965 Agreement

575. The funding formulas at issue in the present complaint date back more than fifty years, starting with the 1965 Agreement, followed by Directive 20-1, which came into effect in 1990 and still operates in three provinces and the Yukon Territory today, and finally EPFA, which was introduced in 2007 and has been implemented in six provinces to date.
576. Since the implementation of the FNCFS Program in 1990, there have been a number of independent and even international reviews of the Program and its funding formulas that have found AANDC's funding for First Nations child and family services on reserve to be flawed and inequitable. These reports, along with their findings and recommendations to address the shortcomings and modify AANDC's funding formulas, have been documented throughout these submissions.⁹⁹⁴
577. In addition to these reports, AANDC has conducted its own reviews of both Directive 20-1 and EPFA, which have identified shortcomings, weaknesses and flaws in both formulas.⁹⁹⁵

⁹⁹⁴ NPR, CHRC BOD, Ex. HR-01, Tab 3; see also *Wen:De* Report One, CHRC BOD, Ex. HR-01, Tab 4; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5; see also *Wen:De* Report Three, CHRC BOD, Ex. HR-01, Tab 6; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271; see also UNCRC Report 2003, CHRC BOD, Ex. HR-03, Tab 23; see also UNCRC General Comment 2009, CHRC BOD, Ex. HR-03, Tab 24; see also Canada's 3rd and 4th Reports to UNCRC, CHRC BOD, Ex. HR-03, Tab 25; see also UNCRC Report 2012, CHRC BOD, Ex. HR-05, Tab 57; see also Auguste Solutions Nova Scotia Report, CHRC BOD, Ex. HR-09, Tab 204; see also Auguste Solutions "Implementation Evaluation of the Enhanced Prevention Focused Approach: Evaluation Technical Report" (2012), CHRC BOD, Ex. HR-09, Tab 205 ["Auguste Solutions Evaluation of EPFA"]; see also First Nations Child and Family Services Program: Risk Assessment Results (2006), CHRC BOD, Ex. HR-14, Tab 363; see also Report to the Minister of Justice and Attorney General of Alberta – Public Fatality Inquiry (June 21, 2013), CHRC BOD, Ex. HR-11, Tab 231 at p. 6; see also Honourable Ted Hughes, "The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children" (2013), CHRC BOD, Ex. HR-14, Tab 389 at pp. 389-395; see also Alberta Child Intervention Review Panel, "Closing the Gap between Vision and Reality: Strengthening Accountability, Adaptability and Continuous Improvement in Alberta's Child Intervention System (2010), Ex. C-2 at pp. 40-55.

⁹⁹⁵ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at pp. ii; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. v-viii, 29-31; see also Internal Audit Report on Mi'kmaw Children and Family Services Agency (2012), CHRC BOD, Ex. HR-05, Tab 51 at pp. 1-16; see also Mid-Term National Review for the Strategic Evaluation of the Enhanced Prevention Focused Approach for the First Nations Child and Family Services Program (2011), CHRC BOD, Ex. HR-08, Tab 113 at pp. v-vii, 18-20, 43; see also Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247; see also Evaluation of the First Nations Child and Family Services

578. In her testimony, Ms. D'Amico recognized that AANDC's FNCFS Program and funding under Directive 20-1 may not be comparable.⁹⁹⁶ More than two decades have passed since its implementation. During that time, AANDC has acknowledged on many occasions the perverse incentives and flawed assumptions inherent in that model that contribute to the increasing number of First Nations children in child welfare care.⁹⁹⁷ And yet, this funding formula lives on and continues to determine the availability and quality of child and family services for thousands of First Nations children in Canada.
579. As will be described further below, while EPFA represents AANDC's attempt to redress the known flaws and inequities in Directive 20-1, it has fallen short of its objective. In fact, since AANDC kept the funding structure and flawed assumptions of Directive 20-1 as the skeleton or basis of EPFA, the new funding formula perpetuates many of the structural deficiencies and inequities of Directive 20-1.⁹⁹⁸
580. In her testimony, Ms. D'Amico stated that the EPFA funding model had a number of shortcomings, including the fact that it does not take into account the early intake and investigation work agencies do,⁹⁹⁹ and does not adjust for situations where increasing numbers of children in care require agencies to use their operations and prevention funding in order to offset maintenance deficits.¹⁰⁰⁰ For example, the situation at the Mi'kmaw Agency in Nova Scotia, where high child protection caseloads have made it impossible for the Agency to provide prevention services to the First Nations on reserve in that province.¹⁰⁰¹

(FNCFS) Program (2007), CHRC BOD, Ex. HR-13, Tab 303; see also Five-Year Plan for Evaluation and Performance Measurement Strategies, CHRC BOD, Ex. HR-14, Tab 359; see also Fact Sheet: First Nations Child and Family Services, CHRC BOD, Ex. HR-04, Tab 38.

⁹⁹⁶ Testimony of Barbara D'Amico, Transcript Vol. 51 at pp. 179-180.

⁹⁹⁷ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at pp. ii, 17-18, 44; see also OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11; see also PAC Report 2009, CHRC BOD, Ex. HR-03, Tab 15; see also OAG Status Report 2011, CHRC BOD, Ex. HR-05, Tab 53; see also PAC Status Report 2012, CHRC BOD, Ex. HR-04, Tab 45; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.

⁹⁹⁸ DPRA Report, CHRC BOD, Ex. HR-13, Tab 271 at pp. CAN052861_0024, CAN052861_0036; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (October 31, 2012), CHRC BOD, Ex. HR-13, Tab 288 at pp. 3, 5, 8-9; see also AANDC Power Point, "Renewal of the First Nations Child and Family Services Program" (November 2, 2012), CHRC BOD, Ex. HR-13, Tab 289 at pp. 3-4, 8.

⁹⁹⁹ Testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 89-92; see also testimony of Derald Dubois, Transcript Vol. 9 at pp. 18-20.

¹⁰⁰⁰ Testimony of Barbara D'Amico, Transcript Vol. 53 at p. 79.

¹⁰⁰¹ Auguste Solutions Nova Scotia Report, CHRC BOD, Ex. HR-10, Tab 204 at pp. 6-7; see also letter from Mi'kmaw Family and Children's Services to AANDC dated July 31, 2012, CHRC BOD, Ex. HR-12, Tab 261.

581. Dr. Loxley testified about how the problems agencies are encountering with EPFA were largely predictable, as were the fundamental flaws with the assumptions AANDC has built into the EPFA funding model.¹⁰⁰²

582. Notwithstanding these known shortcomings with EPFA, Ms. Schimanke testified that the model had not been updated in Alberta since its implementation in 2007:

MS. SCHIMANKE: We continue to use the same formula since – since 2007-08 when it was implemented, yes.¹⁰⁰³

583. This is especially worrisome given that the EPFA funding model was initially set for a term of five years, which have long since passed in Alberta, and yet AANDC has not modified the model to adjust for the flaws and inequities that have been brought to its attention – both domestically and internationally – time and time again.

584. It is disappointing to note that these reports and recommendations, most of which AANDC has funded, contracted, participated in, accepted, approved and/or acknowledged, have not resulted in any meaningful or lasting change in the quality or quantity of funding and services for First Nations on reserve. AANDC is aware of the flaws and inadequacies of its own policies and funding formulas, but has failed to correct them.

585. As Dr. Blackstock noted in her opening statement before the Tribunal:

DR. BLACKSTOCK: [... All] parents, all people expect of one another that when we know better, we will do better for children.

In this case, [AANDC] knows better and didn't do better.¹⁰⁰⁴

586. As well, despite the fact that many reports¹⁰⁰⁵ over the past two decades have called on AANDC to initiate a formal review of Ontario's 1965 Agreement in order to determine whether it is, in fact, comparable and equitable, no such review has been undertaken.¹⁰⁰⁶

¹⁰⁰² Testimony of Dr. John Loxley, Transcript Vol. 27 at pp. 139-141.

¹⁰⁰³ Testimony of Carol Schimanke, Transcript Vol. 62 at p. 49.

¹⁰⁰⁴ Testimony of Dr. Cindy Blackstock, Transcript Vol. 1 at p. 45.

¹⁰⁰⁵ NPR, CHRC BOD, Ex. HR-01, Tab 3 at pp. 15-18, 119-121; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

¹⁰⁰⁶

b.v. Additional Concerns Regarding the Impact of Jurisdictional Disputes on the Availability and Accessibility of Services on Reserve

587. As previously discussed, Parliament unanimously adopted Jordan's Principle on December 12, 2007,¹⁰⁰⁷ the purpose of which is to ensure that "First Nation children [are not] denied access to government services or delayed receipt of access for government services because of additional barriers related to them being a First Nations child."¹⁰⁰⁸
588. Dr. Blackstock testified about the application of Jordan's Principle in the child welfare context, and noted that it is a mechanism through which existing gaps in jurisdiction and service delivery on reserve can be addressed in order to ensure that the services being provided to First Nations are reasonably comparable to those available to children living off reserve.¹⁰⁰⁹ She went on to state that Jordan's Principle is essentially "a very simple principle of equality."¹⁰¹⁰
589. As a result of jurisdictional disputes, children can be "placed into care to receive services, even though the placements often do not involve child protection issues",¹⁰¹¹ since the costs of maintaining a child in care are covered by AANDC.¹⁰¹² In contrast, children resident off reserve have access to the services they require through the province(s) – the services are primarily based on the needs of the child, and not the jurisdiction or authority of the responsible government.¹⁰¹³

¹⁰⁰⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 89; Vol. 3 at pp. 138-143; see also letter from Dr. Blackstock to the Honourable Chuck Strahl dated March 9, 2009, CHRC BOD, Ex. HR-06, Tab 67 at pp. 1-2; see also letter from the Honourable Chuck Strahl to Dr. Cindy Blackstock dated May 28, 2009, CHRC BOD, Ex. HR-06, Tab 68 at pp. 1-2.

¹⁰⁰⁷ Jordan's Principle Motion 296, CHRC BOD, Ex. HR-03, Tab 20 at p. 15 (pages unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 148-149.

¹⁰⁰⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 153-154.

¹⁰⁰⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at pp. 154-155; see also AANDC Briefing Note, "Jordan's Principle" (2008), CHRC BOD, Ex. HR-14, Tab 352; see also AANDC, "Jordan's Principle Dispute Resolution: Preliminary Report" (2009), CHRC BOD, Ex. HR-13, Tab 302 at pp. 12-15.

¹⁰¹⁰ Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 179.

¹⁰¹¹ AANDC Briefing Note, "Jordan's Principle and Children with Life Long Complex Medical Needs" (2007), CHRC BOD, Ex. HR-14, Tab 380; see also House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 40th Parl, 3rd Sess, No 40 (December 6, 2010) at p. 5 (Sheila Fraser, Auditor General of Canada).

¹⁰¹² As previously noted, under Directive 20-1, the actual costs of maintaining a child in care are covered by AANDC so long as they are deemed to be "eligible" maintenance expenditures. Under EPFA, the actual eligible costs of maintaining a child in care are covered but agencies have to work within their annual maintenance allocation, which is re-based each year.

¹⁰¹³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at pp. 195-196, 179.

590. In her 2008 report, the Auditor General found that jurisdictional disputes impact the “availability, timing and level of services [provided] to First Nations children”,¹⁰¹⁴ and that First Nations child and family service agencies were having to place children with special medical needs “outside of their” communities in order to facilitate “access to the medical services they need.”¹⁰¹⁵
591. Similarly, the *Wen:De* reports stated that “jurisdictional disputes continue to have significant impacts on the lived experiences of First Nations children – particularly those with special needs.”¹⁰¹⁶ Attempting to resolve these disputes requires a significant amount of time and effort from First Nations child and family service agencies; *Wen:De* found that social workers spent on average 54.25 hours resolving each dispute.¹⁰¹⁷
592. Even after the adoption of Jordan’s Principle, a 2012 study found that “First Nations children continue to be the victims of administrative impasses.”¹⁰¹⁸
593. Disputes between levels of government and also between various government departments “about who should fund services” can result in delay, disruption and or denial of a service for a First Nations child on reserve.¹⁰¹⁹ These issues are dealt with on an *ad hoc* case-by-case basis, and the federal government has not adopted an overarching policy to address these gaps in jurisdiction.¹⁰²⁰
594. For the foregoing reasons, the Commission submits that to the extent jurisdictional disputes continue to exist and remain unresolved by AANDC’s implementation of Jordan’s Principle, they constitute adverse differential treatment of First Nations on reserve by delaying, disrupting and or denying them meaningful access to necessary services.

¹⁰¹⁴ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at pp. 16-17, section 4.39.

¹⁰¹⁵ OAG Report 2008, CHRC BOD, Ex. HR-03, Tab 11 at p. 17, section 4.40.

¹⁰¹⁶ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 16.

¹⁰¹⁷ *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 17.

¹⁰¹⁸ Canadian Paediatric Society, “Are We Doing Enough? A status report on Canadian public policy and child and youth health” (2012), CHRC BOD, Ex. HR-06, Tab 83 at pp. 28-29; see also AANDC, “Jordan’s Principle Dispute Resolution: Preliminary Report” (2009), CHRC BOD, Ex. HR-13, Tab 302; see also AANDC Briefing Note, “Jordan’s Principle and Children with Life Long Complex Medical Needs” (2007), CHRC BOD, Ex. HR-14, Tab 380; see also Honourable Ted Hughes, “The Legacy of Phoenix Sinclair: Achieving the Best for All Our Children” (2013), CHRC BOD, Ex. HR-14, Tab 389 at p. 390.

¹⁰¹⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 2 at p. 39.

¹⁰²⁰ Testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 193; see also AANDC Briefing Note, “Jordan’s Principle and Children with Life Long Complex Medical Needs” (2007), CHRC BOD, Ex. HR-14, Tab 380.

b.vi. AANDC Reimburses the Provinces More than First Nations Child and Family Service Agencies for the Provision of Child Welfare Services on Reserve

595. As previously noted, AANDC reimburses some provinces directly for the provision of child welfare services to First Nations children on reserve, including: Ontario, pursuant to the 1965 Agreement;¹⁰²¹ Alberta, pursuant to the Administrative Reform Agreement;¹⁰²² and British Columbia, pursuant to the former B.C. MOU (1996) and now the B.C. Service Agreement (2012).¹⁰²³
596. In Ontario, AANDC cost-shares a portion of the province's overall expenditures for child welfare services provided to First Nations children and families on reserve.¹⁰²⁴
597. However, in Alberta and British Columbia, the province provides child welfare services to some First Nations communities directly, while others are served by First Nations child and family service agencies. There are approximately 72 First Nations served by the province of British Columbia, and six First Nations served by the province of Alberta.¹⁰²⁵ AANDC reimburses the provinces for these services in accordance with their respective agreements,¹⁰²⁶ while reimbursing First Nations child and family service agencies pursuant to Directive 20-1 (in British Columbia) and EPFA (in Alberta).
598. Alberta's Administrative Reform Agreement and British Columbia's Service Agreement set out the manner in which AANDC is to reimburse the provinces for the provision of child welfare services to First Nations on reserve. These funding arrangements are not

¹⁰²¹ 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214.

¹⁰²² Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270.

¹⁰²³ 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also Updated B.C. Service Agreement, CHRC BOD, Ex. HR-14, Tab 399; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).

¹⁰²⁴ Program Manual 2005, CHRC BOD, Ex. HR-03, Tab 29 at p. 3; see also Judith Rae Report, CHRC BOD, Ex. HR-11, Tab 213 at p. COO-95/18; see also 1965 Agreement, CHRC BOD, Ex. HR-11, Tab 214 at pp. COO-102/5 – COO-102/8; see also Testimony of Phil Digby, Transcript Vol. 59 at pp. 24-28.

¹⁰²⁵ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 5; see also testimony of Darin Keewatin, Transcript Vol. 32 at p. 20.

¹⁰²⁶ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at p. 3, section 3; Schedule A; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264; see also 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also 1996 B.C. MOU, CHRC BOD, Ex. HR-13, Tab 274; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275; see also Updated B.C. Service Agreement, CHRC BOD, Ex. HR-14, Tab 399; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Vol. 13, Tab 275 (clearer version of Tab 399).

based on Directive 20-1 or EPFA; therefore, AANDC's reimbursement of these services is distinctly different for provinces and First Nations child and family service agencies.

599. The Commission submits that AANDC reimburses the provinces of Alberta and British Columbia for the provision of child welfare services to First Nations on reserve in excess of the funding it provides to First Nations child and family service agencies, despite the fact that both are required to provide the same services in accordance with provincial legislation and standards.
600. For example, British Columbia's Service Agreement with AANDC provided an inflation adjustment for the province in the amount of \$0.4 million in 2013/14.¹⁰²⁷ This allows the province to maintain its "purchasing power", and accounts for the fact that some of the costs of providing child welfare services (both on and off reserve) require adjustment over time in order to keep up with the cost of living.
601. However, First Nations child and family service agencies in British Columbia do not receive any concordant cost of living or inflation adjustment under Directive 20-1.¹⁰²⁸ When AANDC initially developed Directive 20-1 in the late 1980's, a cost of living adjustment was built into the funding formula.¹⁰²⁹ In 1995, AANDC stopped providing the cost of living adjustment to First Nations child and family service agencies,¹⁰³⁰ and since then, there has been no cost of living adjustment,¹⁰³¹ with the exception of a one-time adjustment of 8.24% in 2005, which still fell "far short of making up for the substantial inflation losses during that period of time [between 1995 and 2005]."¹⁰³²

¹⁰²⁷ Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-14, Tab 399 at p. CAN027956_0007, section 7.2; see also Service Agreement Regarding the Funding of Child Protection Services of First Nations Children Ordinarily Resident on Reserve (2013), CHRC BOD, Ex. HR-13, Tab 275 (clearer version of Tab 399); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110; see also B.C. Service Agreement, CHRC BOD, Ex. HR-13, Tab 275 at p. 5.

¹⁰²⁸ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 39-43; see also testimony of Barbara D'Amico, Transcript Vol. 53 at pp. 108-110.

¹⁰²⁹ Child and Family Services Costing Bottom-Up Approach, CHRC BOD, Ex. HR-14, Tab 381 at p. 1 (unnumbered); see also testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at p. 33.

¹⁰³⁰ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also testimony of Sheilagh Murphy, Transcript Vol. 55 at pp. 185-186.

¹⁰³¹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 45; see also Journal Article, "Keeping First Nations children at home" A few Federal policy changes could make a big difference" (2007), CHRC BOD, Ex. HR-05, Tab 52.

¹⁰³² Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

602. This has a serious impact on the quantity and quality of services that First Nations child and family service agencies are able to provide to the First Nations children and families they serve on reserve, who are among the most vulnerable and at-risk in the country.¹⁰³³ As Dr. Loxley noted, AANDC's failure to adjust for inflation means that the "real value of the dollars going to First Nations Agencies [is] actually declining annually quite significantly".¹⁰³⁴
603. Similarly, according to the Administrative Reform Agreement, AANDC reimburses the province of Alberta for the "actual expenditure[s ...] in respect of Indian children and member of Indian Families ordinarily residing on a Reserve who received the service", as well as for the "actual direct administration cost to Alberta in respect of the service."¹⁰³⁵ In other words, the province's actual operational (or administrative) costs are reimbursed by AANDC and, unlike operations funding for First Nations child and family service agencies under both Directive 20-1 and EPFA, are not fixed.
604. The very real and serious impacts that Directive 20-1 and EPFA's fixed operations budget have on First Nations child and family service agencies have already been described in these submissions. The fixed nature of operations funding can significantly impact an agency's ability to provide necessary services to the children and families they serve on reserve, and does not allow for adjustment in communities experiencing crises, or where the number of children being brought into care is in excess of the assumed averages upon which those formulas are based. As well, First Nations child and family service agencies' operations budgets are subject to downward adjustments based on the size of their on reserve child populations.¹⁰³⁶
605. Neither British Columbia's Service Agreement nor Alberta's Administrative Reform Agreement is based on any such assumptions, nor are they subject to downward adjustments if they serve a First Nations community with a population of less than 1,000.¹⁰³⁷ Rather, funding is calculated based on the actual number of children in care

¹⁰³³ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 33-35.

¹⁰³⁴ Testimony of Dr. John Loxley, Transcript Vol. 27 at p. 15.

¹⁰³⁵ Administrative Reform Agreement, CHRC BOD, Ex. HR-13, Tab 270 at Schedule A (pages unnumbered).

¹⁰³⁶ Testimony of Dr. Cindy Blackstock, Transcript Vol. 46 at pp. 52-53; see also AANDC, "Atlantic Region Allocations by Agency 2009-2010", CHRC BOD, Ex. HR-13, Tab 331; see also letter from the First Nations Directors Forum to AANDC (undated), CHRC BOD, Ex. HR-14, Tab 365.

¹⁰³⁷ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 42, 47.

from the prior year.¹⁰³⁸ This creates an inequitable disparity in British Columbia and Alberta, where AANDC funds both the provinces and First Nations child and family service agencies to provide child welfare services on reserve.

606. Moreover, given that many of the costs that are captured under a First Nations child and family service agency's operations budget are "fixed" themselves, the fact that they do not receive a cost of living adjustment (unlike the provinces of British Columbia and Alberta) only compounds this inequity.
607. For example, under EPFA, AANDC sets the amount of funding a First Nations child and family service agency gets for a period of five years, and does not include a cost of living adjustment.¹⁰³⁹ In Alberta, EPFA was implemented in 2007 and AANDC based its funding for staff salaries on the provincial salary grid from 2006 in an effort to try to bring First Nations agency staff salaries up to a comparable level as those of the province. However, given the fixed five-year structure of the EPFA funding formula, staff salaries for on reserve First Nations child and family service agencies have been fixed at the 2006 level since that time, whereas AANDC adjusts its funding for provincial social worker salaries annually in accordance with the Administrative Reform Agreement.¹⁰⁴⁰
608. Therefore, AANDC funds the province of Alberta more than First Nations child and family service agencies to provide the same service to the same group of people.¹⁰⁴¹
609. AANDC's own analysis has confirmed that the cost of reimbursing First Nations child and family service agencies to provide child welfare services on reserve is *less* than it would be if the provinces were providing those same services. In fact, many internal AANDC documents have found that if the provinces were to take over the provision of child welfare services on reserve, it would likely result in "dramatic increases in [FNCFS Program] costs" for the Department.¹⁰⁴²

¹⁰³⁸ Testimony of Carol Schimanke, Transcript Vol. 62 at p. 42; see also testimony of Elsie Flette, Transcript Vol. 20 at p. 102.

¹⁰³⁹ Testimony of Dr. Cindy Blackstock, Transcript Vol. 3 at p. 106; Vol. 47 at p. 40; see also testimony of Dr. Cindy Blackstock, Transcript Vol. 47 at p. 40; see also DPRA Report, CHRC BOD, Ex. HR-13, Tab 271.

¹⁰⁴⁰ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54.

¹⁰⁴¹ Testimony of Carol Schimanke, Transcript Vol. 62 at pp. 53-54; see also Administrative Reform Agreement Billings, CHRC BOD, Ex. HR-12, Tab 264.

¹⁰⁴² First Nations Child and Family Services (FNCFS): Q's and A's, CHRC BOD, Ex. HR-06, Tab 64; see also AANDC Briefing Note, "Explanations on Expenditures of Social Program" (undated), CHRC BOD, Ex. HR-13, Tab

610. Furthermore, AANDC has recognized that many First Nations “children and families are not receiving services reasonably comparable to those provided to other Canadians”,¹⁰⁴³ and that “First Nations are not receiving a fair level of services as compared to non-First Nations in Canada.”¹⁰⁴⁴ The disparity in levels of service on and off reserve is, according to AANDC, because its FNCFS Program funding is insufficient “to permit First Nation communities to effectively and efficiently meet the needs of their communities and their statutory obligations under provincial legislation.”¹⁰⁴⁵
611. With respect to Directive 20-1, AANDC has recognized that the funding provided to First Nations child and family services agencies does not allow them to deliver child welfare services “on reserve to a level comparable to that provided to other children and families living off reserve.”¹⁰⁴⁶ Therefore, the level of funding and quality of services provided to First Nations children and families on reserve in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon Territory are inferior to those being provided by the province off reserve. As a result of the “weaknesses” with Directive 20-1 and this disparity in funding, First Nations children are overrepresented in the child welfare system.¹⁰⁴⁷

330 at p. 2; see also AANDC Briefing Note, “Status of Negotiations: New Brunswick First Nation Child and Family Services (CFS) Agreement” (2004), CHRC BOD, Ex. HR-14, Tab 397 at p. 3; see also AANDC Briefing Note, “New Brunswick First Nation Child and Family Services” (2002), CHRC BOD, Ex. HR-15, Tab 468 at p. CAN112546_002; see also AANDC, “Comparison of Manitoba, British Columbia, Alberta, AANDC Child and Family Services Expenditures per Child in Care out of the Parental Home” (undated), CHRC BOD, Ex. HR-13, Tab 306; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 9, 2012), CHRC BOD, Ex. HR-09, Tab 143 at p. 32; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 22, 2012), CHRC BOD, Ex. HR-09, Tab 144 at p. 18; see also AANDC Power Point, “First Nations Child and Family Services Program: The Way Forward” (August 29, 2009), CHRC BOD, Ex. HR-12, Tab 248 at pp. 13-17; see also AANDC Power Point, “First Nations Child and Family Services (FNCFS)” (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 4; see also e-mail from John Dance to Johann Gauthier et al. dated February 1, 2006, CHRC BOD, Ex. HR-15, Tab 477 at p. 1.

¹⁰⁴³ AANDC Power Point, “Social Programs” (2006), CHRC BOD, Ex. HR-14, Tab 354; see also AANDC Briefing Note, “Meeting with the Honourable Iris Evans, Alberta Minister of Children’s Services” (2004), CHRC BOD, Ex. HR-15, Tab 474 at p. 2.

¹⁰⁴⁴ AANDC Power Point, “Overview of Progress Report” (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 7.

¹⁰⁴⁵ AANDC Power Point, “Overview of Progress Report” (2004), CHRC BOD, Ex. HR-15, Tab 469 at p. 10.

¹⁰⁴⁶ AANDC Backgrounder “Treaty 6, 7 & 8 First Nations Child & Family Services Agencies (FNCFS) Enhancement Framework – April 2007”, CHRC BOD, Ex. HR-14, Tab 391 at p. 1; see also AANDC Backgrounder “Saskatchewan First Nations Prevention Services Model and Accountability Framework Agreement – October 2007”, CHRC BOD, Ex. HR-14, Tab 392 at p. 1.

¹⁰⁴⁷ Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-04, Tab 32 at p. ii; see also Evaluation of the First Nations Child and Family Services Program (2007), CHRC BOD, Ex. HR-14, Tab 346 at p. ii; see also AANDC Power Point, “First Nations Child and Family Services (FNCFS)” (2005), CHRC BOD, Ex. HR-14, Tab 353 at p. 2.

612. While EPFA was intended to address the structural deficiencies and inequities caused by Directive 20-1, AANDC's evaluations and audits of the funding formula have noted concerns that funding is not sufficient to allow First Nations child and family service agencies to "keep up with provincial changes",¹⁰⁴⁸ and that it is not "flexible enough to accommodate the varying needs of the agencies".¹⁰⁴⁹ As previously noted, "studies suggest that the need for child welfare services on reserve is 8 to 10 times [greater] than off reserve."¹⁰⁵⁰ However, the EPFA funding model has not been modified to address these concerns since its implementation in Alberta in 2007.¹⁰⁵¹

D) AANDC Has Failed to Provide a Justification for the Discriminatory Practice

613. For all the reasons above, the Commission submits that a *prima facie* case of discrimination has been established, and that the onus therefore shifts to AANDC to prove the existence of a *bona fide* justification for the discriminatory practice under section 15 of the *CHRA*.

i) The Legal Test for a *Bona Fide* Justification

614. The defence of a *bona fide* justification is established by sections 15(1)(g) and 15(2) of the *CHRA*:

15. (1) It is not a discriminatory practice if .

[...]

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto [...] or is a victim of any adverse differentiation and there is a bona fide justification for that denial or differentiation.

15. (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph 1(g) to be considered to have a *bona fide*

¹⁰⁴⁸ Key Findings: Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-09, Tab 146 at p. 14; see also Implementation Evaluation of the Enhanced Prevention Focused Approach in Saskatchewan and Nova Scotia (2012), CHRC BOD, Ex. HR-12, Tab 247 at pp. 30-31.

¹⁰⁴⁹ Implementation Evaluation of the Enhanced Prevention Focused Approach in Alberta for the First Nations Child and Family Services Program (2010), CHRC BOD, Ex. HR-05, Tab 48 at pp. 26-27.

¹⁰⁵⁰ NPR, CHRC BOD, Ex. HR-01, Tab 3 at p. 95; see also *Wen:De* Report Two, CHRC BOD, Ex. HR-01, Tab 5 at p. 182.

¹⁰⁵¹ Testimony of Carol Schimanke, Transcript Vol. 61 at p. 160; Vol. 62 at p. 49.

justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

15. (1) Ne constituent pas des actes discriminatoires :

[...]

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

15. (2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité. (emphasis added)

615. The Supreme Court has provided guidance on the proper interpretation and application of statutory defences like the defence of *bona fide* justification in sections 15(1)(g) and 15(2) of the *CHRA*. Stated most generally, for a service provider to make out the defence, it must prove on a balance of probabilities that: (i) it adopted the impugned standard for a purpose rationally connected to the function being performed; (ii) it adopted the impugned standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and (iii) the standard is reasonably necessary to accomplish the purpose or goal in the sense that persons who do not meet the standard cannot be accommodated without causing undue hardship.¹⁰⁵²
616. When inquiring into whether a *prima facie* discriminatory standard is reasonably necessary, decision-makers may consider both (i) the procedure, if any, that was adopted to assess the issue of accommodation, and (ii) the substantive content of either a more accommodating standard that was not offered, or alternatively a respondent's reasons for not offering any such standard. Indeed, a *prima facie* discriminatory standard can only be

¹⁰⁵² *British Columbia (Public Services Employee Relations Commission) v. British Columbia Government and Services Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 at para.54-55 ["Meiorin"]; see also *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at paras. 19-21 ["Grismer"].

justified if a respondent meets its burden of proving that it considered and rejected all viable forms of accommodation, on grounds that they would have caused undue hardship.¹⁰⁵³

617. Parliament specifically stated in section 15(2) of the *CHRA* that the factors to be considered in determining whether a measure would cause “undue hardship” are “health, safety and cost.” Emphasizing the principle that statutory defences to human rights laws are to be narrowly construed, the Federal Court recently held that Parliament intended this to be an exhaustive list of the factors that can give rise to undue hardship within the meaning of the *CHRA*. Therefore, the Commission submits that only matters which have a demonstrable impact on health, safety or cost can justify a *prima facie* case of discrimination.¹⁰⁵⁴
618. In order to demonstrate undue hardship, a service provider must offer more than “impressionistic evidence”.¹⁰⁵⁵ Instead, what is required is concrete evidence not just of hardship, but of hardship that is “undue” in all the circumstances.¹⁰⁵⁶ For example, with respect to allegations of financial costs, the threshold for undue hardship requires something more than mere decreased efficiency.¹⁰⁵⁷
619. As the Supreme Court held in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*,¹⁰⁵⁸ the difficulty in attaching a monetary value to the benefits that flow from the elimination of discrimination means that it will always seem cheaper to maintain the *status quo*:

The threshold of “undue hardship” is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible

¹⁰⁵³ *Meiorin, supra* at paras. 64-66.

¹⁰⁵⁴ *Air Canada Pilots Assn. v. Kelly*, 2011 FC 120 at paras. 386-387, 391-393, 398-402 (reversed on other grounds, 2012 FCA 209). In the recent decision of *Adamson v. Air Canada*, 2014 FC 83, the Federal Court found that the list of factors that can give rise to undue hardship was not closed. That decision is currently under appeal.

¹⁰⁵⁵ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 109 [“*Via Rail*”], citing *Grismer, supra* at para. 41.

¹⁰⁵⁶ *Via Rail, supra* at para. 312.

¹⁰⁵⁷ *Via Rail, supra* at para. 225-229.

¹⁰⁵⁸ *VIA Rail, supra*.

environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.¹⁰⁵⁹

ii) There is No Evidence of Undue Hardship

620. In the present case, health and safety considerations are not triggered, and AANDC has not alleged, nor attempted to prove, that it would cause undue financial hardship to provide child welfare services to First Nations children and families on reserve in a non-discriminatory manner.
621. AANDC's witnesses made general statements in the course of their testimonies about the fact that there was no funding or that the FNCFS Program's funding authority and mandate did not cover some expenses.¹⁰⁶⁰ However, AANDC did not lead any evidence with respect to: (i) the reason funding is unavailable; (ii) the steps they have taken to secure funding; (iii) the impact providing funding would have on government operations; or (iv) whether lack of funding constitutes undue hardship.
622. While the Tribunal should show some deference to the federal government in deciding between competing interests, it should not find that a *bona fide* justification has been established in the absence of clear evidence of undue hardship.
623. AANDC did not provide any evidence or calculations with respect to the actual financial hardship they would suffer if discrimination is found. All of this evidence is in its control; therefore, failure to adduce the evidence should result in a finding that the defence was not made out.

¹⁰⁵⁹ *VIA Rail, supra* at para. 225.

¹⁰⁶⁰ Testimony of Barbara D'Amico, Transcript Vol. 50 at pp. 57, 72-83 and following.

PART IV – CONCLUSION

624. In conclusion, the Commission submits that the evidence led by all parties established that AANDC's FNCFS Program and on reserve funding formulas, including Directive 20-1, EPFA and the 1965 Agreement, constitute a service pursuant to section 5 of the *CHRA* in that they provide a benefit that is conferred in the context of a public relationship. But for AANDC's FNCFS Program and funding formulas, First Nations child and family service agencies would not be able to exist and/or operate.
625. Furthermore, the evidence led by all parties established that the levels of funding and services provided pursuant to AANDC's FNCFS Program are inequitable, and lead to adverse differentiation in the provision, and in some cases complete denial, of child welfare services to First Nations children ordinarily resident on reserve based in whole or in part on the prohibited grounds of race and national or ethnic origin, contrary to section 5 of the *CHRA*.
626. Finally, AANDC has failed to establish a *bona fide* justification for the discrimination under section 15 of the *CHRA*. Therefore, the Complainants are entitled to relief.
627. Between 1981 and 2012, First Nations children spent cumulatively 66 million nights in care, away from their homes and away from their families.¹⁰⁶¹ The Commission submits that the First Nations children on behalf of whom this complaint has been brought before the Tribunal are entitled to at least the same child welfare funding and services as those provided to all other children in Canada. This case offers an opportunity to give meaning to the promise and purpose of the *CHRA* by ensuring that First Nations children on reserve, who are undoubtedly one of the most vulnerable groups in Canada, are protected, given an equal chance to succeed, and are able to make for themselves the lives they are able and wish to have free from discrimination.

¹⁰⁶¹ Chart: First Nations Child and Family Services (FNCFS) – Total Number of Children in Care (2012), CHRC BOD, Ex. HR-13, Tab 297.

PART V – REMEDIES

A) Tribunal’s Remedial Authority

628. The remedial powers of the Tribunal are set out in section 53 of the *CHRA*, the following provisions of which are relevant to this case:

53. (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may ... make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

- (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future [...];
- (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;

[...]

53. (2) À l’issue de l’instruction, le membre instructeur qui juge la plainte fondée, peut, sous réserve de l’article 54, ordonner, selon les circonstances, à la personne trouvée coupable d’un acte discriminatoire

- a) de mettre fin à l’acte et de prendre, en consultation avec la Commission relativement à leurs objectifs généraux, des mesures de redressement ou des mesures destinées à prévenir des actes semblables [...];
- b) d’accorder à la victime, dès que les circonstances le permettent, les droits, chances ou avantages dont l’acte l’a privée;

[...] ¹⁰⁶²

¹⁰⁶² *CHRA, supra*, s. 53.

B) Remedies Requested in the Present Case

628. Taking all the foregoing into consideration, the Commission asks that the Tribunal grant the following remedies in this case:

- (1) a finding that AANDC's FNCFS Program and funding formulas, including Directive 20-1, EPFA and the 1965 Agreement, are discriminatory and inconsistent with section 5 of the *CHRA*;
- (2) an order that AANDC cease and desist from applying the discriminatory aspects of its FNCFS Program and funding formulas, in accordance with section 53(2)(a) of the *CHRA*;
- (3) an order directing AANDC to take steps within a period of 12 months, in consultation with the Commission, to redress and remedy the discriminatory aspects of its FNCFS Program and funding formulas, in order to prevent the same or similar practices from occurring in the future, in accordance with sections 53(2) of the *CHRA*; and
- (4) an order that the Tribunal will remain seized of this matter to supervise the implementation of the remedy, for a period of 18 months, or such further time as the Tribunal may by subsequent order direct.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 25, 2014



Philippe Dufresne / Daniel Poulin
Sarah Pentney / Samar Musallam

Canadian Human Rights Commission

PART VI – LIST OF AUTHORITIES

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