Tribunal File: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

B E T W E E N:

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

Complainants (Moving Party)

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

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

Respondent (Responding Party)

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL CANADA
and NISHNAWBE ASKI NATION

Interested Parties

MEMORANDUM OF FACT AND LAW
ASSEMBLY OF FIRST NATIONS
TO ENFORCE RESPONDENT'S FULL COMPLIANCE WITH THE DECISION OF THE CANADIAN HUMAN RIGHTS TRIBUNAL, 2016 CHRT 2, AND THE PANEL'S REMEDIAL ORDERS

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PART I – STATEMENT OF FACTS

A. Overview

1. The Assembly of First Nations ("AFN") brings this motion to enforce compliance by the Respondent, formerly known as Aboriginal Affairs and Northern Development Canada ("AANDC"), now known as Indigenous and Northern Affairs Canada ("INAC"), with the Panel's Decisions, 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16, and the remedial orders for immediate relief contained in those Decisions. The AFN is particularly concerned with those INAC child welfare funding policies and programs (the FNCFS program and other related provincial/territorial agreements) that have been found to be discriminatory in that they fail to fund prevention services on the basis of need and in light of the historically disadvantaged circumstances of First Nations children and families on reserve, while fully funding apprehensions, which acts as a perverse incentive to promote the removal of First Nations children from their on-reserve families and homes.

2. It has now been over a year since the Panel rendered its Decision, 2016 CHRT 2, ordering INAC to cease its discriminatory practices. However, INAC continues to fund prevention services according to its discriminatory funding formulas and refuses to institute immediate measures to begin funding prevention services on the basis of need. The impact of INAC's refusal to comply has not been ascertained at this point; but presumably

if its funding policies and practices continue to act as an improper incentive, then it can be expected that it will result in the further removal of children from First Nations families and homes on reserve. The conduct of the Respondent cannot be condoned. Therefore, the AFN seeks a clear order that INAC must comply on the issue of funding prevention services on reserve on the basis of need, within a specified timeframe, after which it will be found to be in non-compliance. This will enable the AFN to take further enforcement steps as it deems appropriate.

3. Though we are focused primarily on immediate relief, our submissions regarding consultation apply more broadly to both immediate relief issues as well as mid- to long-term issues. Indeed, it is our submission that consultation – which currently excludes the co-complainants – should not be an excuse to delay immediate relief, particularly with regard to funding prevention based on need. Immediate relief must be immediate while ongoing consultation may address both mid- and long-term relief. Likewise, while the AFN favours the re-establishment of the NAC, that should not be interpreted as a pre-condition to INAC implementing immediate relief measures. The NAC, if properly constituted, will be helpful particularly with regard to bringing about long-term reforms, and could be a useful vehicle in fulfilling INAC's consultations duties, including the development of a consultation protocol. The successful establishment of the NAC in the short term will facilitate the transition into dealing with the mid- to long-term reforms.

4. The AFN will also address issues of INAC general non-compliance and non-compliance respecting areas other than prevention. This secondary focus is intended to both provide the Panel with context regarding the circumstances in First Nations after the Main Decision, and support the AFN position that the way INAC funds First Nations child welfare – according to existing funding formulas and policies, rather than on the basis of need – continues to have discriminatory impacts that hamper the ability of FNCFS Agencies to function effectively.

5. The AFN's motion is submitted in conjunction with the motions brought by the Co-Complainant, the First Nations Child & Family Caring Society of Canada (hereinafter "Caring Society"), and the Interested Parties, the Chiefs of Ontario ("COO") and the Nishnawbe Aski Nation ("NAN"). Although the focus of the AFN is on prevention, AFN supports the motions and positions of the other parties.

B. Complaint Substantiated

6. On January 26, 2016, the Panel substantiated the complaint in its decision, 2016 CHRT 2[1] (hereinafter the "Main Decision"), finding a *prima facie* case of discrimination was established against the Respondent, INAC. INAC was found to be discriminating against First Nations children and families living on-reserve and in the Yukon through its First Nations Child and Family Services Program (hereinafter the "FNCFS Program") and other related provincial/territorial agreements, by denying and/or differentiating adversely in the provision of child and family services, in violation of subsections 5(a) and 5(b) of the *Canadian Human Rights Act*[2].[3]

C. The Panel's Main Findings

7. The Panel's main findings with regard to the need to reform and redesign the FNCFS Program in the short- and long-term were summarized at paragraphs 384 to 389 of the Main Decision:

> [384] Under the FNCFS Program, Directive 20-1 has a number of shortcomings and creates incentives to remove children from their homes and communities. Mainly, Directive 20-1 makes assumptions based on population thresholds and children in care to fund the operations budgets of FNCFS Agencies. <u>These assumptions ignore the real child welfare situation in many First Nations' communities on reserve</u>.

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[1] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Norther Affairs Canada)*, 2016 CHRT 2. ["2016 CHRT 2" or "Main Decision"]
[2] *Canadian Human Rights Act*, RSC, 1985, c. H-6, ss. 5(a) and 5(b) ["*CHRA*"].
[3] 2016 CHRT 2, paras 456-467.

Whereas operations budgets are fixed, maintenance budgets for taking children into care are reimbursable at cost. If an FNCFS Agency does not have the funds to provide services through its operations budget, often times the only way to provide the necessary child and family services is to bring the child into care. For small and remote agencies, the population thresholds of Directive 20-1 significantly reduce their operations budgets, affecting their ability to provide effective programming, respond to emergencies and, for some, put them in jeopardy of closing.

[385] Directive 20-1 has not been significantly updated since the mid-1990's resulting in underfunding for FNCFS agencies and inequities for First Nations children and families on reserves and in the Yukon. In addition, Directive 20-1 is not in line with current provincial child welfare legislation and standards promoting prevention and least disruptive measures for children and families. As a result, many First Nations children and their families are denied an equitable opportunity to remain with their families or to be reunited in a timely manner. In 2008, at the time of the Complaint, the vast majority of FNCFS Agencies across Canada functioned under Directive 20-1. At the conclusion of the hearing in 2014, Directive 20-1 was still applicable in three provinces and in the Yukon Territory.

[386] AANDC incorporated some of the same shortcomings of Directive 20-1 into the EPFA, such as the assumptions about children in care and population levels, along with the fixed streams of funding for operations and prevention. Despite being aware of these shortcomings in Directive 20-1 based on numerous reports, AANDC has not followed the recommendations in those reports and has perpetuated the main shortcoming of the FNCFS Program: the incentive to take children into care - to remove them from their families.

[387] Furthermore, like Directive 20-1, the EPFA has not been consistently updated in an effort to keep it current with the child welfare legislation and practices of the applicable provinces. Once EPFA is implemented, no adjustments to funding for inflation/cost of living or for changing service standards are applied to help address increased costs over time and to ensure that prevention-based investments more closely match the full continuum of child welfare services provided off reserve. In contrast, when AANDC funds the provinces directly, things such as inflation and other general costs increases are reimbursed, providing a closer link to the service standards of the applicable province/territory.

[388] In terms of ensuring reasonably comparable child and family services on reserve to the services provided off reserve, the FNCFS Program has a glaring flaw. While FNCFS Agencies are required to comply with provincial/territorial legislation and standards, the FNCFS Program funding authorities are not based on provincial/territorial legislation or service standards. Instead, they are based on funding levels and formulas that can be inconsistent with the applicable legislation and standards. They also fail to consider the actual service needs of First Nations children and families, which are often higher than those off reserve. Moreover, the way in which the funding formulas and the program authorities function prevents an effective comparison with the provincial systems. The provinces/territory often do not use funding formulas and the way they manage cost variables is often very different. Instead of modifying its system to effectively adapt it to the provincial/territorial systems in order to achieve reasonable comparability; AANDC maintains its funding formulas and incorporates the few variables it has managed to obtain from the provinces/territory, such as salaries, into those formulas.

[389] Given the current funding structure for the FNCFS Program is not adapted to provincial/territorial legislation and standards, it often creates funding deficiencies for such items as salaries and benefits, training, cost of living, legal costs, insurance premiums, travel, remoteness, multiple offices, capital infrastructure, culturally appropriate programs and services, band representatives, and least disruptive measures. It is difficult, if not impossible, for many FNCFS Agencies to comply with provincial/territorial child and family services legislation and standards without appropriate funding for these items; or, in the case of many small and remote agencies, to even provide child and family services. Effectively, the FNCFS funding formulas provide insufficient funding to many FNCFS Agencies to address the needs of their clientele. AANDC's funding methodology controls their ability to improve outcomes for children and families and to ensure reasonably comparable child and family services on and off reserve. Despite various reports and evaluations of the FNCFS Program identifying AANDC's "reasonable comparability" standard as being inadequately defined and measured, it still remains an unresolved issue for the program.[4] (emphasis added)

8. In sum, the Panel's findings regarding prevention form part of the immediate relief, which

[4] 2016 CHRT 2, paras 384-389.

over a year after the Panel's Main Decision, remains unfulfilled by INAC.

D. The Main Adverse Impacts

9. Also in the Main Decision, at paragraph 458, the Panel outlined in a non-exhaustive fashion the main adverse impacts it found in relation to the FNCFS Program and other related provincial/territorial agreements, which is also provided as declaratory relief.[5]

> [458] AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements have resulted in denials of services and created various adverse impacts for many First Nations children and families living on reserves. Non-exhaustively, the main adverse impacts found by the Panel are:
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> - The design and application of the Directive 20-1 funding formula, which provides funding based on flawed assumptions about children in care and population thresholds that do not accurately reflect the service needs of many on-reserve communities. This results in inadequate fixed funding for operation (capital costs, multiple offices, cost of living adjustment, staff salaries and benefits, training, legal, remoteness and travel) and prevention costs (primary, secondary and tertiary services to maintain children safely in their family homes), hindering the ability of FNCFS Agencies to provide provincially/territorially mandated child welfare services, let alone culturally appropriate services to First Nations children and families and, providing an incentive to bring children into care because eligible maintenance expenditures are reimbursable at cost;
>
> - The current structure and implementation of the EPFA funding formula, which perpetuates the incentives to remove children from their homes and incorporates the flawed assumptions of Directive 20-1 in determining funding for operations and prevention, and perpetuating the adverse impacts of Directive 20-1 in many on-reserve communities;
>
> - The failure to adjust Directive 20-1 funding levels, since 1995; along with

[5] 2016 CHRT 2, paras 473.

funding levels under the EPFA, since its implementation, to account for inflation/cost of living;

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

- The failure to coordinate the FNCFS Program and other related provincial/territorial agreements with other federal departments and government programs and services for First Nations on reserve, resulting in service gaps, delays and denials for First Nations children and families;

- The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children.[6] (emphasis added)

10. In cross-examination, Cassandra Lang testified that adverse effects against First Nations children and families on-reserve and in the Yukon continue despite the Panel's order for immediate relief that these adverse effects be addressed according to its findings.[7]

E. The Panel's Remedial Orders

11. The complaint against INAC was substantiated which allowed the Panel to make an order against INAC pursuant to subsection 53(2) of the CHRA. The Panel's remedial orders are found in the Main Decision at paragraphs 468 to 494. To summarize, the Panel made findings of discrimination, ordered immediate relief, and retained jurisdiction over the matter until all remedial orders were fully implemented.

F. Immediate Relief

12. The AFN's motion is primarily focused on the Panel's remedial orders regarding immediate relief. At paragraph 481 in Main Decision, the Panel issued the following remedial order

[6] 2016 CHRT 2, para 458.
[7] Transcript of the Cross-Examination of Cassandra Lang, pg 98 (Line 9) to pg 101 (Line 21).

regarding immediate relief:

> [481] AANDC is ordered to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. AANDC is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's principle.[8] (Panel's emphasis)

13. The Panel's remedial orders for immediate relief are clear and require INAC to cease its discriminatory funding practices regarding preventative measures. These important legal obligations and undertakings rest entirely with INAC, whose ongoing failure to sufficiently fund preventative measures have already found by the Panel to be discriminatory. Further, Cassandra Lang, Director of Children and Families in the Children and Families Branch of INAC,[9] testified that INAC considers itself bound by the Tribunal's decision.[10] Additionally, in cross-examination, Cassandra Lang admitted there is nothing stopping INAC from complying with the Panel's immediate relief orders. However, she said that before INAC fully complies it wishes to gather information that already exists in the several reports currently before the Panel. In this way, INAC appears to be duplicating what has already been done.[11]

G. Updated Order

14. On April 26, 2016, approximately three months after the Main Decision, the Panel issued its subsequent decision, 2016 CHRT 10[12], updating its orders from the Main Decision. The updated order is found in 2016 CHRT 10 at paragraphs 10-37.

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[8] 2016 CHRT 2, para 481. (Panel's emphasis)
[9] Transcript of the Cross-Examination of Cassandra Lang, pg 3, Line 1-3.
[10] Transcript of the Cross-Examination of Cassandra Lang, pg 335, Line 2-8.
[11] Transcript of the Cross-Examination of Cassandra Lang, pg 105 (Line 1) to pg 117 (Line 18).
[12] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10. ["2016 CHRT 10"]

H. Update to Remedial Order

15. On September 14, 2016, the Panel updated its remedial orders against INAC in its decision 2016 CHRT 16.[13] At paragraphs 157-161, the Panel's update to its remedial order included additional immediate measures to be taken, additional reporting, and additional information to be provided by INAC to the Complainants, Interested Parties and the Commission, as well as the Panel's continued jurisdiction over the remedies in this matter.

I. The Panel's concern about funding determinations

16. In 2016 CHRT 16, the Panel wrote the following about INAC funding the FNCFS Program at paragraph 33:

> [33] That is, the Panel analyzing is not concerned with the specific amount of funding per se, but rather the way in which it is determined. It is the way in which the FNCFS Program is delivered and funding is determined that results in discriminatory effects for First Nations children and families. The Panel's focus is on whether funding is being determined based on an evaluation of the distinct needs and circumstances of First Nations children and families and their communities. While other key factors come into play in determining whether the amount of funding provided to FNCFS Agencies is adequate to address the needs of the communities they serve, such as remoteness and the extent of travel to meet children and families (which will be addressed later in this ruling), the assumptions about the number of children in care, the number of families in need of services and population levels are the starting point for addressing the discriminatory impacts of INAC's funding formulas.[14] (emphasis added)

J. The Panel's Concern about INAC's Submissions regarding its Remedial Orders

17. In 2016 CHRT 16, the Panel wrote the following about INAC's submissions at paragraph 29:

> [29] …The Panel is concerned to read in INAC's submissions much of the same type

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[13] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 16. ["2016 CHRT 16"]
[14] 2016 CHRT 16, para 33.

of statements and reasoning that it has seen from the organization in the past. For example, that it is up to each FNCFS Agency to determine how they allocate their funding for such things as prevention and cultural programing (see Decision at paras. 187-189, 311, 313 and 314). This prompts the same question as at the time of the hearing: what if funding is not sufficient to allow for that flexibility? How has INAC determined that each agency has sufficient funding to comply with provincial child welfare standards and is still able to deliver necessary prevention and cultural services? The fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination.[15] (emphasis added)

K. INAC's Piecemeal Approach to Reform is not an Effective Way to Proceed

18. In 2016 CHRT 16, the Panel wrote the following at paragraph 34 regarding piecemeal reform not being an effective way to proceed:

> [34] Therefore, leaving some of the assumptions and flaws in the funding formulas for long term reform to ensure everyone is consulted may be problematic. As said in the Decision, a piecemeal approach to reform is not an effective way to proceed (see Decision at paras. 185 and 331). While the Panel understands that INAC is determined to reform the entire FNCFS Program and believes it intends do so, it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFS Program has fostered for the past 15 years. Over that time, despite well documented problems with the program and consultations with its partners and at tripartite tables, INAC's system has failed to adapt to the needs of First Nations children and families (for example, see Decision at paras. 134, 138-141, 203, 311, 314-315, 383-394 and 456-467). The Panel understands this is no easy task and that the FNCFS Program cannot be reformed in an instant. However, this does not mean that effective measures cannot be implemented in the meantime. The Panel also agrees with the parties that a one-size-fits-all type of approach is not to be used; this was also addressed in the Decision (see para. 315).[16] (Panel's emphasis, "believes it intends to do so")

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[15] *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indian and Northern Affairs)*, 2016 CHRT 16, para 29. ("2016 CHRT 16")
[16] 2016 CHRT 16, para 34.

(emphasis added)

L. The AFN's Charter, Mandate and Resolutions

19. The AFN was established pursuant to and operates under a Charter. The AFN is a national delegated forum for the purpose of advancing the aspirations of First Nations. The AFN's actions are made pursuant to these principal objects, and are interned to further these principal objects.[17]

20. The AFN derives authority from specific mandates provided through resolutions from the First Nations Chiefs-in-Assembly, a governing body within the AFN structure. The resolutions process serves to effectively foster and capture national consensus on significant policy matters. Resolutions are considered at the Annual General Assembly or at the Special Chiefs Assembly.[18]

21. As set out in the Affidavit of Jonathan Thompson (affirmed December 20, 2016), the AFN filed the human rights complaint alongside the Caring Society against INAC pursuant to the authority granted under Resolution No. 53/2006 (dated December 2006).[19]

22. Following the Tribunal's Main Decision, at the AFN's Annual Assembly held in July 2016, the Chiefs-in-Assembly discussed INAC's lack of progress in implementing the remedies as ordered in the Main Decision. Further, the Assembly passed Resolution No. 62/2016, which calls upon INAC and the Government of Canada to (i) take immediate and concrete actions to implement and honour the Tribunal's findings in its decision, 2016 CHRT 2, (ii) to honour all subsequent Remedial Orders, and (iii) to implement Jordan's Principle across all First Nations and all Federal Government services.[20] Resolution No. 62/2016 also calls upon the INAC and the Government of Canada to honour its commitment to fully

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[17] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 5, referring to Exhibit "A".
[18] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 7.
[19] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 8, referring to Exhibit "B".
[20] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 9.

implement the Truth and Reconciliation Commission of Canada's Calls to Action respecting "Child Welfare".[21]

23. Resolution 62/2016 (at paragraph G) also states Canada's unilateral actions with respect to budget allotments for First Nations child and family services and Jordan's Principle were without meaningful consultation, are inconsistent with the United Nations *Convention on the Rights of the Child*[22] and articles of the *United Nations Declaration on the Rights of Indigenous Peoples*[23].[24]

24. Later, in December 2016, the AFN's Special Chiefs' Assembly passed another Resolution. Resolution No. 83/2016 addressed the deep concern by all First Nations across Canada over Canada's failure to immediately and fully comply with the Tribunal's Main Decision and subsequent remedial orders.[25]

M. The National Advisory Committee

25. Resolution No. 83/2016 affirms the National Advisory Committee (hereinafter "NAC") and associated Regional Tables proposed by the AFN and the Caring Society to be the legitimate process to provide advice to the Chiefs-in-Assembly and Government of Canada on the reformation of the FNCFS Program and implementation of Jordan's Principle.[26]

26. The Terms of Reference for the NAC was approved by the Minister of INAC on January 17, 2017. The first meeting of the NAC was held on January 24 and 25, 2017.[27]

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[21] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 10, referring to Exhibit "C".
[22] *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.
[23] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295, Articles 2 and 22(2).
[24] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 12, referring to Exhibit "D".
[25] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 14.
[26] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 12, referring to Exhibit "E".
[27] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 4. See also, Affidavit of Cassandra

27. Apart for the negotiations of the Terms of Reference, the AFN has not been meaningfully engaged by INAC regarding proposed reforms to the FNCFS Program. For instance, the AFN was not consulted on INAC's October 28, 2016 questionnaire[28] regarding the needs assessments of FNCFS Agencies. The AFN is critical of the questionnaire as being limited in scope and not reflective of the range of shortfalls the Panel ruled on in the January, 2016 ruling.[29]

N. The Minister's Special Representative

28. On October 27, 2016, Minister Carolyn Bennett appointed a Minister's Special Representative (hereinafter "MSR") on First Nations Child Welfare. The AFN was not consulted on the appointment of the MSR. The MSR also excludes the NAC and the other co-complainant, the Caring Society, by attempting to engage First Nations on the issue of child welfare without a Terms of Reference or Accountability Framework in place, and is part of an ongoing pattern of non-consultation and unilateral decision-making from INAC.[30]

29. INAC attempts to justify its diminished funding levels and the pace for augmenting funding levels to eliminate discrimination by saying that First Nations and FNCFS Agencies are not ready. This excuse by INAC to justify diminished funding levels is unsupported by Ms. Lang's testimony regarding INAC's lack of funding of Band Representatives. Ms. Lang, when asked could not provide a response to why INAC has chosen not to provide Band Representative funding to First Nations who have clearly demonstrated that they have the capacity to provide these services and have even self-funded these services.[31]

Lang (affirmed January 25, 2017), para 30, referring to Exhibit "5". See also, Transcript of the Cross-Examination of Robin Buckland, pg 132, Line 8-17.

[28] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 7, referring to Exhibit "3".

[29] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 5, referring to Exhibit "A". See also, Transcript of the Cross-Examination of Cassandra Lang, pg 327 (Line 21) to pg 332 (Line 17).

[30] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 25.

[31] Transcript of the Cross-Examination of Robin Buckland, pg 22, Line 9.

30. Furthermore, First Nations were critical of the MSR likening allotting child welfare funds to "throwing confetti in the air".[32] The AFN is critical of INAC's piecemeal approach to reforming the FNCFS Program, and that INAC's approach will only perpetuate the discrimination and is paternalistic. It is similar to Canada's previous approach to reform child welfare, namely, the Enhanced Prevention Focused Approach (EPFA), which was a piecemeal approach, insisting on negotiating regional agreements while intentionally avoiding sharing of information nationally resulting in ongoing discrimination against First Nations children and families in the provision of child welfare services. The exclusion of the NAC will result in the same outcomes and delays in the complete overhaul of the FNCFS Program.[33]

31. The Statement of Work[34] relating to the MSR appears to be overly broad, for instance, at paragraph 4.1.2, the MSR is to be a member of the NAC and undertake work to support the committee. At this point, the MSR is not a member of the NAC, and the Terms of Reference of the committee does not contemplate her involvement in any of its work.[35]

32. In addition, the AFN has not been involved in any of INAC's regional engagement activities. On October 27, 2017, the MSR[36] was appointed and has participated in a number of meetings since that date. The scope and nature of these regional discussions is presently unknown to staff at the AFN.[37]

33. A letter was sent to the Minister of INAC, the Honorable Carolyn Bennett, from Treaty 8 on January 26, 2017 pointing out that they do not support the process taken to address

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[32] CBC News, *Liberals will support motion demanding action on First Nations child welfare*, by John Paul Tasker, October 31, 2016, online: http://www.cbc.ca/news/politics/ndp-motion-first-nations-child-welfare-1.3829161.
[33] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 26.
[34] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 15, referring to Exhibit "4".
[35] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 8.
[36] Affidavit of Cassandra Lang (affirmed January 25, 2017), paras 12-19.
[37] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 6.

the CHRT Ruling which addressed discriminatory funding for First Nations children on reserve. This letter highlighted that the engagement process will need to respect First Nations cultural processes. This letter reminds the Minister that the CHRT Ruling "…demonstrate the inequalities that have existed for our children and families in terms of funding…"[38]

34. Further, the Yorkton Tribal Council Child and Family Services Inc. (YTCCFS) has had no dealings, discussions, etc. with the MSR. However, the agency is being forced to meet with the MSR despite the agency's (and other agencies) lack of confidence in the MSR's mandate and ability to affect the required reform to eliminate the discrimination. There are no documents available regarding the MSR, as nothing has been provided to the agencies, other than INAC's instructions that agency Directors will be meeting with the MSR during the week of February 28 – March 2, 2017.[39]

O. AFN's Efforts to Engage with INAC regarding Immediate Relief

35. On February 25, 2016, shortly after the Tribunal's Main Decision, National Chief Perry Bellegarde addressed a letter to Minister Carolyn Bennett, Indigenous and Northern Affairs Canada, on behalf of the AFN. The letter sought INAC's confirmation that it would not judicially review the Tribunal's Main Decision. The letter also expressed the AFN's concern that "no efforts or program changes have been made to date to end the discriminatory practices by your department". The correspondence expressed the AFN's willingness to assist INAC in identifying the immediate relief that could be implemented in compliance with the Tribunal's order without delay.[40]

36. On March 1, 2016, Minister Bennett responded in writing to National Chief Bellegarde confirming that INAC accepts the Tribunal's Main Decision, its findings, and conclusion

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[38] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 7, referring to Exhibit "B".
[39] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 10.
[40] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 16, referring to Exhibit "F".

regarding the inadequacy of the FNCFS Program, and would not be filing for judicial review. Minister Bennett also expressed that meaningful program reform requires working in partnership with agencies and front-line service providers, First Nations communities, organizations and leadership, as well as other federal departments and provinces and territories. More specifically, Minister Bennett said the following:

"Action cannot be taken unilaterally on matters like the 1965 Ontario Welfare Agreement, and given the changes to Jordan's Principle will have an impact beyond the immediate parties, engagement with a wide range of stakeholders must be pursued. I have asked my officials to start this engagement work right away by reconstituting, with you and other parties, the National Advisory Committee and Regional Tables. Department officials will reach out to you to organize a meeting in the coming days to initiate this dialogue and begin configuring the Committee to include provincial and territorial representation and to add new members as needed".[41]

37. In a letter dated March 15, 2016, Paula Isaak, Assistant Deputy Minister, Education and Social Development Programs and Partnerships, INAC, confirmed that Canada accepts the Tribunal's Main Decision and is ready to move forward to make immediate and long-term changes to child welfare on reserve. Assistant Deputy Minister Isaak wrote that Minister Bennett's earlier correspondence was reinforced by Canada's subsequent submissions to the Tribunal on March 10, 2016, which committed Canada to the immediate re-establishment of the NAC and further proposed the Committee be co-chaired with the AFN.[42]

38. The purpose of Assistant Deputy Minister Isaak's letter was to confirm the AFN's ongoing interest in re-establishing the NAC and to invite the AFN to an initial meeting. Since May 2016, the AFN has been engaged with INAC (along with the Caring Society) for the re-establishment of the NAC, including negotiating the Terms of Reference for the NAC.

[41] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 17, referring to Exhibit "G".
[42] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 18, referring to Exhibit "H".

Negotiations have been slow, due primarily to INAC's intransigence on several key items, which have become problematic:

- The number of First Nations representatives on the NAC
- The inclusion of Provincial/Territorial representatives on the NAC
- The number of Federal Representatives on the NAC
- The Chair of the NAC[43]

39. Among the key outstanding issues to be resolved is the appointment of the Chair of the NAC. Input from First Nations experts was always to include Regional Tables, inclusive of First Nations child welfare experts, that would engage in a structured dialogue the information form which would then be transferred to the National Table to ensure a national response to ending a national issue, the discrimination against First Nations children. INAC's regional approach, and its ignoring of its commitments to enable the expertise of the NAC, is inconsistent with previous practices.[44]

40. Robin Buckland, Executive Director at the Office of Primary Health Care within Health Canada's First Nations Inuit Health Branch,[45] testified that Health Canada (like INAC) adopts a regional approach to Jordan's Principle cases. Each region approached Jordan's Principle, which is a policy initiative, which is not necessarily in conformity with one another, for example, by designating a particular case as a Jordan's Principle, where a similar case in a different region may not be designated a Jordan's Principle case.[46]

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[43] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 19.
[44] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 20. See also, Transcript of the Cross-Examination of Robin Buckland, pg 130, Line 20-21.
[45] Transcript of the Cross-Examination of Robin Buckland, pg 2, Line 21-23.
[46] Transcript of the Cross-Examination of Robin Buckland, pg 274, Line 7-15.

P. Unilateral Consultations with FNCFS Agencies are Ineffective

41. INAC and Health Canada are engaged in consultations with First Nations Child and Family Services Agencies ("FNCFS Agencies") about reforming the FNCFS Program. Unfortunately, the AFN has been excluded from these consultations, and was not asked to review any consultation material. Inexplicably, INAC and Health Canada decided to unilaterally exclude both co-complainants, the AFN and Caring Society, in these consultations, despite both parties being national organizations that represent First Nations and FNCFS Agencies across Canada, respectively.[47]

42. INAC's decision to not include the AFN or Caring Society hinders INAC's ability to effectively implement the Tribunal's Main Decision and remedial orders, and facilitates the ongoing discrimination against First Nations children.[48]

43. In correspondence dated October 28, 2016 from Margaret Buist, Director General, INAC, to all FNCFS Agencies across Canada, engaged consultations and included a questionnaire[49] that sought to acquire information from agencies about their respective needs and circumstances to inform INAC's thinking on new funding approaches. The letter also offers a one-time funding opportunity.[50]

44. This letter attempts to reform the FNCFS Program, using information gathered from the questionnaire where excluding the involvement of the NAC on First Nations Child Welfare, the Complainants, and is absent any identifiable research methodology that could properly inform the necessary changes to funding.[51]

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[47] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 21. See also, Transcript of the Cross-Examination of Robin Buckland, pg 130, Line 12-24.
[48] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 22.
[49] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 7, referring to Exhibit "3".
[50] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 23, referring to Exhibit "I".
[51] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 24.

Q. INAC's Funding not in Compliance with Panel's Remedial Orders

45. While it is difficult to provide a comprehensive picture of the situation of FNCFS Agencies after the Main Decision, Mr. Shingoose's affidavit summarizes the impacts of INAC's non-compliance on one FNCFS Agency.

46. For example, Mr. Shingoose states that in regard to the YTCCFS, which is a child welfare agency that delivers a full range of child and family services in the Province of Saskatchewan,[52] the total funding received from INAC to YTCCFS for the 2016-17 fiscal year is $9 million: $4M for operations, $3.1M allocated for maintenance, with only $1.5M for prevention.[53]

47. In 2014/15, YTCCFS incurred a cumulative deficit of $840,977 which then triggered a response from INAC. In its response, INAC reminded YTCCFS that for the past three fiscal years the financial indicators have been trending negatively and suggested the agency implement the necessary action to address the negative financial trend and the sustainability ratio calculations was deemed to be unfavourable.[54]

48. In 2015/2016, the agency with the assistance of an external independent consultant conducted a financial review to address the deficit situation and the financial sustainability of the organization. From this review, the recommendation to downsize without impacting or jeopardizing service delivery was implemented during the latter part of the 2015/16 fiscal year. The implementation of the recommendations streamlined operational processes that aligned with INAC's inadequate costing formula/Directive 20-1 funding allocations.[55] Cassandra Lang testified that Directive 20-1 still applies to this day, and that

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[52] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 1.
[53] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 19, referring to Exhibit "A".
[54] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 20, referring to Exhibits "B" and "C".
[55] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 21.

maintenance (rather than prevention) is still reimbursed at cost.[56]

49. At the end of the 2015/16 fiscal year, YTCCFS incurred a $1,206,570 deficit prompting the agency to fully implement the financial review recommendations immediately April 1, 2016. Since then, YTCCFS has been encountering challenges specifically relating to reduced human and financial resources but making best efforts to manage and maintain quality of care standards, and to comply with provincial legislation.[57]

50. In May 2016, after the Tribunal's Main Decision, INAC provided $973,054 in funds (hereinafter the "CHRT Funds" or "CHRT Funding") which prompted YTCCFS to develop a new five-year plan to address the past discrimination practices and the existing $1.2M cumulative deficit. While this additional funding is welcome, it is grossly inadequate to meet both YTCCFS' immediate needs, particularly in prevention services, but also its accumulated needs, and the needs related to Jordan's Principle.[58]

51. The YTCCFS was not included nor privy to the discussion(s) that created the "national methodology" referred to in the Affidavit of Cassandra Lang.[59] The YTCCFS does not know what the intention or expectation is for the national methodology, nor how it was developed. Outside of Ms. Lang's affidavit, the YTCCFS has received no information at all about the national methodology.[60] Robin Buckland testified that it makes logical sense to include FNCFS Agencies in these discussions.[61] However, Mr. Shingoose states that this is not occurring.[62]

52. The YTCCFS assesses its actual needs based on sixteen First Nations who are currently and

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[56] Transcript of the Cross-Examination of Cassandra Lang, pg 308 (Line 21) to pg 310 (Line 15).
[57] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 22.
[58] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 23.
[59] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 34.
[60] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 4.
[61] Transcript of the Cross-Examination of Robin Buckland, pg 296 Line 2-7.
[62] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 4.

continue to lack services in prevention, and also in health and education needs, despite the information provided in the Affidavit of Cassandra Lang[63].[64]

53. The YTCCFS does not understand INAC's rationale in its calculating the estimate of $973,054 for this fiscal year,[65] and its estimates for the next four years, and how those amounts are expected to meet the needs of YTCCFS. It is apparent that INAC's rationale (which should be addressing actual need) lacks an evidentiary basis. Rather, based on the Daily Living Assessment Service Tool used to identify the gaps, a child needs to be in care at an average of $2,500/case, thus the YTCCFS estimates a $1,320,000 million-dollar shortfall (not $973,054). This figure is calculated by multiplying the number of Jordan's Principle cases in the YTCCFS, which is forty-four (44), by 12 months, which totals $1,320,000 and is a figure better reflective of the actual needs of the YTCCFS, based on information directly from the agency.[66]

54. Further, the YTCCFS has accumulated a $1.2 million-dollar deficit over the last 8-years because of prevention costs because the agency could only meet a fraction of the primary and secondary needs, excluding tertiary services, which has always been a challenge for the YTCCFS to fund these services, especially in mental health.[67]

55. For example, the $973,054 does not even begin to address the YTCCFS' prevention needs, all it really does is address the YTCCFS' accumulated $1.2 million-dollar deficit. The INAC costing formula required us to downsize to 11 positions in prevention when we actually need 20 positions to meet the YTCCFS' communities' needs. The immediate funding is supposed to relieve the pressure we are experiencing but from the information that is circulating, and based on the Affidavit of Cassandra Lang, it appears such immediate

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[63] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 34.
[64] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 5.
[65] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 34.
[66] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 6.
[67] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 7.

funding is not on the horizon and that a continuation of the status quo will persist, which means the discrimination will persist.[68]

56. INAC does not provide for special needs. Rather, special needs are deducted from maintenance and applied to the Children's Special Allowance (which is associated with the Family Allowance). The Children's Special Allowance is supposed to be used to fund cultural, recreation, etc. but due to funding shortfalls the allowance is used to fund maintenance. INAC should be paying this bill as the first service provider (and if necessary, then Health Canada).[69]

R. Funding not in Compliance with Tribunal's Remedial Orders regarding Jordan's Principle

57. Exhibit B of the Affidavit of Robin Buckland[70] provides that the Government of Canada announced a commitment of up to $382 million in new funding for Jordan's Principle. However, only $11,460,737.91 has been spent on Jordan's Principle cases.[71]

58. The AFN's participation on Health Canada's Jordan's Principle actives was limited. On December 12, 2016, the AFN wrote to Sony Perron, Senior Assistant Deputy Minister, Health Canada, to express the AFN's concerns regarding the lack of AFN's involvement in this area. AFN's Chief Executive Officer pointed out that "In relation to continued good relationship, I was encouraged to be informed about the AFN FNHIB Engagement Protocol. …. has been important resource and plan to reflect on its objective s as we develop other partnerships for improved health policy…" The letter also emphasizes that "…In regards to the application of the application of the engagement protocol and the implementation of Jordan's principle, there is concern that parts of the relationship were overlooked....

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[68] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 8.
[69] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 9.
[70] Affidavit of Robin Buckland (affirmed January 25, 2017), para 10, referring to Exhibit "B".
[71] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 10, referring to Exhibit "C".

ignored the AFN Engagement Protocol".[72] Robin Buckland confirms that Health Canada has chosen not to involve the AFN in the area of Jordan's Principle at this stage of its development, but that in the long-term the AFN may be more involved.[73]

59. On December 30, 2016, the AFN received a response from Health Canada acknowledging the shortfall. Health Canada invited the AFN to co-chair a working group on Jordan's principle, which the AFN accepted.[74]

60. INAC and Health Canada continue to not comply with the Tribunal's orders as a first service provider since funding is a service. As a result of the Tribunal's remedial orders, the YTCCFS expects INAC/Health Canada to pay for the bills directly related to mental health and special needs that require medical attention, such as orthodontic needs and medicines that are deemed not insurable, and special formula required for new born infants. According to the Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), the cases referred to in his earlier affidavit (affirmed December 20, 2016) would meet their requirements, and INAC as a first service provider should pay these costs and then can seek reimbursement from Health Canada afterward.[75]

61. Robin Buckland testified that the services provided by Jordan's Principle should address "gaps" in the services provided through federal funding. However, her evidence shows that Jordan's Principle is not covering the gaps in federal funding. For example, Ms. Buckland testified as to her awareness of Dewey Pruden, a child with significant handicaps and needs and a Jordan's Principle case in Manitoba. Dewey Pruden is receiving services that Ms. Buckland testified fall under Jordan's Principle, however Dewey Pruden is also the

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[72] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 11, referring to Exhibit "D" and Exhibit "E". See also, Transcript of the Cross-Examination of Robin Buckland, pg 101, Line 10-19, and pg 102, Line 2-18.
[73] Transcript of the Cross-Examination of Robin Buckland, pg 298, Line 2-23.
[74] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 12, referring to Exhibit "F".
[75] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 12.

complainant in a current human rights complaint against Health Canada programming, specifically its Home and Community Care Program and its Non-Insured Health Benefits Program. Another complainant is involved by the name "Taylor". These complainants are not receiving the services they require, the need, and thus Jordan's Principle is not fulfilling its roles vis-à-vis the gaps in federal funding.[76]

62. Robin Buckland testified that her knowledge of the "gaps" is limited, in particular in regard to the Non-Insured Health Benefits offered through Health Canada. [77] Ms. Buckland testified that "gaps" continue to exist in health services to First Nations children, specifically with mental health, and that change within Health Canada and other departments to address the "gaps" has been slow.[78] Ms. Buckland testified that while "gaps" in mental health have been identified, coordination with regard to addressing the gaps between Health Canada INAC has not occurred. Ms. Buckland testified that she has not "sat down with INAC and discussed the mental health gaps".[79] Ms. Buckland identified some of the gaps as including physiotherapy[80] and travel costs[81]. For its part, INAC acknowledges that since the Tribunal's decision there has been no concerted effort to address children's mental health issues, beyond engaging with their partners. When asked how much time it would take to develop internally an understanding of what the gaps are for children with mental health needs in Ontario, Ms. Cassandra Lang could not give a definitive deadline.[82]

63. Ms. Buckland also testified that the definition of Jordan's Principle in the past was "quite narrow". In fact, Ms. Buckland could not with certainty say whether regional executives

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[76] Transcript of the Cross-Examination of Robin Buckland, pgs 266 (line 8) to pg 271 (Line 9).
[77] Transcript of the Cross-Examination of Robin Buckland, pg 280, Line 10-15.
[78] Transcript of the Cross-Examination of Robin Buckland, pg 284, Line 16-19.
[79] Transcript of the Cross-Examination of Robin Buckland, pg 218, Line 25-26.
[80] Transcript of the Cross-Examination of Robin Buckland, pg 288, Line 22.
[81] Transcript of the Cross-Examination of Robin Buckland, pg 291, Line 1-6.
[82] Transcript of the Cross-Examination of Cassandra Lang, pg 284, Line 5-7.

had advised their partners that the definition of Jordan's Principle is more expansive then how INAC and Health Canada had initially chosen to define it.[83] Ms. Buckland admitted that despite recent efforts to broaden the definition, Health Canada has chosen not to go back to past potential Jordan's Principle cases that, if submitted for approval now, would fit within the broadened definition.[84]

64. As stated in the Reply Affidavit of Raymond Shingoose, the YTCCFS is not aware of any Advisory Committee regarding Jordan's Principle, more importantly, however, even if the YTCCFS was aware, the agency doesn't have the funding to perform the navigation that INAC is suggesting.[85] Also, the YTCCFS is not aware of the Enhanced Service Coordination approach referred to in the Affidavit of Robin Buckland[86].[87]

S. Prevention Services

65. Mr. Shingoose notes that primary and secondary community based prevention services are developed by the staff and the prevention committees and delivered by the 9.5 staff to children/youth, parents, families and/or community events. Elders and cultural teachings are also incorporated into the events/activities. Only one tertiary program/counseling service is offered in one of the sixteen communities.[88]

66. The CHRT funding has been allocated for the following tertiary services/staff positions: Cultural Coordinator $70,000, Mental Health: Protection/Prevention: $145,000, Wellness Worker/Addictions: $70,000, Child First Research $100,000, Core Curriculum $60,000,

[83] Transcript of the Cross-Examination of Robin Buckland, pg 55, Line 2-10.
[84] Transcript of the Cross-Examination of Robin Buckland, pgs 285 (Line 20) to pg 286 (Line 10).
[85] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 13.
[86] Affidavit of Robin Buckland (affirmed January 25, 2017), para 7, 12-16, referring to Exhibit "B".
[87] Reply Affidavit of Raymond Shingoose (affirmed January 30, 2017), para 14.
[88] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 24, referring to Exhibit "D". See also, Transcript of the Cross-Examination of Robin Buckland pg 294 (Line 16) to pg 295 (Line 11).

Elders Advisory, $25,000, Debt $124,000.[89]

67. A list of prevention programs offered by the provincial agency that YTCCFS cannot offer due to budget shortfalls is available at paragraph 26 in the Affidavit of Raymond Shingoose.[90] Cassandra Lang testified that the some of the programs listed by him in his affidavit could be provided under the maintenance budget provided it is an eligible expenditure, however where the services are not eligible, it is likely that there are no other sources of potential funding outside the maintenance or preventions budgets.[91] Additionally, Cassandra Lang testified that INAC will not fund prevention programs or services at cost.[92] Rather, INAC would still fund eligible expenditures under the maintenance budget even if it still involved apprehending a First Nations child from its family and community.[93]

68. A list of actual Jordan's Principle cases (redacted for privacy reasons) where funding shortfalls prevent YTCCFS from offering prevention services to keep a child in the home is available at paragraph 27 in the Affidavit of Raymond Shingoose.[94]

69. A list of cases (redacted for privacy reasons) where funding shortfalls prevented YTCCFS from offering prevention services to keep a child in the home is available at paragraph 28 in the Affidavit of Raymond Shingoose.[95]

70. A list of cases (redacted for privacy reasons) where funding shortfalls prevented YTCCFS from offering prevention services to keep a child in the home, resulting from the loss of

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[89] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 25, referring to Exhibits "E", "F" and "G".
[90] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 26. See also, Transcript of the Cross-Examination of Robin Buckland pg 292 (Line 3) to pg 294 (Line 15).
[91] Transcript of the Cross-Examination of Cassandra Lang, pg 318 (Line 3) to pg 320 (Line 12).
[92] Transcript of the Cross-Examination of Cassandra Lang, pg 320 Line 13-16.
[93] Transcript of the Cross-Examination of Cassandra Lang, pg 324 Line 9-18.
[94] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 27.
[95] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 28. See also, Transcript of the Cross-Examination of Cassandra Lang, pg 316 (Line 19) to pg 318 (Line 2).

parents through suicide or drug related death after children apprehended, is available at paragraph 29 in the Affidavit of Raymond Shingoose.[96]

71. A list of real impacts of funding shortfalls on YTCCFS clients is available at paragraph 30 in the Affidavit of Raymond Shingoose.[97]

T. Immediate Needs must be addressed and also a National Strategy is required to Eliminate the Discrimination

72. In the Affidavit of Raymond Shingoose, the sixteen First Nations Chiefs and communities his agency serves lie within the same region and are certainly aware of the difficulties within their region, but they are also aware that the discrimination continuing against First Nations children in the FNCFS Program is occurring elsewhere and on a national scale.[98]

73. Issues related to child protection/prevention services for the sixteen communities Mr. Shingoose represents need a greater infusion of immediate federal funding resources. The YTCCFS' organization has the capacity to manage the application of those resources if they are provided in a timely manner. In the long term, there are issues arising provincially or inter-provincially that may require a national strategy. First Nations must take the lead in developing a national strategy, consistent with self-determination, and the federal government must play the main supporting role as fiduciary, along with provincial governments.[99] In order for the federal government to ensure that a national strategy is developed consistent with principles of self-determination and the nation-to-nation relationship it is important for departments such as INAC and Health Canada to engage with the AFN. It is evidenced in Ms. Lang's statements with respect to the work of the MSR and the NAC, that INAC has not developed a specific process for engagement with First Nations and does not have an implementation plan for the recommendations received

[96] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 29.
[97] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 30.
[98] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 31.
[99] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 32.

from the NAC.[100]

PART II – STATEMENT OF ISSUES

74. The AFN submits the following statement of issues:

1. Prevention:

    a. What is the Panel's immediate relief order regarding prevention?

    b. Has INAC complied with this order?

    c. Who has the burden of proving compliance?

    d. Is INAC obligated to comply?

    e. INAC should be provided a final opportunity to comply regarding prevention.

2. Consultation:

    a. Can INAC avoid compliance regarding immediate relief by claiming it must consult?

    b. Is INAC engaging in meaningful consultation?

    c. Can INAC circumvent the AFN and the other co-complainant and interested parties in its consultations?

    d. Should INAC be required to enter into a protocol with the AFN and the other complainant parties on consultations?

[100] Transcript of the Cross-Examination of Cassandra Lang, pg 261, Line 2-7 and Line 12.

PART III – STATEMENT OF ARGUMENT

1. Prevention

a. What is the Panel's immediate relief order regarding prevention?

75. Prevention services are aimed at assisting families during a crisis or where risks to a child have been identified. As opposed to separating a child from his or her family, prevention services are designed to provide relief through "least disruptive measures" to mitigate the risks of separating a child from his or her family. Prevention services provide family supports that keep children within their family environment, which is required by provincial legislation before a child is placed in care.

76. The Panel found that the lack of prevention services was one of the main adverse impacts of the FNCFS program.[101] And, that inadequate prevention funding provides a perverse incentive that brings children into care because prevention-like programs can be reimbursed at cost under maintenance. The Panel ordered the Respondent to cease its discriminatory practices and reform the FNCFS Program and *1965 Agreement* to reflect the findings in this decision. This includes immediate measures to address the assumptions and flaws in its funding formulas related to prevention services.[102]

77. The Respondent acknowledges that prevention services are captured in the Panel's Orders to immediately cease its discriminatory practices.[103]

b. Has INAC complied with this order?

78. Despite the Panel's orders, FNCFS Agencies still cannot access a number of prevention programs offered off-reserve that remain unavailable to children and families on-reserve as a direct result of INAC's discriminatory funding model. Mr. Shingoose, Executive

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[101] 2016 CHRT 2, para 458.
[102] 2016 CHRT 10, paras 20 (where Panel has provided emphasis) and 23.
[103] Transcript of the Cross-Examination of Cassandra Lang, pg. 316 (Line 19) to pg 317 (Line 2),

Director of YTCCFS, lists a number of prevention programs his agency cannot offer as of this date. These programs are:

i. Suicide Interventions/supports
ii. Ongoing mental counseling and assessments
iii. Educational assessments for special needs children
iv. Assessments for FASO, FAE
v. Trauma interventions affected by Child Abuse
vi. Daycare
vii. Family Supports Centers
viii. Emergency Food
ix. Recreational facilities/Programs
x. Staff Training curriculum and trainers
xi. Quality Assurance funded positions
xii. Investigation Units on child abuse
xiii. Funding for NGO's contracted to provide services to children/parents
xiv. Child protection legal services
xv. Capital funding for buildings, group and emergency homes
xvi. Range of Educational and training resources available for adults and youth.
xvii. Optional treatment services for clients in involved with the addictions, law or for children with complex multiple needs.
xviii. Cultural services with Elders/Helpers
xix. More options for housing units and for mothers with children at risk
xx. Services for youth exiting care
xxi. Independent Living units for youth[104]

79. Mr. Shingoose advises that there are real impacts to First Nations children and families as result of his agency (YTCCFS) not being able to offer the above noted prevention services.

[104] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 8.

The lack of prevention programs results in apprehension and placement of children into care. In addition, parents lose hope and eventually stop trying to make changes in their lives as no supports are provided to them. In some cases, children receive less than adequate care or no access to services for their needs.[105]

80. INAC continues to focus its attention on the specific amount of funding it provides to FNCFS Agencies. It refers to the 2016-17 federal budget whereby $71 million in additional funding was allocated to the FNCFS program. Funding for prevention continues to be set on a specific dollar amount, which is not necessarily in line with the Panel's orders.

81. As noted above, in the case of YTCCFS, total funding received from INAC for the 2016-17 fiscal year is $9 million: $4 million is for operations, $3.1 million is for maintenance, with only $1.5 million for prevention.[106] Mr. Shingoose advised that the increase of funding, while welcome, still does not address the needs of the Fist Nation communities his agency serves. Mr. Shingoose advises that his agency has incurred a $1,206,570 deficit prompting the agency to fully implement recommendations of a financial review, including reduced human and financial resources.[107]

82. In response to YTCCFS's deficit, INAC offers no recourse, other than offering an opportunity for the agency to clarify and share information about its actual needs and distinct circumstances.[108] The AFN submits the additional funding provided in the last federal budget continues to be based on a flawed approach, the historical *per capita* funding formula, which is concerned with a dollar amount for services, as opposed to meeting the distinct needs and circumstances of First Nations children, families and their communities which should be the focus.

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[105] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 30.
[106] Affidavit of Raymond Shingoose (affirmed December 20, 2016), para 19.
[107] Affidavit of Raymond Shingoose (affirmed December 20, 2016), paras 22-23.
[108] Affidavit of Cassandra Lang (affirmed January 25, 2017), para 34.

83. The AFN submits that needs based funding is required to address and respond to the actual needs of First Nations children and families, which can be traced back to colonialism, the Indian Residential Schools experience, the Sixties Scoop and other racist or discriminatory policies that have damaged First Nations communities.

84. Despite recent funding increases, the AFN submits that INAC has failed to address and correct the perverse incentive that favors the removal of First Nations children. To date, INAC continues to pay maintenance costs at actual rates. However, little funding is provided for prevention. Under INAC's current policies, there is an unlimited amount of funding available to apprehend First Nations children.

> Q. So my question is, it's kind of peculiar to me that the federal government has no qualms, no concerns whatsoever about costs of taking children into care and that's an unlimited pot, and when it comes to prevention services, they're not willing to make that same sacrifice. To me, that just does not make sense. Now, as a program director, is that the case where if every child in Ontario that's First Nation on reserve is apprehended tomorrow, you would pay the maintenance costs on all those apprehensions?
>
> A. For eligible expenditures, yes.[109]

c. Who has the burden of proving compliance?

85. The AFN submits that since the Panel issued the Main Decision, INAC carries the burden of proving to the Panel and parties that it is complying with the Panel's remedial orders as set out in its three decisions, 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16.

86. The AFN seeks declaratory relief that INAC is both technically and substantially in breach

[109] Transcript of the Cross-Examination of Cassandra Lang, pg 324 (Line 9-19).

of the Panel's decision, including the Tribunal's orders in 2016 CHRT 2, 2016 CHRT 10, and 2016 CHRT 16. Therefore, INAC continues to be guilty of discrimination, by not addressing the immediate measures as ordered by the Panel according to its findings. Declaratory relief has been previously granted by this Panel in the Main Decision.[110]

87. The declaratory relief in this matter is in fact the Panel's findings of discrimination as set out at paragraph 458 of the Main Decision. The Panel's findings of discrimination at paragraph 458 (or declaratory relief) are non-exhaustive, and are what the Panel found were the main adverse impacts of INAC's design, management and control of the FNCFS Program; the corresponding funding formulas; and, related provincial/territorial agreements. This should be read in conjunction with the Panel's main findings with regard to the need to reform and redesign the FNCFS Program summarized at paragraphs 384 to 389 of the Main Decision.

88. Based on these main adverse impacts and the Panel's findings, the Panel ordered the immediate relief against INAC to "cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision" and to "cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle".[111]

89. The AFN submits that reforming the FNCFS Program to reflect the findings of the Panel necessarily requires INAC to: (i) remove the flawed assumptions in Directive 20-1 about children in care and population thresholds that do not accurately reflect the service needs of on-reserve communities, (ii) amend or remove the current structure of the EPFA funding formula to address actual need, (iii) adjust or increase the funding levels under Directive 20-1 to meet actual need, (iv) update the 1965 Agreement, (v) coordinate the FNCFS Program with the provinces, territories and other federal departments in order to avoid

[110] 2016 CHRT 2, paras 472-473.
[111] 2016 CHRT 2, para 481.

service gaps, delays and denials for First Nations children, and (vi) broaden the definition of Jordan's Principle in order to implement its full meaning and scope.

90. The Panel's remedial orders are aimed at immediate relief, which means all of the above should have been performed as expeditiously as possible. The fact that the AFN and the other parties have moved for an order of non-compliance approximately a year after the Panel's remedial orders were issued indicates the majority position amongst the parties in this matter that INAC's compliance with the Panel's remedial orders remains outstanding.

91. It is important to acknowledge that shortly after the Panel issued the Main Decision on January 26, 2016, Minister Bennett wrote to National Chief Perry Bellegarde, notifying him that INAC accepts the Panel's decision, its findings, and conclusion regarding the inadequacy of the FNCFS Program, and would not be filing for judicial review.[112]

92. The Panel wrote the following regarding INAC's burden to implement and comply with the Panel's remedial orders and findings:

> [9] Generally, the Panel fails to understand why much of the information provided in INAC's most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS Program back in March 2016. INAC ought to have known this information was and remains important in responding to the Panel's information requests and reporting orders. Indeed, the Panel and the CCI Parties have been requesting this type of information for months now. <u>It rests on INAC and the federal government to implement the Panel's findings and orders, and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation, ensures the Panel and the parties that this is indeed the case</u>.[113] (emphasis added)

93. Additionally, the Panel stated the following regarding INAC's burden to implement and

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[112] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 17, referring to Exhibit "G".
[113] 2016 CHRT 10, para 9.

comply with the Panel's remedial orders and findings:

> [21] The Complainants and Commission requested INAC to immediately remove the most discriminatory aspects of the funding schemes it uses to fund FNCFS Agencies under the FNCFS Program; and, in response, the Panel ordered INAC to cease its discriminatory practices and reform the FNCFS Program to reflect the findings in the Decision. While the Panel did request clarification on certain remedial items and understood the Federal government may need some time to review the Decision and develop a strategy to address it, that was three months ago and there is still uncertainty amongst the parties and the Panel as to how the Federal government's response to the Decision addresses the findings above. The Panel appreciates that some reforms to the FNCFS Program will require a longer-term strategy; however, it is still unclear why or how some of the findings above cannot or have not been addressed within the three months since the Decision. Instead of being immediate relief, some of these items may now become mid-term relief.[114] (emphasis added)

94. Both of the above quotes are from the Panel's decision, 2016 CHRT 10, that was issued on April 26, 2016, approximately three months after the Main Decision. It is clear from these quotes that as early as April 26, 2016 the Panel (and the parties) were already concerned about INAC's intransigence and non-compliance in implementing the Panel's remedial orders regarding immediate relief as set out in the Main Decision. It was clear at that time that INAC had done very little in terms of compliance with the Panel's remedial orders, which concerned the parties that the Panel's remedial orders regarding immediate relief would not be followed.

95. The AFN submits the Panel's remedial orders are specifically directed at INAC, and therefore full implementation of the Panel's findings and remedial orders regarding immediate relief specifically lies with INAC. In addition, INAC is also expressly required to communicate with the parties how it is implementing the Panel's findings and remedial

[114] 2016 CHRT 10, para 21.

orders, and must justify its actions to implement the Panel's findings and remedial orders, to ensure the parties that the Panel's findings and remedial orders are being followed.

96. The AFN also submits that the Panel's expectation is that its remedial orders be executed now by INAC, not in five years or any other length of time, and that immediate relief be conducted as expeditiously as possible. This is also the expectation of the Chiefs-in-Assembly as set out in Resolution No. 62/2016.[115]

d. Is INAC obligated to comply?

97. As mentioned, the AFN is particularly concerned with those INAC child welfare funding policies and programs (the FNCFS program and other related provincial/territorial agreements) that have been found to be discriminatory in that they fail to fund prevention services on the basis of need and in light of the historically disadvantaged circumstances of First Nations children and families on reserve, while fully funding apprehensions which acts as a perverse incentive to promote the removal of First Nations children from their on-reserve families and homes.

98. The AFN submits that INAC is obligated to comply with the Panel's order as expeditiously as possible, and that INAC is well aware of the impacts of this perverse incentive has on First Nations children and families. The AFN also submits that INAC is taking little action to correct this discriminating aspect of the FNCFS Program at this time. Instead of acting expeditiously as it ought to, INAC has suggested that any correction of the perverse incentive can only take place after extensive consultations with its partners and First Nations.

> 19 Q. Yes. And we had a discussion about that. And
> 20 then it goes on to say, however, any further reform must be
> 21 undertaken in collaboration with Canada's partners. I take

[115] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 10, referring to Exhibit "C".

22 it to mean that any other changes that the department is
23 going to facilitate are not going to occur until you
24 complete your engagement process. Is that a fair statement
25 to glean from your affidavit?

1 A. Well, we want major -- yes, the reform of the
2 program, we must undertake with our program -- with our
3 partners.

4 Q. So, but any other changes are not going to come
5 until you're completed your engagement process?

6 A. At this point, there aren't specific ones that
7 are envisioned.

8 Q. So that's a no.
9 A. Yes. [116]

99. In addition to the lack of funding for prevention services, there are time limits for any prevention program that individuals are enrolled in, whereas that same individual would be entitled to long-term programing in the case of an apprehension. Ms. Lang testified as follows:

2 Q. Can you read the two paragraphs right before
3 7.1? It's right above it, starting with the maximum?

4 A. "The maximum length of time for funding an
5 active prevention case is 90 days with a
6 possibility of a further 90 days with supervisor
7 approval for a total of 180 days."

8 Q. My understanding of that is in most cases
9 prevention programs, it's to a maximum of 90 days in

[116] Transcript of the Cross-Examination of Cassandra Lang, pg 214 (Line 19) to pg. 215 (Line 9).

Manitoba. Is that correct? Unless a supervisor approves otherwise?

A. I don't know all the specifics of the Manitoba legislation, but based on reading this, that's what it appears to say.

Q. Does your department fund actuals for maintenance for children that are in care for more than 90 days?

A. Yes.

Q. And there is no limitation on that?

A. No.

100. That AFN submits that INAC has failed to take any steps eliminate its discriminatory practices of creating a perverse incentive to remove children. The lack and/or limiting of funding for prevention programs is one of the main differential treatments on-reserve First Nations are subjected to when compared to off-reserve children. Access to the same types of prevention programs that off-reserve children currently enjoy would provide more equality and will begin to address the real needs of First Nations children and families, which may vary from child-to-child or family-to-family.

101. INAC has considerable authority and discretion over the FNCFS Program and can provide prevention programs on the same basis as it provides maintenance. It has the ability to unilaterally make changes to the child welfare program, funding methodology, eligible programs/services and culturally appropriate prevention programs. Also, it has demonstrated its discretion when it unilaterally applied funding for prevention like programs in all remaining Directive 20-1 jurisdictions this fiscal year.

102. While the AFN appreciates the additional funding INAC has and will make available to FNCFS Agencies, the AFN fails to understand why the Respondent continues to rely on a

funding formula that is based on a flawed *per capita* basis.

103. Additionally, the AFN submits that the rule of law in this matter is directly dependent on the ability of the Tribunal to enforce its process and maintain respect for its remedial orders. It is within the power of the Tribunal and this Panel to uphold its process by ensuring its remedial orders are carried out by INAC. The rule of law is at the heart of our society; without it there can be neither peace, nor order, nor good government.[117] As stated by the Supreme Court in *Carey v. Laiken*[118]:

> [30] "…The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931. It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 94 O.R. (3d) 614, at para. 20."

104. The AFN submits that the Tribunal has an obligation to protect the efficacy and integrity of the *CHRA*. The entire purpose of the act is to provide a meaningful remedy for those who have suffered discrimination. To eliminate discrimination, the remedy ordered must be effective and consistent with the nature of the rights protected.[119] This is not possible if the Panel's orders are not carried through by INAC according to the Panel's findings.[120]

e. INAC should be provided a final opportunity to comply regarding prevention

105. It is consistent with the principle of reconciliation that INAC be given one last opportunity to comply. In 2016 CHRT 10, the Panel wrote the following at paragraphs 40-42 about the

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[117] *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 SCR 901, p 931.
[118] *Carey v. Laiken*, [2015] 2 SCR 79, 2015 SCC 17, para 30.
[119] *Cruden v. Canadian International Development Agency & Health Canada*, 2012 CHRT 5 para 6 referring to *Robichaud v. Canada (Treasury Board)*, [1987] 2 SCR 84, para 13
[120] *Brooks v. Department of Fisheries and Oceans*, 2005 CHRT 14, para 14.

remaining remedial issues:

> [41] On this journey towards change, I hope trust can be rebuilt between the parties. Effective and transparent communication will be of the utmost importance in this regard. Words need to be supported by actions and actions will not be understood if they are not communicated. Reconciliation cannot be achieved without communication and collaboration amongst the parties. While the circumstances that led to the findings in the Decision are very disconcerting, the opportunity to address those findings through positive change is now present. **This is the season for change**. **The time is now**. [121] (Panel's emphasis)

106. From the above quote, the Panel is concerned about producing meaningful change for First Nations children and families, and that the discrimination must end now. Importantly, the Panel also expresses concern that it is not enough for INAC to limit itself to discussing how the discrimination will end, but that INAC is required to take decisive action to end the discrimination, and that whatever action it decides to take cannot wait any longer. According to the Panel, the time to end the discrimination is now.

107. INAC's non-compliance cannot be permitted to continue. The AFN submits that the Panel fashion a clear order that INAC is ordered, as an immediate relief measure, to cease its discriminatory funding practice of not funding prevention on the basis of need. Also, that INAC be ordered to develop an alternative means for funding prevention services for First Nations children and families on-reserve and in the Yukon, based on actual needs especially in light of the historically disadvantaged circumstances of First Nations. Additionally, that INAC be given 60-days to develop and implement the methodology, and report back to the Panel in 60-days.

2. Consultation

108. As stated by the Supreme Court in *Haida*, the Crown's duty to consult and accommodate

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[121] 2016 CHRT 10, paras 41.

is by its very nature a balancing of Aboriginal and other interests and lies close to the aim of reconciliation, at the heart of Crown-Aboriginal relations.[122] The duty obliges the Crown and First Nations to engage in discussion and achieve a mutually agreeable resolution to their issues. What is required from the Crown is meaningful consultation held in good faith with those authorized to engage in consultations.

a. Can INAC avoid compliance regarding immediate relief by claiming it must consult?

109. The AFN submits that INAC cannot avoid immediate relief by claiming it must first consult with its partners and FNCFS Agencies.

110. As stated above, the Panel's remedial orders for immediate relief are clear and require INAC to cease its discriminatory funding practices regarding preventative measures. INAC has accepted the Panel's decision,[123] it acknowledges that is bound by the decision and must follow through with its orders,[124] and INAC admits there is nothing stopping INAC from complying with the Panel's immediate relief orders. [125]

111. INAC's efforts to consult do not advance immediate relief. The AFN submits that INAC has the information it needs to eliminate the discrimination according to the Panel's findings. That stated, INAC's efforts to consult may not be in good faith, but rather a delay tactic used to avoid complying with the Panel's remedial orders.

112. The AFN submits it would appear unnecessary for INAC to gather more information about its discriminatory funding practices when there are several reports available, and which are also before this Panel, such as the Wen:de series of reports and the Auditor General's report. Considering this, INAC's efforts to consult is really a duplication of information that

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[122] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73, para 14 and 42.
[123] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 17, referring to Exhibit "G".
[124] Transcript of the Cross-Examination of Cassandra Lang, pg 335, Line 2-8.
[125] Transcript of the Cross-Examination of Cassandra Lang, pg 105 (Line 1) to pg 117 (Line 18).

is already available. INAC's further information gathering should not be reason for delaying immediate term relief.

113. AFN Resolution No. 83/2016 addressed the deep concern by all First Nations across Canada over Canada's failure to immediately and fully comply with the Tribunal's Main Decision and subsequent remedial orders.[126] Accordingly, the time for deep consultation has passed, and now is the time for INAC to take meaningful actions to comply with the Panel's orders. Additionally, INAC appears to be attempting to circumvent the AFN in its consultation efforts despite the AFN's mandates to follow-up on the implementation of the Tribunal's remedial orders.

114. As stated above, INAC and Health Canada are engaged in consultations with FNCFS Agencies about reforming the FNCFS Program. The AFN has been excluded from these consultations, and was not asked to review any consultation material. For unknown reasons, INAC and Health Canada decided to unilaterally exclude both co-complainants from these consultations, despite both parties being national organizations that represent First Nations and FNCFS Agencies across Canada, respectively.[127] The AFN submits that INAC's decision to not include the AFN or the Caring Society hinders INAC's ability to effectively implement the Tribunal's Main Decision and remedial orders, and facilitates the ongoing discrimination against First Nations children.[128] Further, the AFN was not consulted on the appointment of the MSR,[129] despite the AFN being mandated to engage on these issues. [130]

115. Finally, the AFN submits the NAC must be properly constituted as a priority. The NAC's role

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[126] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 14.
[127] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 21. See also, Transcript of the Cross-Examination of Robin Buckland, pg 130, Line 12-24.
[128] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 22.
[129] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 25.
[130] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 10, referring to Exhibit "C".

is to facilitate the transition to addressing mid- to long-term relief issues, including consultation and developing proper protocols regarding consultation. As stated above, the AFN views the NAC to be the legitimate process to provide advice to the Chiefs-in-Assembly and Government of Canada on the reformation of the FNCFS Program and implementation of Jordan's Principle.[131] However, apart for the negotiations of the Terms of Reference, the AFN has not been meaningfully engaged by INAC regarding proposed reforms to the FNCFS Program.[132]

b. Is INAC engaging in meaningful consultation?

116. INAC has a poor record consulting First Nations across Canada which was acknowledged by the Panel in the Main Decision at paragraph 461, where the Panel found against INAC that "[n]otwithstanding numerous reports and recommendations to address the adverse impacts outlined [in the Main Decision], including its own internal analysis and evaluations, [INAC] has sparingly implemented the findings of those reports". Further, in 2016 CHRT 16 at paragraph 29, the Panel found that INAC has difficulty changing its mindset and distancing itself from its discriminatory practices, "[t]he Panel is concerned to read in INAC's submissions much of the same type of statements and reasoning that it has seen from the organization in the past."

117. In *Brown v. Canada (Attorney General)*,[133] which is a recent decision from the Ontario Superior Court from Justice Edward P. Belobaba involving a class action based on the Sixties Scoop in Ontario, reveals that Canada's lack of consultation with First Nations regarding child services, also existed in Ontario in regards to the Sixties Scoop.

118. In *Brown*, a representative plaintiff brought a motion for summary judgment asking that

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[131] Affidavit of Jonathan Thompson (affirmed December 20, 2016), para 12, referring to Exhibit "E".
[132] Reply Affidavit of Jonathan Thompson (affirmed January 30, 2017), para 5, referring to Exhibit "A". See also, Transcript of the Cross-Examination of Cassandra Lang, pg 327 (Line 21) to pg 332 (Line 17).
[133] *Brown v. Canada (Attorney General)*, 2017 ONSC 251.

the certified common issue be answered in favour of the class members.[134] There was no dispute about the fact that thousands of Aboriginal children living on-reserve were apprehended and removed from their families by provincial child welfare authorities from 1965 to 1984, and placed in non-Aboriginal foster homes, or adopted by non-Aboriginal parents.[135] Also, there was no dispute that this caused great harm: loss of Aboriginal language, culture and identity.[136]

119. The issue before Justice Belobaba of the Ontario Superior Court of Justice on the motion for summary judgment was whether Canada can be found liable in law for the class members' loss of Aboriginal identity after they were placed in non-Aboriginal foster and adoptive homes.[137] It was held that when Canada entered into the *1965 Agreement* and over the years of the class period, Canada had a common-law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-Aboriginal foster or adoptive parents, from losing their Aboriginal identity. It was found that Canada had breached this common-law duty of care.[138]

120. The certified common issue focused on three things: (i) the Ontario *1965 Agreement*, (ii) action/inaction of Canada (not Ontario), and (iii) the time period *after* the Aboriginal children had been placed in non-Aboriginal foster or adoptive homes.[139] The class period covered 19 years, from the time when Canada entered the *1965 Agreement* (December 1965), to the time when Ontario amended its child welfare legislation to recognize for the first time that "Aboriginality" should be a factor to be considered in child protection and placement (December 1984).[140] The stated goal of the *1965 Agreement* was to make

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[134] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 1.
[135] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 5.
[136] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 6.
[137] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 10.
[138] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 85.
[139] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 12.
[140] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 14.

available to the Indians in the province the full range of provincial welfare programs.[141] As found by the Court, Canada could have enacted its own child protection statute, but didn't, and also Ontario could have extended its statute to apply on-reserve (by virtue of section 88 of the *Indian Act*[142]), but didn't.[143]

121. Instead, Canada chose to fund the provincial extension as an exercise of its spending power, whereby Canada reimbursed Ontario for the *per capita* cost of the provincial programs so extended, in accordance with a formula set out in the *1965 Agreement*.[144] More than just a federal spending agreement, it was found that the *1965 Agreement* reflected Canada's concern that the extension of provincial laws would respect and accommodate the special culture and traditions of the First Nations people living on-reserve, including their children.[145]

122. Ontario's undertaking to provide provincial welfare programs on-reserve was subject to Canada's obligation to fully consult with the Indian Bands and secure their concurrence, because it was viewed that forcing the provincial services on the Indian peoples against their wishes would be a serious breach of faith.[146] Canada was prepared to exercise its spending power to fund the extension of provincial programs to reserves but only with the advice and consent of every affected Indian Band to every one of the 18 provincial programs that were being so extended.[147] As found by the Court, Canada's obligation to consult was intended to include explanations, discussions, and accommodations, and it was meant to be a genuinely meaningful provision that applied to all 18 provincial

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[141] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 15.
[142] *Indian Act*, RSC, 1985, c. I-5, s. 88 (General provincial laws applicable to Indians).
[143] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 17.
[144] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 17.
[145] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 18.
[146] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 23.
[147] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 24.

programs, including child welfare services. [148]

123. However, no Indian Bands were ever consulted and the full reach of the provincial child welfare regime was extended to all reserves without any consultation or concurrence on the part of any Indian Band.[149] It was found by the Court that Canada breached the *1965 Agreement*, specifically s. 2(2), by failing to consult the Indian Bands.[150] The evidence showed that if the Indian Bands had been consulted they would have suggested that some contact be maintained with the removed children during the post-placement period so that they would know that they were loved and "could always come home"; and that the "white care-givers" be provided with information about the removed child's Indian Band, culture and traditions and the various federal educational and financial benefits that were available to the Indian children.[151] Additionally, had the Indian Band's been consulted, the Court found that it would have been far less likely that the children of the Sixties Scoop would have suffered a complete loss of their Aboriginal identity.[152] Finally, if Canada had honoured its obligation to consult the Indian Bands, the information about the child's Aboriginal identity and culture and the available federal benefits would have been provided years sooner.[153]

124. The Court found that subsection 2(2) of the *1965 Agreement* created a common-law duty of care on Canada for the benefit of the certified class, per the *Anns-Cooper* test.[154] Subsection 2(2) created a common-law duty of care and provided a basis in tort for the class members' claims.[155] A common-law duty of care arose out of the fact that the *1965*

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[148] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 24.
[149] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, paras 34-36.
[150] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 37.
[151] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 47.
[152] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 49.
[153] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 61.
[154] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 77.
[155] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 72.

Agreement was analogous to a third-party beneficiary agreement.[156] Canada undertook the obligation to consult in order to benefit the Indian Bands. The Indian Bands were not parties to the Agreement. But, it was ruled that a tort duty can be imposed on Canada as a contracting party in these circumstances.[157]

125. The certified class' claim in tort flowed directly from the fact that at the time of entering the *1965 Agreement*, Canada assumed and breached its common-law obligation to consult with the third party Indian Bands. It was found that the law attaches a duty of care in circumstances where there is not only a unique and pre-existing special relationship based on both history and law, but a clear obligation to consult the beneficiaries about matters of existential importance.[158] Although the Court found that it could be argued the third-party beneficiaries were the Indian Bands, not the apprehended children (i.e. the certified class members), that argument could not withstand scrutiny in the First Nations context where notions of good faith, political trust and honourable conduct are meant to be taken seriously, and where Canada's breach of the *1965 Agreement* was so flagrant.[159]

126. Under the first stage of the *Anns-Cooper* test, Justice Belobaba found a *prima facie* duty of care was clearly established on the evidence, but also because it was beyond dispute that a special and long-standing historical and constitutional relationship exists between Canada and Aboriginal peoples that has evolved into a unique and important fiduciary relationship.[160] Justice Belobaba also found that it was beyond dispute that given such close and trust-like proximity it was foreseeable that a failure on Canada's part to take reasonable care might cause loss or harm to Aboriginal peoples, including their children.[161] Also, during the class period in question, Canada had accepted that its care and welfare of

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[156] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 73.
[157] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 73.
[158] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 74.
[159] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 75.
[160] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 78.
[161] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 79.

the Aboriginal peoples was a "political trust of the highest obligation", and there was no doubt that the Aboriginal peoples concern to protect and preserve their Aboriginal identity was and remains an interest of the highest importance.[162]

127. Under the second stage of the *Anns-Cooper* test, Justice Belobaba found that Canada did not advance a credible policy consideration that would negate the common-law duty of care.[163] Therefore, a common-law duty to take steps to prevent Aboriginal children who were placed in the care of non-Aboriginal foster or adoptive parents from losing their Aboriginal identity was established.[164]

128. It should be noted that Canada chose not to appeal this case. As shown above, the *Brown* case touches upon child welfare issues. In this case, INAC was obligated to consult according to the *1965 Agreement* and was found by the Court to have failed to do so. *Brown* serves to give an indication of lack of good faith by INAC when it comes to consultation regarding child welfare, which consistent with much older and racist patterns that prevailed during the residential school era.

129. The AFN submits the *Brown* case is further evidence of Canada's poor record and history of consulting First Nations people regarding child services. This poor record and history also includes INAC. The Panel had criticized INAC of its old mindset. This old mindset may be more aptly described as INAC's paternalistic mindset existent across Canada and borne from a dark, colonial past. The discrimination that existed then has dissipated, but it is revealed in cases like *Brown*, and in the current matter before this Panel regarding immediate relief, and it shows that INAC as a federal department within Canada has not totally divorced itself from its prejudices against First Nations people. INAC's approaches

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[162] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 80.
[163] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 82.
[164] *Brown v. Canada (Attorney General)*, 2017 ONSC 251, para 83.

continue to be steeped in practices that are paternalistic in nature.

130. The AFN also submits that, like *Brown*, there has been little to no engagement or consultation with the AFN or Caring Society in this case. Also, like *Brown*, INAC is unilaterally extending its policies and practices over First Nations with little to no engagement or consultation or concurrence. First Nations children and families are put in the position of having to accept INAC policies and practices concerning child and family services without having the opportunity to influence the decisions INAC must make to eliminate the discrimination. INAC's approach is paternalistic, and it is from this mindset that INAC found itself in violation of the *CHRA* and guilty of discrimination.

131. The AFN also submits that the First Nations children and families in this matter are represented by people, like Raymond Shingoose at the YTCCFS Agency, who are empowered to advocate on their behalf and seek the necessary resources and offer services that are helpful. There are also regional organizations that are similarly empowered, but more importantly there are national organizations like the AFN and the Caring Society who represent a much larger cohort of First Nations people, as evidenced by the Chiefs-in-Assembly who represent First Nations people across Canada, and have the knowledge to properly inform INAC how to eliminate the discrimination. These organizations, like the AFN and Caring Society, have helpful ideas that could assist INAC succeed in its efforts to eliminate the discrimination. But, INAC is not consulting these organizations. INAC is not engaging the AFN or the Caring Society, and the AFN submits INAC is also not listening to the concerns of FNCFS Agencies. Instead, INAC is addressing immediate relief in this matter in a manner similar to its past approaches, that is, in a paternalistic fashion with little regard to the actual need of First Nations people who face the brunt of INAC's paternalistic and ill-informed practices.

c. Should INAC be required to enter into a protocol with the AFN and the other complainant parties on consultations?

132. The AFN submits that INAC continues to determine funding in a way that the Panel found to be discriminatory in the Main Decision. The Panel found that the FNCFS Program is more than just funding – the funding must also address the differing needs and circumstances among First Nations, and be implemented in a consistent and equitable manner.

133. The Panel wrote:

> [482] "…there is a need to refocus the policy of the program to respect human rights principles and sound social work practice. In the best interests of the child, all First Nations children and families living on-reserve and in the Yukon 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."[165]

134. As found by the Panel in the Main Decision, the *2008 Report of the Auditor General of Canada* concluded that INAC's funding formula must be delivered in an equitable manner.[166] Also, it was found by the Panel that INAC's funding formulas do not account for the actual needs of the FNCFS Agencies.[167] Additionally, it was found that INAC's funding formulas under Directive 20-1 and EPFA are largely based on population levels, which disproportionally affect small and remote FNCFS Agencies[168]

135. The AFN submits that INAC is not complying with the Panels remedial orders by failing to address the inequities in its funding formulas and budget by not accounting for actual need. This was a concern raised by the Panel in its decision, 2016 CHRT 16, where it wrote

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[165] 2016 CHRT 2, para 482.
[166] 2016 CHRT 2, paras 187-189.
[167] 2016 CHRT 2, para 311.
[168] 2016 CHRT 2, paras 313-314.

"[t]he fact that key items, such as determining funding for remote and small agencies, were deferred to later is reflective of INAC's old mindset that spurred this complaint. This may imply that INAC is still informed by information and policies that fall within this old mindset and that led to discrimination."[169]

136. The AFN submits that although INAC has provided additional funding, it remains largely unknown whether this additional funding is addressing the most discriminatory aspects of INAC's funding formulas in the immediate term as found by the Panel. Importantly, as stated by the Panel, "the concern is not with the specific amount of funding per se, but rather the way in which it is determined."[170] In other words, regardless of the additional funding, if INAC's funding formulas have not been amended and/or removed then the way in which the FNCFS Program is delivered and funded would remain the same, and thus the discrimination against First Nations children and families continues. Cassandra Lang testified that INAC still has not fully considered removing the most discriminatory aspects of the funding schemes, and has not fully considered the least disruption measures, such as funding the prevention budget of FNCFS Agencies at cost.[171]

137. The AFN submits that what is important is that INAC's funding formulas and budgets meet the distinct needs and circumstances of First Nations children and families and their communities. Also, the AFN submits it is within INAC's power to amend and/or remove its discriminatory funding formulas and budgets by addressing the Panel's findings regarding the assumptions about the number of children in care, the number of families in need of services and population levels. These are areas that INAC can address in the immediate term on its own without the need to engage extended consultation with First Nations across Canada, rather all that is required is for INAC to follow the Panel's findings in the

[169] 2016 CHRT 16, para 29.
[170] 2016 CHRT 16, para 33.
[171] Transcript of the Cross-Examination of Cassandra Lang, pg 326 Line 3-19.

Main Decision.

138. The AFN submits that INAC would be in violation of the Panel's remedial orders if it left amending and/or removing its discriminatory funding formulas and budgets to be addressed in the long-term. INAC's funding formulas is one of the most discriminatory aspects of the FNCFS Program as found by the Panel, which significantly impacts First Nations children and families.[172] Rather, the necessary reform of INAC's funding formulas under the FNCFS Program must be done in wholesale and immediately, not in a phased or piece meal approach. The AFN submits that a phased or piece meal approach has not worked in the past with the FNCFS Program,[173] and will result in ongoing discrimination.

139. The AFN submits it is particularly important that the systemic discrimination that currently exists under the FNCFS Program come to an end in the immediate term, as much as possible. It would appear that systemic discrimination under the FNCFS Program continues unabated despite the additional funding increases. The AFN submits that this is because INAC has not amended its funding formulas according to the Panel's findings to address the actual need and circumstances among First Nations children and families.

140. The AFN submits that it is not how much funding INAC budgets for the FNCFS Program, but rather the way it funds the program. The way that INAC funds the FNCFS Program lies at the core of the systemic discrimination that INAC is allowing to continue in spite of the Panel's findings. INAC must address the way it funds the FNCFS Program by bringing it in compliance with the Panel's findings and remedial orders.

141. The Canadian Human Rights Tribunal stated the following in *Public Service Alliance of Canada*:

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[172] 2016 CHRT 16, para 33.
[173] 2016 CHRT 2, para 185 and 331.

> [815] The Tribunal also recognizes the importance of addressing systemic remedies when one is dealing with systemic discrimination. Remedial measures should remedy the past, present and future effects of such discrimination. As Mr. Justice Dickson, then Chief Justice of the Supreme Court of Canada, pronounced in 1987 "statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained…[and] the purpose of the CHRA is…to prevent discrimination. After a lengthy discussion of systemic discrimination and the methods necessary to combat it, the Chief Justice concluded that "it is essential to look to the past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future."[174]

142. Further, as stated in *Grover*, the primary focus of the *CHRA* is the eradication of discriminatory practices, and that section 53(2) be interpreted in a manner that best facilitates this primary focus.[175] As submitted by the AFN, the INAC's discriminatory practices are continuing in spite of the Panel's remedial orders for immediate relief. The nature of the discrimination in this case is long-standing and systemic, and as shown in the evidence of the AFN's motion, and in the other parties' motions, implementing an effective remedy is difficult given the history of INAC's intransigence to eliminate the discrimination.

143. The AFN submits that it is important that the Panel remained seized of its jurisdiction over this matter to ensure its remedial orders are carried through by INAC. However, to be included amongst its remedial orders should be an additional order that INAC carry out the immediate relief, which has already been ordered, within a certain period of time to ensure the parties remedy is effectively implemented. The Panel's general order regarding

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[174] *Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39, para 815 referring to *CN v. Canada (Canadian Human Rights Commission*), [1987] 1 SCR 114, paras 24-25 and 44.
[175] *Grover v. Canada (National Research Council)*, [1994] F.C.J. No. 1000, paras 32.

immediate relief[176] was issued over a year ago, and still some of the most discriminatory aspects of the FNCFS Program remains.

144. Additionally, in consideration of the above, INAC should be required to enter into a protocol with the AFN and the other complainant parties on consultations to ensure that INAC's funding is addressing the differing needs and circumstances among First Nations, and is implemented in a consistent and equitable manner.

PART IV – COSTS SUBMISSIONS

145. The complainants do not seek costs and ask that they not be subject to any costs orders.

PART V – NATURE OF THE ORDER SOUGHT

146. The Assembly of First Nations supports and adopts the remedies requested by the Caring Society, the COO and NAN, and requests the following additional Declaration and Orders:

- A Declaration that INAC is both technically and substantially in breach of the Panel's Decision, including the Tribunal's Orders in 2016 CHRT 2, 2016 CHRT 10 and CHRT 16, and therefore continues to be guilty of discrimination, by not addressing the immediate measures identified in the said Orders.

- An Order that INAC immediately develop in consultation with the AFN, the Caring Society, COO and NAN, as well as the Commission, a protocol grounded in the honor of the Crown, for engaging in consultations with First Nations and FNCFC agencies that are affected by the Decision and the Remedial Orders herein, and that INAC engage in consultations in a manner consistent with the protocol and the honor of the Crown, to address the elimination of discrimination substantiated in the Panel's Decision.

[176] 2016 CHRT 2, para 481.

- An Order that, pending long term reform to its funding models, INAC immediately eliminate that aspect of its funding models that creates a perverse incentive resulting in the unnecessary apprehension of First Nations children from their families and/or communities. To this effect, INAC be ordered to immediately implement a system for funding the cost of prevention/least disruptive measures, which operates on the same basis as INAC's current funding practices for maintenance costs, that is, by fully reimbursing actual costs for these services, as determined by FNCFC agencies to be in the best interests of the child.

- An Order that INAC comply with the Panel's Remedial Orders regarding immediate relief in a manner which is effective, expeditious and in consultation with the AFN, the Caring Society, COO and NAN, as well as the Commission, and to avoid a phased piecemeal approach to funding and addressing immediate measures, in order to ensure that historic disadvantage and systemic discrimination is not further perpetuated.

- An Order that INAC be directed to address long term relief by establishing the National Advisory Committee in consultation with the Complainants.

- An Order that INAC cease its discriminatory funding practice of not funding prevention on the basis of need, and that INAC develop an alternative means for funding prevention services for First Nations children and families on-reserve and in the Yukon, based on actual needs especially in light of the historically disadvantaged circumstances of First Nations, and, additionally, that INAC be given 60-days to develop and implement the methodology and report back to the Panel.

- Such further and other relief as the Panel deems just and fit to allow in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 28, 2017

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